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Hate in Cyberspace: Regulating Hate Speech On the Internet

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Hate in Cyberspace: Regulating Hate Speech on the Internet

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I. INTRODUCTION

The speed at which information can be spread throughout the United States and other countries has been greatly enhanced by the Internet. This computer-driven, technological medium consists of various modes of transmission, including discussion groups, interactive pages, and mail services. A wide variety of pictorial, auditory, and written information is available on the Internet. Persons with disparate goals can access and affect large audiences through it. Both those seeking social improvement and those promoting racist violence can now increase the magnitude, diversity, and location of their audiences. Persons advancing democratic ideals and those inclined to exclusionary elitism can use e-mails and electronic chat rooms to communicate with like-minded individuals located in different cities and in other lands.

There are millions of people who regularly connect to and interact on the Internet.¹ It is a communications system that uses computer programs, computer parts, and algorithms to facilitate local, national, and international interactions.² The Internet has globalized the spread of knowledge. It has made available more educational opportunities, increased citizens' roles in government, given greater access to health related resources, made available library catalogues, and allowed people to find employment far from their homes.³ In those ways, it has been an invaluable tool for thriving democracies.

On the other hand, it has also been manipulated by cynical forces seeking to create social division and inequality.⁴ There are at least 800 Internet sites devoted to hatred against outgroups like minorities, homosexuals, and other identifiable groups, such as Jews.⁵ These sites thrive in the United States because of the few controls on their activities. In this country, the maintenance of unencumbered free speech is often considered the ultimate political value, regardless of indices that link

1. While the exact number of Internet users fluctuates and is therefore not certain, recent estimates find that there are between 140 and 304 million users worldwide. *See South Africa; Good Going on South Africa's Gambling Industry*, AFR. NEWS, Aug. 4, 2000, available at <http://allafrica.com/stories/2000008040025.html> (saying there are approximately 140 million users); *Telecom Committee Urges Beauty Contest for 2000 System*, BUS. DAY (Thail.), Aug. 4, 2000, available at LEXIS, News Group File, All. (claiming 170 million users); Walaika Haskins, *Super Economy*, PC MAG., Aug. 2000, at 82 (saying there were 304 million users as of March 2000).

2. *See infra* Part II.B (discussing the technical workings of the Internet).

3. *See* Administration Policy Statement, 58 Fed. Reg. 49,025, 49,026 (Sept. 21, 1993).

4. *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1135 (2000) (concerning the destructive possibilities of cyberspace).

5. Louise Surette, *New Laws to Curb Hate on Internet?: Symposium Urges Federal Action*, GAZETTE (Montreal), Mar. 24, 1999, at A12.

hate speech⁶ to the perpetration of crimes against minorities.⁷ The role of hate speech in developing and sustaining anti-democratic social movements is discussed in Part II.B of this Article.

Besides theorists who hold that laws should not prohibit hate speech,⁸ there are those who argue that the Internet should not be regulated because it is extraspacial and, therefore, should be unencumbered by government regulations.⁹ No state, it is proclaimed, does or can have sovereignty in this extraterritorial cyberspace.¹⁰ The proponents of this doctrine fail to recognize that coded writings and images are transmitted

6. Mari J. Matsuda provides useful distinguishing characteristics of dangerous hate speech: "(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." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989). To this definition, it should be added that hate speech is intended to harm its targets and has a substantial probability of doing so.

7. 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*, RECORD, June 29, 1994, at A20, available at LEXIS, News Group File, All (reporting that FBI Director Louis Freeh said the most frequent motive for 1993 hate crimes in the United States was 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.

8. See, e.g., Marjorie Heins, Comment, *Banning Words: A Comment on "Words That Wound"*, 18 HARV. C.R.-C.L. L. REV. 585, 592 n.39 (1983); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 562-69.

9. See generally David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) (advocating the use of Internet rules that, unlike laws, are not territorially based). Commentators who have made similar arguments include Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413, 419 (1997) (concluding that "self-governance is desirable for electronic communities"); Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475, 543 (1997) ("Given time, we may have sufficient experience with cyberspace to justify general legislation to govern it. Until then, first do no harm."); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993, 1029 (1994) (arguing that absent some "compelling contrary social policy" parties using cyberspace should be governed by self-help remedies, like contracts or private associations).

10. See E-mail from John Perry Barlow, to John Perry Barlow (Feb. 9, 1996, 17:16:35 +0100), at http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296 (last visited June 20, 2000). "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather." *Id.*

and received through physical processes occurring in specific jurisdictions.

This Article postulates that there is a unified reality within which electromagnetic signals are transmitted over the Internet. These signals have consequential influence on the plans and actions of those who transmit and receive them. It is therefore argued herein that disseminated information can affect and impact human lives. This is true not only in theory but also in practice on the Internet, where some persons convey racial and ethnic hate through various media, seeking to persuade others to act on animus. The Internet provides an extensive forum to persons intent on directing outgroup oppression. Instead of tolerating this antisocial activity, Internet hate speech, which poses a substantial threat to egalitarian democracy and its constituents, should be prohibited.

The first part of this Article discusses the structure of spacetime. It then shows how data transmission over the Internet occurs within that manifold and therefore is within the purview of legal regulations. Part II also covers the proliferating number of Internet sites that spread messages promoting racial and ethnic hatred and oppression. The third Part reviews and criticizes current United States jurisprudence on hate speech. Part III then explicates how hate speech undermines egalitarian democracy. Part IV gives a brief account of how Canada and Germany have managed to honor freedom of speech on the Internet while contemporaneously prohibiting hate propaganda. Finally, Part V considers whether it is appropriate to enact laws prohibiting the distribution of hate speech on the Internet, and if so, to what extent such expression may constitutionally be limited. This last Part of the Article formulates a cause of action against hate speech in cyberspace. It includes an analysis of jurisdictional issues and the ineffectiveness of private filtering systems.

