

WHO'S AFRAID OF WHO'S-A-RAT.COM?:
A CHALLENGE TO THE FIRST AMENDMENT IN THE INTERNET AGE

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Brooke Salkoff, B.A.

Georgetown University
Washington, D.C.
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Brooke Salkoff, B.A.

Mentor: Rory Quirk

ABSTRACT

This thesis examines the legal and social implications of a single website, www.WhosARat.com, and by extension probes wider challenges to the fledgling state of First Amendment law in the age of the Internet.

In its very name and Internet address, the website WhosARat.com poses the question “Who’s A Rat?” and claims to answer it, with the names and other personal information of hundreds of individuals who are believed to be cooperating with law enforcement in criminal investigations and prosecutions. It claims to serve a valuable social end, based on the premise that government informants (called “snitches” where they are reviled) are unreliable, and that defendants have a fundamental, constitutionally-protected right to learn the information that is being offered against them in a criminal proceeding, and who is providing it.

Federal law enforcement officials, however, argue that for its chilling effect on witness cooperation, at a minimum WhosARat.com hamstringing law enforcement in investigating crimes. At worst, they say, it will lead to violence against willing cooperators and their families. The result is a classic clash of law and order and free

speech, but in virtually uncharted territory of Internet communication. The website raises basic questions that could have profound implications in the wired age: is WhosARat.com's transmission of information that could threaten individual safety and undermine criminal prosecutions, entitled to longstanding First Amendment protection? Does the instant and global transmission of this material online alter the traditional standard for assessing whether speech is proscribed—based on a real and immediate threat to safety—and thus call for a fundamental re-thinking of the legal definition of incitement as it applies to the Internet?

This thesis relies on published accounts in newspapers and magazines, and on documents from the U.S. Justice Department, to describe the genesis of WhosARat.com and its context within a long history of anti-snitching campaigns. It will explain how the website poses a special challenge to law enforcement because of its content and reach, and because of longstanding speech protections guaranteed by the First Amendment to the U.S. Constitution. A close review of the evolution of these safeguards with respect to Internet threats will show that this area of the law is in its infancy, and will demonstrate the challenges to applying traditional standards of free speech to online communication. As a result, individual confrontations between online speakers and law enforcement may serve as defining tests of First Amendment protections in the Internet age. WhosARat.com is one of these instances.

In the absence of evidence that WhosARat.com threatens bodily harm, or incites likely, imminent lawless action, an analysis of the website and First Amendment law suggests that -- for the moment at least -- it may operate on the Internet frontier without fear of government interference. Furthermore, as troubling as it may sound, one might reasonably conclude that a person may have to be hurt or killed, as a result of material posted on WhosARat.com, before the government is legally justified in trying to shut the website down, on grounds that its content poses a threat to individual or public safety.

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A lifetime of appreciation to my husband, Jonathan,
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This project is dedicated to Eleanor and Nate,
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I: INTRODUCTION: WHAT'S THE WHO'S-A-RAT PROBLEM?

Not long ago, the introduction of the Internet as a mainstream tool heralded a transformation of human activity and interaction, and promised great benefits the world over. Many of these predictions have borne out; a few clicks of a mouse and we can learn the picayune details of virtually any conceivable subject, communicate with family and strangers across great distances, telecommute, shop without leaving home, and promulgate our whims and deepest ideals for global information consumption. The full impact of this technological wave, however—both practically and conceptually—has yet to be realized. In the United States, century-old newspapers are crumbling under the economic pressure exerted by their online rivals. And Internet communication has sparked fresh debate over the adequacy of the traditional standards of free speech, that quintessentially American value.

Technological innovation, of course, has revolutionized communication before. Five hundred years ago it was the printing press that transformed humanity, by enabling the spread of a single person's ideas to thousands or even millions of people. Some of these ideas were not welcome. Social and political provocateurs, from anti-war activists to hate-mongers, had a new platform from which they could transmit their diatribes to a wide audience, and to mobilize followers for protest or potentially illegal activity. Today's radicals have in the Internet a powerful new tool: an instant,

booming and inexpensive megaphone. With a \$500 computer and negligible other costs, a Ku Klux Klansman can put up a slickly produced website with a potential audience in the millions. Bomb-making instructional videos are available for free viewing on jihadist websites. The Internet has enabled the free flow—or free-*flood*—of often coarse and provocative online speech, testing anew our tolerance for messages that we may find repugnant or even dangerous.

With a few taps on the keyboard, for instance, one finds a bold challenge to law enforcement called WhosARat.com. For five years the website has exposed Government informants, answering its own question “Who’s A Rat?” by posting cooperators’ names, addresses, and other identifying information. An image of a rodent tops its homepage, which features three “Rats of the Week.” And the homepage invites users to vote on whether all cooperators (or by implication, just *some*) are “cut from an untrustworthy cloth.”

The message to those who would aid Government is clear: your picture, address and cooperative role can be transmitted with all of the reach and immediacy of the Internet. Prisoners, criminal defendants and their associates with online access may see it, and learn about the specifics of your involvement. Much of the material, albeit sensitive, is obtained from public court documents available online.

Administrators of WhosARat.com insist that the website serves as important legal aid

to criminal defendants; under the U.S. Constitution the accused are entitled to learn the evidence that may be used against them at trial, and the sources of that information. In light of cases in which informants have lied to the Government, they argue that the website is a critical check on truthfulness and accountability in the criminal justice system.

Federal prosecutors brush aside the website's claim as disingenuous at best. They see WhosARat.com instead as a brazen taunting of Government informants to cooperate at their peril. In their view, the website is an ominous escalation of the broader problem of anti-snitching campaigns in American cities, and only magnifies intense pressure on potential witnesses and informants *not* to assist law enforcement. This pressure threatens the ability of investigators to gather informant testimony, which can be critical to resolving the most dangerous and pervasive crimes undermining America's social fabric. Criminal activity ranging from drug-dealing to murder goes unaddressed, because potential witnesses and informants conclude that there is more risk and more stigma in speaking out than in staying silent.

The exponential dissemination of information about Government cooperators and their roles has provoked a rising tide of concern over whether such speech is in fact protected under the First Amendment. To date, the Supreme Court has afforded the Internet the same broad protections of print media, regardless of content. It has done so even while acknowledging the medium's unprecedented reach: "Through the

use of chat rooms,” the Court has written, “any person with a phone line can become a town crier with a voice that resonates farther than it could from a soapbox.”¹ Thus, with respect to content, every online speaker has the legal latitude of a publisher. He may have one reader or millions. She may be popular or reviled. But the subject matter, and the extent to which it is reviewed or censored, are decisions ultimately for the person at the keyboard.

As with print media and other communications, however, free speech protection on the Internet is not absolute. Speech may be legally curtailed or even punished where it directly causes physical harm, or creates a high risk of such harm. But the very nature of the Internet is apt to shape our interpretations of when speech crosses a line and becomes dangerous. Online communication may be transmitted over vast distances, but not necessarily. Speakers and listeners may be interacting in real time, or speech may be posted indefinitely. Might these circumstances affect one’s assessment of the imminence of harm? Furthermore, the audience for a potential Internet threat may be in the millions. Does this amplify the seriousness of an alleged threat, or dilute it?

¹ Reno v. ACLU, 521 U.S. 844 (1997). In June 1997, the Court voted 9-0 to invalidate portions of the Communications Decency Act (CDA), a law that punished the Internet transmission of “indecent” materials in a manner that would allow minors to see it. The Court held there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].” Reno, 521 U.S. at 870.

Thus the nature of the Internet communication has begun to test whether traditional standards for proscribing speech still apply. The Government's contention that WhosARat.com's online content invites offline harm has led some to call for a basic recalibration of the line that divides protected speech from illegal threats and incitement. The contours of the law in this area are by no means settled; each new confrontation between Internet speakers and the Government has the potential to reshape established standards. The fate of WhosARat.com, therefore, is poised to determine the extent to which in future online speech is considered "free."

II: A BRIEF HISTORY OF SNITCHING: INFORMANTS, STIGMA AND BACKLASH

History of Informant Aid to Law Enforcement

The use of informants in the criminal justice system is nothing new, and neither is widespread public ambivalence about their roles. In the adversarial world of criminals and crime-fighters, informants are seen as neither fish nor fowl. They are often instead denigrated as *rats*, and by a host of pejorative slang terms—finks, snitches, tattletales, stool pigeons—that are spread by individuals with a basic distrust of law enforcement officers and their tactics. Informants have chosen to side with law enforcement over their colleagues and community. It is because of that choice, even when it involves a courageous moral turnabout to promote justice, that reasonable people might question the authenticity and trustworthiness of the act. Informants are willing to make personal gain out of privileged information, to leverage themselves at the expense of peers. They can be prized and loathed, sometimes simultaneously, and always depending on the eye of the beholder.

As a group, informants have one thing in common: they provide information that in some way helps the Government to investigate people suspected of illegal activity. Some have made a public break with criminally-minded associates; others provide information to law enforcement in secret and on an ongoing basis. As opposed

to ordinary witnesses who offer information voluntarily, informants are providing their information as part of an arrangement with law enforcement authorities that typically delivers them some kind of reward. They can be motivated by numerous factors, including money, civic duty, fear, revenge, attention, elimination of competitors, and leniency in criminal punishment.

The use of informants to promote law and order in society dates back to the earliest records of governing institutions. As long as states have existed, they have relied on informants to help in guarding against challenges to their authority. In ancient Greece and Rome, rulers were primarily concerned with crimes against the state's power and stability, and employed informants to combat subversion. Rulers in classical Athens (425-322 B.C) actively encouraged the reporting of planned and already committed treasonous acts. Any person could come forward, man or woman, slave or free person, citizen or foreigner. The informant would report to the courts of capital crimes in Athenian society, and incentives and punishment were in place depending on the quality of the information provided. A 415 B.C. law provided that an informant would be put to death if his information were found not to be true.¹

¹ Robert M. Bloom, *Ratting: The Use and Abuse of Informants in the American Justice System*. (Westport, Conn.: Praeger, 2002), x.

As with today's jailhouse informants, cooperators in ancient Greece were often members of a conspiracy to commit treason and would come forward on condition of absolution. Andocides, for example, became the most renowned Greek informant in 415 B.C., for naming his own father among those who had conspired to desecrate Athenian statues. Andocides was acquitted of his own role in the conspiracy, and so too was his father, Legoras, who followed his son's example and informed on fellow conspirators to gain his own freedom.²

Perhaps the best-known early informant comes from the Bible. Judas Iscariot became infamous among Christians for his role in helping Roman soldiers to locate, identify and arrest Jesus Christ. In 33 A.D., during the Passover feast, Judas guided the soldiers to Gethsemane, a remote grove outside Jerusalem where Judas knew Jesus to be celebrating. Judas identified Jesus under the torchlight by giving him a kiss, and with that, Roman soldiers apprehended him.³ Judas the informant thereby facilitated the central acts of Christianity from which followers find meaning: the persecution and crucifixion of Jesus Christ. Next to Jesus himself, Judas is arguably responsible for the basis of Christianity as we know it.

² Bloom, *Rattling*, 2.

³ Bloom, *Rattling*, 3. Judas quietly supplied the information needed to locate Jesus Christ in order to avoid an uprising.

In exchange for his help, Judas received thirty pieces of silver and a legacy among Christians and non-Christians alike as the “one who betrayed him.”⁴ Religious scholars speculate that Judas may have been motivated by greed, hate, altruism or some combination.⁵ But to Christian laity and in popular interpretations of Judas’ behavior, his motivations are practically irrelevant. He is cast as a traitor, and even apart from religious or biblical context his name is synonymous with betrayal.

The fact that informants stand to gain, financially or otherwise, by cooperating with law enforcement has long raised suspicion about the veracity of their information. From the Middle Ages to the Enlightenment, the informant system in England was problematic. Law enforcement officials sometimes compelled prisoners to inform on innocent parties in order to extort ransom. By the 18th-century, a common informant was entitled to part of a fine that might be imposed upon the accused, introducing the possibility that informants would provide false information in order to reap the financial benefits.⁶ The use of money in the informant system has opened it to

⁴ Matt. 10:4.

⁵ Bloom, *Rattling*, 4. Bloom describes two theories for Judas’ apostasy. First, that Judas had faith that while in custody Jesus could manifest his full power for all to see. Second, that Judas was resentful of Jesus’ large following, and eager to assist in his downfall.

⁶ *Ibid.*, 6.

questions of corruption, and to doubts about whether serving justice was its paramount goal.

Western European states began to develop more sophisticated police forces in the early nineteenth-century. In France, a small-time career criminal named Francois Vidocq parlayed his experience as an informant to found the Paris Surete, a criminal investigation division of the Paris police. From 1810 to 1827, Vidocq set up a network of informers, hired former criminals as detectives, and pioneered modern protocols for police surveillance and investigation. The French system was mirrored in England, where the criminal justice system developed a tradition of using informants effectively. This early informant system laid the foundation for improved information-gathering strategies, particularly in the policing of the younger colony of America.

