
NOTES

A HAVEN FOR HATE: THE FOREIGN AND DOMESTIC IMPLICATIONS OF PROTECTING INTERNET HATE SPEECH UNDER THE FIRST AMENDMENT

PETER J. BRECKHEIMER II*

The U.S. Constitution is unique even among democratic nations for the guarantees it grants to U.S. citizens. The interpretation of the Constitution further distinguishes American notions of freedom and liberty from every other country in the world. The Internet Age, however, has ushered in a period where national boundaries and guarantees are blurred among the many intersections of the World Wide Web. This uncertainty has raised serious questions relating to the fundamental rights and liberties established by our forefathers: Can the United States maintain its guarantee of freedom of speech for the Internet? Who profits from such a guarantee? What are the implications for other nations if the United States ignores their pleas to rein in such guarantees?

Given the nearly unanimous international institution of regulations restricting online hate speech, the United States stands alone in its support of free speech—including Internet hate speech. Because of such a stance, however, the United States may become a beacon of hope for hate-mongers around the world whose views are stifled by the restrictions on speech in their homelands. Will the United States become a haven for online hate speech by continuing to guarantee such speech near-absolute protection? This Note attempts to answer the above questions and examines the desirability of U.S. protection of hate speech on the Internet.

Part I of this Note provides examples and statistics confirming not only the violent potential of Internet hate speech, but also the growth of hate-related organizations since the advent of the Internet. Part II analyzes the competing views regarding regulation of hate speech in the context of American First Amendment guarantees of expression. After laying the foundation for the debate over restricting free speech, Part III addresses the existing legal responses to hate speech on the Internet. This section contrasts the American legal system and its near absolute protection of online speech with that of the international community, which nearly unanimously supports online regulation. To further distinguish the uniqueness of the American protection of hate speech even among Western democracies, this Note also analyzes the legal systems of Germany and Canada. Part IV focuses on the implications to the United States and the rest of the world resulting from American protection of online hate speech. Part V illustrates the U.S. indifference to the international community's concerns regarding the proliferation of Internet hate speech. As engagement of the international community through dialogue provides the most promising way to combat the propagation of Internet hate speech, Part VI proposes one long-term and two interim solutions to this problem. Finally, this Note concludes that the United States needs to take seriously the implications of Internet hate speech for both itself and the rest of the international community.

I. HATE PROLIFERATION

The U.S. Supreme Court has observed that “the content on the Internet is as diverse as human thought.”¹ The Internet hosts an assortment of ideas and opinions. While some embrace this diversity and perceive the Internet as a facilitator for robust debate, others attempt to stifle this dialogue by using the Internet as a tool for discrimination and suppression. Indeed, many hate groups have established Web sites not only encourage intolerance, but also to promote violence. The result has been clear: Internet technology has spurred a resurgence among hate groups in the United States. The rise in activity and virulence of these groups has had deadly consequences.

* Class of 2002, University of Southern California Law School; B.A. University of Southern California. I would like to thank Professors Erwin Chemerinsky and Edwin Smith for inspiring this research. Warmest appreciation for my family and friends, who have supported and encouraged my studies. Special thanks to my parents, without whom nothing would be possible.

1. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

A. “STICKS AND STONES”: THE UNRELENTING FORCE OF HATE SPEECH

From Web pages that scientifically support the “inherent inferiority of [B]lacks”² to sites that feature animation of “blond teen-agers firing rifles at a poster of a pig” that reads, “Kill the Jew pigs before it’s too late,”³ bigotry forcefully makes its mark on the Internet. Moreover, seemingly every type of intolerance is represented: antigay,⁴ anti-White,⁵ antifeminism,⁶ and everything in between.⁷ Furthermore, because of the capabilities associated with the Internet, hate groups are no longer limited to text messages as in print media; rather, their capabilities include hate music,⁸ interactive hate games,⁹ and streaming radio broadcasts¹⁰ of hate on their Web sites.

The results of this interactive hate have had dire repercussions for American society. For example, *The Turner Diaries*, a book available on the Internet that details the successful world revolution of an all-White army, is “believed to have inspired several major acts of violence, including the April 1995 Oklahoma City bombing.”¹¹ Additionally, “[i]n Colorado, Internet hate—as well as dangerous information about weapons and bombs—has been cited by some as a factor in the Columbine High School shootings.”¹² Further, hate groups that have seen large increases in

2. Michel Marriott, *Rising Tide: Sites Born of Hate*, N.Y. TIMES, Mar. 18, 1999, at G1.

3. *Id.*

4. See, e.g., Neal Horsley, *Arresting Homosexuals*, The Creator’s Rights Party, at <http://www.christiangallery.com/creator.html> (last visited Sept. 25, 2002).

5. See, e.g., Anarchist People of Color, at <http://www.illegalvoices.org/apoc/freaq/issues.html> (last visited Oct. 8, 2002) (featuring an anti-White email list).

6. See, e.g., August Strindberg, *The Disciple Asked: What Is a Misogynist?*, Misogyny Unlimited, at <http://www.ozemail.com.au/~ksolway/misogyny.html> (last visited Sept. 25, 2002).

7. See generally Raymond A. Franklin, *The Hate Directory: Hate Groups on the Internet*, at <http://www.bcpl.net/~rfrankli/hatedir.htm> (providing a fairly comprehensive compilation of hate-related Internet sites).

8. See, e.g., Resistance Records, at <http://www.resistance.com> (last visited Oct. 8, 2002) (hate music website).

9. See Marriott, *supra* note 2 (“[P]opular computer games, like Doom and Castle Wolfenstein . . . have been reconfigured to include [B]lacks, Jews and other members of minority groups as targets.”).

10. See, e.g., Plunder and Pillage, *Lights Out!*, Resistance Radio, at <http://www.resistance-radio.com> (last visited Sept. 25, 2002) (hatecore internet radio).

11. *Prepared Statement of Howard Berkowitz, National Chair of the Anti-Defamation League Before the Senate Committee on the Judiciary*, FED. NEWS SERV., Sept. 14, 1999, LEXIS, Nexis Library [hereinafter *Berkowitz*].

12. See Andrew Backover, *Hate Sets Up Shop On Internet*, DENVER POST, Nov. 8, 1999, at E-01.

their membership from online recruiting have been closely linked to murder and bombing attempts aimed at Jews, Blacks, and homosexuals.¹³

These examples winnow away any credence one may lend to the age-old adage, “sticks and stones may break my bones but words will never hurt me.” Indeed, increasingly it seems prudent to take seriously groups such as the National Alliance, the largest and most active neo-Nazi organization in the nation, whose propaganda promotes biological determinism, hierarchical organization, and “a long-term eugenics program involving at least the entire populations of Europe and America.”¹⁴ As evidenced above, words from these hateful organizations may in fact have a deadly result.

B. IMPLICATIONS OF THE INTERNET: FOSTERING THE HATE MOVEMENT

Statistics produced by the Southern Poverty Law Center (“SPLC”), an organization dedicated to the documentation and investigation of hate crimes in the United States, show that membership in hate groups has consistently risen since the first hate site was posted on the Internet in 1995.¹⁵ This trend in recruitment has coincided with a tremendous increase in the number of hate sites available on the Internet. In 1998 alone, a year that saw a number of particularly horrendous hate crimes,¹⁶ the number of hate sites in the United States grew to 254, an increase of ninety-one sites from the previous year.¹⁷ Additionally, in 2000, there was a 32% increase in hate sites over the previous year, bringing the total number of U.S. hate

13. See Berkowitz, *supra* note 11. World Church of the Creator (“WCOTC”) Reverend George Loeb “was convicted of first-degree murder for killing Harold Mansfield Jr., an African-American Persian Gulf War veteran,” and “in California, police averted potential bombing sprees that were to be directed at Jews, Blacks, and homosexuals.” *Id.* In both cases, the “would-be terrorists were closely affiliated with branches of [WCOTC].” *Id.*

14. *Id.*

15. See SOUTHERN POVERTY LAW CTR., INTELLIGENCE REPORT: THE YEAR IN HATE, at <http://www.splcenter.org/intelligenceproject/ip-4i1.html> (Fall 1998) [hereinafter SPLC 1998 REPORT]. The Ku Klux Klan (“KKK”) added nine chapters, the WCOTC added thirteen chapters, the National Socialist White People’s Party doubled in size, adding eleven chapters, and there was an increase in the number of patriot organizations. *Id.*

16. Two of the most publicized events include the brutal dragging death of James Byrd Jr. (motivated by anti-Black sentiment) in Jasper, Texas and the violent assault and killing of Matthew Shephard (motivated by antigay sentiment) in Laraine, Wyoming. For additional information on the Byrd murder, see James Byrd Jr. Foundation for Racial Healing, at <http://www.byrdfoundation.org/history.htm>. For additional information on the Shephard murder, see Wayne Jackson, *The Death of Matthew Shephard*, Christian Courier, at http://christiancourier.com/penpoints/matthew_shephard.htm (Oct. 19, 1998).

17. SPLC 1998 REPORT, *supra* note 15.

sites to 602.¹⁸ While the increase of hate propaganda on the Internet is certain, experts caution that the pool of sites used in the SPLC study is incomplete, and that the actual number of U.S.-based hate sites is “almost certainly undercounted.”¹⁹ Facilitated by the Internet, the hate movement is growing at an alarming rate.

