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Prohibiting Incitement on the Internet

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I. Introduction

1. The Internet is a remarkable facilitator for exchanging ideas. Data posted on the Internet is transmitted by altering the amplitudes, frequencies, or phases of electromagnetic waves. System users send messages across borders through a series of interlinked servers. A variety of physical network media, such as Ethernet or Token Ring, transform electrical charges into the lines, letters, and pictures appearing on computer screens.

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2. Persons searching for educational or commercial providers can find a plethora of Web sites with interactive electronic dictionaries, newspapers, games, health care information, and government links.¹ The list of services available on the Internet is limited only by human imagination and advances in computer technology, both of which improve rapidly. Democracies benefit from this new technology because it facilitates the exchange of ideas and exploration of diverse views.
3. However, not all Internet polemicists are democratically inclined. The expansive reach of data transmission over the information superhighway has provided hate mongers with a huge forum to develop networks of intolerance, awaiting the opportunity to act against outgroup rights. As of 2001, there were approximately 4,000 Web sites devoted to ethnocentrism, racism, anti-Semitism, and homophobia.² These sites thrive in the United States because of the few controls on their activities. In this country, the espousal of a doctrine placing virtually unencumbered free speech above all other democratic values sometimes comes in conflict with indices linking hate speech³ to bias crimes.⁴
4. This article argues that the state should prohibit persons and organizations from intentionally conveying racial animus through the Internet when their messages are substantially likely to produce bias motivated malfeasance. Given the transnational capacity of new technologies such as the World Wide Web, e-mails, and listservs domestic law alone will not sufficiently deter the dissemination of hate propaganda. Democratically administered countries will also need to enter into an international treaty for preventing terrorists and supremacists from indoctrinating volatile followers.
5. The article begins by surveying some of the many hate group Web sites. It then reflects on the shortsightedness of United States jurisprudence about incendiary speech. Next, it canvasses several European countries' laws against the dissemination of hate propaganda. The final part discusses technical aspects of Internet transmissions and proposes a law for curbing hate speech on the Internet.

¹ See Administration Policy Statement, 58 Fed. Reg. 49,025, 49,026 (Sept. 21, 1993) (describing a variety of Internet resources).

² See Robert MacMillan, *French, U.S. Courts Decline to Block Net Hate Speech*, NEWSBYTES NEWS NETWORK, Nov. 8, 2001, at 2001 WL 23420148; see Louise Surette, *New Laws to Curb Hate on Internet?: Symposium Urges Federal Action*, GAZETTE (Montreal), Mar. 24, 1999, at A12.

³ Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989), characterizes dangerous hate speech as: "(1) The message is of racial inferiority; (2) The message is directed against a historically oppressed group; and (3) The message is persecutorial, hateful, and degrading." Additionally, hate speech is intended to harm the targets and is dangerous when it has a substantial probability of doing so.

⁴ See Cedric Merlin Powell, *The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond*, 12 HARV. BLACKLETTER L.J. 1, 2 (1995); Michael J. Sniffen, *American Rate of Hate Killings Very Alarming Surpasses Germany, Says FBI*, N.Y. TIMES, June 29, 1994, at A20 (reporting FBI Director Louis Freeh's statement that in 1993 most hate crimes in the United States were motivated by racial bias). In 1998, more than half the hate crimes in the United States were motivated by racial bias. See Charles Dervarics, *Congress Takes on Hate Crimes*, ASAP, July 20, 2000, at 7, available at LEXIS, News Group File, All.

II. Hate Speech on the Internet

6. Hate groups have been using the Internet for years. The World Trade Center bombing in New York on September 11, 2001 further enkindled their fury, not at terrorists but against traditional scapegoats. The most extreme of them, and there are many organizations in this category, save their sharpest barbs for attacking the civil liberties of minorities. The relatively inexpensive technologies necessary to run computer servers have enabled hate groups to rapidly increase their presence on the Internet by spreading ideologies through electronic pamphlets, books, and a variety of multimedia documents. They can also engage in real time discussions with similarly minded ideological devotees, even though they are physically hundreds of miles apart. These group meetings, think tanks, and strategy sessions can either be public or the messages can be encrypted for secure conversations with limited audiences.
7. The Southern Poverty Law Center, which tracks online hate group sites, found that many groups extensively use the Internet to instigate violence against outgroups.⁵ The electronic medium has opened a vast geographic region, where the importation of racist rhetoric across borders allows previously isolated individuals to expand their spheres of influence. Hate groups use a variety of data streams to recruit followers including direct mailings and racist music.⁶ The ease with which racist messages can now be sent enabled David Lane, a member of a supremacist group called the Order, to propagandize from a federal penitentiary.⁷ During the trial of racist, mass murderer Richard Baumhammers, Tim Haney, a member of the Allegheny County Police Department in Pennsylvania, testified that computer records confiscated at Baumhammers' home indicated his frequent visits to white supremacist Internet sites.⁸ During Michael Brad Magleby's trial for violating federal civil rights laws, the United States Court of Appeals for the Tenth Circuit affirmed the District Court's decision to allow testimony that Magleby spoke about accessing racist Internet sites.⁹ The counts against Magleby arose when he burned a cross on an interracial couple's property, and prosecutors used evidence of his Internet site visits to prove that Magleby knew the significance of cross burning.¹⁰
8. Civil Rights organizations, which record the spread of hate groups on the Internet, have found a steady increase in their numbers. The Simon Wiesenthal Center, a human rights

⁵ The Southern Poverty Law Center established tolerance.org to "use[] the power of the Internet to fight hate and promote tolerance." Tolerance.org, *About Us*, at <http://www.tolerance.org/about/index.html> (last visited Aug. 14, 2001); *Southern Law Poverty Center, 163 and Counting ... Hate Groups Find Home on the Net*, INTELLIGENCE REPORT, Winter 1998, at <http://www.splcenter.org/intelligenceproject/ip-4e2.html> (discussing how the World Church of the Creator's Web site targets children and encourages a "R[a]cial H[o]ly War").

⁶ See *Hate groups recruiting via 'Net*, CINCINNATI POST, July 16, 2001, available at 2001 WL 24525548.

⁷ See *White Supremacist Publishing Outlet Moves Operation from Idaho to Camden County*, ASSOCIATED PRESS, Nov. 20, 2001, available at 2001 WL 30231074. Lane was sentenced to 180 years in jail for conspiring to kill a Jewish radio talk-show host. See Bill Morlin, *A Petri Dish for Racism Supremacists' Message Spreading Through Nation*, *Butler Says*, MAIN NEWS, July 22, 1995, available at 1995 WL 8786395.

⁸ Michael A. Fuoco, *County Officer Specializes in Cyber Crime Cases*, PITTSBURGH POST-GAZETTE, Sept. 4, 2001, available at 2001 WL 22224093.

⁹ See *United States v. Magleby*, 241 F.3d 1306, 1308 (10th Cir. 2001).

¹⁰ *Id.* at 1313.

organization, discovered that in 1995 there were approximately fifty hate groups with their own electronic bulletin boards.¹¹ Two other groups dedicated to tracking racist hate group activities, Klanwatch and Militia Task Force, determined that with the aid of the Internet, in 1997, there was “an all-time high of 474 hate groups in the United States ... a 20% increase over 1996.”¹² By 1999, the number of Internet sites promoting animus against “religious groups, visible minorities, women and homosexuals” grew to eight hundred.¹³ In 2000, hundreds of new Web pages and chat rooms threatening Jews burgeoned.¹⁴ According to German North Rhine-Westphalia Justice Minister Joechen Dieckmann, the number of racist Internet sites with information in the German language increased three fold between 1999 to 2000.¹⁵ After the September 11th terrorist attack, many hate groups exploited the event to recruit new members.¹⁶ The Council of Europe found that as of 2001 there were 4,000 racist Web sites, and that 2,500 of them were based in the United States.¹⁷

9. Among the groups spreading racial and ethnic animus on the Internet are the Ku Klux Klan and White Aryan Resistance.¹⁸ Their messages rely on prejudices that have long been used by bigots for justifying discriminatory behavior. On its Web site, the Neo-Nazi National Alliance blames Jews for United States immigration policy, susceptibility to terror, and for supposed media distortions.¹⁹ Another site maintains that Jews kill Christian children and use their blood in Passover matzah.²⁰ The popular Stormfront Web site promotes white supremacy by providing worldwide links to other hate-filled Internet sites and offering for sale a variety of anti-Semitic pamphlets, T-shirts, and videos.²¹ The Aryan Nation enlists biblical passages to lend credence to its racist ideology.²² Racialcompact, a Web site devoted to supposed racial purity, advocates the creation of an independent, sovereign racial nation on United States territory.²³ These groups, along with their many counterparts, use colorful graphics, games, while others

¹¹ Steve Barmazel, #&?!@*%\$!: *There Is No Stopping Hate Speech*, 15 CAL. LAW. June, 1995, at 41.

¹² Richard A. Serrano, *Internet Promotes a Surge in Hate Groups, Study Finds*, L.A. TIMES, Mar. 4, 1998, at A10.

¹³ Surette, *supra* note 2, at A12.

¹⁴ See *Antisemitic Internet Sites Multiply*, JERUSALEM POST, Oct. 17, 2000, available at <http://www.jpost.com/Editions/2000/10/17/LatestNews/LatestNews.13880.html>.

¹⁵ See *Number of Extremist German Internet Sites Soar*, AGENCE FRANCE-PRESSE, Aug. 22, 2001, available at 2001 WL 24995978.

¹⁶ See Larry Copeland, *Hate Groups Using Sept. 11 To Further Causes*, USA TODAY, Nov. 27, 2001, available at 2001 WL 5477246.

¹⁷ MacMillan, *supra* note 2, at 2001 WL 23420148.

¹⁸ See Barmazel, *supra* note 11, at 41; Mark Mueller, *Hate Groups Spewing Venom on Net*, BOSTON HERALD, Sept. 15, 1996, at 001, available at <http://pqasb.pqarchiver.com/bostonherald/main/doc/000000017325514.html>.

¹⁹ See William Pierce, *Great Masters of the Lie*, NATIONAL ALLIANCE, at <http://www.natall.com/pub/01/120801.txt> (visited on Dec. 8, 2001).

²⁰ See Kathleen Schalch, *The Dark Side of The Internet*, ALL THINGS CONSIDERED, Oct. 21, 1997, available at 1997 WL 12834034.

²¹ See *Stormfront White Pride World Wide*, at <http://www.stormfront.org> (last visited Mar. 25, 2001).

²² See <http://www.nidlink.com/~aryanvic/index-E.html> (visited Aug. 14, 2000).

²³ See Richard McCulloch, *Racial Partition for Racial Preservation*, THE RACIAL COMPACT, at <http://www.racialcompact.com/partitionmap.html> (visited Dec. 8, 2001).

have catchy music designed to attract children.²⁴ One Web site sponsored a video game simulating a lynching.²⁵

10. Many hate groups on the Internet expressed ardent support for the September 11th terrorist attack on the World Trade Centers.²⁶ Sheikh Omar Bakri Muhammad of the London based Islamist organization Al-Muhajiroun considered the terror attack in which approximately 3,000 people died to be a Muslim “determination to die for a just cause.”²⁷ A few days after the bombings, Al-Muhajiroun argued on its Website that the Taliban regime in Afghanistan was a pious government whom the United States was attacking to prevent the Taliban from establishing a Shari’ah, a state based on Islamic code. Quoting from Islamic texts, Al-Muhajiroun adjured its readers to help “fight against the enemies of Allah.”²⁸ Atallah Abu Al-Subh, writing on behalf of a Palestinian terrorist organization, Hamas, praised the Anthrax attacks perpetrated by unknown assailants in the United States: “Oh Anthrax ... you have sown horror in the heart of the lady of arrogance, of tyranny, of boastfulness! ... I thank you ... May you continue to advance ... to spread. If I may give you a word of advice,” Al-Subh instructed Hamas sympathizers, “enter the air of those ‘symbols,’ the water faucets from which they drink....”²⁹ Hate group sites also expressed increased support for Palestinian suicide bombing attacks against Israeli civilians. For instance, Sheikh Yusuf al-Qaradawi of the Muslim Brotherhood said that suicide bombings are the “kind of terror” that is “legitimate. The Palestinian factions defending their land, such as Fatah, Hamas, or Islamic Jihad, are not terrorists. [It is] a Jihad for the sake of Allah ... every man has the right to become a human bomb and blow himself up inside this military society [Israel].”³⁰
11. The tragedy in New York has budded an ominous alliance between radical Islamists and white supremacists. Billy Roper, the National Alliance’s membership coordinator, posted a message supporting al-Qaeda, the organization behind the September 11th attack, stating, “Anyone who is willing to drive a plane into a building to kill Jews is alright by me ... I wish our members had half as much testicular fortitude.”³¹ Aryan Action implied that Jews were in control of the American government and praised the September 11th attack, “Either you're fighting with the jews against al-Qaeda, or you support al-Qaeda

²⁴ See, e.g., Stormfront.org for Kids, at <http://kids.stormfront.org> (visited Dec. 8, 2001).

²⁵ See Schalch, *supra* note 20.

²⁶ See Harold Brackman, *9/11 Digital Lies: A Survey of Online Apologists for Global Terrorism*, available at http://www.wiesenthal.com/social/pdf/pdf_archive.cfm (last visited Dec. 8, 2001).

²⁷ Sheikh Omar Muhammad, *A Muslim Activist Questioning Sheikh Omar Regarding the Recent Attack on USA*, Al-Muhajiroun, Sept. 11, 2001, *quoted in id.*

²⁸ Press Release, Al-Muhajiroun, U.S. At War with Islam (Sept. 16, 2001), at <http://www.almuhajiroun.com>.

²⁹ Atallah Abu Al-Subh, *Hamas on Anthrax*, Bradynet Forum, at <http://www.bradynet.com/bbs/mideast/100010-0.html> (Nov. 7, 2001).

³⁰ See Sheikh Yusuf al-Qaradwui, Muslim Brotherhood, *Terror in America*, MIDDLE EAST MEDIA & RESEARCH INSTITUTE, Sept. 25, 2001, *quoted in* Brackman, *supra* note 26.

³¹ Paul H. B. Shin, *U.S. Hate Groups Seen as Bioterror Suspects*, N.Y. DAILY NEWS, Oct. 18, 2001, available at 2001 WL 27984518.

fighting against the jews.”³² Shortly after the attack, a Web site posted the following comments: “May the war be started . . . We can blame no others than ourselves for our problems due to the fact that we allow Satan's children, called Jews today, to have dominion over our lives.”³³

12. Many of these groups do not stop at discrimination and prejudice; they recruit Internet users to commit violence against outgroups and to propagandize white supremacy.³⁴ Notorious among these organizations is the World Church of the Creator, which calls followers to a “Racial Holy War” against nonwhites.³⁵ On its Web page, the National Socialist Movement sports a swastika logo thereby showing their support for Nazism.³⁶ The cover of its magazine exclaims, “Total War Is the Shortest War!”³⁷ It solicits people to contact the National Socialist headquarters and begin training, presumably to participate in their preparations for a race war.³⁸ Patrick Henry On-Line provides an opportunity for interested racists and anti-Semites to contact and join numerous racist militias.³⁹ Those militias, in turn, prepare their members for a race war.⁴⁰ Civil War Two sponsors a racist and anti-Semitic secessionist page.⁴¹ These Internet sites advocate and further the violent aspirations of hate groups, seeking to increase their memberships.