Use of Informants to Combat Drug-Dealing

By the early 20th-century, America required its own methods for policing itself. Laws of prohibition against the sale and consumption of alcohol domestically, and the threat that the Bolshevik Revolution would spread communism to the United States, motivated the Government to seek out information about potentially subversive activity. This led to the creation of the Federal Bureau of Investigation (FBI) in 1908, under President Theodore Roosevelt. The FBI cultivated a network of informants across the country who became essentially domestic spies. From the 1920s to the

1970s, the FBI infiltrated and investigated what it considered to be radical groups, such as the Black Panthers, the Students for a Democratic Society, the Progressive Labor Party, and Vietnam Veterans against the War. These informants not only investigated crimes, but also sabotaged the work of these groups. For the most part, the informants were political operatives, harkening back to ancient Greek and Roman cultures when informants were primarily used to expose traitors and threats to existing rule.

By the late 1960s and early 1970s, the Government mobilized its resources against the drug use that was broadly intertwined with social and political anti-establishment movements of the time. President Richard Nixon saw this youth-based “counterculture”—an amalgamation of civil rights, anti-Vietnam War, environmental and women’s rights activists—as a dangerous threat to the nation. His administration began to target users and dealers of marijuana and psychedelic drugs such as LSD as a way to disrupt it.

The mainstream media made this Government effort more difficult in the late 1970s, when drug users were widely portrayed as iconoclastic rebels, not common criminals. Anti-establishment celebrities from the Beatles to Timothy Leary to Peter (“Easy Rider”) Fonda advocated the use of “consciousness-expanding” drugs to

develop alternatives to the materialism of consumer society.⁷ President Nixon responded with Operation Intercept, a massive federal effort to stop marijuana from entering the country from Mexico, and he recruited entertainers from Sonny Bono to Elvis Presley to take on aspects of his anti-drug campaign. While Presley was not tapped as a Government informant, his own acquisition of illegal drugs and record of abuse no doubt complicated the effectiveness of his anti-drug advocacy.

By the early 1980s, there developed a distinction in drug use by class. Hallucinogenics had been cast in the mainstream media as “party drugs,” while crack cocaine, heroin and methamphetamine were associated with black entertainers and political activists of the 60s and 70s, and with a subsequent, broad rise in violent crime. In response, law enforcement directed its most aggressive anti-drug efforts at young black males. This group became the targets of the Government’s first broad-based “snitch” operation, the Ghetto Informant Program. This law enforcement tactic, combined with the establishment of divergent penalties for certain drug crimes, has led to widely recognized, troubling inequities in the administration of justice.

⁷ Jim Redden, *Snitch Culture: How Citizens are Turned into the Eyes and Ears of the State*. (Venice, Calif.: Feral House, 2000), 192.

Effects of Informant Use on Drug Arrests and Prison Population

The racial disparities in the prosecution of the war on drugs have persisted to this day. In 1986, Congress passed the Anti-Drug Abuse Act, which among other things dramatically increased the penalties for crack cocaine. Given its cruder form and lower cost, crack cocaine is a drug long associated with low-income users, many of them African-American, in the nation's inner cities. Under guidelines established by the law that continue to this day, crack cocaine is the only drug that carries a mandatory prison sentence for a first-time possession offense.⁸ Once convicted, a person who sells merely five grams of crack cocaine receives the same minimum sentence as someone who sells *one hundred times* that amount, or 500 grams, of powder cocaine. The sentencing structure results in average sentences for crack cocaine offenses that are three years longer than for offenses involving powder cocaine. This difference in punishments, based on a *form* of a drug, has had dramatic racial implications on arrest and incarceration rates in the United States.

In its report in March of 2009, Human Rights Watch cites data from the FBI showing that in every year from 1980 to 2007, African-Americans were arrested nationwide on drug charges at 2.8 to 5.5 times the rate at which white Americans were

⁸ United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2007, 8.

arrested.⁹ This comes despite evidence that blacks and whites engage in drug offenses—possession and sales—at roughly comparable rates.¹⁰

This racial disparity in arrest rates led to an explosion of the African-American population in the U.S. prison system. Between 1988 and 1996, incarceration rates for both white and black Americans grew, but at dramatically different rates. The national rate of incarceration of black Americans increased 67 percent, while the white rate increased just 28 percent.¹¹ African-Americans have accounted for the majority of the nation’s prison population since 1995, despite making up merely 13 percent of the nation’s population as a whole. Many of these sentences are for simple drug possession.¹² Minor users—especially of crack cocaine—came to face penalties traditionally reserved for murderers and criminal kingpins.

Once convicted, there was only one way to avoid serving the strict new terms: to provide the government with what prosecutors deem “substantial assistance” in

⁹ Human Rights Watch, *Decades of Disparity: Drug Arrests in the United States* [March 2009], <http://www.hrw.org/en/node/81105/section2> [accessed March 31, 2009].

¹⁰ Human Rights Watch, *Targeting Blacks: Drug Law Enforcement and Race in the United States* [May 2008], <http://www.hrw.org/en/reports/2008/05/04/targeting-blacks-0> [accessed March 31, 2009].

¹¹ Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, [May 2000], <http://www.hrw.org/legacy/reports/2000/usa/> [accessed March 31, 2009].

arresting and convicting other drug dealers and users. In other words, become an informant. According to a 1995 study by the National Law Journal, “Between 1980 and 1993, the number of federal search warrants relying exclusively on an unidentified snitch nearly tripled, from 24 percent to 71 percent.”¹³ Prosecutors were increasingly turning to informants to investigate and solve crimes. And crime suspects, many of them young and black, were becoming increasingly eager to slip the severe, mandatory minimum sentences by informing on friends, associates, and even family members. In many instances this was a mutually beneficially exchange.

In fact, strict drug laws and sentencing guidelines over the past two decades have yielded law enforcement a huge pool of potential informants. This trend has led to virtually standard negotiations for leniency in exchange for information that would allow law enforcement an opportunity to snag “bigger fish” in the nation’s drug wars. In some cases, the arrangement involves a relatively quick transaction of information in return for a direct reduction in punishment. In other cases, willing informants are released from custody under a deal that requires them to provide investigators with information about illegal activity in secret, and on an ongoing basis. This longer-term

¹² Human Rights Watch, *Decades of Disparity: Drug Arrests in the United States*. From 1999 through 2007, arrests for drug possession constituted 80 percent or more of all drug arrests.

¹³ Mark Curriden, *No Honor Among Thieves*, ABA, Journal 52, no. 75 (1989).

relationship in some cases involves Government paying informants substantial sums of money.

The exchange of money for information happens at all levels of law enforcement, at amounts that are typically in proportion to the value of their information. At the federal level, rewards in excess of \$1 million are not unusual; the FBI paid the informant in the World Trade Center bombing prosecution of 1995 in excess of \$1 million for his assistance in the investigation.¹⁴ The Internal Revenue Service (IRS) can pay informants up to \$10 million per case, up from a ceiling of \$100,000 in 1997.¹⁵ In the first 30 years of the IRS informant program, approximately 17,000 informants collectively earned over \$35.1 million. The arrangement ended up enriching the U.S. Treasury. In that same period, the IRS credited informant assistance for its recovery of more than \$2.1 billion in unpaid taxes.

Critics argue that too often both sides in these negotiations benefit from informants' duplicity.¹⁶ U.S. Appellate Court Judge and former senior Justice

¹⁴ Ethan Brown. *Snitch: Informants, Cooperators & and the Corruption of Justice*, (Perseus Books Group, 2007), 22.

¹⁵ *Ibid.*, 22.

¹⁶ Bloom, *Rattling*, 7. Bloom describes an FBI Law Enforcement Bulletin in 1998 that openly acknowledged of the value of informants to federal and state authorities and the risks associated with their use. The bulletin focused on the failures and abuses that have plagued informer systems since their inception. It also discussed how to recruit reliable informants, how to document and assess the value of

Department official Stephen Trott, by the late 1990s, was offering this warning in lectures to federal prosecutors: “Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies and double-crossing anyone with whom they come into contact, including—and especially—the prosecutor.”¹⁷

Prosecutors’ aggressive use of informants to combat drug crimes, rewards for informants to cooperate, and evidence of racial disparities in the administration and effects of this crime-fighting strategy, have combined to foster a toxic atmosphere of distrust of law enforcement tactics in many of America’s urban communities. This distrust is fueled further by reports of informant error and wrongdoing in the most serious of criminal trials. According to a study by the Northwestern University Law School’s Center on Wrongful Convictions, 51 of the 111 wrongful death penalty convictions since the 1970s were based in whole or in part on the testimony of

informant information, how to identify false or misleading information, and how to “handle” informants. Certainly U.S. authorities have faced scathing criticism for letting major drug lords out of prison in exchange for their cooperation.

¹⁷ Redden, *Snitch Culture*, 196.

witnesses who had an incentive to lie.¹⁸ A backlash against informants generally was virtually guaranteed.

Informants: The Backlash

If prosecutors credit informants as indispensable, criminals trying to evade detection see them as the ultimate threat. Among their former associates, informants are cast as liars and traitors, deserving of punishment by violence or even death. Indeed, the degree of backlash against ordinary witnesses and informants has increased dramatically in recent years.

Seen as allies to prosecutors, these cooperators are threatened regularly with retaliation, with the effect of limiting law enforcement's ability to gather evidence and prosecute criminals. Prosecutors complain that witness intimidation badly hampers their ability to fight crime, and in some areas it affects nearly every murder case they try. Prosecutors in Baltimore, for instance, can rattle off a litany of brutal retaliations: houses firebombed, witnesses and their relatives shot, contract hits on 10-year-olds.¹⁹

¹⁸ Center on Wrongful Convictions, Northwestern University School of Law. *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, [Winter 2004-05] <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf> [accessed March 31, 2009].

¹⁹ Jeremy Kahn, "The Story of a Snitch." *Atlantic Monthly* [April 2007], <http://www.theatlantic.com/doc/200704/stop-snitching> [accessed March 30, 2009].

In some urban neighborhoods, talking to the law has become a mortal sin, a dishonorable act punishable by social banishment or direct acts of violence. These are just a few recent examples:

- In Newark, witnesses identified suspects in 14 killings, but prosecutors did not charge them for fear that the witnesses would be hurt or killed.²⁰
- In Washington, D.C., Lakita Danielle Tolson, a 19-year-old mother and nursing student, was killed outside a Temple Hills nightclub. Nine months later, Eric S. Holland, 18, was killed in a crowded schoolyard. Law enforcement and family members believe he was targeted because people (wrongly) thought he was cooperating with police on the Tolson case. Large crowds were at both shootings, but only one witness agreed to testify in both cases. No one has been convicted in either homicide.²¹
- In New York, a key witness against a man charged with killing a hero sanitation worker got cold feet after he was threatened by someone shouting into a Brooklyn home. “Snitch, snitch, snitch!” someone yelled at Andrew King’s Crown Heights home Monday night, the night before the teen was to testify against Anthony Williams, 24, in Brooklyn Supreme Court.²²

²⁰ Ronald Moten, “The Real Meaning of Snitching,” *The Washington Post*, 19 August 2005. <http://www.washingtonpost.com> [accessed March 30, 2009].

²¹ Moten, “The Real Meaning of Snitching.”

²² Scott Shifrel, “Key Witness Backs Out, Skips Slay Trial After Threatening Shouts of Snitch,” *Daily News*, 16 April 2008. http://assets.nydailynews.com/news/ny_crime/2008/04/16/2008-04-16_key_witness_skips_slay_trial_after_threa-2.html, [accessed April 7, 2009].

- In Newark, two New Jersey men said to be members of the Grape Street Crips gang were indicted on charges of severely beating an informant who was cooperating with the FBI in a drug investigation of a gang.²³
- In Trenton, New Jersey, Jeri Lynn Dotson was shot twice in the head in front of her 2-year-old daughter a day after she saw fellow gang members kidnap a man who was later choked and left for dead in a garbage bin. As investigators sought potential witnesses in Dotson's killing, one was attacked while in protective custody and scalded in the face with hot oil. A gang leader charged in Ms. Dotson's killing said in a jailhouse interview that the gang members cooperating with prosecutors were unlikely to make it to the witness stand, or to survive if they testified. "Snitches wear stitches," Jose Negrete, 25, said with a smile.²⁴
- In Camden, New Jersey, a 19-year-old gang member named Fred Morton was questioned by detectives about a murder he had witnessed. Twelve days later, he was found strangled and with his throat slit in a city park. Morton's family and neighbors are convinced of a direct connection.²⁵
- In Philadelphia, a drug kingpin was convicted of witness intimidation after he was taped threatening to kill those who testified against him. Five relatives of one witness in the case had already died, in a house fire that prosecutors believe was the drug lord's doing.²⁶

²³ Anthony Ramirez, "Two Newark Men Charged With Beating Informant," *The New York Times*, 25 March 2007. <http://query.nytimes.com/gst/fullpage.html?res=9502EFDF1230F936A15750C0A9619C8B63> [accessed April 7, 2009].

²⁴ David Kocieniewski, "In Prosecution of Gang, A Chilling Adversary: The Code of the Streets," *The New York Times*, 19 September 2007. http://www.nytimes.com/2007/09/19/nyregion/19gangs.html?_r=1&scp=2&sq=kocieniewski%20code%20streets&st=cse, [accessed April 7, 2009].

²⁵ David Kowieniewski, "Keeping Witnesses Off Stand to Keep Them Safe," *The New York Times*, 19 November 2007. <http://www.nytimes.com/2007/11/19/nyregion/19witness.html?scp=1&sq=kocieniewski+witnesses+stand&st=nyt>, [accessed April 7, 2009].

²⁶ Emilie Lounsberry, "Stoking a Culture of Fear for Witnesses," *The Philadelphia Inquirer*, July 27, 2007.