Hate groups see the Internet as an “unprecedented means of communication and recruiting.”²⁰ Don Black, former Grand Dragon of the Ku Klux Klan and author of the white-nationalist *Stormfront.org* site, revels in the benefits the Internet has afforded hate organizations such as his own. As the first to establish a site dedicated to intolerance on the Internet, Black has noted that, “[a]s far as recruiting, [the Internet has] been the biggest breakthrough I’ve seen in the 30 years I’ve been involved in [white nationalism].”²¹ He adds, “Prior to the ‘Net, when we had to rely on printed literature and leaflets and occasional public meetings, we were limited in the number of people we could reach. Now we can reach potentially millions of people.”²²

Many leaders of organizations similar to Black’s have echoed his sentiments regarding the power of the Internet to attract new followers.²³ While success in recruitment and the growth of the hate movement is a concern, potentially the most worrisome aspect of Internet hate speech is the practice of many hate groups of targeting children and teenagers.²⁴

C. MANIPULATION OF INNOCENCE: HATE GROUPS TARGET CHILDREN AND TEENAGERS

World Church of the Creator (“WCOTC”), a neo-Nazi organization, is one example of several hate organizations that make “special efforts to get

18. See SOUTHERN POVERTY LAW CTR., INTELLIGENCE REPORT: THE YEAR IN HATE, at <http://www.splcenter.org/intelligenceproject/ip-4q4.html> (Spring 2001) [hereinafter SPLC 2001 REPORT]. But see Victoria Shannon, *From France, Yahoo Case Resonates Around Globe*, INT’L HERALD TRIB. (France), Nov. 22, 2000, at 1 (reporting that estimates produced by the Simon Wiesenthal Center indicate the actual number of Internet hate sites is closer to 3,000).

19. SPLC 1998 REPORT, *supra* note 15.

20. Backover, *supra* note 12.

21. *Id.*

22. *Id.*

23. See *id.* (quoting David Duke as saying, “I believe the Internet will eventually result in the victory of the things that I believe in”). See also SPLC 2001 REPORT, *supra* note 18 (quoting William Pierce of the National Alliance, “[W]e know that we are on the right course by continuing to put most of our efforts into developing our ability to communicate with the public”).

24. See SPLC 2001 REPORT, *supra* note 18 (noting that the WCOTC made special efforts to attract children and teenagers).

to children, [and] teenagers.”²⁵ By using bright-colored, crayon-style writing and links to games and activities geared toward children, the WCOTC website unabashedly seeks to “make it fun and easy for children to learn about ‘Creativity,’” the organization’s racial religion.²⁶ Similarly, Stormfront features a website hosted by a twelve-year-old named Derek who espouses the belief that Whites across the globe should “rise above the lies” and “take back our freedom . . . to see our heritage in its greatest glory.”²⁷ The site portrays pictures of Derek with the former Governor of Mississippi and provides links to racist games and music.²⁸ By appealing to children and young adults, these organizations actively try to recruit everyone who can be persuaded to adopt their views.²⁹

Additionally, many of these sites host links to revisionist historical “lessons” for children. For example, on Stormfront’s “kids page,” viewers can link to “Martin Luther King Jr.—A Historical Examination” where they will see pictures of Dr. King and his family, and read that he is “just a sexual degenerate, an America-hating Communist.”³⁰ Although this example is extreme, most of such revisionist material is presented in a manner that appears to be factual and based on sound news reporting. As a result, unsuspecting children—and adults for that matter—may not understand the information’s racist perspective. Indeed, some sites, such as Ernst Zündel’s revisionist “Zundelsite,” claim that they can “prove” the information they present “statistically, forensically, and logically.”³¹

Hate organizations also create Web sites that resemble the domain names of large and legitimate news organizations and link those addresses to their hateful versions of the news. For example, Adrian Marlow, the service provider for Black’s Stormfront site, bought the rights to domain names that appeared to link the viewer to such major news publications as the *Philadelphia Inquirer*, the *Pittsburgh Post-Gazette*, the *Chicago Sun-Times*, the *Atlanta Constitution*, and the *London Telegraph*. Instead of linking to those publications, the viewer ends up visiting Black’s Stormfront white-nationalist page. Increasingly, hate sites are “popping up

25. *Id.*

26. WCOTC Staff, Children’s Site, World Church of the Creator, at <http://www.wcotc.com/kids> (last visited Sept. 25, 2002).

27. Children’s Site, Stormfront, at <http://www.kids.stormfront.org> (last modified June 13, 2002).

28. *See id.*

29. *See Backover, supra* note 12 (quoting Don Black as saying, “We try to recruit everyone that is interested in our point of view”).

30. Marriott, *supra* note 2.

31. *Mission Statement*, The Zundelsite, at <http://www.zundelsite.org/english/misc/mission.html> (last visited Mar. 21, 2001).

in routine [Internet] searches and placing the message before new—and sometimes unsuspecting—eyes.”³²

D. SYNTHESIS

The Internet has caused a resurgence of hate-related organizations in the United States. It is also clear that hate groups actively try to manipulate unsuspecting individuals who happen upon their sites. Given the rise in hate group membership and their links to violent acts, it is of vital importance to determine if and how the government can combat such a threat.

II. DEBATING HATE SPEECH REGULATION: AN AMERICAN DILEMMA

In the United States, the debate over whether and when the government can regulate hate speech has raged for two decades.³³ The advent of the Internet, however, has added a new twist to this ongoing dispute. Because of the global and public nature of the Internet, hate speakers are no longer confined to public addresses and pamphleteering. Rather, as the Supreme Court has noted, because of the Internet “any person . . . can become a town crier with a voice that resonates farther than it could from any soapbox.”³⁴ Concerned about the implications of worldwide dissemination of extremist and intolerant ideas, some argue that the government should regulate Internet hate speech. Others maintain that tolerance is a fundamental tenet of American ideology and that hate speech, however offensive, deserves constitutional protection.

32. Backover, *supra* note 12.

33. See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (favoring restrictions on hate speech); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987) (same); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990) (same); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); (same). See also LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986) (favoring tolerance for expressions of hate); Marjorie Heins, *Banning Words: A Comment on 'Words That Wound,'* 18 HARV. C.R.-C.L. L. REV. 585 (1983) (same).

34. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

A. ARGUMENTS SUPPORTING GOVERNMENTAL REGULATION OF ONLINE
HATE SPEECH

Proponents of governmental regulation of Internet hate speech emphasize that the dangers associated with such speech are multiplied exponentially by the Internet's global reach. As recognized by the Anti-Defamation League, "[b]efore the Internet, many extremists worked in relative isolation, forced to make a great effort to connect with others who shared their ideology. Today, on the Internet, bigots communicate easily, inexpensively, and sometimes anonymously with hundreds of fellow extremists."³⁵ Additionally, because the Internet "enables the instant marketing of hate and mayhem"³⁶ at a low cost to the publisher of the material, it is logical that the Internet has become a "highly effective way for hate groups . . . to propagate their hateful ideas."³⁷

Aside from facilitating the dissemination of racist and hateful invective, the Internet has a tendency to lend credence to the claims of hate groups. As one researcher of Internet hate groups has found, "authors of hate messages are able through subtle manipulation and juxtaposition of material to give a veneer of credibility to the context of the messages."³⁸ By targeting adolescents and teenagers, hate groups have successfully recruited members to their cause.³⁹ Supporters of government regulation argue that online hate speech should be restricted from using such tactics.

Furthermore, proponents argue that the offensive nature of hate speech, which some regard as verbal assault, contributes nothing of value to the marketplace of ideas and is not easily discredited by speech to the contrary. Indeed, the Internet "gives the listener the impression of direct, personal, almost private, contact by the speaker, provides no realistic means of questioning the information or views presented and is subject to no counter-argument."⁴⁰ In short, proponents contend that the *victims* of online hate speech are silenced.⁴¹

35. Berkowitz, *supra* note 11.

36. Elizabeth G. Olson, *As Hate Spills onto the Web, a Struggle Over Whether, and How, to Control It*, N.Y. TIMES, Nov. 24, 1997, at D11.

37. Christopher Wolf, *Racists, Bigots and the Law on the Internet*, Anti-Defamation League, at http://www.adl.org/internet/internet_law1.html (July 2000). For an in-depth analysis of how hate groups use the Internet to propagate their message, see generally Berkowitz, *supra* note 12.

38. Chris Gosnell, *Hate Speech on the Internet: A Question of Context*, 23 QUEEN'S L.J. 369, 394 (1998).

39. *Id.*

40. *Id.*

41. See Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 332 (1999).

B. ARGUMENTS AGAINST GOVERNMENTAL REGULATION OF ONLINE
HATE SPEECH

Opponents of governmental regulation argue that the Internet facilitates not only the dissemination of hate speech, but its refutation as well. They maintain that although more people are able to express their views in cyberspace, “[u]nlike printed press where there are publishers and readers or television where there are broadcasters and viewers the Internet allows a far greater level of interaction.”⁴² Thus, contrary to what some argue, *no one* is silenced on the Internet.

In fact, those who oppose online regulation argue that any restrictions on online hate speech would give the government too much discretion to suppress speech. This is largely because any definition of ‘hate’ would be overly broad and unnecessarily restrict protected speech as well. Although various definitions have been posited,⁴³ the Supreme Court would have to adopt one that is neither overbroad nor content-based. Thus, the Court would have to define hate speech according to the “I know it when I see it” standard as was necessary when it first attempted to define obscenity.⁴⁴ Opponents argue that such a subjective standard invariably leads to uncertainty and ultimately increases the likelihood of over-regulation. As one critic opines, “for all [the hate groups’] vitriol, these people are only a tiny handful of the 30–40 million users on the Internet I’m far more concerned about *them* [the government] attacking the Net, and thus our freedom, than I am about watching the Nazis.”⁴⁵

Thus, fears of government suppression and recognition that the Internet is not amenable to content control undergird many activists’ opposition to online regulation. Support for a speaker’s autonomy and tolerance of divergent views, no matter how disagreeable, are trumpeted as virtues upon which America was founded. Regulation of online speech by

42. *Current Free Speech Doctrine: Will It Work On the Internet?*, PlanetPapers, at <http://www.planetpapers.com/Assets/488.php> (Oct. 2002).