II. SPACE AND CYBERSPACE

Cyberspace, a term first coined by William Gibson,¹¹ provides a novel way to communicate and distribute ideas. This resource is so new that it has been incorrectly characterized as “not ontologically rooted in . . . physical phenomena, it is *not subject to the laws of physics*, and hence it is not bound by the limitations of those laws.”¹² Others have called cyberspace “multi-dimensional, artificial, or virtual reality. . . . Objects seen or heard are neither physical nor, necessarily, presentations of physical objects, but are rather—in form, character, and action—made

11. See WILLIAM GIBSON, *NEUROMANCER* 55 (1984).

12. MARGARET WERTHEIM, *THE PEARLY GATES OF CYBERSPACE* 228 (1999).

up of data of pure information.”¹³ This line of thinking leads to the notion that there is no “temporal reality in cyberspace.”¹⁴

Some authors have adopted the metaphor of the Internet as extraspacial to support their view that it cannot be regulated by territorial laws which, after all, are made for real spaces and jurisdictions. Proponents of that position conclude that no state can claim personal jurisdiction over Internet users.¹⁵ Cyberspace is regarded as separate and apart from reality.¹⁶ Cyberspace, so the argument goes, is a virtual reality, the contents of which “exist, in effect, everywhere, nowhere in particular, and only on the Net.”¹⁷ David Johnson and David Post write, “[t]here is no geographically localized set of constituents with a stronger and more legitimate claim to regulate it than any other local group.”¹⁸ Messages, they and others imply, are routed in some ephemeral way that supersedes the abilities of jurisdictions to regulate cyberspace. Essentially, they argue that geographically-based governmental authority and laws are inapplicable in this new communications medium because of its nonphysical nature.

These sweeping pronouncements suffer from an analytical misstep. They accept a postulate as being axiomatic. That is, they fail to examine whether the physical nature of the Internet and the messages transmitted over it really are extraspacial and, therefore, outside the jurisdiction of states with physical borders.¹⁹ By not evaluating what space is and whether the Internet is spacial, they argue circularly: Internet communications are nonspacial, therefore the Internet cannot be regulated by governments because it is nonlocal. This logical error has significant consequences because its proponents employ the argument as a given from which flows the conclusion that governments cannot enforce laws over this virtually nonspacial matrix.

This part of the Article seeks to remedy that mistake by first examining the nature of space and then determining whether processes on the

13. Matthew R. Burnstein, Note, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 78 (1996) (quoting Willard Uncapher, *Trouble in Cyberspace: Civil Liberties at Peril in the Information Age*, HUMANIST, Sept.–Oct. 1991, at 5, 9).

14. Andrew E. Costa, Comment, *Minimum Contacts in Cyberspace: A Taxonomy of the Case Law*, 35 HOUS. L. REV. 453, 465 (1998).

15. See, e.g., Johnson & Post, *supra* note 9, at 1376.

16. See *id.* at 1378.

17. *Id.* at 1375.

18. *Id.*

19. See *infra* Part II.D.

Internet occur in space. If transmissions on the Internet are sent and received in particular locations, then specific fora retain jurisdiction to prosecute illegal activities transacted on the Internet. By showing that everything occurring in cyberspace materializes within the spacetime manifold, this Article attempts to demonstrate that the Internet, like every other social space, can be regulated by carefully crafted laws.

A. *Spacetime and the Flow of Events*

Nature is uniform, but not static, throughout altering phenomena. Inductive reasoning, predictability, and repetitive patterns are derived from this uniformity.²⁰ Seemingly dissonant and chaotic microscopic and macroscopic events are, upon observation, explainable by constant laws.²¹

The object of physics is not only the formulation of consistent theory, but also the ascertainment of truths about nature.²² Accurate descriptions of nature are not limited by individual perspectives; instead, they are based on actual physical processes and relations.²³ Transcendent reality exists independent of our subjective perceptions and individual expectations.²⁴ The character of existence is not based on what we agree it to be; rather, our theories, to be verifiable and useful, must reflect an independent reality.²⁵ There can only be one external space and time.²⁶ A theory holding that there are multiple spaces and times posits fragmentary and subjective states whose images and perceptions are ultimately linked to unitary space and time, existing externally of the percipient. As Anthony Quinton, a philosopher, has noted:

Other spatial and temporal entities are fragmentary and private, a sort of ontological litter to be bundled into the wastepaper basket of the imaginary. . . . [W]e only count those things as real that can be fitted into the one coherent and public space and time, that such locatability is a criterion of being real.²⁷

Space is found in the positional relations of events and their parts; time manifests itself in the altering positions between events.²⁸ Together

20. See J. R. LUCAS & P. E. HODGSON, *SPACETIME AND ELECTROMAGNETISM* 280 (1990).

21. See *id.*

22. See *id.*

23. See A. P. USHENKO, *THE PHILOSOPHY OF RELATIVITY* 33 (1937).

24. See LUCAS & HODGSON, *supra* note 20, at 261.

25. See *id.*

26. See Anthony Quinton, *Spaces and Times*, 37 *PHILOSOPHY* 130, 138 (1962).

27. *Id.*

28. See ALFRED NORTH WHITEHEAD, *The Concept of Nature*, in ALFRED NORTH WHITEHEAD: AN ANTHOLOGY 197, 253 (F.S.C. Northrop & Mason W. Gross eds., Macmillan Co. 1953) (1920).