- In San Francisco, two gang members were freed after state prosecutors' star witness turned up dead.²⁷
- In Denver, a key homicide witness was sexually assaulted in what prosecutors believe was a "contract" attack designed to frighten him out of testifying.²⁸

Reluctance to help investigators is based on more than just fear of gang retaliation, but a consequence of a gradual breakdown—especially in minority communities—of trust in the police and the Government. In predominantly black and Hispanic neighborhoods across the country, residents complain that racial profiling, police corruption and the excesses of the war on drugs have made them suspicious of virtually any arm of Government.²⁹ David Kennedy, the director of the Center for Crime Prevention and Control at the John Jay College of Criminal Justice in New York, believes the silence of many witnesses doesn't come from fear, but from anger: "This is the reward we have reaped for 20 years of profligate drug enforcement in these communities," Kennedy said.³⁰ Charles Ogletree, a Harvard law professor who is studying witness intimidation for the National District Attorneys Association, put it

²⁷ Kahn, "The Story of a Snitch."

²⁸ Ibid.

²⁹ David Kocieniewski, "So Many Crimes, So Many Reasons Not to Cooperate," *The New York Times*, 30 December 2007. <http://www.nytimes.com/2007/12/30/nyregion/30witness.html?scp=1&sq=kocieniewski+so+many+crimes&st=nyt>, [accessed April 7, 2009].

³⁰ Kahn, "The Story of a Snitch."

this way to the New York Times: “A lot of white Americans from suburban communities can’t understand why people wouldn’t talk to law enforcement,” Ogletree said. “But in a lot of inner-city communities, there is so much hostility to the police that many people of color can’t fathom why someone would even seriously consider helping them.”³¹

“Stop Snitching” Movement

Witness intimidation exploded into a national story with the underground DVD titled *Stop Fucking Snitching* that began circulating in Baltimore in November 2004. In it Rodney Thomas, a rapper known locally as Skinny Suge, talks about what he thinks should happen to informants: “To all you snitches and rats ... I hope you catch AIDS in your mouth, and your lips the first thing to die, yo bitch.” The DVD also includes numerous segments in which young men on the street rail against snitches.

In its subject matter, the DVD was more evolution than revolution. The slogan “Stop Snitching” had been around since at least 1999, when it was popularized by the Boston rapper Tangg da Juice. The video would have remained a local curiosity except for one thing: It includes a cameo by Carmelo Anthony, a Baltimore native

³¹ Kocieniewski, “So Many Crimes, So Many Reasons Not to Cooperate.”

who became an NBA star with the Denver Nuggets. Anthony appears in only six of the film's 108 minutes, and spends most of that time poking fun at a former coach and a rival player. But his celebrity, along with the DVD's charged subject matter, created a sensation. This was particularly true in the nation's inner cities, where the endorsement of a professional basketball player combined with rap music to elevate "Stop Snitching" into a powerful creed.

The DVD was produced by Rodney Bethea, a 33-year-old barber and entrepreneur. Bethea claimed it was not intended to encourage violence against witnesses; he had simply set out to make a freestyle documentary, and "snitching" happened to emerge as a major theme. He also said the term "snitch" has a very specific meaning on the streets and in the video. "They are referring to people," Bethea told *The Atlantic Monthly* in 2007, "that are engaged in illegal activities, making a profit from it, and then when it comes time for the curtains to close—you do the crime, you do the time—now no one wants to go to jail. That is considered a snitch. The old lady that lives on the block that calls the police because guys are selling drugs in front of her house, she's not a snitch, because she is what would be considered a civilian."

Bethea believes there is a double standard and a trace of racism in law enforcement's criticism of the anti-snitching culture. "When you think about it, I mean, who likes a snitch?" he said. "The Government don't like a snitch. Their word

for it is treason. What is the penalty for treason?” Bethea pointed out that the police have their own code of silence, and that officers who break it by reporting police misconduct are stigmatized in much the same way as those who break the code of silence on the street.

Bethea’s popularization of the “Stop Snitching” slogan helped to weave it into a forceful social ethic in many of America’s crime-ridden urban neighborhoods. The terms “snitches” or “rats” once described only jailhouse informants. But now, when the terms can be applied also to one’s neighbor or family member, the pressure not to cooperate with law enforcement regularly tests the consciences of people whose only involvement with crime is as a victim or potential witness.

The force of this social stigma has become an exasperating obstacle confronting police as they try to combat violent crime in urban communities. The movement has so legitimized witness intimidation that incidents of pressure even at courthouses are no longer aberrations. There are accounts of gang members lining courthouse steps, forming a gantlet that witnesses and jurors must walk through. Family members of defendants have come to court wearing “Stop Snitching” T-shirts and hats. In one Pittsburgh case in 2006, a key (though hostile) prosecution witness came to court in “Stop Snitching” gear. He was ejected because his clothing was considered

intimidating to other witnesses, and without his testimony, the district attorney dropped the charges.³² At the close of one trial in Baltimore, jurors were so frightened of the defendants and of gang members in the gallery that the forewoman refused to read the guilty verdict aloud; so did another juror asked to do so by the judge. The judge eventually read the verdict herself and, as precaution, had sheriff's deputies accompany the jurors out of the building.³³

Criminals have become more adept at enforcing the code of silence, using increasingly sophisticated methods to bribe, intimidate, and harm witnesses. Defendants and their surrogates have obtained witnesses' supposedly confidential grand-jury testimony and tacked it to their doors, along with threatening notes. They have adopted new technology like cell-phone cameras and text-messages to the phones of sequestered witnesses. Every instance of intimidation, especially cases of witness assault or murder, heightens the climate of fear and suspicion that the law can't or won't protect ordinary people.

The steep decline in the number of informants willing to help law enforcement has a dramatic effect on prosecutions. Witnesses and informants, after all, are often

³² Kahn, "The Story of a Snitch."

³³ Ibid.

prosecutors' most powerful tool at trial. The fewer witnesses the state has and the more a defense attorney expects to be able to discredit them, the more likely she is to advise her client against a plea bargain. This trend has far-reaching implications: not only does it mean that more cases go to trial, at significant expense to the state, but those trials are often more likely to fail. In 2007 in Baltimore, for example, the chance that the defendant would walk ran about 50 percent in a non-fatal shooting, and 38 percent in a murder.³⁴

Prosecutors in most major U.S. cities tell similar stories. While they have contended with reluctant witnesses for decades, law enforcement experts say the problem has gotten dramatically worse. In December of 2008 the Albuquerque Police Department was so desperate for help that posted a want-ad in the city's weekly newspaper for "people that hang out with crooks to do part-time work."³⁵ Officials say the lack of cooperation has led to falling arrest rates in criminal cases. In cities with populations between half a million (for example, Tucson) and a million (Detroit), the proportion of violent crimes that led to an arrest and prosecution dropped from about

³⁴ Kahn, "The Story of a Snitch."

³⁵ Kevin Johnson, "'Snitches' Ad Draws Tips, Criticism; Albuquerque PD Pays Informants," *USA Today*, 30 December 2008. http://www.usatoday.com/news/nation/2008-12-08-snitches_N.htm [accessed April 9, 2009].

45 percent in the late 1990s to less than 35 percent in 2005, according to the FBI. Conviction rates have similarly dropped.³⁶

Many defense attorneys argue that the root of the problem is not witness intimidation, but law enforcement tactics that encourage suspects to lie about their knowledge of other crimes. Elizabeth Julian, Baltimore's chief public defender, pointed out that it is perfectly legal for police to mislead potential witnesses into thinking they won't have to testify in court. "If you are being asked, and you are getting a 'Get Out of Jail Free Card' tonight, people take it. That's human nature," she says. In her view, the result is initial statements that are either outright fabrications or some mixture of fact and rumor. Julian argues that the word on the street, rather than "Stop snitching," ought to be "Stop lying."³⁷

In some states, however, police, prosecutors, and judges are trying to use the *Stop Fucking Snitching* DVD to their advantage. Patricia Jessamy, the state's attorney for Baltimore, had hundreds of copies made and distributed them to politicians and the national media. Arguing that witness intimidation had become mainstream, and a dangerous threat to law enforcement, she won passage of a tougher witness

³⁶ Federal Bureau of Investigation, *Uniform Crime Report, 2005*, http://www.fbi.gov/ucr/05cius/about/crime_summary.html [accessed April 7, 2009].

³⁷ Kahn, "The Story of a Snitch."

intimidation law that the Maryland legislature had voted down the year before. And the police department made a show of arresting the DVD's stars, including a man accused of carrying out contract killings. Police created their own video to counteract it, *Keep Talking*, in order to encourage future witnesses to come forward.

The U.S. Congress has also responded with tougher legislation. A law passed in 1997 explicitly makes witness intimidation grounds for federal prosecution. A federal conviction would trigger potentially lengthy sentences that, unlike the state system, do not allow for probation or parole. And there have been attempts to force a change in popular expressions of support for the anti-informant code. "Stop Snitching" t-shirts, for instance, have been banned from a number of courthouses.

There is no indication, however, that prohibiting a fashion statement or tougher laws against witness intimidation will alter the underlying sentiment. An effective and lasting strategy to encourage witnesses' willingness to participate in the judicial process arguably requires a cultural transformation in America's inner cities. The "Stop Snitching" movement, after all, answered a deep and broad sense of persecution—particularly among young black and Hispanic men—and reflected a dangerously adversarial relationship with law enforcement. Until that relationship is healed, cooperation can be expected to continue to suffer. And those who distrust the use of informants as a law enforcement tactic can be expected to search out, and employ, innovative methods of discouraging their cooperation.

III: GENESIS AND DEVELOPMENT OF WHOSARAT.COM

In the spring of 2003, Eugene “Twin” Coleman made a life-threatening choice, with graver risks than he could have anticipated. After being linked to a murder and cocaine ring run by Kaboni Savage, one of Philadelphia’s most notorious drug kingpins, Coleman opted to cooperate with the FBI.¹ Two years later, by the time Savage was convicted of drug crimes, money laundering and witness intimidation and sentenced to thirty years in prison, two other would-be witnesses against him had been fatally shot. Coleman’s mother and five other family members were dead too, killed in a house fire that investigators believe was set in retaliation for Coleman’s cooperation. Coleman went into the witness protection program.

But if Coleman had hoped that attention on his role in Savage’s conviction would eventually fade, he was wrong. He is featured as Informant 3296 on www.WhosARat.com, a website dedicated to ensuring that cooperators like him are publicized indefinitely. The site blames Coleman for convicting Savage, whom one federal prosecutor called the most “vicious, vindictive and hateful” defendant he has ever seen. Coleman and thousands of purported snitches profiled on the

¹ Emilie Lounsberry, “Site that Snitches on Snitches Irks Judges,” *The Philadelphia Inquirer*, July 22, 2007.

WhosARat.com could have years of fear ahead of them. The website's spread of information that identifies and locates informants could facilitate, and arguably promotes, retaliation against them. This is sending wave of worry through the criminal justice system, where informants play a critical role.

WhosARat.com is the brainchild, perhaps predictably, of a man who found himself on the losing end of an informant's cooperation with the Government in 2004. Radio disc jockey Sean Bucci was indicted in federal court in Boston on marijuana charges, based on information from a cooperating witness. Bucci wasted no time in "leveling the playing field," as he told the media at the time.² Within months of his indictment, and even before being convicted and serving time in prison, Bucci launched his website, WhosARat.com, with the goal of exposing informants' identities and their roles in criminal prosecutions.

The website was initially free to anyone with Internet access who wanted to peruse information on Government cooperators. Eventually, for a charge of \$7.99 for a week or \$89.99 for life (a "membership" that includes a "Stop Snitching" t-shirt), users could learn about three "Rats of the Week" on WhosARat.com's homepage. They can scroll through information on thousands of other informants and undercover

² Adam Liptak, "Web Sites Listing Informants Concern Justice Dept." *The New York Times*, May 22, 2007.

agents inside the site, search for one in particular and post messages on any informant profile. Some profiles include links or attachments to news stories, press releases, and Government documents that detail how witnesses have agreed to help prosecutors in exchange for lenient sentences. One featured informant from Florida, for instance, agreed to plead guilty to cocaine possession in exchange for his commitment to work “in an undercover role to contact and negotiate with sources of controlled substances.”³ Much of the information on the site has been obtained from public documents that, with the Government’s help, are available online.

WhosARat.com claims to receive 15,000 to 50,000 hits weekly from all over the world. The website describes its purpose this way: “Who’s A Rat is a database-driven website designed to assist attorneys and criminal defendants with few resources. The purpose of this website is for individuals and attorneys to post and share all information that has been made public to at least one person in public prior to posting it on this site related to local, state and federal informants and law enforcement.” Users can learn the identities of people who are being used to build a case against them, well before any trial gets underway. Defense lawyers who use it claim it is an effective resource in preparing for trial.

³ Liptak, “Web Sites Listing Informants Concern Justice Dept.”