43. See Markkula Center for Applied Ethics, *The Price of Free Speech: Campus Hate Speech Codes*, 5 ISSUES IN ETHICS 2, 2 (Summer 1992), at <http://www.scu.edu/ethics/publications/iie/v5n2/codes.html> (noting that some hate speech codes prohibit speech that “creates an intimidating, hostile, or offensive educational environment,” while others prohibit behavior that “intentionally inflicts emotional distress”).

44. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

45. JONATHAN WALLACE & MARK MANGAN, *SEX, LAWS, AND CYBERSPACE: FREEDOM AND CENSORSHIP ON THE FRONTIERS OF THE ONLINE REVOLUTION* 245–46 (1997) (quoting noted Internet antihate activist, Ken McVay).

any means, it is argued, is “antithetical to free speech”⁴⁶ and is an unnecessary cost of retaining such a fundamental right.⁴⁷

C. SYNTHESIS

The debate over the regulation of hate speech is likely to rage in the United States as long as Americans are guaranteed the rights of free expression. Outside the United States, however, such guarantees, if they exist at all, are seldom upheld to the same extent. In fact, most nations, regardless of the freedoms they guarantee their citizens, permit the regulation of hate speech on the Internet.

III. LEGAL RESPONSES TO INTERNET HATE SPEECH

A. AMERICAN APPROACH

1. U.S. Constitutional Analysis: Protection of Speech Generally

The United States has never directly addressed the issue of hate speech on the Internet. As judicial application and interpretation have made clear, however, the First Amendment affords such speech broad protection.

The First Amendment to the Constitution guarantees the right of freedom of expression to all Americans.⁴⁸ Since its adoption, this right has continually evolved to address, inter alia, advances in communications technology. Despite these adaptations, the fundamental guarantee of freedom of speech has remained unchanged. All Americans have the right to have their ideas and opinions compete in the “marketplace of ideas,”⁴⁹ no matter how unpopular or offensive their statements may be.⁵⁰ This view, as adopted by the U.S. Supreme Court, reflects the Holmesian notion of tolerance—where “good and bad ideas compete, with truth prevailing . . . [and] harmful speech . . . [being] tested and rejected.”⁵¹

46. John F. McGuire, *When Speech is Heard Around the World: Internet Content Regulation In the United States and Germany*, 74 N.Y.U. L. REV. 750, 773 (1999).

47. For similar arguments against the regulation of hate speech, see ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 285 (2001).

48. See U.S. CONST. amend. I (stating that “Congress shall make no law . . . abridging the freedom of speech”).

49. ANTI-DEFAMATION LEAGUE, COMBATING EXTREMISM IN CYBERSPACE: THE LEGAL ISSUES AFFECTING INTERNET HATE SPEECH 3 (2000) [hereinafter ADL REPORT].

50. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

51. ADL REPORT, *supra* note 49, at 3.

Indeed, any governmental regulation that abridges this fundamental guarantee based on the content “or the ideas of a speaker is presumptively invalid.”⁵²

Yet, freedom of speech is not absolute.⁵³ Federal, state, and local governments may limit free speech if they have a compelling interest and if they use the least restrictive means to do so.⁵⁴ In fact, categories of “low value” speech such as obscenity, defamation, and “fighting words” are often excluded from First Amendment protection.⁵⁵ Furthermore, “communications media, such as broadcast radio and television, enjoy lesser constitutional protection than speech communicated in print media.”⁵⁶

While debates among jurists and legal scholars have raged over where hate speech and the Internet belong on the continuum of First Amendment protection, case law overwhelmingly places them firmly within the ambit of constitutionally protected speech.⁵⁷

2. Constitutional Protection of Hate Speech

The Supreme Court has never determinatively resolved the issue of hate speech, yet several related decisions indicate that it is a category of constitutionally protected speech.

In *Beauharnais v. Illinois*,⁵⁸ the Supreme Court affirmed the conviction of an individual who violated a state group libel⁵⁹ law by distributing leaflets containing libelous statements that advocated segregation. Noting that “wilful purveyors of falsehood concerning racial

52. See Kim L. Rappaport, *In the Wake of Reno v. ACLU: The Continued Struggle in Western Constitutional Democracies With Internet Censorship and Freedom of Speech Online*, 13 AM. U. INT'L L. REV. 765, 772 (1998).

53. The Supreme Court has stated definitively that “the freedom of speech which is secured by the Constitution does not confer an absolute right to speak.” *Whitney v. California*, 274 U.S. 357, 371 (1927).

54. The Court has stated that “a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government.” *Whitney*, 274 U.S. at 371.

55. See, e.g., *Roth v. United States*, 354 U.S. 476, 484–85 (1957) (stating that obscenity is a category of speech unprotected by the First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (stating that fighting words are a category of speech unprotected by the First Amendment). See also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (2d ed. 2002) (stating that tort law imposes liability for defamation, which is speech injurious to reputation).

56. See Rappaport, *supra* note 52, at 773.

57. See *supra* note 33 and accompanying text.

58. 343 U.S. 250 (1952).

59. Group libel is speech that defames a racial or religious group.

and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life,"⁶⁰ eight justices agreed that states had the right to protect citizens from injurious publications that cast aspersions upon race, color, creed, or religion.⁶¹ Although this decision focused on group libel rather than on the hateful nature of the speech, it remains the strongest authority for the government to regulate hate speech.

Although *Beauharnais* has never been overruled, it is unlikely that it is still good law.⁶² Courts have been unwilling to follow it for a number of reasons.⁶³ This has been demonstrated most notably when Supreme Court protected the right of Nazis to march through the predominantly Jewish town of Skokie, Illinois in 1977. State courts had granted an injunction "preventing the marchers from wearing Nazi uniforms, displaying swastikas, or expressing hatred against Jewish people,"⁶⁴ but the Supreme Court summarily reversed.⁶⁵ On remand, the Illinois Supreme Court vacated the injunction as violating the First Amendment.⁶⁶ When the city of Skokie subsequently passed ordinances to bypass the failed injunction, the U.S. Court of Appeals for the Seventh Circuit declared these ordinances unconstitutional and expressly said that it "no longer regarded *Beauharnais* as good law."⁶⁷

Recently, the Supreme Court indicated its reluctance to permit government regulation of racist or otherwise derogatory speech. In *R.A.V. v. City of St. Paul*,⁶⁸ the Court struck down a Minnesota city ordinance that banned speech that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."⁶⁹ In declining to follow *Beauharnais*, Justice Scalia noted that "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."⁷⁰

60. *Beauharnais*, 343 U.S. at 259.

61. *See id.* at 251, 264.

62. *See* CHEMERINSKY, *supra* note 55, at 978.

63. *See id.* (stating that "*Beauharnais* is based on the assumption that defamation liability is unlimited by the First Amendment—a premise expressly rejected by the Supreme Court a decade later in *New York Times v. Sullivan*" and that "the Illinois statute upheld in *Beauharnais* almost certainly would be declared unconstitutional today based on vagueness and overbreadth grounds").

64. *Id.*

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

66. *See* CHEMERINSKY, *supra* note 55, at 979.

67. *Id.*

68. 505 U.S. 377 (1992).

69. *Id.* at 380.

70. *Id.* at 391.

The Court's decisions in *Skokie* and *R.A.V.* indicate the current status of hate speech under U.S. law: While offensive or injurious to the individuals it targets, it is nevertheless protected under the First Amendment.⁷¹ Additionally, symbols of hate, such as swastikas, are accorded this same constitutional protection. Thus, although the government may have a valid interest in protecting individuals from hateful invective, such concerns do not overcome the constitutional protection of speech.

3. Constitutional Protection of the Internet Medium

Most attempts at regulation of communications media have typically focused on the protection of children from obscene⁷² and indecent⁷³ language.⁷⁴ In evaluating the constitutionality of such regulation, the Supreme Court has taken a medium-by-medium approach. For example, radio and television are not entitled to the same First Amendment protection as newspapers.⁷⁵ This raises the question of whether speech on the Internet should receive full protection under the First Amendment, or whether online content should be regulated because the Internet is more similar to television and radio than it is to newspapers.⁷⁶

The Supreme Court answered this question in *Reno v. ACLU*,⁷⁷ where it overruled portions of the Communications Decency Act of 1996

71. *See id.* at 391–92.

72. The test for obscenity is as follows:

(a) [W]hether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (internal citations omitted).

73. Indecency has never been as fully explained as obscenity—it does not meet the standard for obscenity, but does contain offensive sexual language and is generally protected by the First Amendment.

74. *See, e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816–27 (2000) (holding that “signal blocking,” which protects children from night cable porn, is unconstitutional); *FCC v. Pacifica Found.*, 438 U.S. 726, 748–51 (1978) (upholding restrictions on indecent speech on radio because government has a duty to protect children).

75. FCC regulation of radio and television is permitted based on the scarcity of broadcast channels and to provide for the needs of viewers and listeners rather than licensed broadcasters. *FCC v. League of Women Voters*, 468 U.S. 364, 376–77 (1984). Some courts have held that the government has less ability to regulate the program content of cable television compared to that of broadcast television. *See, e.g.*, *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985). Different FCC regulations, however, apply to the commercial use of phones lines. *Sable Communications v. FCC*, 492 U.S. 115, 120 (1989).

76. *See F. LAWRENCE STREET & MARK P. GRANT, LAW OF THE INTERNET* § 8.05[1] (2002).

77. 521 U.S. 844 (1997).