they form a spacetime manifold within which all events occur. The view that space and time are unified by one existing medium of processes revolutionized the understanding of physics from the Newtonian model to the picture presented by Albert Einstein's Special Theory of Relativity.²⁹ Newton conceptualized space as a potentially empty receptacle without its own properties and unconnected to temporal variations.³⁰ According to Newton's model, space is absolute, existing apart from any events. Einstein, to the contrary, realized that the laws of nature are constant relative to the location and the time that specific measurements are taken, and therefore that space is not absolute.³¹ This does not mean physical laws are relative and unpredictable. The results of experiments, presented in predefined units of measurements, are repeatable for all bodies with the same frame of reference. Experimental results must be described not only relative to the specific location of the observations but also relative to the specific time at which they were taken; thus space and time are part of an intertwined frame of reference.³²

The integrated model of space that emerged from Einstein's Special Theory of Relativity is four-dimensional.³³ Space and time are bound in a single reality, "spacetime."³⁴ It was Michael Faraday's and James Maxwell's advances in the electromagnetic theory³⁵ that made it clear to

29. See LUCAS & HODGSON, *supra* note 20, at 1, 37.

30. See *id.* at 22.

31. See WILLIAM J. KAUFMANN, III, UNIVERSE 468 (3d ed. 1991). Einstein discovered that a problem with Newtonian physics was that it failed to explain why the speed of light remained constant regardless of the speed at which a percipient was moving. See *id.* A light signal sent at time *x* appears to be traveling at the same speed both for a person standing still and for another who is moving uniformly in the direction of the light. This means that the speed of light is governed by a consistent and predictable law that does not change based on the relative position of the observer. The absolute theory of space fails to account for why time does not seemingly run slower relative to the person approaching the light source as opposed to the stationary person. Natural laws hold true relative to the location from which measurements are taken, regardless of the speed at which the person collecting data is traveling.

32. See JENNIFER TRUSTED, PHYSICS AND METAPHYSICS 176 (1991).

33. WERTHEIM, *supra* note 12, at 174.

34. *Id.*

35. Faraday proved that magnetic factors help produce electricity. See Department of Electrical & Computer Engineering, University of Maryland, *A Gallery of Electromagnetic Personalities*, at <http://www.ee.umd.edu/~taylor/frame4.html> (last visited Sept. 20, 2000). Maxwell's great contribution, leading to Einstein's Special Theory of Relativity, was the concept of electromagnetic radiation. *Id.* at <http://www.ee.umd.edu/~taylor/frame6.html>. There are numerous forms of electromagnetic radiation including light, "radio waves, microwaves, infrared radiation, ultraviolet rays, X-rays, and gamma rays." *Electromagnetic Spectrum*, at <http://observe.ivv.nasa.gov/nasa/education/reference/>

Einstein that space is not a passive, three-dimensional container.³⁶ Einstein realized that within space were “states which propagated themselves in waves, as well as localized fields which [are] able to exert forces on electrical masses or magnetic poles brought to the spot.”³⁷ Einstein asserted that in all spacetime frames of reference there are consistent natural laws both for mechanical and electromagnetic phenomena.³⁸

The existence of spacetime is an ontologically necessary condition for any specific being and process.³⁹ Empirical occurrences and alterations can only be manifested and measured within the context of spacetime.⁴⁰ The medium is interfused and intermingled in all natural laws and concrete manifestations.⁴¹

Spacial coordinates reflect the characteristics of unified identities when they are interlinked by individuated time sequences of altering positions.⁴² Relative perspectives, which are tied to points of perceptions, are bound to and derivative from objective and nonrelative laws, limiting the possible range of coordinates in spacial appearance and temporal sequence. While in reality there is constant flow and change, spacial position can be abstracted to moments in time. The particular location of a specific particle is determined relative to the spacial location of other particles at a given point in time. Through the flow of time, particles are constantly changing positions, but perceptually, the alteration may be linked to some unity. Through the altering positions of particles, there remain specified qualities linking them to relative parameters of objects.⁴³ These qualities remain during varying lengths of time, eventually losing characteristics that linked them to unified wholes.

emspec/emsspectrum.html (last visited Sept. 20, 2000).

All of these, known collectively as the electromagnetic spectrum, are fundamentally similar in that they move at 186,000 miles per second, the speed of light. The only difference between them is their wavelength, which is directly related to the amount of energy the waves carry. The shorter the wavelength of the radiation, the higher the energy.

Id.

36. Albert Einstein, *The Problem of Space, Ether, and the Field in Physics*, in *SPACE FROM ZENO TO EINSTEIN* 253, 255 (Nick Huggett ed. 1999).

37. *Id.* at 255–56.

38. See LUCAS & HODGSON, *supra* note 20, at 37.

39. See A. M. MOSTEPANENKO, *PROBLEMA UNIVERSAL'NOSTI OSNOVNYX CFOISTV PROSTRANSTVA I VREMENI* [PROBLEMS CONCERNING THE UNIVERSALITY OF THE BASIC PROPERTIES OF SPACE & TIME] 20 (1969).

40. *Id.* at 23.

41. See LUCAS & HODGSON, *supra* note 20, at 265.

42. See 2 SAMUEL ALEXANDER, *SPACE, TIME, AND DEITY* 235 (Humanities Press 1950) (1920).

43. See WHITEHEAD, *supra* note 28, at 273–74.

The identity of an event over infinite variation is called "duration."⁴⁴ Moments of durations have significance throughout the course of an event.⁴⁵ Sets of particles are interlinked by the spacial locations and time sequences of smaller sets of related particles whose elements compose sets of durations.⁴⁶ These sets are then composed of smaller sets, comprised of elements with shorter spatiotemporal distances. When applied to the physical world, this means that the duration of a molecule that comprises a particular chemical interaction is made up of smaller durations composed of lesser durations of atoms. These are made up of even smaller durations of subatomic particles like protons and electrons altering their position relative to each other through the course of relatively shorter periods of time.