Prosecutors, on the other hand, warn that the exposure of informants' identities threatens their safety, and deters both potential informants and ordinary witnesses alike from offering assistance. The use of the Internet, federal officials contend, only compounds these effects. In December of 2006, the then-Director of the Executive Office for U.S. Attorneys, Michael Battle, warned administrators of the federal judiciary that "we are witnessing the rise of a new cottage industry engaged in republishing court filings about cooperators on websites such as WhosARat.com for the clear purpose of witness intimidation, retaliation, and harassment."⁴

The widespread dissemination of sensitive witness information online, Battle wrote, "poses a grave risk of harm to cooperating witnesses and defendants."⁵ In one case, a witness in Philadelphia was moved and the F.B.I. was asked to investigate after material from WhosARat.com was mailed to his neighbors and posted on utility poles and cars in that area. Government officials became so worried about the welfare of agents that shortly after the site was launched, the Homeland Security Department

⁴ Letter from Michael A. Battle, Dir., Executive Office for U.S. Attorneys, U.S. Dep't of Justice, to James C. Duff, Sec'y, Judicial Conference of the U.S. (Dec. 6, 2006), http://www.floridasupremecourt.org/pub_info/summaries/briefs/06/06-2136/Filed_01-31-2007_ProsecutorsSupplementalCommentsAppendix.pdf [accessed April 6, 2009].

⁵ Ibid.

issued a memo warning its agents not to visit the site for fear of revealing government IP, or Internet protocol, addresses.⁶

WhosARat.com insists on its homepage that it “does not promote or condone violence or illegal activity against informants or law enforcement officers.” Its administrators deny that intimidation or retaliation is the goal. Instead, the site’s spokesman and self-described director of operations, Anthony Capone, claims that its goal is to allow defendants to investigate their accusers. Capone contends that informants often tell outright lies, in order to receive a sentence reduction, or for financial gain. With the site’s help, he said, informants are no longer “un-credible (sic) fingers of accusation reaching out darkness.”⁷

There are examples to support Capone’s allegations. Last year, for instance, a former longtime FBI informant pleaded guilty to charges that he schemed to deceive the FBI during a four-year federal grand jury investigation in Detroit. In a news release in June of 2005, the Justice Department said Myron Strong schemed to defraud law enforcement by inventing a fictitious international drug trafficking organization that he claimed was distributing cocaine, heroin and marijuana across the country

⁶ Carrie Weimar, “Web Site Informs on Informers’ Identities,” *St. Petersburg Times*, May 20, 2007.

⁷ Liptak, “Web Sites Listing Informants Concern Justice Dept.”

through several dealers in the Detroit area.⁸ Strong identified and falsely accused certain individuals of being drug dealers and submitted drugs and other substances as alleged evidence of their crimes. Until Strong was caught, it was a lucrative arrangement for him. According to the news release, Strong and his associates netted \$240,000 in drug money and other investigative expenses.

The Government has admitted to missteps in the handling of confidential informants. The Justice Department's Inspector General found that the FBI violated rules for handling confidential informants in 87 percent of cases across the country. In some cases there was no proper oversight of informants who were involved in illegal activity. This evidence seems to support the claims made by operators of WhosARat.com that there is a legitimate place for assessing the reliability of Government informants. And they claim that this assessment, in as public a forum as the Internet, is protected by the First Amendment of the U.S. Constitution.

Indeed, the First Amendment was raised in the criminal case involving Mr. Bucci. During his appeal of his conviction on drug charges, Mr. Bucci asserted that the Government's true purpose in prosecuting him was to shut down the site because "he dared to assert his First Amendment right" to post the information. In their

⁸ Guillermo Contreras, "Does Web Site Level Playing Field or Stack Deck?" *The San Antonio Express-News*, October 07, 2006.

response, federal prosecutors acknowledged that “various levels of Government have long expressed concern that the website endangers the lives of informants and undercover agents, and compromises investigations.”⁹ But they denied that Government disapproval of the site influenced the decision to prosecute Mr. Bucci.

This allegation aside, the Government has not taken any direct steps to try to shut down WhosARat.com, although the concerns about its potential harm are deep and widespread. “It’s reprehensible and very dangerous,” said one former federal prosecutor. “People are going to die as a result of this.”¹⁰ Administrators of WhosARat.com are unfazed. According to Capone, the plea agreements posted on the website speak for themselves. “Law enforcement and informants can whine and complain all they want, but the bottom line is, WhosARat.com is here to stay.”¹¹

⁹ Liptak, “Web Sites Listing Informants Concern Justice Dept.”

¹⁰ Ibid.

¹¹ Contreras, “Does Web Site Level Playing Field or Stack Deck?”

IV: CAN IT REALLY POST THAT? FIRST AMENDMENT PROTECTIONS

The Basis For Protected and Proscribed Speech

The dire warnings from law enforcement about the effect of WhosARat.com on criminal investigations and prosecutions raise the reasonable question: does the Government have the right to shut the website down? The answer requires an exploration of the evolution and current state of free speech protection in the United States, including the exceptions to it and whether new means of expression such as the Internet are forcing a new understanding of the law.

The right to free speech derives from the First Amendment of the U.S. Constitution, which provides that “Congress shall make no law ... abridging the freedom of speech.” The framers of the Constitution employed this strong language on the proposition that a truly free society requires and relies on a free marketplace of ideas, and on its citizens’ free expression of them. On the basis of this belief in the virtue of ideas, American courts have interpreted “speech” broadly and regardless of content. In a legal context, speech can mean expressions ranging from t-shirt messages¹ to political contributions² to Internet websites. Citizens are guaranteed its

¹ Cohen v. California. 403 U.S. 15 (1971). The Supreme Court ruled that even a profane phrase was protected speech in the absence of a compelling reason to protect it. The Court reversed the

protection regardless of whether the speech is motivated by benign factors or by hate or prejudice, whether it represents the viewpoint of millions or of a single person, and regardless of the size of the audience that hears it. The Court has extended this protection against Government censorship throughout all levels of Government, by incorporating First Amendment speech protection through the 14th Amendment of the Constitution.

This Constitutional bias in favor of free speech over Government censorship was tested and firmly reinforced in the 1931 case Near v. Minnesota. In Near, the Supreme Court barred the state of Minnesota from shutting down newspaper publisher J.M. Near.³ The Court ruled that a state's use of a public nuisance law to try to silence Near, who used his newspaper to distribute anti-Semitic diatribes and scurrilous rants, ran counter to the meaning of the First Amendment. The decision stands to this day for the general principle that any prior restraint of expression bears a heavy

conviction of appellant Paul Robert Cohen, who was arrested for disturbing the peace, on the basis of wearing a jacket bearing the plainly visible words, "Fuck the Draft." Neither he nor anyone else threatened to commit any act of violence.

² Buckley v. Valeo, 424 U.S. 1 (1976). The U.S. Supreme Court took its first look at the Federal Election Campaign Act in 1976. The case challenged the constitutionality of many of the Act's provisions as they applied to individuals. The Court held that contribution and expenditure limitations indeed implicate fundamental First Amendment rights, noting that the quantity and depth of expression, along with the size of the audience reached, all would be negatively affected.

³ Near v. Minnesota, 283 U.S. 697 (1931).

presumption against its constitutional validity. However, Near is also significant for cautioning that freedom of speech is not absolute. The Court in Near carved out specific exceptions to First Amendment safeguards, thereby opening the door for obscenity, wartime emergency, and incitement to trump the protection of free speech.

By allowing these exceptions, the Supreme Court reconciled its unequivocal tilt in favor of free speech with a decision only eight years earlier in Schenck v. United States (1919). In Schenck, the Court unanimously upheld the conviction of a leaflet-distributing anti-war crusader, who urged insubordination in the armed services and obstruction of the draft. Writing for the Court, Justice Oliver Wendell Holmes argued that in wartime the stakes might be so high that dissent, permissible at other times, would pose a “clear and present danger” of interference with the war effort. Thus, he concluded, such speech should be stripped of First Amendment protection:

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.⁴

Using metaphor for his argument, Holmes argued that the First Amendment should not protect speech that triggers serious harm, as it should not protect a person in “falsely

⁴ Schenck v. United States, 249 U.S. 47 (1919).

shouting fire in a theatre and causing a panic.”⁵ A few years later in Near, Chief Justice Charles Evans Hughes expanded on Holmes by specifically articulating a public safety exception to free speech:

When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' (Schenck v. United States) ... The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.⁶

The Court relied on these propositions for the next forty years, favoring speakers over Government censorship as a general matter (except in the aforementioned exceptional instances, most significantly when speech poses a “clear and present danger” to public safety.) In 1969, the Supreme Court revisited the “clear and present danger” test in two cases. The outcomes created even tougher new standards for proscribed speech, standards that have laid the foundation for the modern approach to true threats and incitement.

In the landmark case Brandenburg v. Ohio, the Court reversed the conviction of a Ku Klux Klan leader who advocated racist violence at a Klan rally.⁷ Despite a cross-

⁵ Schenck v. United States, 1919.

⁶ Near v. Minnesota, 1931.

⁷ Brandenburg v. Ohio, 395 U.S. 444 (1969).

burning and the presence of firearms at the rally, the Court concluded that the leader's advocacy of violence at an unspecified future time fell short of "inciting and producing imminent lawless action."⁸ By so narrowing the boundaries of this excepted class of speech, Brandenburg put a significantly greater burden of proof on the Government when it seeks to punish expression. Not only must the speaker advocate imminent lawless action, there must be a likelihood that the action the speaker advocates will actually occur imminently.

Within weeks of the Brandenburg decision, the Supreme Court upheld the free speech rights of another speaker, a man who claimed that if he had a rifle "the first man I want to get in my sights is L.B.J. {President Lyndon B. Johnson}." In Watts v. United States, the Court held for the first time that the Supreme Court does not protect "true threats."⁹ But the Court determined that the context of the speech in question, having occurred in a small discussion group at a peace rally in Washington and having evoked laughter in the audience, supported the conclusion that the speaker intended to communicate more political hyperbole than a "true threat." However, the Court offered little guidance for differentiating the two; in its short opinion, the Court merely

⁸ Brandenburg v. Ohio, 1969.

⁹ Watts v. United States, 394 U.S. 708 (1969). "A threat must be distinguished from what is constitutionally protected speech."

offered its conclusion that the defendant’s speech did not meet the requisite, albeit ambiguous, “true threat” threshold.¹⁰

Today, the courts analyze most allegations involving threatening speech under one of these two cases: Watts, when the threat would be carried out by the speaker, or Brandenburg, when the speech incites others to commit violence. Both decisions have been fortified in subsequent years; in 2003, the Supreme Court offered its clearest definition of “true threat” in Virginia v. Black. In this case, the Court struck down a Virginia state statute outlawing cross-burning, but said such a ban may be permissible if it requires that the cross-burning is carried out with the intent to intimidate, and where intimidation involves the threat of “bodily harm.” The addition of such intent, according to the Court’s majority, would turn the fiery speech act into an unconstitutional “true threat,” which Justice Sandra Day O’Connor defined this way:

True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat... Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.¹¹

¹⁰ Watts v. United States, 1969.

¹¹ Virginia v. Black, 538 U.S. 343 (2003).

Justice O'Connor made clear that this category of proscribed speech aims to "protect individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur."¹² However, Virginia v. Black also reinforced the Government's high burden in proving that a speaker expresses more than a mere wish that harm or violence befalls an individual or group. He or she must express the *intent* to commit or cause it.

Similarly, the strictness of the Brandenburg incitement standard, where speech involves advocating that someone else commit violence, has been reaffirmed as well. In NAACP v. Claiborne Hardware (1982), the Supreme Court protected statements made by Charles Evers, who was a leader of a civil rights boycott of white-owned businesses in Mississippi.¹³ On various occasions, Evers warned would-be boycott violators that they would be "disciplined" and "have their necks broken by their own people." Evers' group also bought ad space in a local newspaper to publicize

¹² Ibid.

¹³ NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). The Supreme Court acknowledged that Charles Evers' statements could be interpreted as inviting violent retaliation, "or at least as intending to create a fear of violence whether or not improper discipline was specifically intended." Ibid. at 927. Nevertheless, it held that the statements were protected because there was insufficient evidence that Evers had "authorized, ratified, or directly threatened acts of violence." Ibid. at 929. Nor was publication of the boycott violators' names a sufficient basis for liability, even though collecting and publishing the names contributed to the atmosphere of intimidation that had harmed plaintiffs. Ibid. at 925-26.

violators' identities. Acts of violence against the boycott violators did occur weeks and months after Evers' statements and publication of their identities, but the Supreme Court concluded that neither speech act could be held responsible for them. Reinforcing Brandenburg, the Court emphasized that unless such speech incites imminent lawless action, it must be protected in light of the "'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.'"¹⁴

The overarching upshot of Brandenburg and Watts thus survives, ensuring that it is extremely difficult to cross the prevailing legal threshold and be held responsible for speech that threatens or incites violence, without more. This holds true for individuals and mass communicators alike. Although the Court has allowed for minimal regulation of broadcast media, based on the premise that the scarcity of frequencies justifies a public interest in monitoring content, the predominant trend has been to protect speaker over censor regardless of the form of expression. Indeed, Supreme Court cases concerning Turner Broadcasting, and implicating cable television generally, have freed cable channels from Government interference in content, treating

¹⁴ NAACP v. Claiborne Hardware Co., 1982 at 928. Here, the Court cites language from the landmark free speech case, New York Times Co. v. Sullivan, 458 U.S. 886 (1964).

cable communications in the same vein as verbal or written speech.¹⁵ Moreover, in Reno v. ACLU (1997), the Court applied the same permissive principle to the Internet by invalidating portions of the Communications Decency Act, which sought to treat the Internet like broadcasting.¹⁶ The Court rejected the Government's arguments that the Internet should be as highly regulated as broadcast media, instead seeing it as a “vast democratic for[um]” that for First Amendment purposes, more closely resembles print media.