13. Resourceful hate groups are not ignorant of the power new technologies hold for increasing their sway. As Stormfront’s Don Black explained to the HBO television network, “The Internet is that opportunity we’ve been looking for . . . We never were able to reach the audience that we can now so easily and inexpensively.”⁴² Many hate groups have found safe havens in the United States because of the lenient First Amendment principles which courts here follow. The next section considers some of the difficulties facing the advocates of hate speech legislation. It traces many of the major Supreme Court decisions which hold sway in the hate speech arena. Later sections will then address how best to prevent the fomentation of racist attitudes.

³² Bob Woodward & Dan Eggen, *FBI and CIA Suspect Domestic Extremists; Officials Doubt Any Links to Bin Laden*, WASH. POST, Oct. 27, 2001, at A1.

³³ Ron Martz, *Domestic Hate Groups Put Own Spin on War*, ATLANTA J.- CONST., Nov. 25, 2001, at A1.

³⁴ See Tony Perry & Kim Murphy, *White Supremacist, 3 Followers Charged with Harassing 4 Officials*, L.A. TIMES, Nov. 11, 2000, at A20; Toby Eckert, *Hate Groups Find Web Useful Tool to Spread Word*, SAN DIEGO UNION-TRIB., Nov. 9, 1999, at A-11.

³⁵ See generally World Church of the Creator, *W.C.O.T.C.*, at [http:// www.rahowa.com](http://www.rahowa.com) (last visited Sept. 4, 2000).

³⁶ See National Socialist Movement, at <http://www.nsm88.com> (last visited Mar. 13, 2001).

³⁷ See National Socialist Movement, THE N.S.M. MAGAZINE, at <http://www.nsm88.com/magazine.html> (last visited Mar. 13, 2001).

³⁸ See National Socialist Movement, *Why You Should Join the National Socialist Movement*, at <http://www.nsm88.com/join.html> (last visited Mar. 13, 2001).

³⁹ See Patrick Henry On-Line, at <http://www.mo-net.com/mlindstedt> (last visited Sept. 4, 2000).

⁴⁰ See generally Southern Poverty Law Center, THE INTELLIGENCE PROJECT, at <http://www.splcenter.org/intelligenceproject/ip-mainbtm.html> (last visited May 19, 2001) (giving information on some of these groups).

⁴¹ See Civil War Two, at <http://www.civilwartwo.com> (last visited Sept. 4, 2000).

⁴² Diane Werts, *How the Web Spawns Hate and Violence*, NEWSDAY, Oct. 23, 2000, at B27.

III. Shortsightedness of U.S. Jurisprudence

14. The lenient United States jurisprudence on hate speech has made this country an inadvertent haven for hate groups savvy in electronic-message transmission.⁴³ The Supreme Court has held that penalty enhancement statutes punishing bias crimes are constitutional,⁴⁴ but found laws against the dissemination of racist fighting words unconstitutional.⁴⁵ Internet-based groups operating out of the U.S. can, with impunity, advocate for the persecution of minorities, commission of genocide, or Islamist *jihad*, as long as they are not explicitly calling for immediately harmful actions. The three governing judicial doctrines relevant to regulating hate speech on new technological media are (1) the “imminent threat of harm” standard,⁴⁶ (2) the “marketplace of ideas” concept,⁴⁷ and (3) the content neutral requirement on fighting words regulation.⁴⁸ The sections that follow detail the fundamental principles behind the predominant doctrines prohibiting the passage of hate speech legislation in the U.S. and then criticize their assumptions.

A. Imminently Threatening Speech

15. Significant First Amendment jurisprudence began in the early twentieth century, when Justice Oliver Wendell Holmes wrote a series of influential opinions. The first of these, *Schenck v. United States*,⁴⁹ arose from constitutional issues surrounding the Espionage Act of 1917. Schenck was convicted and sentenced to six months in jail for printing and circulating pamphlets stating that forced conscription during World War I was a form of involuntary servitude, prohibited by the Thirteenth Amendment.⁵⁰ Holmes held that Schenck intended to influence men to refuse to participate in the draft.⁵¹ In upholding Schenck’s conviction, Holmes formulated the still influential “clear and present danger” test:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.⁵²

Clearly present danger is analogous to someone “falsely shouting fire in a theater and causing a panic.”⁵³

⁴³ See Peter Finn, *Neo-Nazis Sheltering Web Sites in the U. S.*, WASH. POST, Dec. 21, 2000, at A1.

⁴⁴ See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

⁴⁵ See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

⁴⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

⁴⁷ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁴⁸ See *R.A.V.*, *supra* note 45.

⁴⁹ *Schenck v. United States*, 249 U.S. 47 (1919).

⁵⁰ *Id.* at 49-51.

⁵¹ *Id.* at 51.

⁵² *Id.* at 52.

⁵³ See *id.*

16. Holmes clarified the doctrine against inflammatory speech in a dissent to a later decision, *Abrams v. United States*.⁵⁴ Abrams was a member of an anarchist group, which drafted a pamphlet opposing President Woodrow Wilson's policy of sending troops to oppose the communist victory in Russia. Five members of the anarchist group were sentenced to twenty years in prison for printing the leaflet.⁵⁵
17. In his dissent, opposing Abrams' conviction, Holmes asserted that, "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."⁵⁶ For Holmes, the crucial factor was that while Abrams supported the sovereignty of the Russian government, he did not advocate overthrowing the U.S. government. Abrams was only prosecuted and convicted because he advocated communism, not because his words posed an immediate danger to the safety of the United States.⁵⁷ Holmes' dissent, then, represents his opposition to suppressing controversial political ideas.
18. Based on the distinction between words expressing abstract ideas and those fomenting violence, the Court further clarified its position in *Chaplinsky v. New Hampshire*.⁵⁸ In determining whether it is reasonably foreseeable that words will provoke a violent reaction, the Court evaluated how they would affect an "ordinary citizen."⁵⁹ These sorts of utterances are "fighting words" with "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁶⁰
19. The Supreme Court's most recent pronouncement on the subject of incitement came in 1969. *Brandenburg v. Ohio* established the principle on which courts continue to rely.⁶¹ The *Brandenburg* Court enunciated the current rule for determining whether a statute, which was aimed at limiting incitement, infringes on individuals' First Amendment rights. At issue was a film showing a speech in which the defendant, the leader of an Ohio Ku Klux Klan chapter, asserted that revenge might be taken against the United States government if it "continues to suppress the white ... race."⁶² Reversing the defendant's conviction, the Court held that the First Amendment guarantee of free speech prohibits the government from proscribing the "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 Further, the Court

⁵⁴ 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

⁵⁵ See Sheldon M. Novick, HONORABLE JUSTICE 329-32 (1989).

⁵⁶ *Abrams*, 250 U.S. at 628.

⁵⁷ *Id.* at 629-30 (1919) (Holmes, J., dissenting). The Supreme Court has repeatedly reaffirmed the rule that there is a constitutional difference between the mere advocacy of abstract theories justifying the use of violence and the actual preparations taken in furtherance of such theories. See, e.g., *Noto v. United States*, 367 U.S. 290, 297-98 (1961).

⁵⁸ 315 U.S. 568 (1942).

⁵⁹ See *Cohen v. California*, 403 U.S. 15, 20 (1971).

⁶⁰ *Chaplinsky*, 315 U.S. at 572.

⁶¹ See 395 U.S. 444 (1969) (per curiam).

⁶² *Id.* at 446. The film also depicted hooded persons setting fire to a cross and carrying firearms. See *id.* at 445.

⁶³ *Id.* at 447.

declared the Ohio statute unconstitutional because it did not distinguish between persons calling for the immediate use of violence and those teaching an abstract doctrine about the use of force.⁶⁴

20. In taking the position that anti-incitement laws are constitutional only when they limit immediately dangerous expressions, the Court ignored a plethora of empirical evidence about the long-term effects of racist and ethnocentric propaganda. Often, ideologues prepare their followers for broad-based, organized destruction through systematic, long-term indoctrination. Years of anti-Semitic propaganda preceded the Nazi atrocities against Jews, and generations of disparaging racism antedated constitutionally countenanced black slavery.⁶⁵ After decades of repetition, when anti-Semitic and racist attitudes became the norm among common German and American citizens, popularly supported leaders were able to harness bigotry to kill and enslave. A wide array of historical documentation manifests how central sustained propaganda is to the gradual development of group hatred. The argument that only immediately inflammatory speech is socially dangerous is based on theory but not careful historical analysis.⁶⁶ As a leading expert on the psychology of prejudice, Gordon Allport put it, “It is apparent . . . that under certain circumstances there will be stepwise progression from verbal aggression to violence, from rumor to riot, from gossip to genocide.”⁶⁷ The inflammatory nature of hate propaganda is so volatile that many democratic countries, which Part IV surveys, have outlawed its dissemination even when there is no clear and present danger.

21. Racist diatribe is not a progressive form of political discourse. Hate crimes and terrorist acts are not committed in a social vacuum. There is a close, and virtually necessary, connection between advocacy, preparation, coordination, infrastructure development, training, indoctrination, desensitization, discrimination, singular violent acts, and

⁶⁴ See *id.* at 448-49

⁶⁵ See generally DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (Vintage Books 1997) (1996); JOHN WEISS, *IDEOLOGY OF DEATH: WHY THE HOLOCAUST HAPPENED IN GERMANY* (1996) (providing accounts of the gradual and extensive anti-Semitic indoctrination in Germany and Austria). The same statements calling for the death and disenfranchisement of Jews that were first made popular by fringe political parties operating at the turn of the twentieth century were later harnessed by the Nazis. See generally LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945*, 23, 45, 59 (1975); DONALD L. NIEWYK, *THE JEWS IN WEIMAR GERMANY* 48 (1980); Shmuel Ettinger, *The Origins of Modern Anti-Semitism*, in 2 *THE ORIGINS OF THE HOLOCAUST* 208 (Michael R. Marrus ed., 1989). So many Germans and Austrians were complicit in the Holocaust because they had learned to view Jews as akin to unwanted vermin. See A. Bein, *Modern Anti-Semitism and Its Effect on the Jewish Question*, in 3 *YAD VASHEM STUDIES* 7, 14 n.19 (Shaul Esh ed., KTAV Publ'g House, Inc. 1975) (1959) (citing Paul de Lagarde, *Juden und Indogermanen: Ein Studie nach dem Leben* 339 (1887)); Shulamit Volkov, *Antisemitism as a Cultural Code: Reflections on the History and Historiography of Antisemitism in Imperial Germany*, in 2 *THE ORIGINS OF THE HOLOCAUST* 307, 325-26 (Michael R. Marrus ed., 1989). On the development of the institution of slavery in the United States from indentured servitude to hereditary slavery, see CARL N. DEGLER, *OUT OF OUR PAST: THE FORCES THAT SHAPED AMERICA* 30 (1959); GEORGE BROWN TINDALL, *AMERICA: A NARRATIVE HISTORY* 97-98 (1984); LUNABELLE WEDLOCK, *THE REACTION OF NEGRO PUBLICATIONS AND ORGANIZATIONS TO GERMAN ANTI-SEMITISM* 203 (1942).

⁶⁶ See generally ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* (2002); Alexander Tesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 *SANTA CLARA L. REV.* 729 (2000).

⁶⁷ GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 57 (25th Anniversary ed. 1979).

systematic oppression.⁶⁸ Angry words, spoken in the heat of the moment, may result in violence, but the entrenchment of outgroup hatred in an entire culture takes time and has far more impact than spontaneous aggression. On the other hand, the imminent threat of harm perspective insists that only fighting words that resemble the verbal taunting immediately preceding an unplanned riot are dangerous enough to justify legal intervention.⁶⁹ The realities of how essential bias speech is to the popularization of nefarious social movements evinces that this view is too narrow. To give two examples: years of systematic government propaganda and frontier lore culminated in large scale Indian Removal in Jacksonian America, and centuries of dehumanizing Arabic discourse perpetuates contemporary black slavery in Mauritania.⁷⁰

22. Intolerant diatribe is inimical to the social well-being of multi-cultural societies. Government should act before an inflammatory organization moves from words to actions.⁷¹ It need not wait to arrest propagandists until they or their followers are on the verge of committing a suicide attack. Better to jail such vociferous ideologues that pose a reasonably foreseeable risk of indoctrinating new waves of terrorists than to wait until they have reaped destruction on humanity. The Internet is a new vehicle for spreading messages lauding the use of force against outgroups. The effect of purposefully aggressive messages on children, who might stumble onto them while surfing the Web, should not be taken for granted. Courts should adopt a more analytical approach that considers material evidence that goes beyond the catchy “imminent threat of harm” approach.

23. Hate speakers aggravate their audience’s prejudiced attitudes by manipulating age-old stereotypes to embroil impressionable persons into engaging in deliberate discrimination. Relying on long-sustained group animus, messages that blame contemporary dilemmas on an outgroup are more likely to find a receptive audience than imminently violent words. The repetition of prejudice is an effective way for distracting people from the real causes of their socioeconomic problems. And such repetition breeds not only emotional anger but also a readiness to commit coordinated or isolated hate crimes.⁷² Where and when prejudices will lead to the perpetration of hate crimes is not always predictable. As

⁶⁸ See Matsuda, *supra* note 3, at 2335.

⁶⁹ See Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 801; Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 80 (1994).

⁷⁰ See TESIS, *supra* note 66, chs. 4 & 5 (explaining how hate propaganda contributed to Indian Removal and Mauritanian Slavery).

⁷¹ See *Dennis v. United States*, 341 U.S. 494, 509 (1951) (stating that the government need not wait to act “until the putsch is about to be executed, the plans have been laid and the signal is awaited”).

