Hate Advocacy: The First Amendment and Lone Wolf Abstract Advocacy

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1. Introduction

   a. Current Criminal and Civil Liability for Hate Groups

      The idea of holding a hate group criminally liable for actions taken by its members has been around since the days of reconstruction. In 1871 congress passed the Civil Rights Act of 1871, also known as the Ku Klux Klan act. The act created federal criminal and civil sanctions for conspiracies that deprive individuals of their civil rights. Despite its good intentions, the act has had little impact on the actions of hate groups. With concerns with the acts effects on federalism, the Supreme Court ruled that deprivations of rights under the Thirteenth, Fourteenth, and Fifteenth Amendments required state action.¹ In 1883, the court applied this to conspiracies to violate civil rights in U.S. v Harris, where twenty white men were indicted under the Ku Klux Klan Act for lynching a black man.² The court held that none of the civil rights amendments gave Congress authority to regulate actions by private persons.³ While the decision in Harris only applied to the Ku Klux Klan Act’s criminal sanction provision, courts assumed it was meant to be applied to the civil provisions as well, and the court confirmed

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³ Id. at 633.
this in 1951 in Collins v Hardyman.\(^4\) For its first hundred years, the Ku Klux Klan act would only apply to conspiracies involving state action.

In 1971, the Supreme Court reversed its decision in Collins, and created a federal civil cause of actions for conspiracies to violate the civil rights of others in Griffin v. Breckenridge.\(^5\) In Griffin, the court laid out the elements of a prima facie case for civil conspiracy to violate civil rights. The plaintiff must show, 1) a conspiracy between two or more persons, 2) who are motivated by some race-or class-based, invidiously discriminatory animus, 3) to deprive the plaintiff of the equal enjoyment of rights secured by the law to all, 4) which results in injury to the plaintiff, (5) as a consequence of an overt act committed by the defendants in connection with the conspiracy.\(^6\) Despite this monumental win for civil rights plaintiffs, the Ku Klux Klan Act has continued to be relatively ineffective, in large part due to the application of the intracorporate conspiracy doctrine to Ku Klux Klan Act civil conspiracy claims.\(^7\)

Within a year of the Griffin decision, courts began applying the intracorporate conspiracy doctrine to civil conspiracy claims.\(^8\) The doctrine holds that corporations cannot be held liable for conspiracies involving internal conspiracies. It is based on the premise that actions by agents of the corporation


\(^6\) Id. at 88-9.


\(^8\) Id. at 146.
are attributed to the corporation itself, and thus employees cannot conspire with each other because that would essential mean the corporation was conspiring with itself. A majority of courts have applied the intracorporate conspiracy doctrine to Ku Klux Klan Act cases. Thus in certain circumstances, hate groups can immunize themselves from civil conspiracy liability under the Ku Klux Klan Act simply by incorporating.

Courts however have carved out some exceptions to the application of the intracorporate conspiracy doctrine in Ku Klux Klan Act cases. Most notably, many courts have refused to apply the doctrine where the person “has an independent personal stake in achieving the corporation's illegal objective.” This has opened the door to holding hate groups civilly liable for the actions of their members. This strategy has been developed and deployed with great success by Morris Dees and the Southern Poverty Law Center.

In 1981, two Klan members went driving around after a Klan meeting, incensed by news that a black man was going to be acquitted for the murder of a white cop. The men came across nineteen-year-old Michael Donald who was on his way to buy some cigarettes. In an attempt to “show Klan strength in Alabama,” the men abducted Donald, beat him, strangled him, slit his throat, and hung him

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9 Id. at 131
from a tree.\textsuperscript{11} The men were members of the incorporated United Klans of America. Morris Dees and the Southern Poverty Law Center brought suit against the United Klans of America on behalf of Donald’s mother, charging a civil conspiracy to violate Donald’s civil rights. The jury found for Plaintiff, and awarded Donald’s mother seven million dollars, effectively bankrupting the United Klans of America.\textsuperscript{12}

Dees has used this strategy successfully in a number of cases to accomplish three goals; 1) to bankrupt both the organizations and the individuals responsible for causing hate violence, 2) to separate the leaders from the followers, and 3) to decrees hate-group violence.\textsuperscript{13} He has used both civil conspiracy causes of action as well as aiding and abetting theory. Under civil conspiracy, four elements: the individual, not present at the scene of the crime, agreed with others on a specific course of action; the primary purpose of that agreement was to promote violent behavior; the manifestation of the violent behavior must be the perpetuation of the course of action; and the manifestation must be an illegal and/or a tortious act.\textsuperscript{14} “To prove a defendant's liability for hate-group crimes vis-à-vis aiding and abetting, plaintiff's counsel must show that the defendant provided substantial