(“CDA”). In passing the CDA, Congress attempted to criminalize the transmission of obscene and indecent material over the Internet in a manner that was easily available to children.⁷⁸ Affording the Internet the same protection as newspapers, speeches, and conversations in the city park, the Court held that regulation of indecent speech on the Internet was an unconstitutional violation of the First Amendment.⁷⁹ The Court noted that because the Internet is a unique medium that has never been subject to government regulation, it should be afforded the highest level of First Amendment protection.⁸⁰ Additionally, several Justices were concerned that such vague and overbroad terms as “indecent” and “patently offensive” would provoke uncertainty among speakers, and effectively chill speech.⁸¹ Further, the Court noted that the breadth of the CDA’s coverage was wholly unprecedented⁸² and that it “effectively censor[ed] discourse” on the Internet.⁸³ While the Court recognized that protecting children from potentially harmful material on the Internet is a compelling interest, it also maintained that “[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”⁸⁴

Although the portions of the CDA pertaining to indecent speech on the Internet have been ruled unconstitutional, the portion protecting Internet Service Providers (“ISPs”) remains intact. Section 230 of the CDA states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁸⁵ This section effectively grants ISPs complete immunity from liability for speech located on their servers. Such unprecedented release from liability is one of the distinguishing factors that sets the United States apart from the rest of the world in Internet regulation—or more accurately, “non-regulation.”⁸⁶

78. *See id.*

79. *See id.* at 849.

80. *See id.* at 868–70.

81. *Id.* at 870–74.

82. *See id.* at 877.

83. *Id.* at 879.

84. *Id.* at 869, 885.

85. 47 U.S.C. § 230(c)(1) (2000).

86. For detailed analysis of factors that set the United States apart from the international community regarding Internet regulation, see discussion *infra* Part III.B.

4. Limits of Protection for Hate Speech on the Internet

Although the Internet—as a medium of communication—and hate speech enjoy broad protection under the First Amendment, their protection is not without limitations. Indeed, the government can lawfully regulate hate speech on the Internet if it is threatening or harassing, if it incites the listener to illegal action.

a) Threatening Speech

Under both common law⁸⁷ and federal civil rights law,⁸⁸ speech that intends to “inflict punishment, loss, or pain on another, or to injure another by the commission of some unlawful act,” receives no First Amendment protection.⁸⁹ In fact, if successfully prosecuted, the user of such threatening speech will face stiff legal consequences. In order to be punishable, however, the speech must be deemed a “true” threat.⁹⁰ In applying this principle to the Internet, several recent decisions have upheld convictions for threats that were motivated by racial animus or that involved the use of racial epithets.⁹¹

b) Harassing Speech

In general, harassing speech is speech that is persistent and pernicious, inflicts significant emotional or physical harm, and is directed at a specific individual.⁹² Although blanket statements expressing hatred of an ethnic, racial or religious group generally cannot be prosecuted, such speech may rise to the level of harassment even if it does not specifically mention the victim.

c) Incitement to Illegality

Although the First Amendment does not protect incitement to violence or other unlawful action, the standard the government must meet to regulate such speech is very exacting. Under the test established by the

87. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (excluding “fighting words” from First Amendment protection).

88. See 18 U.S.C. § 245 (2000).

89. This is the meaning of “threat,” as defined according to BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 7th ed. 1999).

90. For the test of a “true” threat, see *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 23 F. Supp. 2d 1182, 1189 (D. Or. 1998) (stating that “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”).

91. See, e.g., *United States v. Machado*, 195 F.3d 454, 457 (9th Cir. 1999).

92. ADL REPORT, *supra* note 49, at 4.

Supreme Court in *Brandenburg v. Ohio*,⁹³ the government may punish speech if it is intended and is likely to cause imminent illegality. Nevertheless, it is unlikely that hate speech—or any other speech that proposes immediate violence—on the Internet will ever be punishable under this test. As an attorney for the Justice Department notes, Web sites “lack[] the potential for imminent incitement [to violence].”⁹⁴ With the “speaker” and “listener” separated as they are on the Internet, it is extremely difficult for the government to show that posting a message will cause the recipient of that message to engage immediately in the proposed violent or illegal act.⁹⁵ Thus, while such speech is not protected under the First Amendment, the government has yet to bring a successful claim of incitement to illegal action over the Internet, and is unlikely to succeed any time soon.

5. Synthesis: U.S. Protection of Online Hate Speech

Free speech is among the most protected of American ideals. Nevertheless, when joined with conduct that threatens, harasses, or incites illegality, speech loses its First Amendment protection. This is true for hate speech on the Internet. When divorced from this unprotected expression, however, it is clear that in the United States, “pure” hate speech benefits from near absolute First Amendment protection.

B. INTERNATIONAL APPROACHES

1. Contrasting International Responses to Internet Speech

Outside the United States, regulation of speech on the Internet is the norm rather than the exception. From complete censorship and government-enforced firewalls to the establishment of “voluntary” self-policing regimes, each country typically regulates Internet speech much as they would any expressive communication. Because most countries have a much lower threshold for limiting speech than the United States, such regulations are unlikely to conflict with any First Amendment-type protection.

93. 395 U.S. 444, 447 (1969).

94. Olson, *supra* note 36, (quoting U.S. Justice Department attorney Philip Reitingger).

95. For more in-depth discussion of the protective formulation of the incitement test, see CHEMERINKSY, *supra* note 55, at 964–65.

China has been described as “[t]he most Draconian of all Internet regulators.”⁹⁶ By forcing all Internet users to register with the police and imposing “blackouts” on sites featuring topics deemed subversive or offensive, the Chinese government retains tight control over access to all information on the Internet.⁹⁷ Similarly, the governments of Singapore and Vietnam, which like China have traditionally controlled access to all communications media, and broadly censored and restricted access to Internet speech through a system of firewalls.⁹⁸ Additionally, on a regional basis, members of the Association of Southeast Asian Nations (including Singapore, Vietnam, Brunei, Malaysia, Indonesia, Philippines, and Thailand) have agreed to police the Internet and block access to any site that conflicts with vaguely defined “Asian values.”⁹⁹

In the Middle East, censorship of the Internet is achieved largely through the state-owned telecommunications monopolies.¹⁰⁰ In accordance with strict Islamic law, any offensive content, as determined by the government, is vigorously blocked.¹⁰¹ Although most regulation seeks to block access to pornographic and obscene material, such broad governmental control invariably constrains all Internet expression for those to whom the regulations apply.

Western democratic nations typically afford their citizens greater protection of expression than Asian and Middle Eastern countries, but regulation of the Internet nonetheless remains commonplace. Specifically, Western governments have been ardent in their attempts to eradicate hate speech from the Internet. To illustrate, in the United Kingdom, Part III of the Public Order Act of 1986 prohibits behavior intended or likely to stir up racial hatred.¹⁰² In France, it is illegal to exhibit or sell objects that incite

96. Greg Miller, John-Thor Dahlburg, Vanora Bennett & David Holley, *The Cutting Edge; Testing the Boundaries: Countries Face Cyber Control in Their Own Ways*, L.A. TIMES, June 30, 1997, at D1.

97. Clare Haney, Rob Guth, Terho Uimonen, David Legard, Jeanette Borzo, Joanne Taafe, Kristi Essick, Margaret Johnston, Elizabeth DeBony, Marc Ferranti, Pavel Houser & Lisbeth Egeskov, *Censorship on the 'Net: The View from Overseas*, NETWORK WORLD, Oct. 27, 1997, at 51.

98. *See id.*

99. Michael L. Siegel, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare*, 9 ALB. L.J. SCI. & TECH. 375, 392 (1999) (noting that “Asian values” could be construed to mean any speech that runs counter to the government’s views—in addition to hate speech).

100. Stuart Wallace, *Cyberspace Waves Fail to Wash Away Gulf Taboos*, AGENCE FRANCE-PRESSE, Apr. 20, 1999, 1999 WL 2586883.

101. *See Siegel, supra* note 99, at 392.

102. Douglas-Scott, *supra* note 41, at 317.

racial hatred.¹⁰³ A French court recently has held U.S.-based Yahoo, Inc. liable for allowing French citizens to access auction sites for World War II Nazi memorabilia.¹⁰⁴ Further, France, Austria, and Germany have passed laws that criminalize the denial, trivialization, or approval of the Holocaust in print or any other media.¹⁰⁵

Regionally, the European Union has established the European Convention for the Protection of Human Rights and Fundamental Freedom (“ECHR”) to promote the “safer use of the Internet by combating illegal and harmful content,” including “racist and xenophobic ideas.”¹⁰⁶ Known as the “action plan,” the European Union likely has instituted this policy in response to “its World War II legacy of genocide and its recent history of ethnic strife in the Balkans.”¹⁰⁷ Even nations such as Canada and Australia that have no history of extremist hate have imposed regulations against hate speech.¹⁰⁸

Contrasting U.S. protection of speech with Asian or Middle Eastern countries is a straightforward procedure with a predictable outcome. In general, the United States provides vastly more protection of speech than do the other two regions. To best illustrate the uniqueness of the American protection of Internet speech, it is important to contrast such protection with that provided by countries with values and ideologies similar to the United States. Thus, an analysis of German law, which diametrically opposes American Internet speech protection, and Canadian law, which lies somewhere between the protection afforded under German and U.S. law, is a powerful way to draw out this distinction.

2. German Response to Internet Hate Speech

Although freedom of speech is a central tenet in both the German and American legal frameworks, Germany’s interpretation of this right is fundamentally different from that of the United States.

a) German Constitutional Framework

103. *French Court Imposes Speech Restrictions Beyond Its Borders*, Center for Democracy & Technology, at <http://www.cdt.org/speech/international/001120yahoo.shtml> (Nov. 20, 2000) [hereinafter *French Speech Restrictions*].