It is fundamental to the theory of spacetime that events can be ordered.⁴⁷ That is, at any given time *x* the state of particle *a* is derived and determined by the necessary influence of its unique vector, whose direction is chronologically "past-pointing."⁴⁸ The unique attributes of *a* follow a "historical route" containing elements necessary to *a*'s existence.⁴⁹ "Accordingly the unique individuality of the particle is nothing else than the fusion of the continued sameness of the adjective with the concrete individuality of the historical route."⁵⁰ The content of an event reflects past manifestations whose pathway follows an identifiable direction that influences not only the event but also its future potentialities. If the same pathway could be identically repeated, we would expect the same outcome because of the consistency of natural laws. Thus, events occur in spacetime and contain unique characteristics more closely linked to some, and not other, past occurrences. This relationship is called "cause and effect."

While it is impossible to precisely determine the necessary consequences

44. See *id.* at 340–41. All events are really interrelated and continuous, but, abstractly, boundaries of space and time can be assigned to durations. *Id.* at 253.

45. See *id.* at 275.

46. See *id.* at 253.

47. HANS REICHENBACH, *THE PHILOSOPHY OF SPACE & TIME* 285 (Maria Reichenbach & John Freund trans., Dover Publ'ns, Inc. 1958) (1928).

48. See Howard Stein, *On Relativity Theory and Openness of the Future*, in *SPACETIME* 241 (Jeremy Butterfield et al. eds., 1996).

49. ALFRED NORTH WHITEHEAD, *The Principle of Relativity with Applications to Physical Science*, in ALFRED NORTH WHITEHEAD: AN ANTHOLOGY 295, 346 (F.S.C. Northrop & Mason W. Gross eds., Macmillan Co. 1953) (1920).

50. *Id.*

of events,⁵¹ both deductive and inductive reasoning can be used to establish the probability of consequent events occurring from antecedent ones.⁵² Observer's are, of course, limited both by the extent of their knowledge of natural laws and by their profound ignorance of most of the circumstances surrounding and influencing the states of events. Therefore, the predictive power of theory is limited to the degree to which its predicates are accurate about phenomena. For example, advancements in electromagnetic theory make highly probable predictions about the trajectory of those electrons that are influenced by specific magnitudes of magnets. The electromagnetic processes that are associated with the Internet are predictable and traceable to root antecedents.

Thus, all physical processes including electromagnetic ones, happen in spacetime. The next section shows that processes transpiring over the Internet likewise occur in that four-dimensional matrix of reality. The consequence of this conclusion, as argued in Part V, is that the state can enforce laws against persons transmitting certain data over computer networks.

B. The Spacio-Temporal Processes of Cyberspace

This section briefly discusses the history of the Internet and then explains how it works. It describes how the transmission of information occurs by physical processes that can be traced to a source. Since sent materials and posted Web pages originate in specific places at determinable times, persons purposefully transmitting them are subject to the jurisdiction of the location from which they were sent.

Today's global network, the Internet, was developed through research grants from the United States Department of Defense's the Advanced Research Projects Agency. Initially, access to the network was only granted to computer science departments funded by the Department of Defense.⁵³ The network, which was known as the Advanced Research Project Agency Network (ARPANET), began operating in 1969 transmitting 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.⁵⁴ The initial stages of experimentation provided critical observations on the use of protocols

51. For an exceptional presentation of the inability to discover necessary connections in particular occurrences, see 1 DAVID HUME, A TREATISE OF HUMAN NATURE 105-16 (David F. Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739-40).

52. See 6 BERTRAND RUSSELL, *On the Notion of Cause*, in THE COLLECTED PAPERS OF BERTRAND RUSSELL 190, 195-98 (John G. Slater & Bernd Forhmann eds., 1992).

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

54. *Id.* at 41.

which enabled users to exchange information between various computers.⁵⁵ The goal was to develop a system whereby communication links between two distant locations could continue even when one electrical route was destroyed.⁵⁶ If a message was sent through one route which was inaccessible because of power outage or "military attack," the message would then be automatically rerouted through one of many alternate tracks.⁵⁷ This would ensure uninterrupted communications during times of national crisis and reduce the risks associated with electrical malfunction.

In 1979, researchers established an interactive system, called USENET, for computer laboratories which were not funded by the Department of Defense.⁵⁸ The USENET is made up of forums for interactive discussions on specific subjects.⁵⁹ A user with access to a USENET server can post a message to a specific server which then automatically distributes it to adjacent servers.⁶⁰ Anyone having access to the USENET can view the message and, if she or he wishes, reply. Since the appearance of USENET, a variety of other interactive Internet systems have developed. 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')." ⁶¹ The Internet is a series of interconnected computer networks. Although figuratively these communications media are virtual realities, when their workings are examined, they exhibit undeniable physical characteristics, operating in spacetime, not in supraphysical events.

Electronic mail (e-mail) transmits 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.⁶² Real time communication facilitates almost immediate exchange of

55. See *id.* at 120–24.

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

57. See *ACLU v. Reno*, 929 F. Supp. 824, 831–32 (E.D. Pa. 1996).

58. See HAUBEN & HAUBEN, *supra* note 53, at 39–45.

59. See *Reno*, 929 F. Supp. at 835.

60. See *id.*

61. *Id.* at 834.

62. *Id.*

information between computers, similar to telephone conversations.⁶³ Telnet can be used to receive data information which is saved on another computer. Internet library catalogs use telnet communications.