\textsuperscript{11}See Braithwaite, supra note 1, at 256.
\textsuperscript{12}Id. at 258
\textsuperscript{13}See Damon H. Taylor, Civil Litigation Against Hate Groups Hitting the Wallets of the Nation’s Hate-Mongers, 18 Buff. Pub. Int. L.J. 95, 118 (2000).
\textsuperscript{14}See Morris Dees & Ellen Bowden, Hate: Taking Hate Groups to Court, TRIAL MAGAZINE, Feb. 1995, at 22.
assistance or encouragement with the intent that the other defendants would commit violent acts.”¹⁵ Dees has used civil conspiracy and aiding and abetting successfully in a number of cases and has been so successful at bankrupting hate groups that one Aryan Nation leader was quoted as saying, “that the fear of lawsuits was something we thought about every day.”¹⁶ As a result of the crippling lawsuits, hate groups were forced to explore alternative methods of achieving their goals that did not subject them to civil liability.

b. Hate Advocacy: A New Means of Effectuating Hate

On April 19, 1995 Timothy McVeigh drove a rental truck stuffed with more than five-thousand pounds of explosives into the Alfred P. Murrah Federal building in Oklahoma City. At 9:02 am the bomb went off, killing 168 people including nineteen children. It was at the time the largest act of terrorism perpetrated on U.S. soil, and remains to this day the most deadly act of domestic terrorism in U.S. history.¹⁷ Shortly after the bombing, McVeigh was pulled over for driving without a license plate. In his possession were several photocopied passages from a book called The Turner Diaries.¹⁸

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¹⁵ See Taylor, supra note 13, at 121
In 1978 then leader of the neo-Nazi National Alliance William Pierce, under the pseudonym Andrew Macdonald, published The Turner Diaries. The book is a fictional account of the life of Earl Turner, a member in an underground white supremacist army known as the “organization.” The organization, fed up with gang violence being perpetrated by minorities on whites, and a political system run by the Jews at the expense of white Aryans, initiates a campaign to overthrow the Jewish run “system”. The campaign begins with robberies and murders in order to procure funds and weapons.

The group eventually plots to initiate a race war by bombing the FBI headquarters in Washington, DC. The book goes into great detail discussing the merits of different explosives, and into details regarding the construction of the bomb. On October 31, 1991 at 9:15am Turner detonated a rental truck packed with explosives in the basement of the FBI headquarters, killing seven-hundred people. Turner expresses the heavy burden of responsibility he feels for killing so many innocent people, but adds, “there is no way we can destroy the System without hurting many thousands of innocent people....And if we don't destroy the System before it destroys us...our whole race will die.” Because of his actions, Turner is selected to join an elite group within the organization called “the

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20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
order”.25 Turner eventually dies on a suicide mission to drop an atomic bomb on the Pentagon. With the Pentagon destroyed, the order is able to strategically drop atomic bombs on minority group controlled cities around the world, including Israel, which leads to a new world order to white dominance around the world.26

Since being published, the Turner Diaries has been described as “a blueprint for murder” and “the bible of the right wing.”27 McVeigh was not the only militant to allegedly have been inspired into action by the book. A group of white-supremacists in the early 1980s led by Robert Mathews tried to carry out the events in the Turner Diaries. Calling themselves “The Order”, a name adopted from the book, they initiated a string of armed robberies, stockpiled weapons, and eventually assassinated Jewish talk show host Alan Berg in an effort to start a race war.28 John Williams King, the man convicted of murder for dragging African American James Byrd behind his truck was alleged to have said, “We’re going to start the Turner Diaries Early”, as he tied Byrd to the back of his truck.29

The Turner Diaries is just one prominent example of a new form of hate advocacy used by hate groups to shield themselves from Donald style civil liability. It has been termed “Lone Wolf” activism because it attempts to spur