⁷² See TEUN A. VAN DIJK, *COMMUNICATING RACISM* 11 (2d prt. 1989) (explaining how ingroups’ communications of prejudiced attitudes become the cognitive bases of ethnic or racial discrimination); HOWARD J. EHRLICH, *SOCIAL PSYCHOLOGY OF PREJUDICE* 110 (1973) (stating that ethnic attitudes are transmitted “across generation”); RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?* 10 (1997) (arguing that racist attitudes derive from derogatory epithets and racial names); MILTON KLEG, *HATE PREJUDICE & RACISM* 155 (Albany: State University of New York Press, 1993) (“When tied to prejudiced attitudes, stereotypes help create a number of behaviors ranging from avoidance to violence.”); GEORGE E. SIMPSON & J. MILTON YINGER, *RACIAL & CULTURAL MINORITIES* 64, 143 (4th ed. 1972) (stating that prejudiced attitudes are part of cultural heritage).

the majority of the Supreme Court stated in *Gitlow v. New York*:

It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.⁷³

In light of historical information about the long-term power of hate speech and its crescendoing effect on intolerant attitudes, waiting until there is an impending threat to democracy is an unwarranted risk.

B. Marketplace of Ideas

24. Another of Justice Holmes' contributions to First Amendment jurisprudence was the marketplace of ideas doctrine:

[M]en ... may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—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. That at any rate is the theory of our Constitution.⁷⁴

The Supreme Court has reaffirmed the continuing authority of this doctrine in a variety of different contexts.⁷⁵

25. At first glance it might seem Holmes asserted that the interchange of ideas ultimately leads to unquestionable analytical conclusions tending to improve self-expression. A close inspection of this doctrine reveals, somewhat surprisingly, that it sounds in social relativism rather than objectivism.
26. To be consistent with his philosophic writings, Holmes could not have meant to forge the marketplace of ideas doctrine to protect fundamental rights because he rejected “[i]nalienable human rights and absolute principles of law.”⁷⁶ The principal impetus behind laws, according to Holmes, is the will of those who are in power: “All that can be expected from modern improvements is that legislation should easily and quickly, yet not

⁷³ *Gitlow v. New York*, 268 U.S. 652, 669 (1925) (regarding revolutionary utterances). The Supreme Court, however, has not continued to follow the *Gitlow* reasoning; it has instead followed the narrower view that only imminently threatening speech threatens society. *See, e.g., Dennis*, 341 U.S. at 536-46 (Frankfurter, J., concurring).

⁷⁴ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁷⁵ *See generally* *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (holding that the Internet is a new marketplace of ideas and finding some provisions of the Communications Decency Act unconstitutional); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (finding that commercial speech has some value in the marketplace of ideas); *Red Lion Broad. Co. Inc. v. FCC*, 395 U.S. 367, 389-90 (1969) (relying on the marketplace of ideas concept in upholding the “fairness doctrine”).

⁷⁶ Paul L. Gregg, *The Pragmatism of Mr. Justice Holmes*, 31 *GEO. L.J.* 262, 294 (1943).

too quickly, modify itself in accordance with the will of the de facto supreme power in the community....”⁷⁷ The object of all legislation must be “the greatest good of the greatest number.”⁷⁸ John Dewey, a leading Pragmatist, asserted that, “[a]t times, [Holmes’] realism seems almost to amount to a belief that whatever wins out in fair combat, in the struggle for existence, is therefore the fit, the good, and the true.”⁷⁹ Neither did Holmes shirk from the logical conclusion of his ideas. He recognized that the “dominant forces of the community” had the right to impose a “proletarian dictatorship” against its weaker members.⁸⁰ A government’s value, Holmes believed, lies in the extent to which it carries out the will of the powerful.⁸¹ Thus, Holmes recognized, and in fact advocated, that his marketplace of ideas doctrine could result in a dominant group ruling the country without any objective criteria for determining whether it was abusing its power.

27. This legal philosophy leaves in doubt the safety of minority rights. The ingroup’s obligation to minorities is to cultivate “an educated sympathy” by enacting laws that will keep the latter’s losses at a minimum.⁸² Since force is the determining arbiter between groups with competing interests, minorities can only hope to institute their agenda if they gain power and dominate policy making.⁸³ But, then, they too might be Machiavellians and act oppressively toward their antagonists. Force is the remedy between two groups with divergent world views.⁸⁴ “If the welfare of the living majority is paramount, it can only be on the ground that the majority have the power in their hands.”⁸⁵ Cataclysmic class, racial, political, and religious conflicts are inevitable in Holmes’ marketplace of ideas where competing ideas win not because they are socially better but because they represent the views of the most powerful group. If a radical group gains popular power after a hostile Internet campaign, then, it follows, that they can impose their vision of truth onto the rest of society.

28. Contrary to the Madisonian tradition of speech, which regards the free exchange of ideas as the facilitator for civil liberties and political representation, Holmes’ view encourages populist factionalism, regardless of what principles it embraces.⁸⁶ Holmes economic

⁷⁷ [Oliver Wendell Holmes], *The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873).

⁷⁸ *Id.* at 584.

⁷⁹ John Dewey, *Justice Holmes & the Liberal Mind*, in MR. JUSTICE HOLMES 33, 43 (Felix Frankfurter ed., 1931).

⁸⁰ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

⁸¹ See OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 258 (1920). “What proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community – that is, conformity to the wishes of the dominant power? Of course, such conformity may lead to destruction, and it is desirable that the dominant power should be wise. But wise or not, the proximate test of good government is that the dominant power has its way.” *Id.*

⁸² [Holmes], *The Gas-Stokers' Strike*, *supra* note 77, at 583.

⁸³ See Gregg, *supra* note 76, at 294.

⁸⁴ See Letter from Oliver Wendell Holmes to Frederick Pollock (March 22, 1891), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 35, 36 (Mark DeWolfe Howe ed., 1961) (writing skeptically about the effectiveness of the League of Nations).

⁸⁵ [Holmes], *The Gas-Stokers' Strike*, *supra* note 77, at 584.

⁸⁶ See Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1762 (1995).

model of speech, as a free market, favors persons and groups with more resources since they have greater access to technology, such as e-mails and listservs, than persons with less education and funding. What is more, Holmes lacked any mechanism for checking the majority from abusing its power. He recognized that the marketplace of ideas might lead to a proletariat dictatorship,⁸⁷ but provided no theory to put out the fire of undemocratic, repressive movements.

29. Justice Louis Brandeis, who joined Holmes in many dissents including *Abrams*, nevertheless held different views about the importance of speech. Brandeis, unlike Holmes, regarded speech as beneficial for exposing falsehoods and preventing the formation of “tyrannies of governing majorities.”⁸⁸ This is in contrast to Holmes’ determined support for any group that comes to power, even if that group practices autocratic rule. Brandeis’ devotion to free speech stems from his fear that its suppression will destabilize United States democracy: “[I]t is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”⁸⁹ Thus, Brandeis wanted to keep open avenues for disclosing political and civil grievances without fear of government retribution. But his view did not, as Holmes’, support the claim that hate speech on the Internet should be tolerated even if it might cause democratic instability.
30. Hostile expressions do not contribute to the free flow of ideas. They do not test the legitimacy of democratic institutions because their very aim is to exclude outgroups from participating in policy debates. Just as with other anti-discrimination laws, such as those prohibiting exclusionary employment practice and housing discrimination, the prohibition of virulent animus would improve race relations and diminish arbitrary hate.⁹⁰ Organizations purposefully using new technologies to disseminate hatred, intent on hurting identifiable groups, can broaden their audience and substantially increase the likelihood of causing their desired end. For instance, given enough time and repetition, flashy Web sites advocating the piousness of committing suicide bombings may enkindle aggression against the targeted group. This is particularly true when the electronic transmissions are part of a concerted campaign to de-legitimize the aspirations of a hated group. The marketplace of ideas makes no provisions for dealing with this modern day dilemma.
31. False statements of fact regarding outgroups or individuals do not advance “uninhibited, robust, and wide-open”⁹¹ dialogue about social improvement.⁹² As with fighting words,

⁸⁷ “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.” *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

⁸⁸ *Whitney v. California*, 274 U.S. 357, 376-77 (1927) (Brandeis, J., concurring).

⁸⁹ *Id.* at 375 (Brandeis and Holmes, J.J., concurring).

⁹⁰ See *ALLPORT*, *supra* note 67, at 472 (discussing how ethnic relations are improved through laws prohibiting discrimination in housing, employment, education, and health services).

⁹¹ *N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964) (finding on defamation of public figures).

⁹² See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (holding about defamation against a person who was

hate speech has no essential role in “any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”⁹³ Purveyors of hate speech aim at spreading degrading falsities and proposing intolerant solutions which, like defamation, can be restricted without violating the First Amendment.⁹⁴ The Internet is a new forum for forces bent on circulating group defamations worldwide and on recruiting adherents willing to commit violent acts against the hated other. Expressing a derogatory or prejudiced opinion may well be benign, no matter how misguided, but expressing a reckless disregard or purposeful aim of convincing others to carry out injustices should be actionable. Information sent through cyberspace does not act in a surreal world. It threatens real people, entrenches racist attitudes, and therefore undermines social, political, and economic equality.

32. Aside from the incompatibility of Holmes’ marketplace of ideas doctrine with multiethnic egalitarianism, it is manifestly inaccurate that the expression of hatred defuses racism, sexism, or homophobia.⁹⁵ Even a brief survey of history indicates that false or exaggerated misrepresentations do not diminish the incidence of prejudice.⁹⁶ To the contrary, history is replete with examples of large scale exploitation of propaganda in order to embed racism and ethnocentrism into socially acceptable language and political actions. Years of anti-Semitic speech in Germany preceded the rise of National Socialism and the perpetration of the Holocaust.⁹⁷ The guards at Auschwitz, the railroad workers who managed the trains and rails that brought Jews to the death camps, and the ordinary Germans who turned in their Jewish neighbors were raised on rhetoric condemning Jews for German misfortunes and calling for their expulsion, extermination, and dispossession.⁹⁸ Even when intolerant rhetoric is counterweighed by republican voices, as it was in the Weimar Republic, people often cling to the cultural prejudices that predominate through decades of repetition. In spite of the availability, in the ante-bellum United States, of abolitionist literature, slavery did not end through rational discourse. Senator John Calhoun’s pro-slavery dogma won the verbal sieges in the Old South. It took a bloody civil war, initiated by an ideological commitment to black inferiority, to ratify the Thirteenth Amendment, prohibiting that institution.
33. Democracy is not strengthened by the unregulated flow of menacing ideas sent from a terrorist group’s computer server. Calculatingly manipulated scientific data, maliciously fabricated derogations about the intellectual and economic attributes of people, and

neither a public figure nor public official).

⁹³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (establishing the fighting words doctrine).

⁹⁴ *See Powell*, *supra* note 4, at 35.

⁹⁵ *See DELGADO & STEFANCIC*, *supra* note 72, at 71-72, 89.

⁹⁶ *See JOHN STUART MILL, ON LIBERTY* 89 (Pelican Classics 1980) (1859); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 26-27 (1982) (stating that truth is not always triumphant over falsehood); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 177 (1982) (arguing that racial insults are not truth seeking since “they are not intended to inform or convince the listener. Racial insults invite no discourse, and no speech in response can cure the inflicted harm”).

⁹⁷ *See ALLPORT*, *supra* note 67, at 57.

⁹⁸ *See WEISS*, *supra* note 65.

concocted stereotypes do not advance deliberative democracy.⁹⁹ Hate propaganda injures targeted groups because, instead of edifying audiences, it debases and foments insensitivity and brutality.¹⁰⁰ The purveyors of Internet hate speech are not interested in spreading truth, rather they are out to augment their own power base and often do so by unconscionable means. They settle differences of opinion by committing bias crimes rather than by rational discussion. The victims of calculated propaganda campaigns, whether they be the six million who died in the Holocaust or the innumerable number of persons in indigenous American tribes who were violently evicted from their ancestral homes, gain no solace from the fact that the fallacies that motivated their oppressors were eventually denounced. Their sufferings are irreversible, in spite of future rectifications.¹⁰¹

C. Content Neutral Standard

34. The most recent Supreme Court hurdle against enacting a statute prohibiting hate speech on the Internet is the content neutral standard for fighting words established by Justice Scalia's majority opinion in *R.A.V. v. St. Paul*.¹⁰² The concurrences to that case are so significantly different from the majority opinion that knowing their conclusions is essential to understanding the current state of the common law. The case arose when juveniles set fire to a cross on a black family's lawn. They were charged with violating a St. Paul ordinance which made it a misdemeanor to publicly or privately display any symbols known to "arouse[] anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender."¹⁰³ Scalia found that law an unconstitutional "content discrimination."¹⁰⁴ His view was that the ordinance violated the First Amendment because it prohibited the enumerated forms of inciteful speech, but tolerated unenumerated forms, such as those directed against persons' political affiliation.¹⁰⁵ Scalia recognized that the City had a compelling interest in protecting the human rights of the "members of groups that have historically been subjected to discrimination."¹⁰⁶ While St. Paul could have adopted a blanket prohibition against all fighting words, Scalia found it unconstitutional that legislators adopted laws intended only to prohibit some inflammatory messages.¹⁰⁷
35. All three concurrences complained that Scalia had significantly departed from precedent, which had long permitted some content-specific limitations on speech. Justice Blackmun wrote that it was irreconcilable to hold that the state "cannot regulate speech that causes great harm unless it also regulates speech that does not." Blackmun thought *R.A.V.* to be

⁹⁹ See Mahoney, *supra* note 69, at 798.

¹⁰⁰ See Irwin Cotter, *Racist Incitement: Giving Free Speech a Bad Name*, in FREEDOM OF EXPRESSION AND THE CHARTER 254 (David Schneiderman ed., 1991); Delgado, *supra* note 96, at 177.

¹⁰¹ See Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130, 1132 (1979).

¹⁰² 505 U.S. 377 (1992).

¹⁰³ *R.A.V.*, 505 U.S. at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

¹⁰⁴ *Id.* at 387.

¹⁰⁵ *Id.* at 391.

¹⁰⁶ *Id.* at 395.

¹⁰⁷ *Id.* at 415 (Blackmun, J., concurring).

so significant a departure from traditional protections on speech that it would be an anomalous opinion that would “not significantly alter First Amendment jurisprudence.”¹⁰⁸ Unlike Scalia, Blackmun found that no First Amendment principles were jeopardized by a law preventing “hoodlums from driving minorities out of their homes by burning crosses on their lawns.”¹⁰⁹ To the contrary, Blackmun regarded it a “great harm” to prohibit St. Paul from penalizing racist fighting words because it “so prejudice[s] their community.”¹¹⁰ Justice Blackmun’s concurrence makes clear that he was not averse to hate speech laws; he nevertheless found the language of the St. Paul ordinance constitutionally overbroad.¹¹¹

36. Scalia’s opinion is itself content selective. Justice Stevens drew attention to the majority’s internal contradictions: On the one hand, Scalia recognized the state’s right to criminalize threats made against the president, finding that such language was outside First Amendment protections.¹¹² Thus, the Court found it legitimate for government to single out one form of threatening speech because of their particularly dangerous nature. On the other hand, Scalia claimed that no law could single out one type of fighting words rather than any other as especially requiring government restrictions. Stevens further pointed out that the majority conceded that the state could regulate advertising in an industry that was more subject to fraud while not placing the same advertising restrictions on other industries. Such reasoning, Justice Stevens pointed out, would also allow legislatures to narrowly draft laws against biased speech: “Certainly a legislature that may determine that the risk of fraud is greater in the legal trade than in the medical trade may determine that the risk of injury or breach of peace created by race-based threats is greater than that created by other threats.”¹¹³ The problem for Stevens, just as for Blackmun, was that the St. Paul ordinance was overbroad.¹¹⁴ St. Paul could constitutionally target racist messages because they pose a greater threat of danger than other forms of speech; however, the ordinance in this case was poorly drafted.