Remote information retrieval is perhaps the most popular form of Internet communications and includes the World Wide Web (Web). The Web was developed by the European Particle Physics Laboratory to propagate technical information about high energy physics.⁶⁴ The Web has now spread widely outside academic communities. There is no central location for information storage. Documents contained on the Web are stored in specific computers and are located through unique addresses, known as links.⁶⁵ While there may be a variety of spaces where information is stored, those spaces are real because they are public, accessible to all who have the necessary computer hardware and software, exist at specific times after which they can be retained or deleted, and originate from sources with individual Internet addresses.

Messages are transmitted over the Internet through the use of Open Systems Interconnection (OSI), which is the internationally accepted common reference model for transmitting data between telecommunications locations.⁶⁶ This algorithmic model was created to simplify the complex operations involved in Internet communications. The simplification occurs through seven layers each assigned to receive input and responses from the preceding layers.⁶⁷ The various processes involved in Internet communication are divided into these layers, each of which adds specific, necessary functions.⁶⁸ 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."⁶⁹ The rules used by each layer for communicating between points of transmission and reception are known as "protocols."⁷⁰ These protocols are the essential building blocks of the Internet.

Persons utilizing the World Wide Web application layer usually use

63. *Id.* at 835.

64. *Id.* at 836.

65. *Id.*

66. *OSI*, at http://www.whatis.techtarget.com/WhatIs_Definition_Page/0,4152,212725,00.html (last modified Feb. 19, 2001).

67. E-mail from Bruce Zikmund, Technical Architect, Verdian Group, L.L.C. to Alexander Tsesis, Assistant Corporation Counsel, City of Chicago Department of Law, (Sept. 11, 2000, 10:48 P.M. EST) (on file with author).

68. *See OSI*, at http://www.whatis.techtarget.com/WhatIs_Definition_Page/0,4152,212725,00.html (last modified Feb. 19, 2001).

69. *Id.*

70. *Protocol*, at http://www.whatis.techtarget.com/WhatIs_Definition_Page/0,4152,212839,00.html (last modified Oct. 4, 2000).

the Hypertext Transmission Protocol (HTTP) presentation layer. This protocol provides rules for exchanging or delivering multimedia files, including those containing text or video images.⁷¹ The HTTP daemon is a Web browser program, like Netscape Communicator or Internet Explorer, designed to send requests for data streams from server machines.⁷² Files transmitted by HTTP can have references or links to other files saved on various servers throughout the Internet.⁷³ Thus, Internet users can access a broad body of knowledge stored on a variety of electronically linked computers. The computer language used by HTTP for determining how Web pages are to be displayed is known as Hypertext Markup Language (HTML).⁷⁴

HTML documents sent over the Internet are broken up into various units of data known as "datagrams" and physical parts called "packets."⁷⁵ A file is divided into datagrams by the server computer. When it is received at the destination, the message is reassembled. Both of these operations occur at the transport layer, known as Transmission Control Protocol (TCP).⁷⁶ Although 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).⁷⁷ Each computer connected to the Internet has its own IP address identifier. The packets arrive to designated locations because they contain the addresses both of senders and receivers.⁷⁸ Therefore, e-mails or Web pages are readily traceable, and it is feasible to determine the origin of a message that has been sent through various routers. This two layer process of TCP data

71. *Hypertext Transfer Protocol*, at http://www.whatis.techtarget.com/WhatIs_Definition_Page/0,4152,214004,00.html (last modified Oct. 5, 2000).

72. *See id.*

73. *See id.*

74. *HTML*, at http://www.whatis.techtarget.com/WhatIs_Definition_Page/0,4152,212286,00.html (last modified Oct. 3, 2000).

75. *See Transmission Control Protocol*, at http://www.whatis.techtarget.com/WhatIs_Definition_Page/0,4152,214172,00.html (last modified Nov. 28, 1999) (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).

76. *See Transmission Control Protocol*, at http://www.whatis.techtarget.com/WhatIs_Definition_Page/0,4152,214172,00.html.

77. The IP sits in the network layer. *See Internet Protocol*, at http://www.whatis.techtarget.com/WhatIs_Definition_Page/0,4152,214031,00.html (last modified Oct. 5, 2000).

78. *Id.*

assembling and IP identifying the sender(s) and receiver(s) is often referred to by the acronym TCP/IP.

At the data-link layer, datagrams are divided into eight-bit chunks known as octets. This layer gives a definite meaning to an otherwise meaningless stream of data.⁷⁹

Finally, the physical layer electrically and mechanically conveys data.⁸⁰ Hardware sends and receives data packages.⁸¹ Electromagnetic waves are the medium used to communicate information through the Internet. Communication is accomplished by altering the amplitudes, frequencies, or phases of waves.⁸² 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.⁸³ Electromagnetic waves transmitting data are sent from servers through continuously alternating electric and magnetic fields.⁸⁴ These fields cause disturbances to other fields in space. The oscillating electrical fields that are transmitted cause disturbances in physical apparatuses at the receiving end. The oscillations caused at the receiving end mimic the oscillations at the transmitting end. There are a variety of physical network media, like Ethernet or Token Ring, available for transforming electrical charges into the lines, letters, and pictures appearing on computer screens.

The laws of electromagnetism, as discussed in Part II.A, follow universal natural laws operating in spacetime.⁸⁵ Einstein's Special Theory of Relativity maintains that physical laws not only hold true for mechanical processes, but for electromagnetic ones as well.⁸⁶ The events surrounding Internet transmissions are disregarded by persons who argue that "cyberspace . . . is *not subject to the laws of physics*"⁸⁷ and that "[p]hysics does not exist in cyberspace."⁸⁸ Even such an astute student

79. E-mail from Bruce Zikmund, Technical Architect, Verdian Group, L.L.C. to Alexander Tsisis, Assistant Corporation Counsel, City of Chicago Department of Law, (July 21, 2000, 11:31 A.M. EST) (on file with author).