25 Id.
26 Id.
27 See Id.; Nazism in America, supra note 18.
individuals into action not by directing them to commit specific acts, but by disseminating information and propaganda that will lead individuals to act on their own.\footnote{See Extremism in America: Alex Curtis. http://www.adl.org/learn/ext_us/curtis.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=2&item=curtis} Since an element of proving a civil conspiracy to deny civil rights is a showing that the defendant agreed with others on a specific course of action, a person cannot be liable for abstract advocacy where there is no agreement of a specific course of action. “Lone Wolf” activists advocate that individuals commit hate crimes alone, and refusing to cooperate with authorities. This way, if the perpetrator is caught, no one but himself will be exposed to civil or criminal liability.\footnote{Id.} In order to understand the threat posed by “lone wolf” hate advocacy, one must first understand where such speech fits into the current First Amendment framework.

2. The First Amendment and Hate and Crime Advocacy

The First Amendment of the U.S. Constitution provides that Congress shall make no law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. Despite its strong language, and a long tradition in the U.S. of zealously protecting the right to free speech, there are some categories of speech that fall outside of First Amendment protection. Most notably, speech that is obscene, true threats, fighting words, incitement, and defamation lie outside
the protections of the First Amendment, and thus can be regulated. Hate advocacy is a category of speech that has not specifically been dealt with by the Supreme Court. It lies somewhere in between hate speech and criminal incitement, two controversial types of speech that the court has dealt with extensively. An examination of these two categories of speech will illustrate approximately where hate advocacy falls on the First Amendment spectrum.

a. Hate Speech

Hate speech can be categorized as that speech which expresses hate against individuals or groups based on national or ethnic origin, race, religion, sexuality, or political ideology. While the rest of the world tends to strictly regulate such speech, the United States affords enormous protection to hate speech under the First Amendment. First Amendment jurisprudence has gradually come to protect hate speech, however there are some forms of hate speech that the Supreme Court has ruled fall outside of the protections of the First Amendment. Most notably libelous hate speech, hate speech that makes a “true threat”, hate speech which incites imminent lawlessness, and hate speech that has a tendency to cause acts of violence by the person to whom the remark is addressed (fighting words), have

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been found to be types of hate speech that are subject to regulation.\textsuperscript{34} An examination of First Amendment jurisprudence on hate speech will help illustrate some of the limits on regulating hate advocacy.

Attempts to regulate hate speech in the United States first started to arise in the 1920s with regard to communist party recruitment efforts. In Whitney v. California (1927), the Supreme Court upheld the conviction of a Communist Labor Party member who advocated the creation of a unified revolutionary working class to overthrow the government of the United States.\textsuperscript{35} The Court stated that the First Amendment does not protect speech “tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow.”\textsuperscript{36} The court reaffirmed this principle in 1951 in Dennis v. United States, where there court announced the proper test for hate speech was “whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger.”\textsuperscript{37} Through the 1960s, generally spurred by a fear of communism, hate speech remained fairly unprotected under the First Amendment.

\textsuperscript{35} Whitney v. California, 274 U.S. 357, 363-64 (1927).
\textsuperscript{36} Id. at 371.
\textsuperscript{37} Dennis v. United States, 341 U.S. 494, 510 (1951).
Speech that constitutes a “true threat” has generally been held to be outside the protections of the First Amendment. In Watts v. U.S., a recently drafted teen speaking at an anti-Vietnam War rally was arrested after saying, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” The Supreme Court distinguishing between political hyperbole, which is protected, and true threats, which are not, held that the context of the speech and the reaction of the audience clearly indicated that the speech was not intended, and could not be interpreted as a true threat. The Watts true threats doctrine has been consistently affirmed and remains in effect today.

Perhaps the most important case involving hate speech was decided by the Supreme Court in 1952 in Beauharnais v. Illinois. In Beauharnais, the Court upheld an Illinois group libel statute. The state made it a crime to,

“advertise or publish, present or exhibit in any public place . . . any lithograph, moving picture, play, drama or sketch, which portrays . . . depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of peace or riots.”

The Court reasoned that if libel could be prohibited against individuals, then a state cannot be prevented from similarly punishing group libel. In essence, the Court

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39 Id. at 706.
40 Id. at 705, 707.
42 See Beauharnais, supra note 34, at 251
43 Id. at 258.
found that hate speech, insofar as it meets the requirements of libel, is not protected by the First Amendment. The Court based its decision largely on the prior case Chaplinski v. New Hampshire, where the Court created an exception from First Amendment protection for “fighting words”, those words that “by their very utterance inflict injury or tend to incite an immediate breach of peace.”