37. Justice Scalia’s opinion dismisses the numerous instances in which the Supreme Court found restrictions on speech constitutional. Content-based restrictions have been found constitutional in cases which dealt with operating adult theaters,¹¹⁵ threatening the President,¹¹⁶ electioneering within 100 feet of a polling place on election day,¹¹⁷ using

¹⁰⁸ *Id.* at 415 (Blackmun, J., concurring).

¹⁰⁹ *Id.* at 416 (Blackmun, J., concurring).

¹¹⁰ *Id.* at 416 (Blackmun, J., concurring) (“I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community”).

¹¹¹ *Id.* at 416 (Blackmun, J., concurring).

¹¹² *Id.* at 423-24 (Stevens, J., concurring).

¹¹³ *Id.* at 424-25 (Stevens, J., concurring).

¹¹⁴ *Id.* at 436 (Stevens, J., concurring).

¹¹⁵ *See* *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

¹¹⁶ *See* *Watts v. United States*, 394 U.S. 705 (1969).

¹¹⁷ *See* *Burson v. Freeman*, 504 U.S. 191 (1992).

trade names,¹¹⁸ burning draft cards,¹¹⁹ and distributing obscene materials.¹²⁰ This list indicates that constitutionally permissible content-specific restrictions involve both political and non-political expressions. Electioneering is a form of dialogue about the merits of various political candidates. Draft card burning also pertains to political statements, speaking against government involvement in military action or affirming the validity of pacifism. Speech which is not political, such as practicing medicine without a license, is also subject to regulations.

38. Scalia's holding in *R.A.V.* is incongruous with the numerous cases in which narrowly tailored and content-specific speech laws were found to be a legitimate use of governmental power. The majority turned a blind eye to St. Paul's compelling reasons for focusing its attention to rooting out hate speech. The opinion manifests a lack of empathy for minority sensibilities about the threat hate speech poses to their communities. Even though the Court recognized that St. Paul had a compelling interest in passing the ordinance,¹²¹ it nevertheless held to a novel opinion, unsubstantiated by any sociohistorical analysis, about the regulation of content specific speech.
39. One of Scalia's greatest shortcomings in *R.A.V.* was his failure to reflect on whether racist hate speech infringes on victims' fundamental rights in a more substantial way than laws against their expression. He did not balance the Fourteenth Amendment affirmation of equal protections against the value of free expression. Such a discussion would have been pertinent because, after all, the First Amendment was made applicable to the states through the Fourteenth.¹²² While the majority reflected on the danger narrowly tailored laws pose to racists' autonomy right, absent is any meaningful consideration about the diminished sense of freedom experienced by those targeted by their speech. Neither did Scalia consider whether other black families, who were not directly targeted, were likely to be terrorized by the experience because of the violent history associated with cross burning.¹²³ The holding focuses on the value of speech, while giving short shrift to the social harms associated with hate speech.
40. Free speech is one of the fundamental rights protected under the Constitution, but conflicts sometimes arise between persons wanting to express themselves and the people affected by their speech. The *R.A.V.* majority did not balance bigots' rights to express their views against the rights of vulnerable minorities to be free from the substantial risks hate groups pose through their content-specific indoctrination and recruitment. For instance, absent is any reflection on the symbolic meaning of cross burnings. That symbol, after all is not only expressive, but also motivational. Cultural symbolism delimits people's parameters of thought and influences their attitudes, behaviors, and

¹¹⁸ See *Friedman v. Rogers*, 440 U.S. 1 (1979).

¹¹⁹ See *United States v. O'Brien*, 391 U.S. 367 (1968).

¹²⁰ See *Miller v. California*, 413 U.S. 15 (1973).

¹²¹ See *R.A.V.*, 505 U.S. at 395.

¹²² See Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 151 (1992).

¹²³ See Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 778 (2000).

reactions.¹²⁴ Cross burnings are meant to demean and increase support networks for persons with supremacist ideologies.¹²⁵ To comprehend the public meaning of a given symbol, it is important to consider what it represents.¹²⁶ Such an evaluation must reflect on the object and the context within which it appears.¹²⁷ Social history is part of the context of racist expressions—they are used to interlink speakers and audiences through a racist past, a concurrent racist network, and mutually intolerant plans. With the broad, and international reach of the Internet, the threat of galvanization and massive acts of oppression is greater than ever before because it can facilitate the creation of a concerted effort to undermine human rights. Bias motivated crimes might, in fact, be perpetrated in states other than those from which the message was sent. I argue in Part V that entering into an international extradition treaty against Internet hate speech would be the best way of dealing with these cross-boarder implications.

41. Burning a cross on a black family's lawn raises autonomy issues other than just those about the free speech of the actor.¹²⁸ Hate speech engenders personal safety concerns in outgroup members, thereby inhibiting them from freely traveling in their own communities. Sometimes, fearing for their safety, minorities are forced to relocate. After a cross has been burnt on their lawn, a black family is likely to be leery about approaching its own house. The spread of bigotry diminishes autonomy.
42. Reading the phrase “Congress shall make no law abridging freedom of speech” to prohibit all laws targeting content-based fighting words is simplistic. The underlying idea requires a thorough analysis of whether restrictions on expression are congruous with the obligations and aims of civil society. In evaluating the constitutionality of hate speech laws, courts should not make a blanket prohibition against content regulations. Instead, courts should weigh the competing public interest of reducing conflict between various groups and the private or organizational speech interests involved in a controversy at issue.¹²⁹ In Justice Felix Frankfurter's words, “[T]he demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.”¹³⁰
43. *R.A.V.* recognizes, but does nothing to allay, the heightened danger cross burnings pose (not only to the immediate targets of intimidation, but also to a whole group of

¹²⁴ See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 952 (1995).

¹²⁵ See GEORGE SCHEDLER, *RACIST SYMBOLS & REPARATIONS* 10 (1998) for a three part definition of racist symbols.

¹²⁶ See Robert J. Bein, *Stained Flags: Public Symbols & Equal Protection*, 28 SETON HALL L. REV. 897, 913 (1998).

¹²⁷ See Lessig, *supra* note 124, at 958.

¹²⁸ See John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in A Democratic Society*, 16 LAW & INEQ. J. 97, 109 (1998).

¹²⁹ See *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (“Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.”).

¹³⁰ *Dennis*, 341 U.S. at 524-25 (Frankfurter, J., concurring).

people).¹³¹ Hate speech aimed at reducing an identifiable group's rights or at instigating violence against it is not a legitimate form of political discourse. It does not further democratic ideals. To the contrary, destructive messages stratify society into competing camps rather than seeking mutual grounds for compromise designed to benefit all the various factions of the society while respecting the individual rights of its members. Unrestrained bias foments disunion and endangers the civil liberties guaranteed under the Constitution. More and more, the Internet is being used to undermine democracy by providing a far reaching medium for drawing together distantly situated hate groups.

44. The current Supreme Court doctrine allows hate speech to wheedle away at U.S. tolerance and for terrorist organizations to systematically gather followers. They can later be induced to carry out violent acts. Hate speech does not contribute to dialogue on social and political justice; instead, it detracts by spreading rumors, innuendos, and outright libels. The Supreme Court's prohibition against content based laws targeting fighting words denies government the power to prevent hate groups operating out of the United States from spreading their messages throughout this nation and exporting them to other countries. Diatribes adjuring audiences to act intolerantly should not be given a chance to dominate the marketplace of ideas, even if their popularity will only be short lived. Internet communications designed to wound members of identifiable groups are not protected by the First Amendment. Hate speech aims to shut off dialogue, and not to add other voices to it. The First Amendment, as it applies to the states through the Fourteenth Amendment, is based on representative ideals, assuring that a powerful majority will not silence minority voices. Where only imminently harmful speech is deemed dangerous, hate groups can solicit contributions and recruit members more effectively through new technologies. They only need to bide their time until a large enough following is ready to act on democratically regressive belief systems.

IV. Perspectives From Other Lands

45. The Internet enables hate groups to transmit their messages internationally; therefore, to determine the plausibility of regulating hate speech on that medium we must evaluate other countries' laws on hate speech. Particularly if the extradition treaty proposed in the following part of this essay will have any likelihood of success, other nations must be amenable to such a regimen.
46. A brief survey of various democracies indicates that the United States' aversion to laws prohibiting hate propaganda is anomalous amongst countries that protect free speech. Many nations' laws recognize that hate speech poses a threat to outgroup dignitary rights and renders tenuous their participation in democratic institutions. There is a general consensus in post-WWII Europe that virulent bigotry perpetuates racism, anti-Semitism, and other prejudices.¹³² Countries that have enacted laws penalizing the distribution of

¹³¹ CONGRESSIONAL RECORD 11393 (1988), *cited in* VALERIE JENNESS & RYKEN GRATTET, MAKING HATE A CRIME 158 (2001) (quoting Representative John Conyers' statement explaining that hate crimes hurt an entire community, not just the individual victim).

¹³² *See* Mahoney, *supra* note 69, at 803.

hate propaganda include Austria, Belgium, Brazil, Canada, Cyprus, England, France, Germany, Hungary, India, Israel, Italy, Netherlands, Sweden, and Switzerland.¹³³

47. Several international conventions also affirm that the substantial threat to targets of hate speech outweighs the burden imposed on orators. For instance the Convention on the Prevention and Punishment of the Crime of Genocide requires contracting parties to punish “[d]irect and public incitement to commit genocide.”¹³⁴ The European Convention on the Protection of Human Rights and Fundamental Freedoms not only commits twenty-three party states to protecting the rights to free expression and opinion but also acknowledges other civil rights: “The exercise of these freedoms ... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others....”¹³⁵ These conventions are further strengthened by the U.N. Convention on the Elimination of All Forms of Racial Discrimination which commits governments to actions against hate speech:
48. States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination, and to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*:
- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of other persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
 - (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
 - (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.¹³⁶

¹³³ See THOMAS DAVID JONES, HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS 189-224, 259-313 (1998); See Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 72 n.286 (1997); Mahoney, *supra* note 69, at 803.

¹³⁴ CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, Dec. 9, 1948, art.3(c), 78 U.N.T.S. 277.

¹³⁵ THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Nov. 4, 1950, art.10, 312 U.N.T.S. 22, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, & Protocol No. 8, E.T.S 118 (adopted November 4, 1950).

¹³⁶ Quoted in NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 43 (1980).

While the United States signed on in 1966, the Senate only ratified the Convention in 1994 along with several eviscerating reservations to preserve United States hate speech jurisprudence.¹³⁷ To the contrary, most other signatories have enacted domestic laws pursuant to the terms of the Convention.¹³⁸

49. European countries have increasingly incorporated the provisions of these treaties into their domestic laws. For instance, pursuant to the Convention on the Elimination of All Forms of Racial Discrimination, Austria enacted § 283 to its Penal Code. It created a criminal cause of action against anyone who jeopardizes public order by inciting hostilities against persons based on their “religious denomination, race, nation, ethnic group or State.”¹³⁹ France, another signatory to the Convention, passed Act No. 72-546 of 28 July 1972, proscribing “incitement to discrimination; defamation of an individual based on his origin, or his membership or lack thereof in a particular ethnic, national, racial or religious group; and injurious behaviour directed against an individual for those same reasons.”¹⁴⁰ Italy, which is also a party to the Convention, passed Italian Decree-Law 122 providing a criminal penalty against “organizations, associations, movements or groups aiming to incite to discrimination or violence on racial, ethnic, national or religious grounds.”¹⁴¹
50. England also recognized dangers associated to the fascist uses of hate speech. Its earliest attempt to curb such intentional behavior was Article 5 of the Public Order Act of 1936.¹⁴² The law was further bolstered in 1965 with section 6 of the British Race Relations Act, which removed the intent requirement, making it an offense to simply stir up hatred against a racial group.¹⁴³ Even inflammatory scientific and religious works became subject to prosecution.¹⁴⁴ The latest barb in England’s efforts against hate speech is the Public Order Act of 1986. Section 17 of the latter act defines “racial hatred” as “hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.” Persons are subject to arrest when they either intentionally stir racial hatred or “having regard for all the

¹³⁷ See Henry J. Richardson, III, “Failed States,” *Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT’L & COMP. L.J. 1, 23 (1996); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341 (1995).

¹³⁸ See DAVID A.J. RICHARDS, *FREE SPEECH & THE POLITICS OF IDENTITY* 5 (1999).

¹³⁹ Quoted in UNITED NATIONS, COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, *Reports Submitted by States Parties Under Article 9 of the Convention: Thirteenth Periodic Report of States Parties Due in 1997, Austria*, at <http://www.hri.ca/fortherecord1999/documentation/tbodies/cerd-c-319-add5.htm> (last visited Apr. 26, 2001).

¹⁴⁰ Quoted in UNITED NATIONS, *Core Document Forming Part of the Reports of States Parties: France*, at <http://www.hri.ca/fortherecord2000/documentation/coredocs/hri-core-1-add17-rev1.htm> (last visited Apr. 29, 2001).

¹⁴¹ Quoted in UNITED NATIONS, INTERNATIONAL CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, *Eleventh periodic reports of States parties due in 1997: Italy*, at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.317.Add.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.317.Add.1.En?Opendocument) (last visited Apr. 29, 2001).

¹⁴² See Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, c. 6, § 5, (U.K.); Kenneth Lasson, *Racism in Great Britain*, 7 B.C. THIRD WORLD L.J. 161, 165 (1987).

¹⁴³ See ERIC BARENDT, *FREEDOM OF SPEECH* 163-64 (1985).