It is clear, then, that any assessment of the validity of any potential legal challenge to WhosARat.com—based on claims it threatens or incites violence against willing informants and subverts critical law and order operations—must rely on the extremely narrow exceptions to free speech protections. Lower courts, however, are just beginning to wrestle with how the unique characteristics of Internet speech affect determinations of “incitement” and “true threats.” Even the basic question of whether an alleged threat must be received by its intended target has been answered differently

¹⁵ Turner Broadcasting v. Federal Communications Commission, 512 U.S. 622 (1994).

¹⁶ Reno v. ACLU, 521 U.S. 844 (1997). In June 1997, the Court voted 9-0 to invalidate portions of the Communications Decency Act (CDA), a law that punished the Internet transmission of “indecent” materials in a manner that would allow minors to see it. The Court held there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].” Reno, 521 U.S. at 870. In reviewing subsequent Congressional iterations of the CDA, the court has steadfastly reiterated this position.

by different courts; a defendant in Michigan, for example, was exonerated because his speech never reached its target,¹⁷ while a defendant in New York was convicted based on the content and context of his death threat and despite a lack of evidence that his victim was even aware of it.¹⁸

Such divergent legal tests, and the narrow boundaries for proscribed speech specified by Brandenburg, Watts and their progeny, shaped the outcomes of three federal cases involving allegations of Internet threats and incitement. An analysis of these cases offers insight into whether the specific content of WhosARat.com, in the context of widespread anti-snitching campaigns and violence against informants, is protected by the First Amendment or fits within established exceptions to free speech.

¹⁷ U.S. v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997). In what is also known as the “Jake Baker” case, charges against a University of Michigan student based on his online, graphic fantasy about a named fellow student were dismissed. Judge Avern Cohn granted Baker’s request to quash the indictment, calling his speech “a savage and rather tasteless piece of fiction” and not a “true threat.” The Sixth Circuit Court of Appeals agreed, holding that to qualify as a “true threat,” the speech must be directed at achieving a specific goal or coercive impact on the target, and the speaker must wish to make the target aware of it. The Sixth Circuit ruled that there was no evidence of either.

¹⁸ See U.S. v. Kelner, 534 F.2d 1020 (2d Cir. 1976). On November 11, 1974, Yasser Arafat, the leader of the Palestine Liberation Organization, planned to be in New York attending a session at the United Nations. The Jewish Defense League organized a demonstration outside the hotel where Arafat and the PLO delegation were scheduled to stay. The defendant, a member of the JDL, was interviewed by a television news crew while wearing military fatigues and holding a .38 caliber gun. When asked specifically if he intended to kill Arafat, the defendant answered “We are planning to assassinate Mr. Arafat,” and added, “everything is planned in detail.” There was no evidence before the court of whether Arafat had any knowledge of the broadcast.

Online Threats and Incitement: Do Brandenburg And Watts Apply Or Are New Standards Evolving?

The Nuremberg Files

In a case that some observers see as a departure from the Brandenburg incitement standard, two reproductive health service clinics in Oregon and several doctors in 1995 filed suit against American Coalition for Life Activists (ACLA) and other groups, which were using a website to intimidate abortion doctors and patients. Planned Parenthood of the Columbia/Willamette, Inc. (PPCW) and Portland Feminist Women's Health Center claimed the online publicity violated a federal law meant to protect the public's access to abortion facilities.

The speech in question included a portion of the website entitled the "Nuremberg Files," which consisted of information on doctors, clinic employees, politicians, judges and other abortion rights supporters. The site provided specific, identifying information about these individuals, including their photos, home addresses, phone numbers, license plate numbers, and the names of their spouses and children. The site compared those profiled on the site to Nazi war criminals, and claimed the goal of building a repository of information on abortion providers was to prepare for their eventual prosecution on charges of "crimes against humanity" if the procedure were ever banned.

The site was not subtle in its message, labeling the doctors “baby butchers” and animated with dripping blood. Most chillingly, the website kept track of those on the list who were victims of anti-abortion violence by showing a red line through the name of a murdered doctor, and graying out the names of the wounded.¹⁹ The status indicators were updated regularly. For example, when Dr. Barnett Slepian, an abortion provider listed on the website, was murdered, the site was updated within several hours of his death with a line through his name.²⁰

The website contained no explicit threats against the doctors, and in fact asked supporters to follow ACLA guidelines in refraining from violence. Doctors knew, however, that similar messages had preceded clinic violence in the past. They testified that they feared for their lives, and responded by wearing bulletproof vests, drawing the curtains at their homes and accepting the protection of U.S. Marshals. Defendants claimed that the complaints about their website were “simply an attempt to stifle

¹⁹ During the 1980s and early 1990s, clinic protests and blockades were on the rise. Violence against abortion providers was escalating across the country, culminating in the murder of Dr. David Gunn in March of 1993 outside a Pensacola, Florida clinic and the attempted murder of Dr. George Tiller in August of 1993 outside his Wichita, Kansas clinic. These incidents created a sense of urgency in Congress to pass new federal legislation to address violence against reproductive health care facilities and providers and the denial of access to women seeking their services. At least eight shooting incidents followed passage of the Freedom of Access to Clinic Entrances law in May of 1994.

²⁰ Gloria Feldt, “Oregon Jury Strikes Blow Against Anti-Choice Terrorism,” Planned Parenthood Press Release Archive (Feb. 2, 1999), <http://www.plannedparenthood.org/pressreleases/12999-ACLAwin.html> [accessed April 6, 2009.]

debate,” and aimed at silencing their form of “political protest.” They contended that the website itself did not include any express threats, and there were no explicit commands to readers to commit violence against abortion providers. When defendants sought at trial to bring their case within the protection of the First Amendment, the plaintiffs argued that the online material amounted to “true threats.”²¹

In March 1999, the jury rejected the defendants’ free speech claims and concluded that the contents of the website did in fact amount to a “true threat.”²² Judge Robert E. Jones, the presiding judge, called the “Wanted”-style posters and website “blatant and illegal communication of true threats to kill.”²³ He concluded that the plaintiffs were so threatened by the materials that no adequate legal remedy existed. He issued a permanent injunction effectively shutting down the site, barring the defendants from “publishing, republishing, reproducing and/or distributing in print or

²¹ Michael Vitiello, “Nuremburg Files: Testing the Outer Limits of the First Amendment.” 61 Ohio St. L.J. (2000) 1175. This contention by plaintiffs came in response to the defendants’ motion for summary judgment, and brought the allegations within the Watts line of cases. As a result, the court did not have to address whether threatened harm to abortion providers was imminent. As argued by the plaintiffs in opposition to the defendants’ motion for summary judgment, Brandenburg applies in cases in which a speaker encourages a third party to engage in lawless conduct, while Watts applies when a defendant directs a threat toward another person.

²² Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 23 F. Supp.2d 1182 (D. Or 1999).

²³ *Ibid.*

electronic form the personally identifying information about plaintiffs contained in ... the Nuremberg files ... with a specific intent to threaten.”²⁴

In issuing instructions to the jury, Judge Jones relied primarily on two Ninth Circuit U.S. Circuit Court of Appeals cases, Lovell v. Poway Unified School District, (1996)²⁵ and United States v. Orozco-Santillan (1990),²⁶ which employed the following test for determining what may properly be considered a threat: whether “a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement, as a serious expression of intent to harm or assault.”²⁷ The jury concluded that the anti-abortion website met this test, stripped it

²⁴ Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 1999.

²⁵ Lovell v. Poway Unified School District, 90 F.3rd 367, 372 (9th Cir. 1996). Here, the Court of Appeals for the Ninth Circuit considered the entire factual context of the alleged threats, which included the surrounding events and the reaction of listeners, as well as whether the threat was unconditional, equivocal, specific, and immediate enough to demonstrate the gravity of the purpose. In this case, the court determined that when a 10th grade student had threatened to shoot her guidance counselor if the counselor did not make her requested changes to her schedule, that statement was indeed a true threat. This decision was reached by considering the comment in the context of the increasing amount of violence in schools at the time.

²⁶ United States v. Orozco-Santillan (1990), 903 F.2nd at 1265 (“Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.”)

²⁷ *Ibid.*

of First Amendment protection, and ordered the anti-abortion groups to pay \$107 million in damages.

On appeal, the damages award was reduced to \$4.73 million, but the jury verdict on the speech issue was upheld. The full Ninth U.S. Circuit Court of Appeals agreed that the website amounted to illegal threats: “By replicating the poster pattern that preceded the elimination of [murdered abortion providers,] and by putting [the plaintiff doctors on the Nuremberg Files website] that scores fatalities, the ACLA was not staking out a position of debate but of threatened demise. This turns the First Amendment on its head.”²⁸ The U.S. Supreme Court refused to review the case, allowing the verdict to stand: the anti-abortion groups were held liable for Internet speech that was deemed a “true threat.”

²⁸ Planned Parenthood v. Am. Coal. Of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc). It should be noted, however, that there were three dissenting opinions written, with a total of five justices joining in them. Justice Reinhardt interpreted the anti-abortion posters as political hyperbole, vital to our democratic system, and said they should be protected. *Id.* at 1088-89 (Reinhardt, J., dissenting). Justice Kozinski felt that the court had the right test for true threats, but used it incorrectly; the posters should be protected because there was not indication that the speaker, ACLA, would be the actor committing or controlling the violence. *Id.* at 1089 (Kozinski, J., dissenting). Justice Berzon felt that the majority let the wrenching facts in this case sway them too much. He stated, “This case is proof positive that hard cases make bad law, and that when the case is very hard—meaning that competing legal and moral imperatives pull with impressive strength in opposite directions—there is the distinct danger of making very bad law.” *Id.* at 1101 (Berzon, J., dissenting).

SHAC-7

The outcome and rationale of the “Nuremberg Files” case, a civil lawsuit, were successfully used to bolster the Government’s argument in a *criminal* prosecution involving online threats and incitement. The case involved a group of seven activists from Stop Huntington Animal Cruelty USA, or SHAC, a Philadelphia-based animal-rights organization determined to force the shutdown of Huntingdon Lab Sciences (HLS), a New Jersey-based research lab that uses animals to test drugs and chemicals, and HLS business partners.

The SHAC activists launched a website aimed at disrupting HLS operations. The group publicized on the site detailed personal information about employees of HLS and its partners, including names, addresses and phone numbers. It also identified the churches and the schools that the employees and their children attended, as part of a five-year campaign to inflict an economic and psychological toll.²⁹

To address the SHAC website, the Government used a new weapon in its arsenal, the federal Animal Enterprise Terrorism Act, which Congress adopted specifically to deal with an upsurge in violent animal rights activity directed at

²⁹Declan McCullagh, “Police Blotter: Web at Heart of Ecoterror Lawsuit,” 28 December, 2006 http://www.news.com/Police-blotter-Web-at-hart-of-ecoterror-lawsuit/2100-1030_3-6145522.html [accessed April 6, 2009].

businesses that use animals. In the federal indictment, the U.S. Attorney for New Jersey contended the defendants engaged in stalking and used “a facility in interstate and foreign commerce” – the Internet – to incite sympathizers to take illegal actions against HLS employees and their associates.³⁰

The Government contended that the SHAC website encouraged members to engage in “direct action,” even advocating “top 20 terror tactics,” including threatening to injure or kill a person’s family members, assaulting a person by spraying cleaning fluid in their eyes, vandalizing or flooding a person’s home, firebombing a person’s car, breaking the windows of a person’s home while family members are inside, and sending E-mail “bombs” to crash computers.³¹ The particular acts advocated, prosecutors claimed, fit within the “incitement” and “true threat” exceptions to the First Amendment.³²

Defense lawyers countered that the website did not constitute proscribed speech, and was entitled to free speech protection. Fearing that the courts might afford less protection to the online postings, they pointed to the Supreme Court’s holdings in

³⁰ United States v. Stop Huntingdon Animal Cruelty USA, Inc., Cr. No. 04-373 (D. N.J. 2006).

³¹ Catherine E. Smith, “Threats.Com,” *Intelligence Report*, Summer, 2005 <http://www.splcenter.org/intel/intelreport/article.jsp?aid=556> [accessed April 6, 2009].

³² R. Scott Nolen, “Jury to Militant Animal Rights Group: Guilty,” April, 2006 http://www.avma.org/onlnews/javma/apr06/060415d_pf.asp [accessed April 6, 2009].

Reno in arguing that “the First Amendment applies to the Internet. Websites are tantamount to newspapers. . . . It is protected communication. It is not a criminal act.”³³

But as in the case of the “Nuremberg Files,” where the jury was convinced of a proximate relationship between the online speech and clinic violence, employees of HLS and its suppliers and partners also became the targets of criminal activity advocated on the SHAC website. In February 2002, SHAC set its sights on Marsh, Inc., the company that insured HLS at the time. Organizers sent an e-mail to SHAC supporters in February of 2002 urging them to “let Marsh know that. . . we are about to raise the premium on pain.” The e-mail included a list of Marsh offices, phone and fax numbers, and e-mail and home addresses of employees. On its website SHAC posted maps with the locations of Marsh's 60 domestic offices and a statement announcing that by "hitting" Marsh the group hoped to "attack HLS in a way they could never have predicted nor defend themselves against."