While the Beauharnais decision essentially banned hate speech, its holding would be whittled away at in the coming decades, until its effective overturning in Smith v. Collin.

In 1969 in Brandenburg v. Ohio, the court overturned Whitney and Dennis, and began limiting states’ ability to proscribe hate speech. Brandenburg involved a gathering of hooded Klansmen making statements such as “bury the niggers,” and “if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.” Brandenburg was charged under an Ohio criminal syndicalism statute for the duty of using unlawful action to accomplish political reform. The Supreme Court overturned the conviction stating that the state may only prohibit speech advocating unlawful conduct if the speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

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44 See Chaplinski, supra note 34, at 573.
46 Id. at 444-45.
47 Id. at 447.
overturning Whitney, the Court provided greater First Amendment protection of hate speech. However, speech, including hate speech, which incites imminent illegality, could be proscribed. The Brandenburg incitement exception will be discussed extensively, infra.

In the years following Brandenburg, the Court continued to cast doubt on whether the hate speech prohibitions of Beauharnais were still good law. The Court finally began to clear things up in 1978 with its decision in National Socialist Party of America v. Village of Skokie, and its companion case Smith v. Collin, which denied review of the lower court decision made on remand of Skokie.48 In 1978 the National Socialist Party of America (NSPA), a neo-Nazi group, planned to hold a rally and display swastikas in the Skokie, Illinois, a predominantly Jewish community.49 The city required that the NSPA post an enormous bond in order to hold the rally, hoping to dissuade them, even though other groups were not required to post such bonds.50 The town asserted that the march would incite violence by Skokie residents, and that the display of the swastika would be an intentional infliction of emotional harm.51 Initially the Illinois Supreme Court refused to overrule the county court with regard to the

49 See NSPA, supra note 48, at 43.
50 Id.
bond. However, on remand from the U.S. Supreme Court, the Illinois appellate court held that the NSPA could march, but that they could not display swastikas.\(^5\)

During the injunction litigation, the Village of Skokie enacted city ordinances designed to prevent the march. The U.S. Court of Appeals held that these ordinances violated the First Amendment.\(^5\) Skokie requested that the U.S. Supreme Court stay the order of the court of appeals, but the Court denied the petition.\(^5\) The Court’s holding to uphold the decision that the ordinances were invalid seemed to essentially overturn Beauharnais, and future cases would seem to indicate that this was the case. However it is worth noting that Justice Blackmun dissenting in the Smith denial of the petition to stay the injunctions stated, “I feel that the decision of the United States Court of Appeals for the Seventh Circuit is in some tension with this Court's decision, 26 years ago, in Beauharnais v. Illinois. Beauharnais has never been overruled or formally limited in any way.”\(^5\)

While Justice Blackmun may have expressed his opinion that Beauharnais had not been overruled, the court continued to decide cases that seemed to suggest otherwise. In R.A.V. v. City of St. Paul (1992), a group of white youths assembled a cross from a broken chair and burned it in the front yard of an African-

\(^{52}\) Id. at 350-51
\(^{53}\) Id.
\(^{54}\) See Smith, supra note 48, at 953.
\(^{55}\) Id.
American. The boys were charged with violating the City’s Bias-Motivated Crime ordinance, which stated in relevant part, “Whoever places…a symbol, object, appellation, characterization or graffiti, including…a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender…”

The petitioner challenged the statute as an overly broad content based restriction on the freedom of speech guaranteed by the First Amendment. The court concluded that even if all of the expression covered by the ordinance was proscribable as "fighting words," the ordinance was facially unconstitutional because it prohibited otherwise permitted speech solely on the basis of the subjects the speech addressed. The court further held that in addition to being an impermissible content based restriction on expression, the ordinance was also an impermissible viewpoint restriction, because certain types of fighting words such as burning crosses would be prohibited, while other types would go unpunished. Justice Blackmun, who expressed his opinion that in Smith that the court had at no point overturned Beauharnais, seemed to recognize in R.A.V. that if the majority