¹⁴⁴ See Stephen J. Roth, *Curbing Racial Incitement in Britain By Law*, 22 ISRAEL Y.B. HUM. RTS. 193, 201 (1992); BARENDT, *supra* note 143, at 163-64.

circumstances[] racial hatred is likely to be stirred up thereby.”¹⁴⁵ British laws curb discriminatory speech regardless of whether it poses any imminent danger. The focus, rather, is on determining whether the speech at issue contributes to the spread of racism or ethnocentrism and has the potential to harm representative democracy.¹⁴⁶

51. Canada has one of the most progressive laws against hate speech. That vibrant democracy recognizes the fundamental importance of free speech, making it “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁴⁷ Public incitement to hatred is criminally punishable in Canada: “Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.”¹⁴⁸ Two years in prison is the penalty for willfully promoting hatred through public statements directed against an identifiable group,¹⁴⁹ and inciting others to commit genocide carries a potential of five years imprisonment.¹⁵⁰ The Canadian Supreme Court has confirmed the constitutionality of these provisions in several high profile cases.¹⁵¹

52. Canada and Germany have been quick to act against the particular problem hate speech on the Internet poses in their societies. There is a particular risk of Internet sites transmitting Neo-Nazi messages from the United States, where such speech is not punishable, to Canada or Germany, where its expression is understood to be socially inimical.¹⁵² Therefore, the failure of the United States Supreme Court to recognize the dangers of hate speech causes a significant infringement on public peace of those two European countries.

¹⁴⁵ The Public Order Act, 1986, c. 64, §§ 17-29 (U.K.), *quoted in* Lasson, *supra* note 142, at 173-77; *see also* W. J. Wolfe, *Values in Conflict*, 1987 PUB. L. 85.

¹⁴⁶ *See* BARENDT, *supra* note 143, at 161.

¹⁴⁷ *See* CAN. CONST. (Constitution Act, 1982) pt. I (CANADIAN CHARTER OF RIGHTS AND FREEDOMS), §§ 1, 2. Fundamental freedoms set out in section 2 of the Charter include: “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . . [and] freedom of association.”

¹⁴⁸ *See* Criminal Law, R.S.C., ch. C-46, § 319(1) (1985) (Can.).

¹⁴⁹ *See id.* § 319(2).

¹⁵⁰ *See id.* § 318(1) (2000).

¹⁵¹ *See* Canada (Human Rights Commission) v. Taylor, [1990] 3 Can. SCR 892, 904, 919 (Can.); Regina v. Andrews [1990] 3 S.C.R. 870, 885 (Can.); Regina v. Keegstra [1990] 3 S.C.R. 697 (Can.). The Supreme Court of Canada further reaffirmed its commitment to the latter case in Regina v. Keegstra [1996] 1 S.C.R. 458, 459 (Can.). For some detail on these cases see my discussion in TESIS, *supra* note 66, 184-86.

¹⁵² *See* Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 490 (2000); *see also* John F. McGuire, Note, *When Speech Is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 770 (1999) (stating that Germany was the first European country to enact “Internet content control legislation”); Kim L. Rappaport, Note, *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, 792-95 (1998) (discussing specific provisions of Germany’s act); David E. Weiss, Note, *Striking a Difficult Balance: Combating the Threat of Neo-Nazism in Germany While Preserving Individual Liberties*, 27 VAND. J. TRANSNAT’L L. 899 (1994) (discussing the effect of Germany’s act on neo-Nazis).

53. The Canadian Human Rights Commission has taken tangible steps to prohibit the spread of hate messages over the Internet even when the source servers are based in other countries.¹⁵³ Regardless of the location from which these messages were sent, Canadian courts have been granted jurisdiction to try such cases.¹⁵⁴ Recent technological advancements, such as the Internet, have made it more difficult for law enforcement agencies to curb the dissemination of hate messages.¹⁵⁵ The Commission has already investigated inflammatory Web sites like those maintained by Ernst Zundel and Heritage Front.¹⁵⁶ These and other supremacists can be tried under the Canadian Human Rights Act, which prohibits the technological distribution of hate materials.¹⁵⁷ The Act prohibits both persons and groups from exploiting telecommunications in order to expose any identifiable group to hatred or contempt or to incite others to discriminate.¹⁵⁸ Canadian judges may now issue warrants to confiscate computer hard drives, CD ROMs, and computer discs which were used to spread propaganda punishable under § 319.¹⁵⁹
54. Nothing in the Canadian laws restricts criminal prosecution of hate speech to imminently harmful fighting words, nor is the constitutionality of those laws based on their content-neutrality, as they are in the United States. Canada has remained a tolerant society while forbidding hate mongers from elevating their ideologies to the stage of political debate. The crux of Canada's laws is that a multi-ethnic society is better served by limited restrictions on hate speech than by permissiveness with individuals and groups seeking to undermine the common good.
55. Post-WWII Germany has been particularly vigilant in proscribing and penalizing dissemination of socially harmful propaganda. Like Canada, Germany is fundamentally committed to preserving freedom of expression, while also being prudent in legislating against the spread of intolerance. Article Five of the German Basic Law, upon which Germany's constitutional system is established, guarantees freedom of expression. However, that right is not absolute, being 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."¹⁶⁰

¹⁵³ See *Human Rights Body to Investigate Hate on Internet*, CAN. PRESS NEWSWIRE, Nov. 22, 1996, available at LEXIS, News Group File, All.

¹⁵⁴ See *id.*

¹⁵⁵ See Canadian Human Rights Commission, *Issues in Human Rights: Race, Origin, and Religion*, in 1996 ANNUAL REPORT, available at <http://www.chrc-ccdp.ca/ar-ra/ar1996/issues-e.html> (last visited July 11, 2000).

¹⁵⁶ See *id.*; see Canadian Human Rights Commission, *Race, Religion and Ethnic Origin*, in 1997 ANNUAL REPORT, available at http://www.chrc-ccdp.ca/ar-ra/ar1997/a_race_e.html (last visited July 11, 2000).

¹⁵⁷ See Canadian Human Rights Act, R.S.C., ch. H-6, § 13(1) (1985) (Can.), available at <http://laws.justice.gc.ca/en/H-6/text.html>.

¹⁵⁸ See Canadian Human Rights Act, ch. H-6, § 13(1) (1999) (Can.).

¹⁵⁹ See Department of Justice Canada, Information Technology Security Strategy (ITSS) Legal Issues Working Group, *Integrity and Accuracy of Published Government Information* (Nov. 8, 1996) <http://canada2.justice.gc.ca/en/ps/ec/chap/ch06.txt> (last visited on May 2, 2001). The provisions of § 319 are discussed at text accompanying footnotes 148 and 149.

¹⁶⁰ Article 5 of the Basic Law provides that:

(1) Everybody has the right freely to express and disseminate their opinions orally, in writing or visually and to obtain information from generally accessible sources without hindrance. Freedom of the press and

56. Several German laws reduce the risk of hate speech. Any individual or group who (1) incites others to hate particular segments of the population; (2) advocates “violent or arbitrary measures against them”; and (3) insults them, “maliciously exposing them to contempt or slandering them” commits a criminal offense.¹⁶¹ Distributing or supplying “writings that incite to race hatred or describe cruel or otherwise inhuman acts of violence against humans in a manner which glorifies or minimizes such acts of violence or represents the cruel or inhuman aspects of the occurrence in a manner offending human dignity” are also criminal acts.¹⁶² Other German laws,¹⁶³ likewise, lean toward democratic order instead of the unquestioning and historically obtuse doctrine in the United States. Numerous German courts, including the German Constitutional Court, have upheld the constitutionality of laws regulating hate propaganda.¹⁶⁴

57. Israel, another vibrant democracy, also enacted several laws against racism and ethnocentrism. Persons who incite others to racism and negate the democratic state of Israel are prohibited from participating in national elections.¹⁶⁵ Anyone possessing inflammatory materials for later distribution may be imprisoned for one year, and anyone who published materials “with the purpose of inciting to racism” may be imprisoned for up to five years.¹⁶⁶ In Israel, unlike England, conviction is only possible if the prosecution proves that the accused had the requisite mens rea.¹⁶⁷ Scandinavian countries like Denmark, Finland, Sweden, and Norway have also enacted prohibitions against hate propaganda.¹⁶⁸

freedom of reporting through audiovisual media shall be guaranteed. There shall be no censorship.

(2) These 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.

(3) Art and scholarship, research and teaching shall be free. Freedom of teaching shall not absolve anybody from loyalty to the constitution.

Art. 5.1-3 GG, *reprinted in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY 107 (A. P. Blaustein & G. H. Flanz eds., official trans., 1994).

¹⁶¹ § 130 STRAFGESETZBUCH (StGB) (F.R.G.) *reprinted in* Juliane Wetzel, *Judicial Treatment of Incitement against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany*, in UNDER THE SHADOW OF WEIMAR 105 n.12 (1993).

¹⁶² § 131 STRAFGESETZBUCH (StGB) (F.R.G.) *reprinted in* Eric Stein, *History Against Free Speech*, 85 MICH. L. REV. 277, 322-23 (1986).

¹⁶³ Art. 18 GG, *reprinted in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY, *supra* note 160, at 113-14; § 86a STRAFGESETZBUCH (StGB) (F.R.G.) *reprinted in* Wetzel, *supra* note 161, at 104-05 n.11 (1993) (appearing in section of German Criminal Code entitled “Crimes that Endanger the Democratic Legal State,” §§ 84-91 (StGB) (F.R.G.)); Art. 21.2 GG, *reprinted in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY, *supra* note 160, at 115 (“Parties which by reason of their aims or the conduct of their adherents seek to impair or do away with the free democratic basic order . . . shall be unconstitutional”); *see* Art. 9.2 GG, *reprinted in id.* at 109.

¹⁶⁴ *Cf.* Lasson, *supra* note 133, at 76; Stein, *supra* note 162, at 289-99 (providing synopsis of German case law).

¹⁶⁵ *See* Basic Law: The *Knesset* (Amendment No. 9) Law, 1985, *quoted in* David Kretzmer, *Racial Incitement in Israel*, 1992 ISRAEL Y.B. ON HUM. RTS. 243, 245.

¹⁶⁶ The Israeli penal code is quoted in David Kretzmer, *Racial Incitement in Israel*, in LANGUAGE, THOUGHT, & REALITY 251-52 (John B. Carroll ed., 2d ed. 1971).

¹⁶⁷ *See* Eliezer Lederman & Mala Tabory, *Criminalization of Racial Incitement in Israel*, 24 STAN. J. INT’L L. 55, 81 (1988).

¹⁶⁸ *See* DANISH PENAL CODE Art. 266b, *quoted in* James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT’L & COMP. L. REV. 1, 82 (1994); PENAL CODE OF FINLAND & RELATED LAWS, ch. 11,

58. This brief survey of the criminal laws of other Western democracies makes it clear that the United States is following an anomalous pure speech jurisprudence. A variety of governments understand that the intentional spread of bias against insular groups is detrimental to society. Democracies generally recognize that preserving human rights supersedes a bigot's desire to spread instigatory vitriol. Representative government is only weakened by an unrestricted freedom on speech which comes at the expense of outgroup security. Speech that is purposefully, recklessly, or knowingly designed to suppress outgroup enjoyment of a country's privileges and immunities is antagonistic to social contract ideals. Surveying the history of racism in the United States, from Native American dislocation, to slavery, to Japanese internment, makes clear that here, as in other democracies, intolerance and persecution can exist in spite of a constitutional commitment to fairness and equality. Enacting narrowly tailored laws against hate speech can prevent socially regressive forces from establishing effective movements.

V. Methods for Regulating Hate Speech on the Internet

59. The United States' moralistic stance against any limits on fighting words, except those which are content-neutral and control only imminently harmful acts, obsequiously protects free speech more than any other constitutional right. When speech intentionally threatens the autonomy of identifiable groups, especially those groups in less favorable social positions, some limitations must be placed on its expression. The new information transmission technologies should not become unbridled forums for fascist and terrorist indoctrination.

60. The Internet is a vehicle for progressive and regressive thought. On the one hand, it offers a forum for sharing a plethora of beneficial ideas. Many individuals or organizations whose messages are disseminated over the Internet could not otherwise afford to reach the multifaceted audience that Web pages attract. The relative ease with which Web sites can be designed makes a political forum available to persons whose views would otherwise be buried in the often money-driven commercial news media. On the other hand, hate groups have also come to rely on this new communications medium to threaten representative democracies. They have found in Web and e-mail carriers a national and international forum for hate speech. The indoctrinating reach of terrorist organizations is greater than ever. The spread of bias invective on such a grand scale is menacing and detrimental to the fundamental rights of outgroups.¹⁶⁹ Reliance on social norms, townhouse meetings, and computer architectures¹⁷⁰ to control the resulting social

§ 8, *quoted in* PREVENT GENOCIDE INTERNATIONAL *available at* <http://www.preventgenocide.org/fi/rikoslaki.htm> (last visited Apr. 22, 2001); SWEDISH PENAL CODE, *On Crimes [A]gainst Public Order, Chapter 16, § 8* (Law 1988:835) (Swedish Ministry of Justice trans.) *available at* <http://justitie.regeringen.se/propositionermm/ds/pdf/Penalcode.pdf> (last visited Apr. 22, 2001); NORWEGIAN PENAL CODE Number 10 of 1902, *see* Council of Europe (Committee of Ministers), *European Commission Against Racism and Intolerance: Norway I.C.5* (Jan. 9, 1998) *available at* <http://cm.coe.int/reports/cmdocs/1997/97cm213ad.html> (last visited May 1, 2001).

¹⁶⁹ *See* TESIS, *supra* note 66.

¹⁷⁰ *See* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 511 (1999) (advocating the use of computer architecture, i.e. code, as the primary means of cyberspace regulation).

harms are too unreliable given that the consequence at which hate groups aim is the persecution of identifiable groups. Statutes that weigh the individual rights of the subjects and objects of communications are the most reliable alternatives for curtailing the distribution of hate speech intended to energize audiences to commit violent and denigrating acts. Free speech may be limited when it is intentionally manipulated to negatively impact people's fundamental rights.¹⁷¹

61. This Part suggests adopting both a criminal law and an international treaty prohibiting individuals and organizations from transmitting hate speech over the Internet. It begins with a technical description of Internet systems. I then evaluate the viability of dealing with hate speech through commercially available solutions. Next, I propose a cause of action and conclude with a brief discussion of jurisdictional issues.

A. Transmission and Reception of the Internet

62. The line of Internet transmission occurs through a series of physical processes, the source of which can be traced through modern technologies. Persons who send materials or post Web pages originating from a specific place are subject to the laws of that jurisdiction. Laws prohibiting expressions which are unprotected by the First Amendment, such as threats against the President, libel, and copyright theft, can readily be enforced against Internet users. Likewise, I argue that the purposeful promotion of bias crimes over the Internet should also be punished, so long as the message's originator had the requisite mens rea, and a court finds there is a substantial likelihood that the solicited crime will be perpetrated.¹⁷²

¹⁷¹ See Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1315 (1998) (proffering a theory that holds "free speech is a right that is limited by the fundamental rights of other persons and the community").