104. *Id.*

105. See Douglas-Scott, *supra* note 41, at 318–19.

106. ADL REPORT, *supra* note 49, at 25 (quoting from the European Union “action plan”).

107. Olson, *supra* note 36.

108. See Erin Butler, *Internet Regulation As a Global Phenomenon*, MCGILL TRIB. *via* U. WIRE, Nov. 7, 2000 (stating that Canadian government has granted the ISP providers five years exemption from the specified content regulations required for other forms of media).

The Grundgesetz, or Basic Law, is the foundation of the German constitutional system. Adopted in the aftermath of World War II, drafters of the Basic Law were careful to include broad guarantees for expression and information rights as means to prevent any recurrence of Nazi-type totalitarianism.¹⁰⁹ Article 5, Clause 1 of the Basic Law provides that “everybody has the right freely to express and disseminate their opinion orally, in writing or visually and to obtain information from generally accessible sources without hindrance.”¹¹⁰ Additionally, the Basic Law specifically notes that “[t]here shall be no censorship.”¹¹¹

Superficially, protection of free speech under the German framework seems more absolute than that in United States. The second clause of Article 5 circumscribes this protection, however, by stating that all “rights are subject to limitations embodied in the provisions of general legislation, statutory provisions for the protection of young persons and the citizen’s right to personal respect.”¹¹² Additionally, all rights and guarantees for free speech are conditioned on the guarantee of “human dignity” as established in Article 1 of the Basic Law. In fact, although individual rights such as free speech are incorporated, the Basic Law places the highest value on human dignity.

To enforce its hierarchy of rights, the Basic Law establishes a “militant democracy” whereby the government may limit an individual’s expressive right if it conflicts with other people’s rights, public order, or criminal laws.¹¹³ Indeed, “[b]asic rights, including the right to free speech, can . . . be trumped if their exercise is seen as a threat to the fundamental constitutional structure itself.”¹¹⁴ Thus, the Basic Law essentially enables the government to make content-based exceptions to protected speech through legislation. It is through this balance of societal interests that the German Federal Constitutional Court (“FCC”) has upheld the constitutionality of laws restricting Internet hate speech.

b) German Civil Law

Through recent enactments and the application of existing civil law, the German legislature has imposed severe penalties for hate speech on the

109. See McGuire, *supra* note 46, at 765.

110. GRUNDGESETZ [GG] [Constitution] art. 5 (F.R.G.), translated in DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY app. at 344 (1994).

111. *Id.*

112. *Id.*

113. Rappaport, *supra* note 52, at 786.

114. McGuire, *supra* note 46, at 766.

Internet. Under Article 131 of the German Penal Code (“StGB”),¹¹⁵ it is illegal to write or broadcast anything that incites racial hatred or describes “cruel or otherwise inhuman acts of violence against humans in a manner which glorifies or minimizes such acts.”¹¹⁶ Publication or distribution of neo-Nazi or Holocaust denial literature is not only prohibited, but is a criminal offense.¹¹⁷ Laws banning Nazi propaganda, the Hitler salute, and other symbols associated with the Nazi regime reflect Germany’s acute anxiety toward extremist political speech.¹¹⁸

To thwart access to extremist online propaganda, German lawmakers passed the Information and Communication Services Act (“ICSA”). As Europe’s first comprehensive Internet content control legislation, the ICSA has three main effects on Internet content in Germany. First, it subjects ISPs to liability for knowingly making illegal content, such as Holocaust denial material, “available for use” if it is “technically possible to halt in transmission.”¹¹⁹ Second, it mandates the creation of a “cyber sheriff[]” to troll for objectionable content.¹²⁰ Third, the ICSA makes it a crime to disseminate or make accessible materials deemed harmful to children.¹²¹ Under the rubric of militant democracy, German courts have rigorously enforced and upheld these regulations.

c) Application of German Law to Internet Hate Speech

Due in large part to its aggressive legislation regulating hate and indecent speech on the Internet, many commentators have dubbed Germany one of the “most Internet-unfriendly nations in the global press.”¹²² A brief chronology of recent Internet-related incidents seems to justify this.

Germany first applied its Criminal Code to the Internet in 1995, when the Munich Public Prosecutor investigated CompuServe for violating obscenity regulations.¹²³ Fearing criminal sanctions, CompuServe blocked

115. § 131 ¶ 1 StGB, translated in STEPHEN THAMAN, *The German Penal Code 92* (American Series of Foreign Penal Codes No. 32, 2002).

116. *Id.*

117. Rappaport, *supra* note 52, at 787.

118. *See id.*

119. Art. 1 § 5 ¶ 2 luKDG, translated in FED. MINISTRY OF EDUC., SCI., RESEARCH & TECH., *FEDERAL ACT ESTABLISHING THE GENERAL CONDITIONS FOR INFORMATION AND COMMUNICATIONS SERVICES* (Aug. 1, 1997), available at <http://www.iid.de>.

120. Rappaport, *supra* note 52, at 794.

121. *See* Art. 6 luKDG.

122. Rappaport, *supra* note 52, at 788.

123. *See* ADL REPORT, *supra* note 49, at 21.

access to 200 Web sites for four million subscribers in 147 countries.¹²⁴ In 1996, the Manheim Public Prosecutor's office formally charged Ernst Zündel, a German citizen residing in Canada, of violating Section 131 of the German Criminal Code (depiction of violence).¹²⁵ While Zündel published his Holocaust-denial Web site in the United States, and thus seemingly evaded the reach of Germany's laws, Section 9 of the German Criminal Code attaches liability to anyone who commits a crime that has effects within German borders.¹²⁶ Since Zündel had not subjected himself to Germany's jurisdiction, however, he did not face prosecution.¹²⁷ Nonetheless, the German government made it clear that any ISP within German borders providing access to Zündel's or similar sites could face criminal liability. This strong statement prompted T-Online, the largest ISP in Germany, to drop access to Zündel's site. In spite of this attempt to avoid criminal liability, T-Online faced criminal liability that same year for allowing the distribution of neo-Nazi material on its site. T-Online eventually revoked access to 1,500 websites that contained both objectionable and nonobjectionable material.¹²⁸

As one commentator has noted, the threat of criminal sanctions to ISPs for violating German law is the effective equivalent of "electronic book burning."¹²⁹ Repeatedly, the German government has controlled and censored Internet content it deems to be undesirable. This was the case in 1997, when German authorities blatantly censored the Web site of *Radikal*, an underground Berlin magazine, for advocating the overthrow of the German government.¹³⁰

Germany was the first among Western democratic nations to regulate online hate speech. It also became the first among these nations to indict an executive from an online service provider for permitting illegal Internet content. In 1998, CompuServe Germany's general manager, Felix Somm, was prosecuted and convicted under the ICOSA as an accessory to the dissemination of Hitler images and Nazi symbols.¹³¹ While overturned in

124. McGuire, *supra* note 46, at 769.

125. ADL REPORT, *supra* note 49, at 21.

126. *See id.* at 22.

127. This can be contrasted with the 1999 Toben case, where an Australian national, Frederick Toben, was arrested, convicted, and sentenced to jail during a trip to Germany for violating Germany's anti-Holocaust denial laws by posting such information on a site hosted by an Australian ISP. *See* ADL REPORT, *supra* note 49, at 21-22.

128. *See* Credence Fogo-Schensul, *More than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms*, 33 GONZ. L. REV. 241, 268-69 (1997/98).

129. Rappaport, *supra* note 52, at 789.

130. *Id.*

131. *See* McGuire, *supra* note 46, at 769 & n.102.

1999, his conviction sent a warning to all ISPs that they can be held liable in Germany for the content on their servers if they do not take the necessary precautions.

d) Synthesis: German Protection of Online Speech

Textually, Article 5 of the German Basic Law and the American First Amendment appear very similar. In application, however, they are interpreted very differently. While the United States focuses on rights and liberties of the individual, Germany focuses on guarantees to the greater community. As a result, the protection for online speech under U.S. law is very broad, whereas protection in Germany is guaranteed only within narrow limits.

3. Canadian Response to Internet Hate

Much like Germany's Basic Law, the Canadian Charter of Rights and Freedoms guarantees the freedom of speech with limitations. However, unlike Germany and similar to the United States, Canada interprets these limitations very narrowly, and rarely upholds restrictions on speech. As such, Canada represents the middle ground in protection of speech, with Germany and the United States on either side.

a) Canadian Charter of Rights and Freedoms

Section 2 of Canada's constitution, the Charter of Rights and Freedoms, guarantees Canadians the right to free speech.¹³² In interpreting this guarantee, the Canadian Supreme Court has repeatedly held that both the content and the value of the speech affected by a law must be considered in determining whether to uphold restrictions on speech.¹³³ This highly contextual approach to free speech epitomizes the Canadian social order. As a self-declared "communitarian culture," Canadian courts reflect this spirit by balancing "individuals' free speech rights with societal equality interests."¹³⁴ When confronted with hate speech in particular, the Canadian Supreme Court has noted that it is the "uniquely Canadian vision of a free and democratic society" that necessitates a departure from the American view that "the suppression of hate propaganda is incompatible with the guarantee of free expression."¹³⁵ Under this rationale, the

132. See CAN. CONST. (Constitution Act, 1981) pt. I (Canadian Charter of Rights and Freedoms), §2, available at <http://www.tourolaw.edu/publications/internationallawrev/vol6/part1.html>.