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57 Id. at 380-81.
58 Id.
59 Id.
60 Id. at 391.
did not mean to overturn Beauharnais, it certainly meant to severely limit it.\textsuperscript{61} Concurring with the judgment, Blackmun stated, “by deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws.”\textsuperscript{62}

i. The Current State of Hate Speech Jurisprudence

As the cases above suggest, hate speech has become an area of expression that has found fairly widespread protection under the First Amendment. Currently it appears that hate speech may only be proscribed if, 1) it qualifies as defamation under the extremely narrowed Beauharnais standard, and the underlying statute is not overbroad or an impermissible regulation based on content or viewpoint, 2) it qualified as a “true threat” under Watts, 3) it constitutes fighting words, and the proscribing statute is content and viewpoint neutral, 4) it would incite a reasonable person to imminent lawless action. This fourth exception, the incitement to imminent illegality, has been applied to criminally instructive speech, which closely resembles hate advocacy. Therefore, a closer examination of it is warranted.

\textsuperscript{61} \textit{id.} at 416.
\textsuperscript{62} \textit{id.}
b. Incitement and Criminal Instruction

The test for crime advocating speech was announced by the Supreme Court in *Brandenburg v. Ohio*. Reworking the clear and present danger doctrine announced in *Schenck*, the court announced “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”63 The court explained further that, “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action.”64 Thus under *Brandenburg*, in order for speech to be proscribed, it must, 1) advocate illegal conduct, 2) intend to incite either the use of force or illegal conduct, and 3) be highly likely to incite such conduct. The test focuses on the imminence of the threat.65 Thus under Brandenburg and its progeny, statements such as “it’s possible that there might have to be some revengeanance taken”, “we’ll take the fucking street later”, and “if we catch any of you going in any of them racist stores, 63 See *Brandenburg*, supra note 34, at 447.  
64 Id. at 448.  
65 See S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 Wm. & Mary L. Rev. 1159, at 1194 (2000)
we’re gonna break your damn neck” have all been deemed protected speech because of their lack of inciting imminent illegality.66

The Supreme Court’s decision in Brandenburg has generally shielded writers and publishers from prosecutions over crime advocating materials. Courts applying the Brandenburg test have consistently failed to find the requisite level of imminence required under Brandenburg.67 However, some courts began to manipulate the Brandenburg standard in cases involving criminal instruction.68 Where speech was made with the specific intent to teach the listeners how to carry out unlawful acts, the Brandenburg imminence requirement often led to undesirable results. Thus when some courts encountered criminally instructive speech, particularly in cases where seminars were held on how to file false tax returns, they bent the Brandenburg standard, finding speech that was arguably abstract advocacy to be imminent incitement.69 Finally, in a potentially landmark case, the Fourth Circuit in Rice v. Paladin Enterprises, instead of manipulating Brandenburg in a criminal instruction case, held that not every form of advocacy was protected.70

69 See United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978); United States v. Freeman, 761 F.2d 549 (9th Cir. 1985).
In Rice, the families of murder victims that were killed by a contract killer sued the publisher of criminally instructive books. The plaintiffs alleged that the killer, James Perry, used the books *Hit man: A Technical Manual for Independent Contractors* and *How to Make Disposable Silencers* to carry out the murders. The family sued Paladin Enterprises, the publisher, on an aiding and abetting theory. Paladin stipulated that when it published the books, it knew that criminals would use them to commit crime, and that its marketing strategy intended to attract such individuals.\(^{71}\) The district court, applying Brandenburg, found that the book was abstract advocacy, and did not meet the imminence requirement. The Fourth Circuit reversed and remanded. It held that Brandenburg did not apply to advocacy taking the form of criminal instruction. Instead it turned to a case that predated Brandenburg, Noto v. U.S.\(^{72}\)

In Noto, the Supreme Court, eight years before Brandenburg, held that could not be prosecuted for holding lectures and conferences of Communist teachings. Foreshadowing Brandenburg, the court stated, “The mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity to resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”\(^{73}\) The Rice court found that

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\(^{73}\) Id. at 297-98.
Brandenburg did not overrule Noto, and that the distinction created in Noto between advocacy that abstractly taught resort to violence and advocacy that prepared a group for violent action survived Brandenburg. In essence Rice applied Brandenburg in a way that no other court had, choosing an interpretation that in effect created a new category of proscribable speech for criminal instruction. While U.S. Courts of Appeals can obviously not expressly create new categories of proscribable speech, there is some indication that the Supreme Court may agree with the Rice interpretation, and the legality of criminal instruction speech is therefore uncertain.