¹⁷² Mens rea, whether the criminal mental state was purposeful, knowledgeable, or reckless, is typically used to prove liability in criminal cases. See James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 664 (1991). The foreseeability that words or actions will lead to criminal conduct is also not foreign in criminal incitement cases. See, e.g., In re Kyle M., 1 CA-JV 00-0179, 6/7/01 (finding that a criminal state statute provided that spoken words, such as threats to kill another student, were enough to meet the elements of an intimidation statute; the state did not have to prove defendant's ability to carry out the threat) cited in Donn Kessler & Patrick Coppen, *Appellate Highlights* 38 Ariz. Att'y 40, 41 (2001). A Department of Justice Report on Bomb Making recommends that "the government may punish publication of dangerous instructional information where that publication is motivated by a desire to facilitate the unlawful conduct as to which the instructions inform . . . [A]t the very least, publication with such an improper intent should not be constitutionally protected where it is foreseeable that the publication will be used for criminal purposes" Cited in *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 248 (4th Cir. 1997).

Foreseeability is also an important issue in wrongful death claims. *Id.* at 249 (denying summary judgment to a publisher who was sued in a wrongful death claim for publishing "Hit Man: A Technical Manual for Independent Contractors" which gave "step-by-step instructions for murder . . . so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in the preparation and planning, but in the actual commission of, and follow-up to, the murder"); *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 47 (1975) (holding liable a radio station for the wrongful death of a motorist who died when young motorists were racing to win a monetary contest on the station because "[i]t was foreseeable that defendant's youthful listeners, finding the prize had eluded them at one location, would race to arrive first at the next site and in their haste would disregard the demands of highway safety"). *But see* *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987) (finding not liable the publisher of an article about autoerotic asphyxiation because the ideas in the article were not inciteful and,

63. The Internet, which today is a global network, was developed through research grants from the U.S. Department of Defense's Advanced Research Projects Agency. During the early years of its existence, only those computer science departments which were funded by the Department of Defense were granted access to the network.¹⁷³ The Advanced Research Project Agency Network (ARPANET), as the network was known during the early years of its development, became operational in 1969 and was used to send data between computers at the University of California at Los Angeles, the University of California at Santa Barbara, Stanford Research Institute, and the University of Utah.¹⁷⁴ Early experiments provided crucial information about the use of protocols for exchanging messages between various computer terminals.¹⁷⁵ One of the researchers' primary goals was to develop a system for maintaining communication links between distant locations even in cases when an electrical rout had been destroyed.¹⁷⁶ They developed a system for automatically rerouting electronic transmissions to avoid the inevitable disruptions that could occur from normal power outages or "military attack[s]."¹⁷⁷ This would ensure uninterrupted communications during times of national crisis and reduce the risks associated with electrical malfunction.
64. A major move toward popularizing interactive networks occurred in 1979 when researchers established the USENET for computer labs that were not funded by the Department of Defense.¹⁷⁸ The USENET is made up of forums for interactive discussions on specified subjects.¹⁷⁹ All persons or organizations with access to a USENET can post messages on a particular server, which then automatically distributes them to other servers.¹⁸⁰ Anyone with access to the USENET can view and reply to messages posted there.
65. Numerous Internet systems have been developed based on the protocol systems of the early networks. They include: "(1) one-to-one messaging (such as 'e-mail'), (2) one-to-many messaging (such as 'listserv') ... (3) real time communication (such as 'Internet Relay Chat'), (4) real time remote computer utilization (such as 'telnet'), and [5] remote information retrieval (such as ... 'World Wide Web')." ¹⁸¹ The Internet is composed of a series of interconnected computer networks. Electronic mail (e-mail) users transmit information from a specific source, whether individual or organizational, to designated computers. Listserv is an automatic mailing system. When a message is received at one computer server, it is automatically forwarded to a list of subscribers.¹⁸² Real time

therefore, protected by the First Amendment).

¹⁷³ See MICHAEL HAUBEN & RONDA HAUBEN, NETIZENS 41-42 (1997).

¹⁷⁴ See *id.* at 41.

¹⁷⁵ See *id.* at 120-24.

¹⁷⁶ See *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1578 (1999).

¹⁷⁷ See *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

¹⁷⁸ See HAUBEN & HAUBEN, *supra* note 173, at 39-45.

¹⁷⁹ See *Reno*, 929 F. Supp. at 835.

¹⁸⁰ See *id.* at 835.

¹⁸¹ See *id.* at 834.

¹⁸² See *id.*

communications facilitate almost immediate exchange of information between computers, similar to telephone conversations.¹⁸³ Telnet receives data information, which is then saved on another computer. Many libraries use telnet communications to post their library catalogs.

66. Remote information retrieval is perhaps the most popular form of Internet communication and includes the World Wide Web (Web). The European Particle Physics Laboratory developed the Web to propagate technical information about high energy physics.¹⁸⁴ The Web has now become popular in all academic circles, in the humanities and hard and social sciences, and outside of them, where it is commonly used for commercial and entertainment purposes. The data is stored in numerous computers, run both by companies and private individuals, and accessible by unique addresses, known as links.¹⁸⁵ Speeches and other live events can also be broadcast on the Web, making it an ideal medium for spreading political views or incitements.
67. The Internet is composed of interrelated computer networks that do not discriminate between groups inciting violence against vulnerable groups and political organizations promoting policies for social improvement. Without regulations, e-mails or listservs can be manipulated by terrorists or otherwise criminal individuals who intentionally disseminate encrypted or publicly accessible messages to subscribers or persons who happen upon their Web sites by chance. These communications can be traced to their sources by following the electrical rout of the messages. In order to determine who transmitted terrorist documents, investigators must understand the physical processes involved in sending them.
68. Messages are transmitted over the Internet through Open Systems Interconnection (OSI), which is an internationally recognized common reference model for relaying data between telecommunications locations.¹⁸⁶ This algorithmic model was created to simplify the complex operations involved in multi-layered communications. The simplification occurs through seven layers designated to receive input and obtain responses from the preceding stages of transmission.¹⁸⁷ The layers function on a variety of software and hardware levels. They are: “[A] Layer 7: The application layer ... [B] Layer 6: The presentation layer ... [C] Layer 5: The session layer ... [D] Layer 4: The transport layer; ... [E] Layer 3: The network layer ... [F] Layer 2: The data-link layer ... [G] Layer 1: The physical layer.”¹⁸⁸ The established rules used by each layer for communicating

¹⁸³ See *id.* at 835.

¹⁸⁴ See *id.* at 836.

¹⁸⁵ See *id.*

¹⁸⁶ See *OSI*, at http://searchnetworking.techtarget.com/sDefinition/0..sid7_gci212725.00.html (last modified, Apr. 6, 2002).

¹⁸⁷ E-mail from Bruce Zikmund, Technical Architect, Verdian Group, L.L.C. to Alexander Tsesis, Visiting Scholar, Institute for Legal Studies, University of Wisconsin-Madison Law School, (Sept. 11, 2000, 10:48 P.M. EST) (on file with author).

¹⁸⁸ See *OSI*, at http://searchnetworking.techtarget.com/sDefinition/0..sid7_gci212725.00.html (last modified Apr. 6, 2002).

between points of transmission and reception are known as “protocols.”¹⁸⁹ These protocols are the Internet’s fundamental building blocks. The standardization of these rules throughout the world has made interactions possible between users with differing software and hardware.

69. The Web application layer uses the Hypertext Transmission Protocol (HTTP) presentation layer. This protocol includes rules for exchanging or delivering multimedia files, including those containing text or video images.¹⁹⁰ The HTTP daemon is a Web browser program, such as Netscape Communicator or Internet Explorer, which is designed to send requests for data-streams from server machines.¹⁹¹ Within the files that are transmitted by HTTP, writers can embed links to various Internet servers.¹⁹² Internet users can access a broad body of knowledge stored on a variety of electronically linked computers. HTTP uses a computer language known as Hypertext Markup Language (HTML) for determining how Web pages are to be displayed.¹⁹³
70. HTML documents sent over the Internet are broken up into various units of data known as “datagrams” and physical parts called “packets.”¹⁹⁴ The server computer divides a complete file into datagrams. The message is reassembled when it arrives at the destination. Both of these operations occur at the transport layer, known as Transmission Control Protocol (TCP).¹⁹⁵ Even though the datagrams of a particular message all have a common place and time of origin, they can be sent to the destination by various routing computers. The destinations to which the datagrams are sent have unique Internet Protocols (IP).¹⁹⁶ Each computer connected to the Internet has its own IP address identifier. Some of these addresses are static, constantly remaining assigned to one computer, and others are dynamic, randomly reassigned to users by servers. The packets that arrive to designated locations contain senders’ and receivers’ addresses.¹⁹⁷ Therefore, e-mails or Web pages are readily traceable, and it is feasible to determine the origin of a message even though it was sent through various routers. Even when the IP is dynamic, servers typically keep a log identifying which users were assigned which IP during a particular usage time. This two-layer process of TCP data assembling and IP

¹⁸⁹ See *Protocol*, at http://searchnetwork.techtargget.com/sDefinition/0,,sid7_gci212839.00.html (last modified May 22, 2001).

¹⁹⁰ See *Hypertext Transfer Protocol*, at http://searchsystemsmanagement.com/sDefinition/0,,sid20_gci214004.00.html (last modified Oct. 5, 2000).

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ See *HTML*, at http://searchwebmanagement.techtargget.com/sDefinition/0,,sid27_gci212286.00.html (last modified Oct. 22, 2001).

¹⁹⁴ See *Transmission Control Protocol*, at http://searchnetworking.techtargget.com/sDefinition/0,,sid7_gci214172.00.html (last modified Jul. 30, 2001) (discussing packets); *General Description of the TCP/IP Protocols*, at <http://oac3.hsc.uth.tmc.edu/staff/snewton/tcp-tutorial/sec2.html> (last visited March 14, 2001) (explaining the difference between packets and datagrams).

¹⁹⁵ See *Transmission Control Protocol*, at http://searchnetworking.techtargget.com/sDefinition/0,,sid7_gci214172.00.html (last modified Jul. 30, 2001).

¹⁹⁶ The IP sits in the network layer. See *Internet Protocol*, at http://searchnetworking.techtargget.com/sDefinition/0,,sid7_gci214031.00.html (last modified Oct. 5, 2000).

¹⁹⁷ See *id.*

identifying the sender(s) and receiver(s) is often referred to by the acronym TCP/IP. The data-link layer divides datagrams into eight-bit chunks known as octets. This layer gives a definite meaning to an otherwise meaningless stream of data.¹⁹⁸

71. Lastly, the physical layer electrically and mechanically conveys data.¹⁹⁹ Hardware sends and receives data packages.²⁰⁰ Electromagnetic waves are the medium used to communicate information through the Internet. Communication is accomplished by altering the amplitudes, frequencies, or phases of waves.²⁰¹ Outgoing and incoming data are represented through digital information, a bit value of one or a bit value of zero, denoting the absence or presence of electrical charge.²⁰² Electromagnetic waves transmitting data are sent from servers through continuously alternating electric and magnetic fields.²⁰³ The transmitted oscillations cause disturbances in physical apparatuses at the receiving end. The oscillations from the transmitting end are mimicked at the place of reception. There are a variety of physical network media, like Ethernet or Token Ring, available for transforming electrical charges into the lines, letters, and pictures which appear on computer screens.
72. Internet data can be traced back to persons or organizations. A stream of electronic symbols crossing borders is part of an event that originates when someone communicates data. After data is sent, it is saved for a time on a server. From there, it is accessible to other users whom it can affect. The effects include linking users to other Web resources, introducing persons with similar interests, and stimulating receivers to act on inciteful messages. Given a specific message, its constitutive information, pathway, frequency, magnitude, and vector can be measured. Therefore, its source, intermediate locations, and final destination(s) can be determined.
73. The data's originator influences the entire route of transmission, including the temporary or permanent storage on a server and its influence on persons who subsequently access the document. S/he is at least partially responsible for consequences arising from the original electromagnetic stream replication. Thus, persons who use the Internet for illegal purposes can be identified and sued. Before formulating a cause of action against hate speech on the Internet, the next section discusses some of the currently available, but inadequate, protections against groups seeking to entice Internet audiences with

¹⁹⁸ E-mail from Bruce Zikmund, Technical Architect, Verdian Group, L.L.C. to Alexander Tsesis, Visiting Scholar, Institute for Legal Studies, University of Wisconsin-Madison Law School, (July 21, 2000, 11:31 A.M. EST) (on file with author).

¹⁹⁹ See *OSI*, at http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212725,00.html (last modified Apr. 6, 2002).

²⁰⁰ See *id.*

²⁰¹ E-mail from Bruce Zikmund, Technical Architect, Verdian Group, L.L.C. to Alexander Tsesis, Visiting Scholar, Institute for Legal Studies, University of Wisconsin-Madison Law School, (July 21, 2000, 11:31 A.M. EST) (on file with author).

²⁰² See *The Basics of Binary*, SMART COMPUTING REFERENCE SERIES: HOW COMPUTERS WORK, PART II, Aug. 2000, at 94, available at <http://www.smartcomputing.com/editorial/article.asp?article=articles/archive/r0403/20r03/20r03.asp&guid=ng36q6k>

^{v.}

²⁰³ See MELVIN MERKEN, *PHYSICAL SCIENCE WITH MODERN APPLICATIONS* 206 (3d ed. 1985).

inflammatory, bias propaganda.

B. Commercial Solutions

74. Currently, there are several commercially available filtering devices which enable Internet users to block sites based on their contents.²⁰⁴ Some authors believe those commercial devices are adequate and that the government need not and should not regulate the Internet.²⁰⁵ They argue that individuals can purchase and activate any available filtering software that reflects their personal moral or social perspectives.²⁰⁶ The filters are considered preferable to regulations, and less likely to raise freedom of expression issues, because companies, groups, and individuals, rather than the government, maintain control over message transmissions and receptions.²⁰⁷ Support for this view increased.²⁰⁸

75. Among the growing number of fairly effective filtering devices are NetNanny, SurfWatch CyberPatrol, and HateFilter.²⁰⁹ These empower parents and employers wanting to prevent children and employees from browsing Internet sites with objectionable messages. The software functions by scanning Web pages for specific words or graphic designs and then restricting user access to them. For example, when it is activated, the HateFilter denies access to Internet sites “advocat[ing] hatred, bigotry or violence against Jews, minorities and homosexuals.”²¹⁰ These devices, however, sometimes cast too wide a net, unnecessarily blocking out nondiscriminatory and inoffensive Web sites. America

²⁰⁴ See generally Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS 629 (1998) (arguing against the alteration of computer architecture as a means of regulating indecency). Among other benefits, this would improve the ability of cyberspace users to determine what information the sending computer could record about the users preferences (as, for example, by modifying the Cookies function). Cookies are bits of information sent from Web site sources to the computers accessing those sites. This process allows the source computer to retrieve information, often for commercial purposes, from the accessing computer during future exchanges of information between them. See *Cookie*, at http://searchsecurity.techtarget.com/sDefinition/0..sid14_gci211838.00.html (last visited Aug. 21, 2001).