133. See Gosnell, *supra* note 38, at 390-91.

134. Fogo-Schensul, *supra* note 111, at 250.

135. The Queen v. Keegstra, [1990] S.C.R. 697, 743 (quoting Canadian Supreme Court in sustaining Keegstra's conviction).

Canadian Supreme Court has upheld the statutory regulations against hate speech.

b) Canadian Criminal Code

In maintaining that free expression values are not severely abridged by suppressing hate propaganda, Canadian courts have held that anti-hate speech laws are permissible. Under Sections 318 and 319 of the Canadian Criminal Code, it is illegal to advocate or promote genocide and to communicate statements outside of private conversation that willfully promote or incite hatred against any identifiable group.¹³⁶ Additionally, Section 320 grants judges the authority to seize any “hate propaganda” in their jurisdiction, limited only by “reasonable grounds” for believing that such material exists.¹³⁷ To achieve the appropriate balance of societal and individual interests, however, the courts have created a rather subjective, multi-factored test that balances the “pervasiveness, [and] convincingness” of the hate speech against “the likely chilling effects of regulation in a particular medium.”¹³⁸

Although one may assume that the mere criminalization of hate speech in Canada implies a greater tendency there than in the United States to suppress such expression, enforcing these measures has proved rather difficult for the Canadian government. In fact, the only hate-speech case where the government has been able to meet its burden under the Criminal Code concerns the conviction of a high-school teacher for teaching Holocaust-denial material to his students.¹³⁹

c) Canadian Human Rights Act

Enacted as a civil measure, the Canadian Human Rights Act (“CHRA”) supplements the existing rights of, and provides additional protections for, all Canadians. As with the Criminal Code, provisions prohibiting the use of hate speech under the CHRA have been “upheld as reasonable limitations [of speech] under [S]ection 1 of the right to freedom of expression . . . of the Canadian *Charter of Rights and Freedoms*.”¹⁴⁰

136. See R.S.C., ch. C-46, §§ 318–19 (1985) (Can.).

137. *Id.* § 320.

138. Gosnell, *supra* note 38, at 419.

139. Under the Canadian Criminal Code, the government has to show that: 1) the statement’s conscious purpose was to promote hatred; 2) it was directed towards an identifiable group distinguishable by color, race, religion or ethnic origin; 3) it was made other than in private conversation; 4) it was not part of a good faith argument on a religious subject; 5) it was not in good faith attempting to point out for the purpose of removal matters tending to produce feelings of hatred (“media exception”); and 6) it was not true. See R.S.C., ch. C-46 §§ 318–19.

140. Gosnell, *supra* note 38, at 390.

Among these provisions is Section 13, which “addresses the telephonic communication of bigotry” and protects against hatred or contempt “that is based on “race, religion, or another prohibited ground of discrimination.”¹⁴¹ To enforce this limitation on speech, a Human Rights Tribunal has been established under the auspices of the CHRA, vested with the power to “order” the defendant to “stop the discriminatory behavior.”¹⁴² Although limited to issuing civil and equitable remedies, it is through this system that the only Canadian case against online hate speech has been successfully brought.

d) Application of Canadian Hate Speech Regulations to the Internet

In 1997, Ernst Zündel was brought before the Human Rights Tribunal. Zündel—the same man who faced criminal liability in Germany for publishing a Holocaust denial Web site—faced similar charges in Canada under Section 13 of the CHRA for communicating “material that discriminates on the grounds of race, religion, and national or ethnic origin.”¹⁴³ The Web site, entitled “Zundelsite,” contained a “stylized logo that resembles a swastika and posts information that . . . depicts Jews as liars who are corrupt and control governments.”¹⁴⁴ In ordering Zündel to close his Internet site, the Tribunal noted that the “the benefit [of limiting the right of free speech] continues to outweigh any deleterious effects on the Respondent’s freedom of expression.”¹⁴⁵

No case has yet been brought against online hate speech under the Canadian Criminal Code. While some have argued that “communication” under Section 319 is ambiguous, the court has defined it broadly to encompass any statement made over the “telephone, broadcasting or other audible or visible means,” and by extension, the Internet.¹⁴⁶ In arresting several Canadian Skinheads affiliated with the Charlemagne Hammer Skins, a white supremacist group, for promoting racial hatred on their Web site, British and French authorities cited the Canadian Criminal Code as justifying the Skinheads’ detention.¹⁴⁷

e) Synthesis: Canadian Protection of Online Speech

141. ADL Report, *supra* note 49, at 22 (internal quotations omitted).

142. *Id.* at 23.

143. *Id.*

144. CP, *Hate Ruling on Tap This Spring*, EDMONTON SUN, Feb. 27, 2001, at 19.

145. Citron v. Zündel (Jan. 14, 2002) (Canadian Human Rights Tribunal), at <http://www.chrt-tcdp.gc.ca/decisions/docs/citron-e.htm>.

146. ADL REPORT, *supra* note 49, at 22.

147. *See id.* at 23.

Like the United States and unlike Germany, Canada provides protection for ISPs under Section 3 of the Human Rights Charter. However, unlike the United States, and like Germany, Canada has prosecuted individual publishers of Internet hate speech based on the content of their messages. Until the ramifications of the *Zündel* ruling have been ascertained, however, it is unclear if the Canadian courts are willing to allow any further restriction of online speech.

C. SYNTHESIS: AMERICAN AND INTERNATIONAL PROTECTION OF ONLINE SPEECH

It is evident that the United States remains the most protective of speech in the international community. While it has permitted some regulation regarding obscenity,¹⁴⁸ child pornography,¹⁴⁹ and expressive conduct,¹⁵⁰ the United States has yet to introduce any restrictions on racist or otherwise hateful speech. As one legal scholar notes, “The United States stands alone, even among democracies, in the extraordinary degree to which its [C]onstitution protects freedom of speech and of the press.”¹⁵¹

Although the constitutions of both Germany and Canada enshrine free speech as a fundamental right for their citizens, this right is not accorded the same, near absolute, protection that it has received in the United States. For historical and political reasons, both Canada and Germany have subjugated free speech principles to the overriding good of the community. For example, in Germany, the atrocities that resulted from racial extremism during the Second World War have compelled the Germans to remain vigilant against hate speech in an attempt to stem future fanaticism before it begins. To this end, speech that is hateful or denies the horrors of the Holocaust is proscribed. Likewise, in Canada, where the government and court system are traditionally more liberal than their counterparts in the United States, the Charter of Rights and Freedoms upholds community rights in a manner that overrides the rights of the individual. Indeed, many democratic socialist systems in Europe espouse this communitarian ideology. In placing the community before the individual, countries that

148. See generally *Miller v. California*, 413 U.S. 15 (1973) (stating that regulation of speech is permitted when it meets the test for obscenity).

149. See generally *New York v. Ferber*, 458 U.S. 747 (1982) (stating that government has a compelling interest in prohibiting child pornography).

150. See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (stating that government can regulate speech that incites illegality).

151. Ronald Dworkin, *The Coming Battles Over Free Speech*, N.Y. REV. BOOKS, June 11, 1992, at 55, at <http://www.nybooks.com> (on file with author).

adopt this approach are, ipso facto, less tolerant of speech by an individual if it impinges the values of the community.

In sharp contrast, the American ideology is one that values the individual over the community. As evidenced by the protection afforded speech, individuals have great latitude in expressing themselves, even at the expense of others. Yet, while the protection of this guarantee provides benefits to all Americans, they do not come without their costs.

IV. RAMIFICATIONS OF PROTECTING ONLINE HATE SPEECH

A. UNITED STATES IMPORTS HATE

To bypass the increasingly strict international regulation of online hate speech, racists, revisionists, homophobes, and seemingly every other intolerant group seek refuge on American ISPs. By posting their Web sites on American ISPs, hate groups take full advantage of the First Amendment's protection of speech. As one journalist has noted, "any thwarted radical can find fellowship on the Internet—mostly . . . on the uncensored U.S. information highway."¹⁵² The broad speech rights guaranteed by the U.S. Constitution create a "safe haven for foreign haters."¹⁵³ This is largely the result of most nations' unwillingness to assert jurisdiction outside their borders. As a British lawyer observes, "extra-territorial jurisdiction is frowned upon"¹⁵⁴ in the international community. Rather, nations appear willing to prosecute only those individuals who violate laws within their borders. Although the complexity of extra-territoriality on the Internet has blurred national borders, "a country's exercise of its jurisdiction within its own borders appears to be a more reasonable starting point for dealing with varying national cultural norms about Internet content."¹⁵⁵

In documenting the movement of "foreign haters" to the United States, Rabbi Abraham Cooper of the Los Angeles-based Simon Weisenthal Center has watched the number of hate-related sites in the United States

152. Carol J. Williams, *Cyber-Hate Panelists Duel Over Line Between Free Speech, Racism*, L.A. TIMES, June 27, 2000, at A18.

153. ADL REPORT, *supra* note 49, at 20 (internal quotations omitted).

154. Jean Eaglesham, *A Lost Connection: A French Decision to Hold Yahoo! Responsible for Allowing Access to Nazi Memorabilia in the U.S. Raises Questions About the Boundaries to Rulings by National Courts*, FIN. TIMES (London), Nov. 21, 2000, at 28 (quoting Ian De Freitas, a lawyer at the English law firm of Paisner & Co.).

155. *French Speech Restrictions*, *supra* note 103.

skyrocket from one in 1995 to over 3,000 in a span of five years.¹⁵⁶ Rabbi Cooper notes that “[t]he single largest growth is from European extremist groups migrating their Web sites to the U.S.”¹⁵⁷ Indeed, in 1998, the German Federal Office for Protection of the Constitution “found [ten] Web sites, some of which ‘disseminate seditious propaganda,’ that German extremists operate via foreign providers.”¹⁵⁸ Included in this migration are Ernst Zündel’s revisionist “Zündelsite,” located in California, and the Charlemagne Hammer Skin’s “Freedom Site,” located in Florida.¹⁵⁹ Both sites moved from Canada to the United States due to Canadian legal and social pressures.¹⁶⁰

There are a host of undesirable repercussions because of this migration of hate,¹⁶¹ and they do not accrue only to Americans. In fact, the most devastating ramifications of America’s broad speech protection likely fall upon those nations struggling to regulate online speech.