In McCoy v. Stewart, an Arizona Superior Court convicted Jerry McCoy of participating in a street gang under a statute that made it illegal to “furnish advice or direction in the conduct, financing or management of a criminal syndicate’s affairs with the intent to promote or further the criminal objectives of the criminal syndicate.” McCoy had advised another gang on ways to strengthen their gang such as electing officers, establishing a treasury for bail money, and tagging their territory. McCoy was sentenced to fifteen years in prison, the court of appeals affirmed, denying his first amendment claim, and the Supreme Court of Arizona denied his petition for review. McCoy filed a petition for a writ of habeas corpus, which was granted, and the U.S. Court of Appeals for the Ninth Circuit

76 McCoy v. Stewart, 282 F.3d 626, 628-29 (9th Cir. 2002).
overturned his conviction on the grounds that the state court misapplied the
**Brandenburg** test, and that McCoy’s speech lacked the imminence required under
**Brandenburg**. The Supreme Court denied review of the Ninth Circuit’s decision, stating “The harsh sentence for a relatively minor offense provides a permissible justification for this Court's discretionary decision to deny the warden's petition for certiorari.” Justice Stevens went on however to question the Ninth Circuit’s application of **Brandenburg** to criminal instruction speech.

“While the requirement that the consequence be "imminent" is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function…Long range planning of criminal enterprises -- which may include oral advice, training exercises, and perhaps the preparation of written materials -- involves speech that should not be glibly characterized as mere "advocacy" and certainly may create significant public danger. Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech. Our denial of certiorari in this case should not be taken as an endorsement of the reasoning of the Court of Appeals.”

Thus, at least one member of the current court felt it appropriate to point out that the Court has not decided whether the Fourth Circuit was correct in **Rice** when it held criminal instruction to be outside of the protection of the Firth Amendment.

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77 Id. at 633
79 Id. at 995
i. The Current State of Criminally Instructive Speech

As the above discussion illustrates, the current state of criminally instructive speech under the First Amendment is somewhat unclear. Under the narrow Brandenburg imminence view, criminally instructive speech may only be proscribed if it has a tendency to incite imminent illegality. This is the standard most courts have adopted to date, although Rice may represent a change in direction. Under the more broad Rice view, criminally instructive speech need not meet the Brandenburg imminence requirement, if it rises to the level of planning and preparing for lawless action. Therefore, in analyzing how hate advocacy should be treated, it is important to consider both views on criminally instructive speech.

3. Hate Advocacy in the Current First Amendment Framework

As the above discussions on hate speech and criminally instructive speech indicate, hate advocacy falls somewhere in between hate speech and criminally instructive speech. While it clearly meets the general definition of hate speech, it generally does not fall within any of the exceptions to hate speech (defamation, true threats, fighting words, and imminent incitement of illegality) that fall outside of First Amendment protection. In terms of criminal instruction, hate advocacy generally fails to meet the Brandenburg imminence standard since it is neither
directed at an intended reader nor a specific intended victim. While the Rice court found criminally instructive speech that plans and prepares the listener for lawless action to be unprotected, hate advocacy likely falls outside of this prohibition as well.

First it is an abstract type of advocacy. It teaches to hate certain groups, and that these groups deserve any violence that comes their way. It does not direct specific persons to carry out specific acts on specific victims. It generally does not teach methods or tactics. So while the Hit man book taught specific tactics for would be contract killers to follow, and the defendant stipulated that it marketed to these people knowing they would use it to carry out illegal acts, works like The Turner Diaries do not purport to be instructional advocacy materials. Further problematic is the fact that hate advocacy often takes forms that are arguably not advocating anything at all, or a simply advocating hate, and not violence based on that hate.

The Turner Diaries, for example, is a novel based on fictional future events. If we find that The Turner Diaries advocates committing hate crimes, should we also find a book about a serial killer advocates serial killing, or a book about an assassin advocates assassinations? Additionally, it is a basic tenet of the American legal system that people should be punished for their acts and not for their thoughts. Hating people based on their race, religion, sex, sexual orientation, or political
affiliations is not illegal. Furthermore, as the above discussion on hate speech suggests, the American justice system does not punish people for expressing their hateful speech, except in very limited circumstances.