The code system Lessig had in mind is analogous to the V-Chip, which makes it easier for parents to control what their children are watching on television, or to a design which enables law enforcement agencies to tap telephones. See Lessig, *supra* note 170, at 532-33. However, this system is inadequate for regulating hate speech on the Net. Given the argument that hate speech is dangerous to the retention of democratic institutions, the potential consequences require criminal laws. As argued in this section, voluntary application of hardware or software is insufficient protection for society.

²⁰⁵ See, e.g., Rachel Weintraub-Reiter, Note, *Hate Speech Over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution?*, 8 B.U. PUB. INT. L.J. 145, 173 (1998).

²⁰⁶ See *id.*

²⁰⁷ See Ari Staiman, Note, *Shielding Internet Users from Undesirable Content: The Advantages of a PICS Based Rating System*, 20 FORDHAM INT'L L.J. 866, 916 (1997).

²⁰⁸ See *Internet Online Summit: Focus on Children, Mission Statement*, at <http://www.kidsonline.org/mission/> (last modified Nov. 19, 1997) (encouraging market development of technological tools to shield children from inappropriate material).

²⁰⁹ Michael Krantz, *Censor's Sensibility: Are Web Filters Valuable Watchdogs or Just New Online Thought Police?*, TIME, Aug. 11, 1997, at 48; Robert Gearty, *Filter Bars Web Hate*, N.Y. DAILY NEWS, Nov. 12, 1998, at 11, available at 1998 WL 21934217.

²¹⁰ Gearty, *supra* note 209, at 11.

Online, for instance, once prevented its subscribers from accessing sites containing the word “breast.”²¹¹ This well-meaning attempt to prevent children from accessing pornographic sites had serious, unexpected results. For instance, the restriction on accessible resources blocked any files related to important subjects such as breast cancer.²¹² Similarly, blocking out hate propaganda through word and phrase sensitive filters is a good start, but the down side might be that persons conducting educational research on the Internet will be unable to obtain scholarly or otherwise innocuous information. Students will be blocked from accessing sites containing racist terms but posing no danger of inciting anyone to commit bias acts.

76. In their current state of development, the filters contain numerous inaccurate filters: Among the sites CyberPatrol designates as depicting “FullNude” and/or “SexActs” are (1) MIT Project on Mathematics and Computation; (2) The National Academy of Clinical Biochemistry; (3) Department of Computer Science, Queen Mary & Westfield College; and (4) Chiba Institute of Technology in Japan.²¹³ The inaccuracy with which automatic tools filter out useful materials also denies users access to subjects completely unrelated to bigotry.²¹⁴
77. Organizations, both commercial and not-for-profit, design these filtering devices pursuant to a variety of marketing or altruistic aims. The purchasers of filtering devices usually neither know precisely what sites they block nor the architectural principles that software designers used because that information is considered proprietary.²¹⁵
78. Besides the technical problems of regulating hate speech with filters, anyone not running one of the devices can browse to the growing number of Web pages promoting prejudice. The many hate groups actively maintaining listservs and newsgroups continue advocating violence and the use of terrorism to any bigots interested in meeting and organizing with like minded persons.²¹⁶ Filtering devices are inadequate for repelling the socially destabilizing force of hate messages. The filters do not prevent violently-minded people from accessing those hate-filled Internet sites to draw ideological sustenance, further inflame their bigotry, and organize terror networks. Only legislation prohibiting intentionally dangerous forms of hate speech, not just voluntary purchases and installations of commercial products, is necessary to protect individual rights and to guarantee social welfare. The next section proffers such a law.
79. Although well-intentioned, the other available commercial alternatives are no less porous at preventing harms associated with hate speech. Some Internet service providers, such as America Online, have instituted a policy against allowing subscribers to engage in hate

²¹¹ Krantz, *supra* note 209, at 48.

²¹² *Id.*

²¹³ The Censorware Project, *Blacklisted by Cyber Patrol: From Ada to Yoyo*, at <http://censorware.net/reports/cyberpatrol/intro.html> (last visited Apr. 19, 2001).

²¹⁴ See Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453, 455-56 (1997).

²¹⁵ See R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755, 763 (1999).

²¹⁶ Weintraub-Reiter, *supra* note 205, at 170.

speech.²¹⁷ America Online can cancel the accounts of persons or groups violating the policy.²¹⁸ However, the vast number of messages that bombard America Online and search engines like Yahoo! make them unwilling breeding grounds for neo-Nazi groups.²¹⁹ Nevertheless, a French court recently ordered Yahoo! to block an auction of Nazi memorabilia from reaching browsers in France because such commercial activities are illegal there.²²⁰ This case is novel because it imposed French law on a Web site located outside the country.²²¹ It is too early to determine whether this case will withstand the test of time in France or be followed in other countries with laws against hate speech.²²² In fact, a French judge ruled on November 6, 2001 that a French Internet service was not required to block Front14.org, a U.S. based Web site spreading online hate speech; the web site no longer exists so there is no reason to appeal the case.²²³

80. The World Wide Web Consortium, an organization hosted by the Massachusetts Institute of Technology, created another method for limiting access to Internet sites. The Consortium developed software for rating materials in order to categorize them by subjects like pornography and violence.²²⁴ The system does not actually filter materials; instead, it establishes rules for transmitting them.²²⁵ The software can be used by Organizations, governments, and companies to develop Platform for Internet Content Selection (PICS) based systems, tailored to their particular agendas. As with the other commercial alternatives, “[t]he idea behind this technological fix is simple: have a computer program act as a gatekeeper between the user and the Internet”²²⁶ But these systems, which work through firewall technology, are far from perfect, especially

²¹⁷ See *Scene Webworld, Nazi Site Banned: We want you!*, UK NEWSQUEST REGIONAL PRESS, Sept. 6, 2000, available at LEXIS, News Group File, All.

²¹⁸ See *id.* Similarly, eBay, an online auction site, banned the auction of racist group memorabilia. See *EBay Bans Items Connected to Hate Groups*, WALL STREET J., May 4, 2001, at 2001 WL-WSJ 2862494.

²¹⁹ See Keith Perine, *The Trouble With Regulating Hate*, INDUSTRY STANDARD, July 24, 2000, available at 2000 WL 31584076; Ned Stafford, *German Group Finds Neo-Nazism Alive Among AOL Users*, NEWSBYTES NEWS NETWORK, June 11, 2001, at 2001 WL 2819637.

²²⁰ See *Yahoo! Loses Nazi Case*, NAT'L L.J., Dec. 4, 2000, at B4.

²²¹ See Richard Raysman & Peter Brown, *Yahoo! Decision in France Fuels E-Commerce Sovereignty Debate*, N.Y. L.J., Dec. 12, 2000, at 3.

²²² Most recently a U.S. District Court in San Jose refused to enforce the French court's order, finding that such a ruling violates a U.S. ISP's First Amendment rights. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F.Supp.2d 1181 (2001); See Tamara Loomis, *Internet Companies Sighing with Relief, For Now*, N.Y. L.J., Nov. 15, 2001, at 226; *Internet Law*, TIMES OF LONDON, Nov. 13, 2001, at 2001 WL 29004168. The League Against Racism and Anti-semitism and the French Union of Jewish Student, both French civil rights organizations, subsequently filed appeals. See *US Court Rules for Yahoo in Nazi Case*, IRISH TIMES, Dec. 6, 2001, at 2001 WL 30161323.

²²³ See MacMillan, *supra* note 2, at 2001 WL 23420148.

²²⁴ See Weintraub-Reiter, *supra* note 205, at 169; Denise Caruso, *The Problems of Censorship Only Increase When Moved to the Private Sector*, N.Y. TIMES, Dec. 15, 1997, at D6. Lessig, an expert on cyberspace law, maintains that the threat posed by PICS "is a greater danger to free speech than public regulation" because it would allow private parties, like companies, to block materials based on viewpoint. Caruso, *supra*, at D6.

²²⁵ See *ADL Report Documents Increased Use of Internet by Haters*, U.S. NEWSWIRE, Oct. 21, 1997, at LEXIS, News Group File, All. PICS uses both server labeling and browser filtering software. See *Reno v. ACLU*, 521 U.S. 844, 891-92 (1997) (O'Connor, J., concurring).

²²⁶ DAVID S. HOFFMAN, HIGH-TECH HATE: EXTREMIST USE OF THE INTERNET 10 (1997).

because they need not be used to protect against the infringement of individual rights. The idea that industry will be self-regulating in censoring biased ideology is suspect because corporate decisions are often financial and plutocratic not ethical and democratic.

81. Placing in the hands of commercial interests the power to decide whether hate speech should be blocked and, if so, the extent to which it should be limited would be a mistake. Filters are useful for containing the influence of entities scheming to turn back the progress of civil rights; however, they fall short of ensuring civil liberties because they rely on private organizations to bear the standard of justice. For-profit companies are not beholden to humanistic principles, like the advancement of equality, because their interests are private. Even not-for-profit companies have targeted interests. On the other hand, representative democracies are obligated by social contract principles to increase overall good while preserving civil rights.²²⁷ Delegating core governmental duties to private interests opens the way for opportunistic private prejudices, incentives, and priorities.²²⁸ An elitism based on profession, knowledge, and affiliation has already cropped up on Internet sites,²²⁹ and recent improvements in video chat technology increase the ease of discriminating on the basis of immutable physical characteristics, like race and gender, to keep “undesirables” out of chat rooms and Web sites.²³⁰
82. The Internet transmission and membership requirements are likely to fall most adversely on historically denigrated groups, which have suffered the greatest brunt of degrading and inciteful speech.²³¹ When the false and exaggerated misrepresentations of outgroups are based on historically developed stereotypes, they pose the greatest threat of harm because they are so catalytic to hate group unity. Several telling examples of culturally imbedded depictions portray Jews as ruthlessly power hungry, blacks as uncontrollably sex-depraved, Native Americans as drunken savages, gypsies as thieves, and homosexuals as pederastic. Web sites that are designed to perpetuate these sorts of stereotypes²³² and to induce others to act against the objects of the defamatory statements have an impact on real people. Their influence is not merely on some ephemeral computer network but on a real world where ideology turns into actions and reactions.

²²⁷ See TESIS, *supra* note 66, ch. 10 (writing from a rule consequentialist conception of justice); Alexander Tesis, *Toward a Just Immigration Policy: Putting Ethics Into Immigration Law*, 45 WAYNE L. REV. 105, 139-40 (1999) (discussing, in the context of immigration law, the imperative that government protect rights and increase all-around happiness). Jean Hampton, *Retribution & the Liberal State*, 1994 J. CONTEMP. LEGAL ISSUES 117, 135-136 (1994) (explaining how the philosophies of John Locke, Immanuel Kant, Jean-Jacques Rousseau and John Stuart Mill influenced liberal democratic concepts of protecting citizens' rights); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* xviii (1941) (discussing the governmental duty to protect minority rights, and particularly the rights of Native Americans, through an enlightened social conception of rights).

²²⁸ See Netanel, *supra* note 152, at 452.

²²⁹ See *id.* at 453-541; 1132-35; Margie Wylie, *Virtual Snobbery: If You're Not on the List, You Don't Get into Some Netareas*, NEW ORLEANS TIMES-PICAYUNE, Jan. 14, 1999, at E1, available at 1999 WL 4387760 (discussing various elitist online discussion groups).

²³⁰ See Netanel, *supra* note 152, at 454.

²³¹ See *id.* at 455; Miri Rubin, *Imagining the Jew: The Late Medieval Eucharistic Discourse*, in IN AND OUT OF THE GHETTO 177, 178 (R. Po-Chia Hsia & Hartmut Lehmann eds., 1995).

²³² See generally *supra* Part II for a discussion of Internet sites run by hate and terrorist groups.

Bias crime is the end result of averse paradigms about minorities coupled with the promotion of actions against them.²³³ Orators calling for oppression and persecution against identifiable groups increase racial and ethnic tensions.²³⁴ The potential dangers to harmonious democratic order and the long hand reach of terrorist groups engaging in systematic hate propaganda call for laws punishing its dissemination.²³⁵

C. Establishing a Cause of Action

83. States should enact criminal statutes prohibiting the dissemination of hate speech on the Internet because of the significant danger it poses to democratic communities and the ineffectiveness of commercial devices in preventing it. One of the foremost experts on the causes and preventions of bigotry, Gordon Allport, has pointed out that since it is evident that discriminatory legislation augments prejudices, it is logical to infer that the enactment of laws prohibiting discrimination will decrease the incidence of prejudice.²³⁶ Desegregation reshaped conventional sensibility: interacting as equals brought out the fallacies of racist preconceptions. Even more than civil anti-discrimination laws, criminal laws manifest public discontent with culpable behavior and influence citizens' perceptions of what constitutes moral behavior in multiethnic societies.²³⁷
84. Hate speech, on the other hand, tends to legitimize racism by advocating intolerance based on long-standing prejudices. Throughout the course of history, in a wide variety of cultures, widespread hate propaganda paved the way for a broad participation in crimes against humanity. The Nazis relied on many slogans that had been developed in the decades before their ascent to power. These were readily recognized and believed by common Germans. For instance, the infamous Nazi propagandist Julius Streicher, who was eventually sentenced to death by the Nuremberg War Crimes Tribunal for his incitements in the savagely anti-Semitic newspaper *Der Stürmer*,²³⁸ ordered that posters be raised throughout the Third Reich with the inflammatory message "*Die Juden sind unser Unglück*" ("The Jews are our misfortune").²³⁹ This slogan was a verbatim restatement of an 1879 slogan of Heinrich von Treitschke, a well-known university professor who helped legitimize anti-Semitism in German intellectual circles.²⁴⁰ Similarly, discrimination against blacks developed among the British even before they

²³³ See David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 463 (1987).

²³⁴ Rubin, *supra* note 231, at 178.

²³⁵ Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 858-63 (2001). *But see* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1392-93 (1996) (using a non-physical-world metaphor for cyberspace to conclude that the Net should be self-governed by system operators).

²³⁶ See ALLPORT, *supra* note 67, at 469.

²³⁷ See George P. Fletcher, *Law & Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 534 (1987) (reflecting on the role of laws in developing a critical morality).

²³⁸ By the 1930s, Streicher's newspaper was used as a teaching tool by elementary school teachers. See RICHARD GUTTERIDGE, *OPEN THY MOUTH FOR THE DUMB!* 161-62 (1976).

²³⁹ See KARL D. BRACHER, *THE GERMAN DICTATORSHIP* 37-38 (Jean Steinberg trans., 3d ed. 1972).