SHAC soon directed its messages at Marsh offices and employees. One executive received a letter saying, "You have been targeted for terrorist attack." The home of another executive was doused with red paint. "Puppy Killer" and "We'll Be

³³ Anti-Defamation League, “Ecoterrorism: Extremism in the Animal Rights and Environmentalist Movement,” http://www.adl.org/Learn/Ext_US/Ecoterrorism.asp [accessed April 9, 2009].

Back" were painted on another's home. In April of 2002, the address and telephone number of a Marsh employee in Boston were posted online with a note that said, "Let [X] know that it does not end until Marsh USA severs its ties with HLS." A dozen activists protested at [X's] home, chanting through a megaphone: "what comes around goes around...burn his house to the ground." One executive received a letter saying, "You have been targeted for terrorist attack." In July, smoke bombs were detonated in its Seattle offices, forcing the evacuation of two high-rises.

After Marsh announced later that year that it would no longer insure HLS, SHAC took aim at HLS partner Chiron. SHAC's website linked to a statement saying of employees at Chiron: "The Chiron team, how are you sleeping? You never know when your house, your car even, might go boom. Who knows, that new car in the parking lot may be packed with explosives. Or maybe it will be a shot in the dark." On the night of August 28, 2003, two bombs were detonated at Chiron's headquarters in Emeryville, California.

At trial prosecutors relied on the rationale of "Nuremberg Files," which held anti-abortion activists liable for illegal threats, to argue that the SHAC-7 website amounted to criminal incitement. Defense lawyers disagreed: "It's vastly different than what the Government alleges these individuals (SHAC) did on their website,"

argued one defense attorney. “Doctors were killed. You do not have that level of activity here.”³⁴ The defense of the SHAC-7 rested largely on the 1969 case Brandenburg v. Ohio, insisting that they were engaged in legal, political speech that did not direct anyone to commit imminent, lawless acts.

Despite the defense arguments, in March of 2006 a federal jury in Trenton, New Jersey convicted the seven SHAC activists on charges of “terrorism and Internet stalking.” The jury concluded that the defendants used the Internet to “incite attacks” on those who did business with HLS.³⁵ They were sentenced to between three and six years in prison, and ordered to pay joint restitution of more than \$1 million.

The trial judge also granted an injunction to end the online harassment. The judge concluded that “The information disseminated by (SHAC) on its website relates to plaintiffs' claims as evidence of the existence and modus operandi of a conspiracy (to aid and abet) the alleged unlawful harassment and threats.” As of this writing the convictions of the seven SHAC defendants were being appealed.

Critics of WhosARat.com may see Nuremburg Files and SHAC-7 as indications that judges and juries are trending toward new limits on free speech

³⁴ Nolen, “Jury to Militant Animal Rights Group: Guilty.”

³⁵ Smith, “Threats.Com.”

protections online. A third case, however, involving what some describe as the precursor to WhosARat.com, suggests otherwise.

Carmichael

Leon Carmichael, Jr. was arrested in Montgomery, Alabama in 2003 after a number of his associates (who were also under arrest for marijuana distribution) informed the Drug Enforcement Agency that Carmichael had hired them to assist in his drug distribution activities. Shortly after his arrest, Carmichael launched the now-defunct website, Carmichaelcase.com, to search for more information about the informants and agents who were responsible for his arrest. He bought ad space in the Montgomery Westside Weekly, a local weekly newspaper that targets primarily the African-American community, and used it to run an exact reproduction of the website as a full-page advertisement.

The site displayed the names and photos of several informants and agents involved in the case against Carmichael, under the heading: “WANTED: Information on these Informants and Agents.” It then listed the contact information for Carmichael’s attorneys and the disclaimer that the website was “definitely not an

attempt to harass or intimidate any informants or agents, but is simply an attempt to seek information.”³⁶

Federal prosecutors argued that harassing and intimidating informants and agents was precisely the goal and effect of Carmichael’s speech. The Government asked the court to restrain Carmichael “from taking any action . . . that would harass, intimidate, or threaten any witness or prejudice the proceedings in this case, including, without limitation, placing the photographs or personal information of any prospective witness or informant on a poster, advertisement or website.”³⁷ Prosecutors also cited the court’s “inherent authority to control actions of parties, attorneys, and witnesses that impact proceedings before the Court,” in arguing that the disclosure of information about its informants and agents would impede the Government’s ability to get informants to testify in future cases and would make it more difficult for its agents to work undercover in the future.³⁸ The Government indicated that its concerns about Carmichael’s website applied equally to the newspaper publication of the same

³⁶ United States v. Carmichael, 326 F. Supp. 2d at 1271 (M.D. Ala. 2004).

³⁷ Carmichael, 2004.

³⁸ *Ibid.* at 1295.

content, and that both forms of communication qualified as proscribed speech and warranted prior restraint.

In responding to this motion, Judge Myron Thompson framed the issue as “whether the court, at the request of the Government, may order the defendant to take down an Internet website that the Government contends is threatening and harassing its witnesses and agents but that the defendant contends is not only a permissible exercise of his First Amendment right to talk about his case but is needed to prepare his defense.”³⁹ He ordered an evidentiary hearing, where informants and agents claimed to fear for their safety as a result of the website, and alleged that it fostered an “atmosphere of intimidation” surrounding the case. The Carmichael case even overlapped with WhosARat.com, when one of the informants, Robert Denton, was pictured in the “Rats of the Week” section of the WhosARat.com website. His picture and information was posted on the website by Carmichael himself.

Judge Thompson, however, denied the Government’s motions for a protective order. He acknowledged that the witnesses may have been “uncomfortable” in having their names and photographs shown on the website, but he concluded that was not reason enough to hold that the site posed any actual risk to those witnesses. He also

³⁹ Carmichael, 2004.

acknowledged that the publication of their identities could compromise the ability of Government agents to act undercover, but he stressed “this is not evidence that the site is a threat.”⁴⁰ Furthermore, Judge Thompson emphasized that a series of constitutional rights of the defendant were at issue, rights that could not be dismissed. A protective order would infringe on Carmichael’s First Amendment right to discuss his case, the judge concluded, as well as his Fifth and Sixth Amendment rights to a fair trial and to present a defense.

Prosecutors had argued that the website and the newspaper advertisement should be held to the same standard. Judge Thompson did just that, but concluded that regardless of the medium, the content fit within neither the “true threat” nor the “incitement” exceptions to the First Amendment.⁴¹ Addressing the newspaper advertisement, Judge Thompson wrote, “there is no reason to reach a different conclusion regarding Carmichael’s newspaper advertisements because the First Amendment analysis does not turn on the medium involved.” Judge Thompson’s decision was an explicit determination in federal court that Carmichael’s speech, in the

⁴⁰ Carmichael, 2004.

⁴¹ *Ibid.* at 1290.

form of a website, was not bereft of constitutional protection under the First Amendment.

Discussion

Of the three cases discussed above involving allegations of Internet threats, only Leon Carmichael's website prevailed against a Government challenge. At the end of the order denying the Government's request for an injunction, Judge Myron Thompson noted that "a few differences in Carmichael's site could have changed the court's calculus."⁴² He did not specify the nature of the differences that would have had that effect, but a comparison of Carmichael, with Nuremburg Files and SHAC-7, where courts deemed online speech within the established exceptions to First Amendment protection, reveals some important distinctions. These differences offer some insight into the likely fate of WhosARat.com, and whether it eventually may be subject to a Government effort to shut the website down.

The circumstances of Nuremburg Files and SHAC-7 are dramatically different from one another, even though in both cases concerns about individual and public safety ultimately trumped free speech protection. Nuremburg Files was a civil action,

⁴² Carmichael, 2004.

where a jury held the defendants liable for damages for Internet speech that was deemed a “true threat.” SHAC-7, on the other hand, was a criminal prosecution in which defendants were convicted of incitement and sentenced to prison as a result of their online advocacy of violence. Neither set of defendants was accused of actually carrying out the threats that they transmitted; third parties, however, did take actions that the websites were found to have encouraged.⁴³

In both Nuremberg Files and SHAC-7, the online speech was shown to be so closely tied to subsequent illegal action that the speech itself was deemed illegal. This determination of the speakers’ responsibility suggests that courts have come to interpret the Watts and Brandenburg standards so strictly as to *require*, in effect, that violent, illegal action actually occur for speech to qualify as an illegal threat or incitement. This condition appears nowhere in the language of these Supreme Court decisions. It is especially problematic—and potentially dangerous—in the age of the Internet, when the very nature of online speech 1) is arguably more menacing, and 2) makes such a strict threshold in most cases virtually impossible to cross. Indeed, the very aspects of the Internet that make it an ideal free speech forum—including limited

⁴³ This has given rise to criticism of the rationale of the judgment in Nuremberg Files; Ninth Circuit Court Judge Alex Kozinski, who advocated overturning the District Court’s liability judgment, argued forcefully that the speech in Nuremberg Files should have been subject to an incitement analysis based on Brandenburg, instead of a “true threat” assessment under Watts.

barriers to access, a vast and changing audience and users' potential anonymity—enable online crusaders to intimidate and plot illegal action while easily slipping the established, narrow conditions of proscribed speech.

Without actual, subsequent violence to verify the danger of certain online speech, the Internet complicates basic questions about whether an alleged threat is real: who issued it, when was it issued and from where? These questions can be impossible for an ordinary Internet user to answer, challenging both law enforcement and the target of an alleged threat to assess its gravity. The actual physical whereabouts of the threat-speaker may be completely hidden, and the fact that it can be communicated in a fleeting exchange or posted indefinitely prevents the audience from apprehending its proximity. The threat could seem to a target to exist on *every* computer terminal and at all times, suggesting a ubiquitous danger. From a legal perspective, how is a court to evaluate “imminence” under the Brandenburg standard, if a website's threatening postings are literally a continuous presence online? Does the figurative clock start at the moment the threat or advocacy of violence is posted, or when its target accesses it? One can assume that in light of an established legal bias in favor of free speech, including on the Internet, such ambiguities are likely to be resolved legally in favor of the speaker.

While the Internet muddies the perceived proximity of an alleged threat, it can also stir online speakers toward a more menacing tone. With a quick search, users can

easily identify and join niches of common crusaders. An anti-abortion extremist, for example, could have searched for “abortionist” and landed on the Nuremburg Files website to find eager allies in his cause. Such networks use websites and chat rooms and message boards and discussion groups to build their membership and power, and to rally provocative speech. The Internet thus facilitates the grouping of like-minded individuals, creating an online kinship and in some cases, echo chambers for radical views. For extremists, the newfound social structure could make their beliefs seem more socially acceptable, and illegal action on those beliefs seem more justifiable.

Similarly, the ability of individuals to advocate action *anonymously* online can magnify an online threat, and complicate questions of legal accountability. Law enforcement agencies may not be able to make conclusive determinations about who is responsible for building a website, or for adding threatening elements. On the anti-abortion website in Nuremburg Files, for instance, who crossed off names of the clinic personnel who were killed? Who uploaded the pictures of doctors and nurses and typed their captions? Who added the animation of dripping blood? These basic questions challenge any effort to determine individual culpability.⁴⁴

⁴⁴ Michael Vitiello, “Nuremburg Files: Testing the Outer Limits of the First Amendment.” 61 Ohio St. L.J. (2000) 1175. Vitiello argues that even if the defendants’ conduct (in Nuremburg Files) did not amount to “true threats,” they could have been punished for incitement to violence. But unlike the civil trial, which hinged on the District Court’s standard for a “true threat,” Vitiello says a criminal

With the speaker on one end of the online communication, the question of whether an alleged threat is received by an intended target has also proved problematic for the courts. In United States v. Alkhabaz (the “Jake Baker case”), criminal charges against a University of Michigan student for his online posting about the brutal torture, rape, and murder of a named classmate, were dismissed. The Sixth Circuit Court of Appeals agreed with the lower court’s dismissal—on the grounds that Baker’s writing was “a savage and rather tasteless piece of fiction” and not a “true threat”⁴⁵—and added that Baker could not have intended to cause harm because he did not appear to direct the fantasy message to her. Indeed, the female student’s awareness of it stemmed from third parties who brought Baker’s posting to her attention. This requirement of target awareness, however, only adds to the Government’s burden. Baker may have knowingly used a message board that was popular among his classmates, believing that his target would likely read his violent sexual fantasies about her and even, perhaps, intending to act them out. But because the Government

prosecution of the Nuremburg Files defendants would have turned on the proper interpretation of Brandenburg and its progeny.

⁴⁵ U.S. v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997). Charges against a University of Michigan student based on his online, graphic fantasy about a named fellow student were dismissed. The Sixth Circuit Court of Appeals agreed, holding that to qualify as a “true threat,” the speech must be directed at achieving a specific goal or coercive impact on the target, and the speaker must wish to make the target aware of it. The Sixth Circuit ruled that there was no evidence of either.

couldn't prove that Baker knew that his classmate was a regular reader of that message board, Baker was allowed to carry on with impunity. It is another example of how the nature of Internet communication helps to shield the speaker from censorship.

Finally, online speech also lacks the contextual markers that are typically used in other forms of communication to gauge the seriousness or imminence of a threat. In a face-to-face interaction, one can evaluate the speaker's intonation, gaze, facial expression, contact, body orientation, gesture and movement. These can help a listener discern a serious message from a joke or from hyperbole. In United States v. Kelner (1974), for instance, a man who threatened to assassinate Yassir Arafat was wearing military fatigues and holding a .38 caliber handgun in view at the time of his broadcast interview. The Second Circuit Court of Appeals noted the power of these threatening symbols to reinforce the literal meaning of the defendant's words, and sustained his conviction. In the absence of such contextual markers, it becomes difficult to establish that an online speaker may intend to cause harm.