A prominent hate advocacy case illustrated the difficulties created by hate advocacy, even though the defendant was held liable under the true threats doctrine from Watts. In Planned Parenthood v. Am. Coalition of Life Activists, the ninth circuit upheld a jury verdict against an anti-abortion website. Neal Horsley was running a website called The Nuremberg Files, which had pictures of abortion doctors with their names and home addresses arranged in a wanted-poster style. The website would update under each picture if the doctor had been killed, injured, or quit because of the activities of anti-abortion extremists. The court held that such postings amounted to true threats under Watts. In explaining its decision, the court stated that had the speech not been a true threat, it would have been analyzed under Brandenburg, and “If [Defendant] had merely endorsed or encouraged the violent actions of others, its speech would be protected.” This sort of mere endorsement or encouragement of violent action is exactly what is at stake in hate advocacy cases. However in most instances, like with The Turner Diaries, the speech is not directed at a specific victim like in Planned Parenthood, 

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80 Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058, 1063 (9th Cir. 2002).
81 Id. at 1062.
82 Id.
83 Id.
84 Id. at 1072
and therefore falls outside of the Watts true threats exception, and is therefore protected.

Often times a fine line exists between the expression of attitudes of hate, and expressions of hate which the speaker intends, or reasonably should know might lead to violent actions. What is clear is that hate advocacy, like hate speech and criminally instructive speech, generally falls within the protection of the First Amendment. As a result, authors of works such as The Turner Diaries, despite hundreds of deaths attributed to them and them being termed “blue print[s] for murder,” continue to be shielded from liability by the First Amendment. The question that arises is should this expression be protected, and if not, how can the First Amendment jurisprudence be changed to outlaw hate advocacy materials without infringing on the free speech rights that our nation holds so dear.

4. Should Hate Advocacy be Protected?

Justice Louis Brandeis once said that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."85 Justice Oliver Wendell Holmes opined, that “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”86

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85 See Whitney, supra note 35, at 375.
These quotes illustrate the rationale for American First Amendment jurisprudence; that society is best served by the free flow of ideas. However, even the some of the most adamant supporters of freedom of speech agree that it is appropriate to censor it in certain situation, discussed supra. Should Hate advocacy be one of these exceptions?

When analyzing whether a type of speech should be proscribable, it is important to weigh the danger it poses to society, against the harm caused by suppressing speech, and the risk of suppressing “valuable” speech. To understand this weighing, it is important to recognize some of the harms and benefits of allowing hate advocating speech. In terms of benefits, hate advocacy helps facilitate public debate. Society benefits when it hears an opposing viewpoint, analyzes it, and determines that it is incorrect. On a similar note, society benefits to some degree when unpopular views are known to society at large. For example, if hate advocacy were banned, it would likely not disappear, but rather go underground. Society cannot protect itself from information that it does not have. In the example of the Nuremberg Files case, at least abortion doctors were forewarned that their name and address was being circulated among anti-abortion extremists. Finally, anytime speech is suppressed, the marketplace of ideas is less diverse, and the pursuit of truth becomes less attainable.
The harms of allowing hate advocacy are fairly apparent. First and foremost, lives are lost because of hate advocating speech. Second, hate advocating speech fosters and reinforces racism, sexism, homophobia, and bigotry. Finally, there is the mob mentality concept. Individuals are less likely to act out violently on their own than when part of a group. When a racist individual is bombarded with materials that advocate hate and violence, it can create the feeling that the person is a part of a larger movement, and increase that individual’s tendencies towards hatred and violence.

In addition to the harms of regulating hate advocacy itself, is the risk of proscribing otherwise lawful “valuable” speech. “Valuable” speech refers to speech that is not the speech meant to be censored itself, but speech that shared enough similar characteristics that it ends up falling within a statutory prohibition. For example if a law were enacted to prevent the publishing of books describing how to make bombs, a high school chemistry book that illustrates a particular chemical reaction by explaining an explosive compound would be “valuable” speech inadvertently censored. In the case of hate advocacy, a great deal of “valuable” speech would be a risk of censorship. Part of what makes hate advocating works like The Turner Diaries so effective is that they so closely resemble historically protected materials. Novels, political speeches, movies, and
even violent video games could become subject to censorship if the First Amendment allowed hate advocacy to be censored.