²⁴⁰ See Volkov, *supra* note 65, at 323-25.

practiced systematic black slavery.²⁴¹ “When slavery did become embodied in law, it could not help but reflect the folk bias within the framework of which it developed.”²⁴² The religious dogma that Africans were Ham’s progeny who were accursed to slavery because of their progenitor’s sin, and the secular dogma of their purported biological inferiority were found, in somewhat modified forms, in literature from the sixteenth century until the Civil War.²⁴³ Images of Native Americans portraying them as nomadic hunters, who were not tied to any particular land nor had any real property interests, were instrumental to passing and carrying out forced Indian Removal.²⁴⁴ Modern day injustices such as the slave trade in Mauritania, Sudan, and Saudi Arabia continue using ancient Arabic folklore purporting the inferiority of blacks.²⁴⁵

85. Some laissez-faire is preferable for commercial transactions, but the stakes are higher in protecting civil rights because they pertain to fundamental liberties that the federal government must assure against infringement.²⁴⁶ Laws can help reduce intolerance by altering social outlooks.²⁴⁷ Criminal laws in particular are official declarations that can have lasting effects in equalizing outgroups’ status by shaping social mores.²⁴⁸ Strong legislation will deter unprincipled groups who might otherwise carry out schemes intended to undermine equitable justice and democratic institutions.²⁴⁹ A representative government, such as the one embodied in the United States’ constitutional framework, is formed to assure that majorities will not arbitrarily exercise their power.²⁵⁰
86. Carefully tailored legislation should be enacted even though, like any other law, it may fall short of complete effectiveness.²⁵¹ Legislators should not be deterred by a blind zeal for speech from enacting laws narrowly tailored to further the compelling state interest of

²⁴¹ See DEGLER, *supra* note 65, at 30. Compare Oscar Handlin & Mary F. Handlin, *The Origins of Negro Slavery, in THE ORIGINS OF AMERICAN SLAVERY AND RACISM* 21 (Donald L. Noel ed., 1972) (1950).

²⁴² See DEGLER, *supra* note 65, at 30.

²⁴³ See generally WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (1968); WILLIAM S. JENKINS, *PRO-SLAVERY THOUGHT IN THE OLD SOUTH* (Peter Smith 1960) (1935).

²⁴⁴ See ROBERT F. BERKHOFFER, JR., *THE WHITE MAN'S INDIAN* 148 (1979) (concerning pseudo-justifications used by frontiersmen for stealing Native American lands); PRESIDENT ANDREW JACKSON, *2 COMPILATION OF THE MESSAGES & PAPERS OF THE PRESIDENTS* 458 (James D. Richardson ed., Bureau of Nat'l Literature and Art 1902) (Dec. 8, 1829) (rationalizing his administration’s Indian Removal policy).

²⁴⁵ See BERNARD LEWIS, *RACE & SLAVERY IN THE MIDDLE EAST* 22, 56-57, 92, 95 (1990) (writing about traditional Islamic stereotypes about blacks); <http://www.hrw.org/reports/2001/africa/mauritania/mauritania.html> (Visited July 29, 2001) (2001 report finding that slavery persists in Mauritania).

²⁴⁶ See *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1680, 1703-04 (1999) (balancing the interests of “uniform rules” and “lawless pluralism”); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xviii-xx (1993) (reflecting on problems with the free market model of free speech and advocating a Madisonian democracy model).

²⁴⁷ See Matsuda, *supra* note 3, at 2360-61. “Racism as an acquired set of behaviors can be dis-acquired, and law is the means by which the state typically provides incentives for changes in behavior.” *Id.* at 2361.

²⁴⁸ See RICHARD L. ABEL, *SPEAKING RESPECT, RESPECTING SPEECH* 97 (1998).

²⁴⁹ See JONES, *supra* note 133, at 5.

²⁵⁰ See Netanel, *supra* note 152, at 415.

²⁵¹ See Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1405 (1996).

safeguarding liberal democracy.²⁵² Society's interest in stability and diversity outweighs bigots' interest in using new technologies to destroy constitutional institutions.

87. Below is a model law against the dissemination of hate speech on the Internet, taking into account the trans-boarder audience that electronic medium can affect.²⁵³

- (1) Any Internet user who;
- (2) Advocates the perpetration of hate crimes;
- (3) Where the communicator intended the message to instigate those crimes; and
- (4) Where it was reasonably foreseeable or substantially probable that such advocacy would elicit the solicited response; and
- (5) Where the message(s) affected persons in this jurisdiction or the user sent the message(s) in question from this jurisdiction;
- (6) Shall be imprisoned for at least three months and not more than three years;²⁵⁴
- (7) Community service, not to exceed four hundred hours, may be imposed in addition to the term of imprisonment.
- (8) This section shall not apply to any Internet Service Provider which unintentionally carried the data on its network.²⁵⁵

D. Personal Jurisdiction and Extradition

88. As with any other criminal matter, only courts with personal jurisdiction over a defendant could adjudicate the proposed Internet hate speech statute. In the United States, criminal laws require that trials commence in the defendant's presence.²⁵⁶ There are a few exceptions which permit trials to be litigated even though the defendant is unable to attend court throughout the proceedings.²⁵⁷ Ordinarily, however, courts will only have

²⁵² See Matsuda, *supra* note 3, at 2380-81.

²⁵³ This model is based on some of the foreign laws discussed in Part IV of this Article.

²⁵⁴ This element can be further broken down by misdemeanor and felony.

²⁵⁵ See 47 U.S.C. § 230(c)(1) (1991 & Supp. 2001) (providing immunity to the common carriers of Internet sites). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3). A district court in *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991), held that in civil cases no liability attaches to those Internet distributors which do not know the content of a defamatory publication. An Internet distributor is analogous to a "public library, book store, or newsstand." *Id.* at 140. Sunstein, *supra* note 86, at 1796.

²⁵⁶ See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 279-81 n.215 (1993).

²⁵⁷ Defendants can, for example, be removed from the courtroom for disruptive conduct. FED. R. CRIM. P. 43(b)(3). The trial court will also proceed without a defendant if s/he fled after its commencement. FED. R. CRIM. P. 43(b)(1).

jurisdiction over Internet hate propaganda cases when a defendant is present in their jurisdictions, either because s/he resides there or was extradited there from abroad.²⁵⁸

89. Given the current state of United States common law on fighting words,²⁵⁹ it is unlikely that my proposed statute will be enacted in the United States. An extradition treaty offers the best hope for bringing to justice the disseminators of Internet hate speech. The United States should become a signatory to such a treaty, especially because most hate groups using the Internet transmit hate speech from the United States to European countries where hate speech is illegal. Since this country does not recognize hate speech to be criminal it will probably qualify its treaty participation as only valid in cases where incitements pose an imminent threat of harm. The U.S. should handle these cases as any other extradition matters.
90. Extradition is a form of international law facilitating the surrender of criminals from one sovereignty to another.²⁶⁰ An extradition treaty must meet the several goals of signatory parties, including provisions for obtaining evidence that was gathered by the extraditing country and mechanisms for cooperating between governmental bodies.²⁶¹ Generally, countries will only extradite criminals to those countries that would reciprocate the surrender of culprits in similar circumstances. The requesting nation obtains jurisdiction after the defendant is arrested in a different sovereignty and then removed to the requesting state.²⁶² Traditionally, extradition treaties were limited to listed offenses.²⁶³ Signatories were only obligated to hand over persons who committed the enumerated acts.²⁶⁴ However, the recent trend, in the United States, has been to make extradition available when “the offense is punishable by a specified minimum sentence.”²⁶⁵
91. Extradition occurs after the accused has presented a case to an extraditing magistrate or judge who determines that s/he committed an extraditable offense. In the United States, the quantum of proof in extradition hearings is lower than the “beyond a reasonable doubt” standard required for a criminal conviction.²⁶⁶ U.S. law provides that:

²⁵⁸ See Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 813-14 (1993) (concluding that the United States can get jurisdiction of defendants residing in foreign countries by requesting formal extradition pursuant to a treaty).

²⁵⁹ See Part III.

²⁶⁰ See John T. Soma et. al, *Transnational Extradition for Computer Crimes: Are New Treaties & Laws Needed?*, 34 HARV. J. ON LEGIS. 317, 318 (1997).

²⁶¹ See Michael Hatcher et. al, *Computer Crimes*, 36 AM. CRIM. L. REV. 397, 439 (1999).

²⁶² See David Goodman, Note, *Proposals for a Federal Prohibition of Internet Gambling: Are There Any Other Viable Solutions to This Perplexing Problem?*, 70 MISS. L.J. 375, 406 (2000).

²⁶³ Andre M. Surena et al., *Extraterritorial Application of Criminal Law*, 85 AM. SOC'Y INT'L L. PROC. 383, 383-84 (1991), available at WL 85 ASILPROC 383; GEOFF GILBERT, *TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS* 84 (1998).

²⁶⁴ See M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION & WORLD PUBLIC ORDER* 330 (1974) (writing about the procedural aspects of extradition).

²⁶⁵ Surena et al., *supra* note 263, at 384.

²⁶⁶ See Matthew M. Curley, Note, *Untying a Judicial Knot: Examining the Constitutional Infirmities of Extrajudicial Service & Executive Review in U.S. Extradition Procedure*, 49 VAND. L. REV. 1239, 1253 (1996).

Whenever there is a treaty or convention for extradition between the United States and any foreign government . . . any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention . . . issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered.²⁶⁷

Extradition is only proper in cases where there is at least probable cause to believe that the defendant committed a crime and that the wanted person has been properly identified.²⁶⁸

92. An international treaty against cybercrime with a hate speech component would be the best way of assuring that smooth extradition procedures reflect policies of the requesting and extraditing states.²⁶⁹ In fact, some countries, such as France, Germany, and Italy, have already begun working together to prevent cybercrime and assuring prosecution in cases where fugitives have fled from one country to another in an attempt to elude arrest for computer crimes.²⁷⁰ Pursuant to this type of alternative, the requesting nation can obtain jurisdiction after the defendant has been arrested in a different sovereignty.²⁷¹ The defendant could only be arrested in those states or countries where incitement is a crime.²⁷² The proper venue for trying such cases would either be where the crime was committed or, where the crime affects several districts, the defendant can be tried in any of the affected districts.²⁷³

93. Jurisdiction should not be limited to the country where a crime was perpetrated. The United States can try citizens or noncitizens for actions committed outside this country that have consequences within it.²⁷⁴ It is a well-established principle here that a state has

²⁶⁷ 18 U.S.C. § 3184 (2001).

²⁶⁸ See, e.g., *In re Extradition of Garcia*, 890 F. Supp. 914, 922 (S.D. Cal. 1994) (discussing the requirement that probable cause be found before an extradition treaty between Mexico and America can be applied). John G. Kester argues that greater procedural safeguards than currently exist should be applied to extradition cases where criminal charges are involved. See *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1446 (1988).

²⁶⁹ See Catherine P. Heaven, *A Proposal for Removing Road Blocks from the Information Superhighway by Using an Integrated International Approach to Internet Jurisdiction*, 10 MINN. J. GLOBAL TRADE 373, 387-88 (2001) (discussing a proposed international treaty for obtaining jurisdiction over cybercrime).

²⁷⁰ Laura J. Nicholson et. al, *Computer Crimes*, 37 AM. CRIM. L. REV. 207, 253-54 n.349 (2000).

²⁷¹ See Goodman, *supra* note 262, at 406.

²⁷² See John T. Fojut, *Ace in the Hole: Regulation of Internet Service Providers Saves the Internet Gambling Prohibition Act of 1997*, 8 DEPAUL-LCA J. ART & ENT. L. 155, 170 (discussing extradition treaties against Internet gambling).

²⁷³ See Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 43 (1996).

²⁷⁴ See *United States v. Noriega*, 746 F. Supp. 1506, 1512 (S.D. Fla. 1990) (“[T]he United States has long possessed the ability to attach criminal consequences to acts occurring outside this country which produce effects

the jurisdiction to punish acts taken outside the jurisdiction but intended to affect or affecting someone or something within it.²⁷⁵ A nation has an extraterritorial right to protect its interest from criminal acts undertaken outside its limits.²⁷⁶ A person is subject to extradition if s/he transmits hate speech from a computer in one sovereignty to another, where the sender knew the message violated a significant public interest²⁷⁷ – such as the maintenance of intergroup tranquility.

94. The sovereignty from which the message was sent will also have jurisdiction to adjudicate actions brought under the model criminal statute proposed in Part V. The source can be determined by tracing the message to its originating IP address and investigating who used that protocol on the date and time of posting. Of course, the trial court will also need to evaluate whether the defendant violated all the elements of the statute, including the criminal culpability requirement. As a consequence of *R.A.V.*, the United States is unlikely to extradite the purveyors of hate speech to countries like Germany and Canada, where such expressions are illegal even when they do not pose a clear and present danger. Therefore, initially, there should be a judicial reevaluation in the United States of the hate speech doctrine. Only then will hate groups cease to exploit this country as a safe harbor for transmitting messages *via* the Internet to countries where their acts are criminally punishable.

VI. Conclusion

95. The Internet contains an abundance of democratically progressive and regressive ideas. The rapid availability of vast information resources, which previously took strenuous research to accumulate, is awe-inspiring. On the other hand, the Internet is also a breeding ground for hate groups which recruit supporters willing to commit bias crimes. The instigation of racial animus is not conducive to representative democracy; instead, it catalyzes irrational prejudices. Incendiary propaganda intended to snuff out minority rights threatens civil liberties. Inciteful messages terrorize outgroups and further the political aspirations of organizations bent on separatist and violent solutions.
96. When hate speech is broadcast over the Internet, it increases the influence of previously isolated groups. Laws should be enacted against any Internet hate propaganda which is substantially likely to cause discrimination against an outgroup. Passing both criminal laws and an extradition treaty preventing the international dissemination of hate speech on the information superhighway could diminish the reach of hate groups using that global network. The European Commission, which is the European Union's executive branch, recently proposed to harmonize its members' laws against racist crimes generally

within the United States”), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

²⁷⁵ See *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.”).

²⁷⁶ See *Church v. Hubbart*, 6 U.S. 187, 234 (1804).

²⁷⁷ See MODEL PENAL CODE § 1.03 (2000). States can try acts occurring outside their boundaries “when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.” *Id.* § 1.03(1)(f).

and the dissemination of racist materials specifically.²⁷⁸ The Commission found it “difficult to prosecute those who disseminate racist material on the Internet because racist sites often are located in non-EU countries, particularly in the United States, where they are protected as free speech.”²⁷⁹ The reluctance of United States courts to recognize the danger hate speech poses, a danger which other democracies have long acknowledged, will weaken such a compact because hate groups will continue operating Web sites from the United States and disseminating their messages extraterritorially.

²⁷⁸ See *EU Commission Proposes Harmonization of Laws Against Racist Crimes*, AGENCE FRANCE-PRESSE, Nov. 28, 2001, available at 2001 WL 25073354.

²⁷⁹ See Greta Hopkins, *Politics: Europe Moves to Harmonize Hate Crime Laws*, INTER PRESS SERVICE, Nov. 26, 2001, available at 2001 WL 4806069.