80. See *OSI*, at http://www.whatis.techtarget.com/WhatIs_Definition_Page/0,4152,214172,00.html.

81. See *id.*

82. E-mail from Bruce Zikmund, Technical Architect, Jeridian Group, L.L.C., to Alexander Tsisis, Assistant Counsel, City of Chicago Department of Law (July 21, 2000, 11:31 AM EST) (on file with author).

83. *How Computers Work, Part II*, 4 SMART COMPUTING 94, 94 (Aug. 2000), available at <http://www.smartcomputing.com/editorial/article.asp?article=articles%2Farchive%2F0403%2F20r03%2F20r03%2Easp>.

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

85. See *supra* text accompanying notes 20–27.

86. See LUCAS & HODGSON, *supra* note 20, at 37.

87. WERTHEIM, *supra* note 12, at 228.

88. Seth Safier, *Between Big Brother and the Bottom Line: Privacy in Cyberspace*,

of Internet law as Lawrence Lessig has written that “the real world is made of atoms, cyberspace of bits; the rules of the atoms don’t work very well when applied to bits. . . . Hence rules that would contain atoms can’t be applied well to bits.”⁸⁹ To the contrary, examination of space and the Internet indicates that electromagnetic transmissions over that medium follow the same laws as any other real event. Moreover, as Lessig recognizes, cyberspace can be regulated because it affects the real world: “[Cyberspace] will be regulated by real space regulation to the extent that it affects real space life, and it will quite dramatically affect real space life. That is the amazing thing about this space—that this virtual place has such power over what we call the nonvirtual.”⁹⁰ However, unlike Lessig, this Article argues in Part V that laws, not merely software code or network architecture, are the best means of regulating dangerous messages transmitted over the Internet.

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 by 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. The duration of a sent message continues from its transmission through its storage, reception, and distribution.

Two sets of events are connected “if there is a route connecting them, if each lies at some definite distance and in some definite direction from the other.”⁹¹ Transitivity must be one of the characteristics of the route: where there is a path between event particles *A* to *B* and *B* to *C*, then there must be a route between *A* to *C*.⁹² The relationship between the source message, the sent datagrams, and received information is transitive. This section’s elaboration of how data is sent over the Internet makes clear that even when the data is routed through intermediate servers, the source of messages can readily be traced. The historical route of individual bit streams can be determined by control data added at the various levels of OSI.⁹³ Given a specific message, its constitutive

5 VA. J.L. & TECH. 6, 9 (2000), at www.vjolt.net/vol5/issue2/v5i2a6-safier.html.

89. Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1404 (1996).

90. *Id.* at 1406.

91. Quinton, *supra* note 26, at 130.

92. *Id.*

93. See *supra* text accompanying notes 66–70.

information, pathway, frequency, magnitude, and vector can be measured. Therefore, its source, intermediate locations, and final destination(s) can be determined.

The originator of the data influences the entire route, with all of its various gateway branches, that the message does, and potentially can, follow. She or he is causally responsible for the effects of the message throughout the entire duration during which the original electromagnetic stream is replicated. Furthermore, because the set representing the duration of that stream can be subdivided into subsets of shorter durations, the data originator is responsible for the sent information so long as the message continues to exist either on the computer where it was created or on a different computer where it was downloaded.

The only real spacetime is public spacetime. Only those things that can be located in "one coherent and public space and/[or] time" are real.⁹⁴ All other images are fleeting, incongruous, and private. The very fact that Internet processes can be measured by physical apparatuses indicates that they occur in real space, public to anyone conducting experiments under specific conditions. The event of a user creating and transmitting particular data can never recur. However, through the event the sender can influence multiple other events during which users download or view the message from the Internet. Given a specific set of data, its exact wave frequencies and oscillations can be measured.⁹⁵ Therefore, its place and time of origin, intermediate locations, and final destinations can be determined and traced to particular persons or organizations.

C. Hate Speech on the Internet

The utility of the Internet to spread views and opinions has been realized both by the advocates of democracy and by racist groups. The Internet is filled by a multiplicity of variegated commercial and private users. It is a boon for all sorts of advocacy. Among the views available for consumption on the Web are those that denigrate people based on their race, ethnicity, national origin, gender, and sexual preference. Hate groups take advantage of this relatively inexpensive medium for ideological distribution. They can spread pamphlets, letters, and images to groups of users who can anonymously participate in racist meetings, think tanks, and planning committees. One of the down sides of the Internet is that it provides a global forum for the advocates of intolerance and inequality.

94. Quinton, *supra* note 26, at 138.

95. See discussion *supra* Part II.A.

There has been a steadily increasing number of hate groups with Internet forums. In 1995, the Simon Wiesenthal Center found that approximately fifty hate groups had their own electronic bulletin boards.⁹⁶ Klanwatch and Militia Task Force, two agencies dedicated to monitoring racist hate groups, determined that in 1997, with the aid of the Internet, there was “an all-time high of 474 hate groups in the United States . . . , a 20% increase over 1996.”⁹⁷ The number of Internet sites promoting hate and targeting “religious groups, visible minorities, women and homosexuals” had grown to at least eight hundred by 1999.⁹⁸ In 2000, during unrest in the Middle East, hundreds of new Web sites and chat rooms deriding Jews burgeoned.⁹⁹ The Southern Poverty Law Center, which tracks hate group Internet sites,¹⁰⁰ concluded that the Internet is a medium extensively used by hate groups calling for intolerance of and violence against outgroups.¹⁰¹