In assessing hate advocacy, the danger posed to society is extremely great. The Oklahoma City Bombing, for example, was the deadliest act of domestic terrorism in U.S. history, and was at least in part the result of hate advocacy. Likewise, however, the harm caused by suppressing speech and the risk of suppressing “valuable” speech is also great with hate advocacy. The freedom of expression is curtailed, the marketplace is less diverse, society is unaware of unpopular and potentially dangerous viewpoints, and potentially “valuable” speech is at risk of censorship. The potential harms to society however outweigh the benefits of allowing hate advocating speech. Our First Amendment jurisprudence, with its exceptions for true threats, fighting words, and incitement, clearly places the highest value on preventing violence from occurring. The potential for violence created by hate advocating speech necessitates that the first amendment be read in a manner that allows narrowly written prohibitions of hate advocacy.

5. Proposed Changes to the Current First Amendment Jurisprudence

First Amendment protections of the freedom of speech are not absolute. Exceptions have been made for obscenity, fighting words, defamation, true threats, and incitement. The benefits to society of allowing the free flow of ideas are
simply outweighed by the harms to society that these categories of speech cause. Each exception has been narrowly drawn to minimize the risk that “valuable” speech will be censored. The benefits of hate advocating speech are similarly outweighed by its harms to society. Therefore, the current First Amendment framework needs to be reworked to protect society from hate advocacy.

As this essay has illustrated, hate advocacy has generally fallen within the protections of the First Amendment because it is hate speech that does not rise to the level of defamation, fighting words, true threats, or incitement, and it is criminally instructive speech that does not satisfy either the Brandenburg imminence requirement, or the Rice plan or preparation standard. Therefore a new exception needs to be created for speech that is meant to advocate hate, and exists somewhere in between imminent incitement and plan or preparation.

The distinguishing characteristics of hate advocacy are that it 1) advocates hate and violence, 2) is not directed at a particular hearer/reader, 3) is not directed at a particular victim, and 4) can take the form of generally protected speech (i.e. novel). While these distinguishing characteristics make it difficult to proscribe hate advocacy without proscribing other “valuable” forms of speech, it is not impossible. In fashioning an exception, it is important to address each distinguishing elements individually.
Element one will require an individualistic ad hoc analysis to determine whether a particular expression is advocating hate and violence. While leaving such discretion to judges is usually frowned upon, hate advocacy is one of those difficult to define, “I know it when I see it” types of speech like obscenity.\(^{87}\) A reasonable person reading a book about a serial killer that stalks women knows it is not advocating hatred and murder of women, while a reasonable person reading *The Turner Diaries* recognized it is more than just a story, but a call to arms.

Elements two and three, that there is no intended reader or victim requires that the exception for hate advocacy not include a *Brandenburg* style imminence requirement. Whenever expression is simply out there for anyone to pick up and act on their own time, in their own manner, *Brandenburg*’s imminence is not going to be satisfied. Instead, the hate advocacy exception must look at whether the expression advocated hate towards a particular group or groups of people, and whether the speaker/writer knew or should have known that the work would encourage others to carry out acts of violence against that group.

Element four, that hate advocacy can take the form of generally protected speech, will require that the hate advocacy exception be flexible. The spectrum of ways in which hate advocacy can be expressed is as vast as the human imagination. A novel such as *The Turner Diaries* is a potent advocator of hate. So too could a

\(^{87}\) *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Potter, J., Concurring).
video game that teaches military tactics and has the militants using these tactics to kill members of a particular race. Therefore, the ad hoc review discussed for elements one must be particularly vigilant as to avoid being under protective, and censoring “valuable” speech.

6. Conclusion

In the wake of hate groups being crippled by civil conspiracy and aiding and abetting lawsuits, many have turned to a new method of effectuating their hate. Hate advocacy, as laid out in this essay, is a form of expression in which the speaker/writer, 1) advocates hate and violence, 2) does not direct it at a particular hearer/reader, 3) does specify a particular victim, but rather a group or groups of potential victims, and 4) can forms resembling generally protected speech. This form of speech has been recognized as a contributing factor in a number of acts of violence, including the Oklahoma City Bombing. Hate advocacy has become popular among hate groups in America because it falls just outside the requirements of censorship for both hate speech and criminally instructive speech. Because of the danger it poses to society, the American First Amendment jurisprudence needs to be altered to include an exception from protection for hate advocating speech. A narrow and effective exception can and should be crafted, taking into account the distinguishing characteristics of hate advocacy, that will censor no more speech than necessary, and make the United States a safer place for
people of all races, genders, religions, sexual orientations, and political persuasions.