The fact that Nuremburg Files and SHAC-7 resulted in civil and criminal liability for each set of speakers, respectively, despite the ambiguities inherent in Internet communication, suggests that the necessary element in their outcomes was that actual violence followed the online speech and was convincingly tied to it. In

Nuremburg Files, this violence was bodily harm, the killing and injuring of clinic personnel.⁴⁶ In SHAC-7, it was destruction of property.⁴⁷ In both cases, the courts relied on the ensuing violence to support their conclusions, as well as the fact that both websites recorded the incidents after they occurred. This implied a virtual dialogue between the websites and the third-party perpetrators of the violence, interaction that suggested that the online communication was connected to offline harm.

The logical lesson of these two outcomes for Internet users is not, as some have asserted, that the courts are restricting free speech online in new ways. Instead, a reasonable online speaker would see the outcome of Nuremburg Files this way: in order for me to be held legally responsible for what I post on the Internet, 1) I have to advocate the harming of identified individuals and provide specific information that would enable it, 2) injuries or death have to occur shortly afterward, and 3) I have to respond quickly and approvingly to the violence. Furthermore, I would read Jake

⁴⁶ During the 1980s and early 1990s, clinic protests and blockades were on the rise. Violence against abortion providers was escalating across the country, culminating in the murder of Dr. David Gunn in March of 1993 outside a Pensacola, Florida clinic and the attempted murder of Dr. George Tiller in August of 1993 outside his Wichita, Kansas clinic. These incidents created a sense of urgency in Congress to pass new federal legislation to address violence committed against reproductive health care facilities and providers and the denial of access to women seeking their services. At least eight shooting incidents followed passage of the Freedom of Access to Clinic Entrances law in May of 1994.

⁴⁷ Shortly after the postings on the SHAC site, the identified targets' homes, cars, and personal property were vandalized—rocks thrown through windows, homes spray-painted with slogans, and in one instance, a target's car overturned in his driveway. HLS and its business associates' facilities also experience vandalism and smoke bombs, while online attacks shut down computer systems.

Baker as requiring the Government to prove that I was looking to intimidate my target, and therefore that I needed to make him aware of my threat. If he learns about my online speech second-hand, as did Baker's alleged target, I would not be held responsible for it. As an online speaker I feel almost limitless legal leeway.

In Carmichael, none of these conditions existed. In fact, Judge Thompson explicitly contrasted the facts surrounding Leon Carmichael's website with those of the anti-abortion website in Nuremburg Files. He concluded that the latter site *was* threatening, even quoting some of the language of the decision to demonstrate it:

It is use of the "wanted"-type format in the context of the poster pattern – poster followed by murder – that constitutes the threat... . None of these "wanted" posters contained threatening language either.... "wanted"-type posters were intimidating and caused fear of serious harm to those named on them... . In the context of the poster pattern, the posters were precise in their meaning to those in the relevant community of reproductive health service providers. They were a true threat.⁴⁸

By noting that "Wanted" posters historically carry the connotation that someone is wanted "dead or alive," Judge Thompson nodded to the District Court's conclusion that the Nuremburg Files constituted a true threat.

Judge Thompson was unconvinced, however, that Carmichael's site intended violence on its featured informants. Contrasting it from Nuremburg Files, he accepted

⁴⁸ Carmichael, 2004.

Carmichael's claim about his website at face value; its purported goal was to seek out information about identified individuals (as opposed to publicizing information about individuals in Nuremburg Files) for the purposes of his own defense, and it contained no hint of violence or intimidation in its text or subtext that would have called this motive into doubt. There was no graphic implication of dripping blood, for instance, or outrageous statements against informants generally.

Going beyond the website itself, Judge Thompson considered the Government's request for an injunction specifically in light of the general history of informants being killed in drug-conspiracy cases.⁴⁹ His conclusion, however, was that Carmichael's website was not launched in the context of numerous murders of witnesses and Government agents linked to similar publications.⁵⁰ Judge Thompson ultimately used Nuremburg Files as a basis for his order *not* to restrain Carmichael's Internet speech.

There are caveats to any attempt to predict the fate of WhosARat.com based on Carmichael alone. While Carmichael's site was the work of one defendant and pertained to his criminal case alone, WhosARat.com is essentially a clearinghouse of

⁴⁹ Carmichael, 2004.

⁵⁰ *Ibid.* at 1285.

informants in thousands of cases. The argument that WhosARat.com has Fifth and Sixth Amendment rights at stake, as Carmichael did, is therefore not compelling. Furthermore, WhosARat.com charges subscribers for access, making it an overtly commercial enterprise. These distinctions would tilt against WhosARat.com in court if it is eventually challenged.

Such a challenge, however, at this point seems unlikely. So far the Government has not alleged any direct connection between WhosARat.com and anti-snitching violence, a claim that Nuremburg Files, SHAC-7 and Carmichael suggest is essential for the Government to argue that online speech poses a future threat of harm. As a result, the administrators of WhosARat.com appear confident that they can carry on without fear of Government interference. The website prominently features a disclaimer of liability, in which users are warned not to post threats of violence.⁵¹ Considering the speaker's intent is a factor in the assessment of allegedly threatening

⁵¹ The web site's disclaimer states the following:

This website does not promote or condone violence or illegal activity against informants or law enforcement officers. If you post anything anywhere on this site relating to violence or illegal activity against informants or officers your post will be removed and you will be banned from this website, if you are in law enforcement of work for the government and you have privileged information that has not been made public at some point to at least one person of the public do not post it. All posts made by users should be taken with a grain of salt unless backed by official documents. Please post informants that are involved with non-violent crimes only.

or inciteful speech, the WhosARat.com clearly wants to appear to intend a legitimate purpose.

If such a simple disclaimer helps to protect Internet speakers from Government interference, as it did in Carmichael, and if the application of the Brandenburg and Watts standards effectively requires illegal *conduct* and other strict conditions in order to outlaw *speech*, Internet speakers should feel quite free to warn, threaten, advocate and provoke with impunity. This broad legal latitude invites trouble in the murky new age of the Internet, where this vast forum for communication has become a powerful organizing tool for political crusaders, from peace activists to jihadists.

In this uncharted speech environment, advocates who argue that the Internet is so immense that listeners deserved heightened protection find themselves on the defensive. This argument is apt to lose to the logic of past decisions in favor of free speech. It was, after all, the finite nature of the broadcast spectrum on which Congress justified its oversight of network television. Once cable television operators entered the entertainment realm, the Supreme Court accepted the argument that their virtually limitless transmission capacity warranted that cable (and satellite) be treated more like a newspaper than a broadcast operator, and freed them from government efforts to restrict their content. The Internet is an exponential leap forward in communication. As technology such as the Internet grows the communications marketplace, its size will

likely only reinforce courts' long bias in favor of free speech, however inflammatory its content.

This is the likely reality facing law enforcement in cyberspace, and as shown below, it is a reality of which they are quite aware.

V: CHALLENGING WHOSARAT.COM: A STRATEGY

By the end of 2006, federal law enforcement officials had become highly concerned about the effects of WhosARat.com on criminal prosecutions. In a letter to the Judicial Conference of the United States, the administrative and policy-making body of the federal court system,¹ the then-Director of the Executive Office for U.S. Attorneys, Michael Battle, wrote, “We are witnessing the rise of a new cottage industry engaged in republishing court filings about cooperators on websites such as WhosARat.com for the clear purpose of witness intimidation, retaliation, and harassment.”²

The letter cites one instance involving a cooperating witness referred to only as “Stewart,” who was arrested for interstate drug trafficking in New Mexico and subsequently agreed to cooperate with authorities and testify against his co-defendants. The Government filed Stewart’s plea agreement with the court, and an electronic version became available for download on the Public Access to Court Electronic

¹ The purpose of the Judicial Conference of the United States is to oversee matters of administration of justice in federal courts and to address challenges that may arise, including access to public documents.

² Letter from Michael A. Battle, Dir., Executive Office for U.S. Attorneys, U.S. Dep’t of Justice, to James C. Duff, Sec’y, Judicial Conference of the U.S., 6 December 2006. http://www.floridasupremecourt.org/pub_info/summaries/briefs/06/06-2136/Filed_01-31-2007_ProsecutorsSupplementalCommentsAppendix.pdf [accessed April 4, 2009].

Records (“PACER”) service.³ Shortly thereafter, Stewart’s photo and PACER files were featured on WhosARat.com. The site also included a nasty comment: “This guy is a drunk, and a heavy weed smoker, and a recognized car thief among his peers. He is the one who needs to be taken off the streets.”⁴

Federal prosecutors in Pennsylvania, where Stewart lived, alleged that two of his co-defendants printed flyers containing this WhosARat.com information, along with the labels “rat” and a “snitch,” and plastered them on utility poles and windshields in Stewart’s West Philadelphia neighborhood. The flyers were also sent by direct mail to residents in the area,⁵ a district where the anti-snitching campaign had taken root in deadly form. In one incident in the neighborhood, a young mother who had bought guns for friends in a drug gang was slain hours before she was about to testify in 2001. In another, in the same neighborhood, six relatives of a drug informant were killed in a 2004 arson that remains under investigation. U.S. Attorney Patrick Meehan of

³ Public Access to Court Electronic Records (“PACER”) is an electronic public access service that allows users to obtain case information from the federal courts. PACER offers “an inexpensive, easy-to-use alternative for obtaining case information without having to visit the court house. PACER allows an Internet user to request information about a particular case or party. The data is immediately available for printing or downloading.” ADMIN. OFFICE OF THE U.S. COURTS, PACER INFORMATION BROCHURE, http://pacer.psc.uscourts.gov/documents/pacer_brochure.pdf (accessed Sept. 7, 2008).

⁴ Emilie Lounsberry, “Couple Accused of Intimidating Witness in West Philadelphia,” *The Philadelphia Inquirer*, July 25, 2007. The article cites court documents filed in New Mexico.

⁵ Letter from Michael A. Battle, December 6, 2006.

Philadelphia expressed his certainty in media interviews that the flyers were a certain attempt to intimidate Stewart from cooperating with law enforcement and, in the context of the neighborhood's deadly anti-snitch history, to endanger his life.⁶

This case is an example of one way in which law enforcement officials nationwide are combating WhosARat.com, by monitoring criminal cases for illegal conduct that relies on information supplied by the website. Although the WhosARat.com-based campaign against Stewart falls short of actual bodily harm or destruction of property—crimes that Nuremburg Files and SHAC-7 suggest may be de facto requirements in the Internet age for any prior restraint on cyberspeech—it may begin to lay the groundwork for prosecutors eventually to challenge as spurious claims that WhosARat.com exists merely as an informational tool, and thus is protected as free speech.

Federal law enforcement officials are tackling the website from another angle, as well. To the extent that increased Internet access to court records has fed the development of WhosARat.com, the U.S. Justice Department and the entire federal judiciary are weighing their options for starving the site of its information supply. It is

⁶ Lounsberry, "Site that Snitches on Snitches Irks Judges."

a cumbersome process that implicates an entire bureaucracy, the history of its practices and procedures and, could trigger its own First Amendment complications.

The process is centered within the Judicial Conference of the United States, which has acknowledged the unwelcome side effects of easy public access to its computerized case management system. In 2002, the federal judiciary began to implement the Case Management/Electronic Case Files (“CM/ECF”) system,⁷ which allows litigants to file pleadings, motions and petitions over the Internet, and permits courts to maintain case documents in electronic form.⁸ As of August 2007, more than 31 million cases throughout the country had been on CM/ECF systems; 99 percent of the federal courts currently use them.⁹

Remote electronic access to these files is available via PACER. With the help of the Internet, PACER opens the nationwide database of docket information and judicial records from federal appellate, district and bankruptcy courts to public

⁷ U.S. Courts, Case Management/Electronic Case Files, <http://www.uscourts.gov/cmecf/cmecf.html> [accessed April 10, 2009].

⁸ Ibid.

⁹ Press Release, U.S. Courts, Case Management/Electronic Case Files (CM/ECF) (June 2008), <http://pacer.psc.uscourts.gov/documents/press.pdf> [accessed April 10, 2009].

perusal.¹⁰ At a cost of eight cents per downloaded page, anyone connected to the Internet anywhere in the world can access the information at any time.¹¹ To further its ease of use, PACER offers a search function that allows users to locate particular parties to any federal litigation anywhere in the country.¹²

Prior to the implementation of systems permitting remote electronic access to judicial documents, the public's ability to inspect court records depended on physical presence at the courthouse.¹³ But the inherent limitations of paper recordkeeping often made it difficult to find the particular information one was looking for, or to find it quickly. Besides having to travel to the courthouse, one was often subjected to lines at the clerk's office, filling out paperwork and paying applicable copying charges.¹⁴ If these were not deterrents enough, the disorganized and often un-indexed nature of the records amounted to a barrier to access. Paper documents were not infrequently "lost,

¹⁰ U.S. Courts, PACER Overview, <http://pacer.psc.uscourts.gov/pacerdesc.html> [accessed April 10, 2009].