Groups using the Net to spread their messages include the Ku Klux Klan and White Aryan Resistance.¹⁰² Their messages are not, in many cases, new; rather, they rely on age-old prejudices that have proven effective vehicles for inciting acts of oppression. For example, on its Web home page, Stormfront¹⁰³ aggressively promotes white supremacy and nationalism, providing worldwide links to other hate-filled Internet sites and offering a fairly broad range of anti-Semitic articles, T-shirts, and videos for

96. Steve Barmazel, #&?!@^*%\$!: *There Is No Stopping Hate Speech*, 15 CAL. LAW. 41 (1995).

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

98. See Surette, *supra* note 5, at A12.

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

100. See Southern Poverty Law Center, *Intelligence Project*, at <http://www.splcenter.org/intelligenceproject/ipmain.htm> (last visited May 19, 2001). The Southern Poverty Law Center created Klanwatch, which “tracks the activities of more than 500 racist and neo-Nazi groups.” *Id.*

101. In response, the Southern Law Poverty Center established tolerance.org to “use[] the power of the Internet to fight hate and promote tolerance.” See 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 the World Church of the Creator’s Web site that targets children and encourages a “Racial H[o]lly War”).

102. See Barmazel, *supra* note 96, 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>.

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

sale.¹⁰⁴ The Aryan Nation uses biblical passages to justify its racist dogma.¹⁰⁵ Moreover, the National Observer advocates using “biological terrorism.”¹⁰⁶ Such organizations embellish their propaganda through colorful, interactive Web pages where like-minded people can join their movements.¹⁰⁷

Many of these groups do not stop at discrimination and prejudice; they recruit Internet users to engage in violent acts against outgroups and to propagandize white supremacy.¹⁰⁸ Notorious among these is the World Church of the Creator, which calls for a “Racial Holy War” against nonwhites.¹⁰⁹ The National Socialist Movement sports a swastika logo thereby praising Adolf Hitler on its Web page.¹¹⁰ The cover of its magazine exclaims, “Total War Is the Shortest War!”¹¹¹ It solicits people to contact the National Socialist headquarters and begin training, presumably to participate in their preparations for a race war.¹¹² Patrick Henry On-Line provides an opportunity for interested racists and anti-Semites to contact and join any one of numerous racist militias.¹¹³ The militias, in turn, prepare their members for a race war.¹¹⁴ Civil War Two sponsors a racist and anti-Semitic secessionist page.¹¹⁵ These Internet sites advocate and further the violent aspirations of hate groups seeking to increase their memberships. Some hate groups have even taken to recruiting children through catchy music and colorful games.¹¹⁶

All of these disseminated ideas are linked to specific sources. With the help of technology and Internet Protocols, electromagnetic waves

104. *Id.*

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

106. See Tony Perry & Kim Murphy, *White Supremacist, 3 Followers Charged with Harassing 4 Officials*, L.A. TIMES, Nov. 11, 2000, at A20.

107. See Reid Kanaley, *Hate Groups Love Internet: Free Speech Flaunts Its Evil Side with Recruitment Drives*, NEW ORLEANS TIMES-PICAYUNE, July 7, 1996, at A12, available at 1996 WL 6429902.

108. See Perry & Murphy, *supra* note 106, at A20; Toby Eckert, *Hate Groups Find Web Useful Tool to Spread Word*, SAN DIEGO UNION-TRIB., Nov. 9, 1999, at A-11.

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

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

111. *National Socialist Movement, The N.S.M. Magazine*, at <http://www.nsm88.com/magazine.html> (last visited Mar. 13, 2001).

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

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

114. See generally Southern Poverty Law Center, *The Intelligence Project*, at <http://www.splcenter.org/intelligenceproject/ip-mainbtm.html> (last visited May 19, 2001) (providing information on some of these groups).

115. See generally <http://www.civilwartwo.com> (last visited Sept. 4, 2000).

116. See Tanya Talaga, *Neo-Nazis Trying to Snare Kids Through Net*, TORONTO STAR, Mar. 26, 1997, at A4, available at 1997 WL 3828469.

transmitting hate propaganda can be traced to their place and time of origin. No matter how often the messages are transmitted, the source remains the same. Hate groups should be held responsible for the intended consequences of their Internet communications, regardless of whether they have already instigated violence or have a significant probability of later causing violence.

D. The Practicality of Regulating the Internet

Part II.B showed that it is simplistic to argue that messages transmitted on the Internet are not stored and relayed and do not affect real places at particular times (i.e., in spacetime). Like any other medium for information transmission, be it telephone or paper, the source of the message can be traced to someone or some group expressing ideas from someplace at a specific time.¹¹⁷ The creator of that message remains the same, regardless of how many times the information is resent and downloaded. Web pages, e-mails, and all the other forms of Internet communications are relayed by electromagnetic waves traveling through space.¹¹⁸ They are subject to the same laws of reality as any other electromagnetic process.¹¹⁹ Thus, the sovereign state where the information was initially stored and the location where it was received both have personal jurisdiction over the message creator, be it a group or person.¹²⁰ If messages cross state lines, Congress can grant federal courts jurisdiction to hear cases.¹²¹ Such an analysis will serve to make Internet users accountable for their illegal actions rather than allowing an electronic free-for-all in which computer literate persons run roughshod over laws by using various network servers to disguise their whereabouts.

There is as clear a relation between messages sent from one computer

117. *But see* Johnson & Post, *supra* note 9, at 1370 (arguing that the Internet “radically subverts the system of rule-making based on borders between physical spaces”).

118. *See supra* text accompanying notes 82–84. *But see* Burnstein, *supra* note 13, at 78 (stating that cyberspace is “made up of data, of pure information” that are not physical objects).