B. UNITED STATES INTERFERES WITH FOREIGN DOMESTIC POLICY

In connecting millions of computers with millions of subscribers around the world, the Internet has “shattered many geographic, social, and political boundaries.”¹⁶² Because the United States protects ISPs and Web publishers from liability for online content, any nation that has access to the Internet also has access to the broad array of content provided in America. But because most countries limit speech to a degree unacceptable in the United States, many nations have faced a difficult decision: Establish a firewall to block the unacceptable content from entering their country, or allow for more limited government censorship by restricting access to specified material through filters and “cyber policing.” In either case, it is evident that the protection of speech in the United States dramatically reduces the likelihood that nations who wish to regulate online speech will be able to do so.

156. See Victoria Shannon, *From France, Yahoo Case Resonates Around Globe*, INT’L HERALD TRIB. (France), Nov. 22, 2000, at 1.

157. *Id.*

158. ADL REPORT, *supra* note 49, at 21.

159. *See id.* at 24.

160. *See* references *supra* Part III.B.3.d (discussing Ernst Zündel’s prosecution in Canadian courts).

161. *See* discussion *supra* Part I (discussing implications of increase in Internet hate in United States).

162. Stephen A. Sharkey, *The Proliferation of Hate Speech on the Internet: What Can Be Done?*, Computers & The Law, at http://law.buffalo.edu/Academics/courses/629/computer_law_policy_articles/CompLawPapers/sharkey.htm (Spring 1997) (unpublished manuscript).

The free flow of information on the Internet threatens the fundamental political ideology of many nations. This is true because “[g]overnments of each country have differing views as to what they regard as intolerable information.”¹⁶³ For example, many Asian countries are deeply suspicious of Western culture and accordingly, limit access to the Internet. In these countries, the Internet is viewed as the embodiment of Western ways.¹⁶⁴ As one scholar notes:

[Asian a]ttitudes toward the Internet are deeply rooted in culture; while traditional Asian cultures value moral and economic order, as well as its official enforcement, such actions would offend Western ideas of personal independence and individualism. In addition, the Internet’s brassy open information-exchange paradigm runs contrary to Eastern culture’s subdued, more guarded methods of communication.¹⁶⁵

This aversion to unabated communication is not limited to Eastern countries with histories of strictly limiting speech. Even traditionally “open” countries such as France have taken a narrow view of the Internet’s fluid system. One French citizen notes that the French government “doesn’t have an open mind about a medium that allows people to speak their thoughts, and especially a medium that is beyond the government’s control.”¹⁶⁶

On a regional level and in response to growing concerns about the recent rise of racist and xenophobic Internet sites in Europe, the European Union created a special consultative committee to address the problem. In a report subsequently issued by the Consultative Commission of Racism and Xenophobia, the EU urged member states to “take all needed measures to prevent [the] Internet from becoming a vehicle for the incitement of racist hatred.”¹⁶⁷ Reflecting their past confrontations with Nazi and other extremist political ideologies, most Europeans feel their concerns about online racist and hate speech are justified.¹⁶⁸

Nevertheless, states are “relatively powerless”¹⁶⁹ to prevent Internet users in one country from accessing hateful Internet material in the United

163. Steven M. Hanley, *International Internet Regulation: A Multinational Approach*, 16 J. MARSHALL J. COMPUTER & INFO. L. 997, 1001 (1998).

164. See Amy Knoll, *Any Which Way But Loose: Nations Regulate the Internet*, 4 TUL. J. INT’L & COMP. L. 275, 292 (1996).

165. *Id.*

166. Ginger Adams Otis, *Vive Le Censeur!*, VILLAGE VOICE, July 25, 2000, at 29 (internal quotations omitted).

167. Knoll, *supra* note 164, at 286 (internal quotations omitted).

168. Otis, *supra* note 166 (reporting that they want a ban on all hate speech).

169. Williams, *supra* note 152.

States. Recognizing the truth of this, it has been said that Canadian authorities “know that any attempt at national regulation will be a waste of time” and ask, “What’s the point [of trying to regulate] when the server can move across the border [to the U.S.]?”¹⁷⁰ Similarly, many German authorities have condemned the broad protection in the United States of online hate speech because such protection will effectively “undermine [German hate-speech] laws which are very important for ensuring that history in Germany is not repeated.”¹⁷¹ In fact, Germany recently “has conceded defeat to the cross-border reach of the Internet and given up trying to bar access to foreign-based neo-Nazi sites.”¹⁷² Admitting that shielding Germans from such sites is unrealistic, the German government, like many others, realized that ISPs outside its jurisdiction are, ipso facto, outside its control.

Such defeat is exactly what many American-based civil rights activists want. Organizations such as the Electronic Privacy Information Center and the Global Internet Liberty Campaign advocate the benefits of a censorship-free Internet.¹⁷³ Disavowing any restrictions of online speech, they maintain that the Internet is “[u]niquely [s]uited to [p]romoting [d]emocracy”¹⁷⁴ and “deserves the highest protection from government intrusion.”¹⁷⁵ Using the Eastern culture as a model, however, it is not at all clear that all cultures agree with democratic notions of individual liberty.¹⁷⁶ Indeed, as pointed out with Canada and Germany, even Western constitutional democracies vary in the degree to which they are willing to uphold individual liberties when they conflict with societal interests.

This then begs the question: Should the American legal system completely disregard the political and societal values of other nations by acting as a haven for online hate? As one American rabbi puts it, the French and Germans are simply saying, [I]n our societ[y], [restricting speech] is how we deal with the problems of hate, racism, and Holocaust

170. Butler, *supra* note 108.

171. ADL REPORT, *supra* note 49, at 22 (internal quotations omitted).

172. Adam Tanner, *Germany Won't Block Access to Foreign Neo-Nazi Sites*, JERUSALEM POST, July 31, 2000, at 6.

173. See James X. Dempsey & Daniel J. Weitzner, *GILC Principles*, Global Internet Library Campaign, at <http://www.cdt.org/gilc/report.html> (last visited Sept. 26, 2002); *Free Speech*, Electronic Privacy Information Center, at http://www.epic.org/free_speech/default.html (last modified Apr. 8, 2002).

174. Dempsey & Weitzner, *supra* note 173.

175. Richard Petersen, *Hate and Freedom on the Internet*, z publishing, at <http://www.zpub.com/sf/hate.html> (June 13, 1996) (internal quotations omitted).

176. See discussion *supra* Part IV.B (noting that Asian cultures are wary of the broad freedoms granted to citizens in many Western cultures).

denial You in America have your own laws, but at least respect our values.”¹⁷⁷ The American response, however, is not accommodating to this appeal.

V. AMERICAN RESPONSE: INTERNET HATE IS NOT OUR PROBLEM

The United States faces a very difficult choice: either begin regulating online hate speech, or persist on its current course and continue to protect it. There is no middle ground. One step the U.S. government can take, however, is to engage actively the international community and to find a common solution to this problem.

A. COMMON GROUND?

Some argue that a common solution is the problem. Critics contend that achieving a common ground for legal regulation is a practical impossibility, as laws tend to reflect each country’s own national customs and national interests.¹⁷⁸ These same detractors insist that “any attempts to achieve an international agreement on the appropriate level of protection of online content . . . are . . . unrealistic,”¹⁷⁹ as “there’s nothing resembling consensus among the nations of the world on what can properly flow across [territorial boundaries].”¹⁸⁰ This fractured foundation exists even among members of regional groups like the European Union, where certain Internet acts are criminally punishable in one member state but not in another.¹⁸¹

Other commentators, however, are more optimistic. They contend that even between nations with such divergent viewpoints on the issue of online speech as Germany and the United States, there is agreement that obscenity and child pornography are outside the scope of protection.¹⁸² While this represents a small step when compared to the international scale of consensus that must be achieved, it is, nevertheless, a step.

177. Steve Kettmann, *German Hate Law: No Denying It*, WIRED NEWS, Dec. 15, 2000, at <http://www.wired.com/news/print/0,1294,40669,00.html> (internal quotations omitted).

178. See Amy Harmon, *Internet Tests Boundaries of Decency—and Nations; Computers: Cyberspace May Be Making Laws of Any One Country Irrelevant, Shifting Power from Governments*, L.A. TIMES, Mar. 19, 1997, at A1.

179. Rappaport, *supra* note 52, at 812.

180. Harmon, *supra* note 178.

181. See *id.*

182. See Rappaport, *supra* note 52, at 788.

B. AMERICAN INDIFFERENCE

The United States, however, has disregarded the significance of this and similar points of accord. Instead of pursuing an active dialogue with foreign leaders to reach consensus on a global level, American policymakers have withdrawn from the international scene, appearing unconcerned with a problem that seemingly does not affect them.¹⁸³

An illustration of this indifference occurred in the Spring of 2000, when the United States failed to send any representatives to an international conference on Internet extremism.¹⁸⁴ Hosted by the German Justice Minister, the conference attempted to establish an international minimum level of acceptable regulation. The United States was noticeably absent.

United States officials respond that regulation of speech is not a solution consistent with current U.S. law.¹⁸⁵ Sending an official to a conference that seeks to impose limitations on protected speech would justifiably create a firestorm of public outcry from American citizens. Thus, it is not insensitivity to international problems, but rather a response to political realities, that keeps U.S. officials from participating in the international dialogue on Internet hate speech.

Although the United States does not need to support, nor will it support, restrictions of online hate speech, it is evident that completely disregarding the issue is not the solution. Rather, by engaging foreign authorities in constructive dialogue and finding basic points of agreement, such as the protection of children and the prosecution of those who incite illegal conduct, the United States could achieve aims that are compatible with its constitutional protections for speech, while still recognizing the differing cultural and political realities of foreign nations.