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Robert Deyling, Office of Justice Programs, Admin. Office of the U.S. Courts, Privacy and Public Access to Federal Court Case Files 1 (2003), <http://www.law.qut.edu.au/files/04-30-2003-whitepaper1.pdf> [accessed April 10, 2009].

¹⁴ Peter Winn, "Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information," 79 Wash. L. Rev. 307, 316 (2004).

disassembled, or misfiled.”¹⁵ In the words of prevailing case law on the openness of public documents, these hurdles rendered public court filings “practically obscure.”¹⁶ This “practical obscurity” often insulated litigants and third parties from harm that could result from the misuse of any personal information contained in court filings.

Technical innovation has eroded this “practical obscurity” safeguard, however, and given rise to privacy and security concerns unrealized in the era of paper records. The prospect of unlimited electronic dissemination of sensitive information contained in tax returns and medical or employment records, for instance, may facilitate identity theft, stalking, harassment and violence toward victims. In a criminal context, law enforcement officials warn that the re-publication of sensitive information on websites such as WhosARat.com, poses a “grave risk of harm” to cooperating witnesses and defendants.¹⁷ In the Justice Department’s view, the costs associated with the remote electronic availability and dissemination of judicial documents may be bumping up against the benefits of transparency historically associated with the U.S. criminal justice system.

¹⁵ Gregory M. Silverman, “Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet,” 79 Wash. L. Rev. 175, 195 (2004).

¹⁶ U.S. Dept. of Justice v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 762, 780 (1989).

¹⁷ Letter from Michael A. Battle, December 6, 2006.

Toward the end of 2006, the Judicial Conference of the United States issued a memorandum to district judges warning them of the existence of WhosARat.com, and its use of information that is publicly available on PACER.¹⁸ The memorandum asked judges to “consider sealing documents or hearing transcripts in accordance with applicable law in cases that involve sensitive information or in cases in which incorrect inferences may be made.”¹⁹

The Judicial Conference also sent a letter to the U.S. Department of Justice to solicit its view on how to address the issue. In its response, the Department warned that continued allowance of unfettered Internet access to sensitive, albeit public documents could lead to a decline in suspects’ cooperation with the government due to fears of intimidation, retaliation and harassment; a resulting increase in criminal trials that might otherwise have been disposed of at the pleading stage; a simultaneous increase in inaccurate verdicts due to potential witnesses’ refusal to testify; and a jeopardizing of ongoing investigations. In light of these concerns, the Department urged federal courts to undertake fundamental changes in public access to electronic

¹⁸ Memorandum from John R. Tunheim, Chair, Comm. On Court Administration and Case Mgmt., and Paul Cassell, Chair., Comm. On Criminal Law, to Judges, U.S. Dist. Courts, and U.S. Magistrate Judges (Nov. 2006) http://www.floridasupremecourt.org/pub_info/summaries/briefs/06/06-2136/Filed_01-31-2007_ProsecutorsSupplementalCommentsAppendix.pdf [accessed April 9, 2009].

¹⁹ Ibid.

court files by removing plea agreements from them, whether or not they involve cooperating witnesses.

The Judicial Conference named a committee of federal judges to weigh this recommendation and gather public comment, in pursuit of a new nationwide policy on electronic access that balances security concerns with the longstanding priority of openness to the court system. The Honorable John Tunheim of the U.S. District Court for the District of Minnesota has been leading this effort, and has signaled a compromise approach. According to Judge Tunheim, the “threats to cooperating defendants are real, and disclosure of cooperation agreements can both affect a defendant’s personal security and affect a willingness to continue to provide substantial assistance. At the same time, plea agreements are often the only record of how criminal cases are resolved. The public surely has an interest in knowing how criminal cases are resolved.”²⁰ Judge Tunheim revealed his own inclination to the *New York Times*, telling the newspaper in one interview that he favored “putting the details of a witness’ cooperation into a separate document and sealing only that document, or withholding it from the court file entirely.” Regardless of the eventual outcome, the search for a nationwide policy is almost certain to result in a redefinition of “public”

²⁰ Adam Liptak, “Web Sites Listing Informants Concern Justice Dept.,” *The New York Times*, May 22, 2007.

document as it is currently understood, by limiting—at a minimum—the particular documents that have in recent years been available for public viewing online.

This restriction on public access will not go unopposed. The common law right to inspect and copy judicial records pertaining to open proceedings is widely recognized.²¹ Trial court judges do have a certain amount of discretion in allowing access to documents and proceedings; it often happens that certain documents are placed under seal by judge's order. For the most part, however, access is allowed unless a judge specifically finds that public dissemination would threaten rights to a fair trial or would invade personal privacy.

Many judges are anticipating new guidelines that limit online access by initiating such restrictions themselves. Many are withholding certain court documents from the Internet. For example, Federal judges in eastern Pennsylvania are keeping all plea agreements and sentencing documents offline, out of concern about the potential for WhosARat.com to re-publish the information.²² The documents are still available in person at the federal courthouse.

²¹ See Press-Enter. Co. v. Superior Court (Press Enter. II), 478 U.S. 1 (1986); Press-Enter. Co. V. Superior Court (Press Enter. I), 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

²² Associated Press, "Secrecy in Minn. Federal Court Troubles First Amendment Experts," February 21, 2008. <http://www.firstamendmentcenter.org/news.aspx?id=19706> [accessed April 10, 2009].

Such steps trouble government watchdogs. In January 2008, a newspaper investigation of federal court cases in Minnesota found that 83 of 3,000 criminal cases filed from January 1998 through 2007 were under seal. Two-thirds of those cases were under seal for more than three years. This means that no information about these cases, including the nature of the crime or the name of the person charged, is available to the public. Jane Kirtley, a professor of media ethics and law at the University of Minnesota, called the newspaper's findings painful. "Any kind of secret proceeding," Kirtley told the Associated Press, "is subject to problems—corruption, special interest, favored treatment, discriminatory treatment—and the only way you know that those things aren't happening is if they take place in public."²³

Federal judges in at least one district feel similarly. In January of 2009, Chief Judge Federico Moreno of the Southern District of Florida openly defied the wishes and the warnings of the U.S. Justice Department—and the trend among most federal judges nationwide—and ordered all plea agreements to be posted online. In his order, Judge Moreno stated that all plea agreements "will be public documents, with full remote access available to all members of the public and the bar, unless the Court has entered an order in advance directing the sealing or otherwise restricting a plea

²³ Associated Press, "Secrecy in Minn. Federal Court Troubles First Amendment Experts."

agreement.”²⁴ Judge Moreno said most of the district judges agreed with his directive. “The sense of the Court is that the public’s interest in access must prevail in this instance and that restricting access to all plea agreements is overly broad,” states Judge Moreno’s order. “Other means are available to the prosecution and defense to insure that the public record does not contain information about cooperation agreements in those instances where the interests of safety or other considerations require different treatment.” Judges in this courthouse, however, nonetheless retain their power to keep certain information out of the public eye by sealing plea agreements at their discretion.

The bottom line is that in response to WhosARat.com, the Justice Department and the federal judiciary appear to be focused on restricting the information that is available for online publication, rather than trying to keep website administrators from publishing what they learn. There are proposals under consideration, for example, for prosecutors to refrain from filing plea agreements entirely. As a result, the federal judiciary and law enforcement officials’ response to WhosARat.com could greatly affect what ordinary Americans and the media are allowed to know about the U.S. court system and its proceedings. It would be a reversion from the trend toward openness and accessibility to which many Americans in the Internet age have become

²⁴ Julie Kay, “Federal Judge Defies DOJ Wishes, Orders All Plea Agreements to be Posted Online,” *The National Law Journal*, January 28, 2009.

accustomed. One law professor at the University of California, Los Angeles, Eugene Volokh, put the balancing act this way: “Government secrecy,” he said, “ends up being part of the price you pay for having broad speech protection.”²⁵

²⁵ Liptak, “Web Sites Listing Informants Concern Justice Dept.”

VI: WHITHER WHOSARAT?

For five years WhosARat.com has served as a consolidating force for what are now widely dispersed, case-specific anti-snitching campaigns in American cities. By exposing cooperators' personal information online, it will likely continue to intimidate informants from testifying and drive down the rates at which witnesses agree to cooperate with law enforcement. Federal prosecutors and administrators of WhosARat.com are in disturbing agreement over the trajectory of this trend: informants, their loved ones and associates will be targeted in attacks aimed at preempting or punishing their cooperation. Government officials and WhosARat.com also seem to agree that the law currently protects the website from any legal responsibility for this outcome: "If people got hurt or killed, it's kind of on them," a WhosARat.com spokesman told the Associated Press. "They knew the dangers of becoming an informant."¹

Federal officials are hopeful, however, that indirect pressure on the website may avert the worst-case scenario of injury or death for informants. On one front, the

¹ Matt Apuzzo, "Does Web Site Endanger Witnesses?: WhosaRat.com Claims to ID," Associated Press, 31 November, 2006 [news service on-line]; available from <http://www.associatedpress.com>; Internet; accessed 24 March, 2009.

Government's emerging strategy within the federal judicial system to limit online access to public documents could effectively deprive the website of the information it uses to stigmatize and to deter informant cooperation. This strategy does not come without costs, however, in reversing what had been seen as a purely positive trend toward increasingly public access and transparency in the criminal justice system.

On another front, in the same way that anti-snitching pressure emerged from the streets of America's urban neighborhoods, the seeds of a grass roots backlash against it could grow. Community activists in several American cities, including Baltimore, Washington, D.C. and Philadelphia have publicly denounced calls for witnesses and informants to stay silent. They have urged instead that witnesses have a duty to speak up in the name of retaking their communities from criminals. These indirect forces may already be having an effect on WhosARat.com. An online service that tracks website activity does reveal a considerable decline in the number of users who visit the site, down from its onetime maximum of about ten thousand hits a day.

In other instances of alleged threats and incitement online, however, there may be no indirect strategy available to combat them. It would likely have been impossible, for instance, for the Government to have foreseen and blocked in advance the publication of names, photos and addresses of the doctors on the anti-abortion website in Nuremburg Files. A court would have been cool to any request for prior restraint,

and the information could have been simply reproduced out of a phone book anyway. Other public information, such as instructions on how to build a bomb, has proven to be impossible to withhold from publication on jihadist websites or elsewhere.

At least as formidable as the legal constraints are the technological obstacles in limiting the online publishing of potentially dangerous information. Federal law enforcement officials are keenly aware, for instance, that militant groups based overseas are using U.S.-based Internet service providers and website hosting services to organize and to transmit anti-American propaganda. They admit, however, the futility of trying to shut the websites down. Domain names are easily changed, and websites can be easily relocated under new addresses.

What the Internet represents, then, is a refuge for a 21st-century version of what British political philosopher John Stuart Mill described as the clever inciter. In his 1859 essay "On Liberty," Mill acknowledged that a system in which free speech is paramount might allow for a clever person to escape punishment by inciting lawless action without specifically advocating it. A speaker is permitted to criticize, to use Mill's example, "corn dealers are starvers of the poor," but not to shout to an angry mob, "Burn down the silo."² William Shakespeare depicts Mark Antony as a clever

² John Stuart Mill, "On Liberty," (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

inciter in his eulogy after Julius Caesar's death. Using deft rhetoric and the power of insinuation, Antony successfully incites Julius Caesar's mourners to seek vengeance against Caesar's murderers, all the while avoiding explicitly directing this retribution.³

Today's clever inciters have even more power—and more freedom—to rally the masses to action. They have the Internet. For the same reasons that this new technology is an ideal free speech forum, the Internet is also fertile ground for threats and incitement. Its low cost of access, incomparable reach and veil of anonymity, guarantees online speakers a diverse audience with a vast geographic reach. The nature of this communication, as well as a long legal history in the United States of favoring speech over Government censorship, combine to afford Internet speakers almost unbridled freedom. So far, the only instances where Internet speech has been constrained have involved circumstances where the online speech is shown to be almost inextricably twisted with violent, illegal action.

As an Internet speaker and listener, I warily proceed. Based on how limited free speech restrictions have been applied to the Internet, we live in a world where the harm I direct a person to commit against someone else, and the harm I tell a person I

³ Instead Antony reminds them of Caesar's integrity and generosity, and insinuates his Brutus' greed and ambition even as he calls him an "honorable man." See William Shakespeare, *Julius Caesar*, Act 3, Sc. 2.

want to commit against him, appear actually to have to occur in order for my online speech to be considered legally dangerous. This is a disturbing tautology. The premise of our narrow proscriptions on free speech is to prevent likely *future* harm, not merely to verify threats or incitement in retrospect. But the reality of the electronic revolution is that we may have expanded and altered our communication—in volume, speed and reach—beyond the ability of traditional constraints on dangerous speech to much matter.

Fifteen years after the Internet's mainstream introduction into homes and workplaces, our technological creation is in the process of transforming *us*. It is reshaping our perceptions of openness and privacy, individuality and community, and freedom and security in potentially profound ways. We appear to face a choice: either we accept the often coarse, scary, and sometimes dangerous speech that the Internet can transmit, or we initiate a dramatic pivot away from the free speech safeguards that many Americans see as a natural right. For those who care deeply and equally about public safety and free speech, this is not a welcome choice. But as we enjoy instant messages with faraway relatives, telecommuting from the home office and news updates on our wireless devices, our new capabilities in the age of the Internet may yet be accompanied by some limitations.

We are clearly just beginning to adapt to it.

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