VI. SOLUTIONS?

While political and legal realities may inhibit American politicians from actively engaging the international community on hate speech regulations, it is clear that a dialogue with foreign leaders on this topic is still possible and desirable.

183. See Kimberly Hohman, *Fighting Hate on the 'Net*, About, at <http://racerelements.about.com/newsissues/racerelements/library/weekly/aa062800a.htm> (June 28, 2000).

184. See *id.*

185. See discussion *supra* Part III.A for an analysis of the current law in the United States regarding the regulation of online hate speech.

A. INDUSTRY-DIRECTED FILTERING REGIME

By encouraging leaders of the U.S. Internet industry to meet with their foreign counterparts to establish a self-regulatory system, the U.S. government could avoid the implications of directly espousing restrictions on speech. A convention of Internet executives, motivated by the potentially enormous market for effective filtering systems, arguably would be the most efficient way to deal with the many conflicting views regarding Internet speech regulation.

To accommodate the varying levels of restrictions on speech, such a system would need to be adaptable to fit each nation's needs. Current filtering systems are capable of being customized according to the content the viewer wants to screen out. By finding international consensus on a rating system, such filtering can occur according to the particular nation's parameters. For example, news sites can be classified by country of publication to allow countries that restrict access to foreign publications, such as China, to screen those out. Likewise, Web sites that include hate-related or obscene material can be classified as both hate-related and obscene, so that countries that regulate against one or both of those elements can screen them out.

The detail of the filtering system will be vital. Over-filtering will undoubtedly take place if, for example, a country allows hate material but not obscene material, and both are on the same page. This, unfortunately, may be a necessary implication of a universal filtering system. Still, internet users would prefer over-filtering to a complete ban on Internet use or to ultra-restrictive firewalls, which some countries now impose.

When using this system, some governments may choose to force local ISPs to subscribe to this worldwide filtering system. Many countries, such as China and Vietnam, already force their ISPs to filter out vast quantities of information. If this international regime of filtering is established, ISPs will only need to filter out Web sites containing unacceptable ratings, which would vastly facilitate the screening process. Conversely, for individuals in nations such as the United States, the filtering system would be purely voluntary. As evidenced by the popularity of existing filtering systems, many individual ISPs would gladly utilize an international filtering system that covers the entire Internet.

Each individual nation would be able to prevent access to hate-related material according to the particular ratings of those sites. Thus, the United States would not have to implement restrictions on speech in order to appease foreign leaders. Additionally, because access to hateful sites

would be restricted according to country, the United States would not likely become a haven for hate since access to those pages would be limited to nations where hate speech is not restricted.

In order to pursue this goal, however, it is evident that the United States needs to deal with the international community in an aggressive and affirmative manner. Even if international consensus on regulation is not realistic in the near future, the U.S. government should heed the valid concerns of other nations regarding hate speech and should encourage the private sector to investigate and institute effective solutions, such as a universal filtering system.

B. INTERIM MEASURES TO STEM ONLINE HATE

Like all regulation of the Internet, an internationally coordinated filtering system requires acceptance and application by every nation around the world to be effective. Because global consensus has yet to emerge, two interim alternatives are posed for curbing the effect of Internet hate speech: public/market pressure and parent-controlled filtering systems.

1. Public/Market Pressure to Reduce the Proliferation of Hate

Based on the assumption that ISPs, as animals of a market economy, will respond to the desires of those they host, it is likely that public pressure to restrict online content will be heeded. Although the First Amendment would seem to shield hate speech from any ISP censorship, the Constitution does not apply to private actors dealing with private contracts.¹⁸⁶ As such, commercial service providers generally reserve the right to block transmittals that fall outside their policies. As evidence of this increasing trend toward self-regulation, a majority of the large ISPs already actively enforce policies banning racist and hateful statements. For example, by marketing itself as a family-oriented computer network, Prodigy rigorously filters its network to screen out “profanity, and racial and ethnic slurs”;¹⁸⁷ Geocities, a California-based service provider, expressly prohibits hate groups;¹⁸⁸ and America Online and CompuServe

186. See CHEMERINSKY, *supra* note 55, at 486 (stating that “[t]he Constitution’s protections of individual liberties and its requirement for equal protection apply only to the government”).

187. Valerie Curry Bradley, *Cyberhate and the First Amendment*, Computers and the Law, at http://law.buffalo.edu/Academics/courses/629/computer_law_policy_articles/CompLawPapers/bradley.htm (Fall 1995) (unpublished manuscript).

188. See Sharkey, *supra* note 162.

both use a system of managers to monitor their networks for information that is “inconsistent with decorum and good taste.”¹⁸⁹

While not expressly noting their reasons for implementing restrictive policies toward invective speech, service providers likely have responded to the demands of their customers. In particular, two online retail stores, *Barnes and Noble.com* and *Amazon.com*, have explicitly stated recently that public pressure forced them to restrict their online sales. Responding to public outcry about selling Hitler’s autobiography, *Mein Kampf*, to Germany where it is banned, both of these stores removed the book from their German online inventory lists and refused any further shipments to Germany.¹⁹⁰

These represent only a few examples of the power of public pressure to curb Internet hate speech. Although there are many counterexamples,¹⁹¹ it is evident that public pressure is a valid and effective means to control the market for online hate speech and should be considered a viable weapon for those who wish to combat such speech.

2. Parent-Controlled Filtering Systems

Ultimately, the protection of children from online hate speech is the responsibility of parents. Although this may not satisfy the international community’s desire to create a universally enforceable set of restrictions, parental control is clearly the most effective way to protect children, who are most vulnerable, from exposure to hate speech.

Protecting children from purveyors of hate, obscenity, and other objectionable material has long been a goal of governments and activist groups around the world, as well as in the United States. The U.S. Supreme Court has explicitly stated that protecting a child’s “physiological, emotional and mental health” is a “compelling” interest that can justify state regulation of speech.¹⁹² Further, several American activist groups, such as the Anti-Defamation League and the Southern Poverty Law Center, provide detailed information regarding the regulation of hate on the Internet in an attempt to educate the public about the possible solutions for

189. Bradley, *supra* note 187.

190. See Yojana Sharma, *Rights: Zero Tolerance for Internet Hate Speech*, INTER PRESS SERV., June 27, 2000.

191. See, e.g., Wolf, *supra* note 37 (noting that Earthlink states in its “acceptable use policy” that the site “supports the free flow of information and ideas over the Internet” and does not actively monitor the content of Web sites it hosts).

192. *New York v. Ferber*, 458 U.S. 747, 758 (1982).

shielding children against unwanted exposure to hate.¹⁹³ In fighting against extremist Web sites that are “filled with simple propaganda devoted specifically to wooing children,” these organizations seek to stop racism and intolerance before it has a chance to “capture the minds” of the world’s youth.¹⁹⁴

Governments and activist organizations, however, are limited in their abilities and effectiveness. As we have seen, the Internet is not conducive to complete regulation by any government, and no activist group has yet changed this fact. Thus, the most important and practical way of combating online hate speech is through the supervision of a parent.

By using existing filtering software, parents are able to screen out materials that contain extremist propaganda or pornography.¹⁹⁵ Programs such as Cyber Patrol, SurfWatch, Net Nanny and CyberSitter prohibit access to sites containing certain speech.¹⁹⁶ Additionally, by taking advantage of built-in options, most of these programs can be customized by the parent to filter out specific speech (in other words, pornography and hate speech).¹⁹⁷ Thus, filtering software is flexible to meet the particular needs of the parent and to suit the age of the child.¹⁹⁸ While some argue that filtering systems are too comprehensive in their screening and sometimes “throw the baby out with the bathwater,” such systems are an effective, if only temporary, means of sidestepping content that may be detrimental to children.

C. SYNTHESIS: SOLUTIONS FOR NOW

Both public/market pressure and parent-controlled filters represent opposite ends of the Internet regulation spectrum. At one end, network hosts are pushed to restrict online hate by public/market pressure, and at the other end, the network users vulnerable to such content are shielded from such content through parent-controlled filtering systems. Although neither of these are permanent solutions to the problem of online hate speech, both are effective and practical ways of dealing with it until international consensus on regulation can be achieved.

193. See *Poisoning the Web: Hatred Online*, Anti-Defamation League, at http://www.adl.org/poisoning_web/introduction.asp (last visited Sept. 25, 2002).

194. *Id.*

195. See McGuire, *supra* note 46, at 782.

196. See Sharkey, *supra* note 162.

197. See ADL REPORT, *supra* note 49, at 17.

198. Of course, this software can be used by anyone—it is not used exclusively in a familial setting.

CONCLUSION

The United States should not bury its head in the sand and continue to disregard the concerns of the international community. If nothing else, it must consider the implications of becoming a safe haven for hate mongers around the world. The Oklahoma City bombing and the Columbine shooting serve as horrific testaments to the deadly consequences linked to Internet hate, and they lend credence to the international community's concern regarding such speech online.

According to current Supreme Court doctrine, hate speech cannot be regulated based on its content unless it falls into one of the unprotected categories of speech. This leaves the United States in a seemingly intractable situation, both domestically and internationally: either accept the likely violent and otherwise injurious ramifications associated with protecting hate speech or agree to some type of international regulation of such speech and chip away at the most basic First Amendment protection of expression.

In response to this dilemma, it is clear that, in order to minimize the likelihood of future acts of hate-related violence, the United States must engage the world and actively attempt to find a reasonable solution to Internet hate speech. An international regime of ratings and filters may be the most effective way of combating online hate, as such a system responds to the differing parameters of each nation. Unfortunately, the creation of such a regime is unlikely to occur soon, and the spread of hate is occurring now. Although interim solutions, such as public/market pressure and parent-controlled filtering systems, can limit the reach of hate temporarily, it is apparent that long-term international solutions are the only way to stem the rising tide of hate.