119. *But see* WERTHEIM, *supra* note 12, at 228 (contending that the Internet is not subject to physical laws); Johnson & Post, *supra* note 9, at 1378.

120. A more detailed discussion on the jurisdictional issue of prosecuting online hate speech is provided in Part V.C *infra*.

121. *See* Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 227 (1998) (discussing the basis for Congress to intervene in cyberspace activities).

via an Internet server to numerous users as there is between a statement sent by a broadcasting station to a radio transmitter and then picked up on multiple radios. The source and route of a message transmission can be traced because each computer has its own IP identifier which remains embedded in the message, even when it is sent thousands of miles from the place of transmission.¹²² Relationships formed by long-distance Internet communications are as ontologically real as relations established during long-distance telephone conversations.

To maintain that the Internet is devoid of characteristics analogous to other physical and social connections is inaccurate because it loses sight of the physical processes involved in its operations.¹²³ Courts have repeatedly used spacial analogies to describe the spacio-temporal functions associated with electronic communications and postings.¹²⁴ For example, Justice O'Connor pointed out that "[c]yberspace undeniably reflects some form of geography; chat rooms and Web sites, for example, exist at fixed 'locations' on the Internet."¹²⁵ The Western District of Oklahoma, likewise, reflected that "[n]ews groups are interactive 'places' on the Internet into which anyone with access, anywhere in the world, may place graphic or text messages."¹²⁶

Besides the physical aspect of technology necessary to send and receive Internet transmissions, inciteful ideas have an effect on the real world. Purveyors of hate can use message boards and Web sites to recruit and retain members. The growing network of hate groups is not virtual but real. For instance, the information obtained on an antiabortion web site, called "The Nuremberg Files,"¹²⁷ was not at all extraspacial. A jury found liable persons and organizations responsible for posting information on The Nuremberg Files' site, which listed the names, addresses, and telephone numbers of physicians, like Robert Crist, who provided abortion services.¹²⁸ When three physicians were murdered,

122. See *Internet Protocol*, at http://www.whatis.techtarget.com/WhatIs_Definition_Page/0,415214031,00.html. For a more detailed account of the physical processes of Internet messaging, see *supra* Part II.B.

123. See Zatz, *supra* note 121, at 173.

124. See *id.* at 181.

125. *Reno v. ACLU*, 521 U.S. 844, 890 (1997) (O'Connor, J., concurring in the judgment in part and dissenting in part) (overturning the Communications Decency Act of 1996). But see *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997) (stating that "geography . . . is a virtually meaningless construct on the Internet" in a decision overturning a child obscenity law as against the Commerce Clause).

126. *Loving v. Boren*, 956 F. Supp. 953, 954 (W.D. Okla. 1997).

127. This Web site has been shut down since 1999. It was formerly located at: <http://www.christiangallery.com>. See Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 887 (1999).

128. Wardle, *supra* note 127, at 887; Kim Murphy, *Anti-Abortion Web Site Fined \$107 Million*, L.A. TIMES, Feb. 3, 1999, at A1. One night after Dr. Crist's name and home address had been posted on The Nuremberg Files Web site along with an offer of

their names were crossed off the list.¹²⁹ Physicians whose names appeared on the Web site lived in fear knowing that they were targets of persons who, for ideological reasons, wished to murder them.¹³⁰ Apparently an unknown gunman took the "wanted" sign seriously when she or he shot into Dr. Crist's house.¹³¹ Defendants who maintained the site were found liable for the threatening language and ordered to pay over \$107.9 million dollars in damages.¹³² The dangers of The Nuremberg Files Web site reverberated in real life in real communities.¹³³

If a hate message influences persons to attack someone, it does not matter whether the victim lives near or far from the location of transmission; the danger is just as great because the Internet is a global network. Whether the disseminator of bigotry can predict the consequences of e-mailing hate propaganda is irrelevant.¹³⁴ What is consequential is whether such a person or group intentionally elicits violence or persecution and whether there is a substantial probability that the posting will lead to violent criminal activity.¹³⁵ The temporal proximity of the act and the message are immaterial.¹³⁶ What matters is the extent to which the bigot was influenced to act by propaganda posted on the Internet; that is, whether the hate message is part of an event culminating in the substantial probability of oppressive or discriminatory consequences.

Advocates of an unregulated Internet place insufficient import on the role of a representative democracy in protecting individual rights.¹³⁷ The

\$5,000 to anyone who could "successfully persuade" Crist to stop performing abortion procedures, "an unknown gunman fired shots into his children's playroom." *Id.*

129. *Jury Slams Anti-Abortion Web Sites*, INTELLIGENCER J., Feb. 3, 1999, at A-1, 1999 WL 6462238.

130. *See id.*

131. *See* Murphy, *supra* note 128, at A12.

132. *See id.*

133. The Ninth Circuit Court of Appeals later vacated the district court's decision, 41 F. Supp. 2d 1130 (1999), finding that the electronic postings were protected by the First Amendment because they were part of a public discourse and posed no imminent harm. *Planned Parenthood v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1015-20 (9th Cir. 2001).

134. *Cf.* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1244 (1998) (arguing that it is no defense for an Internet provider to argue that it could not predict where information would flow because, just as an air polluter who does not know which way the wind blows, both are responsible for the consequences).

135. *See infra* Part V.B (providing an elaboration of these elements).

136. *See infra* Part III.A.1 for criticism of the clear and present danger test.

137. *See* Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 405 (2000); *infra* Part III.B.

ephemeral communities of cyberspace¹³⁸ include the democratically and the autocratically minded. It is unrealistic that hate groups will protect the rights of the very individuals whose interests they are attacking. Bigots are more likely to use a self-governing and anarchic system of cyberspace to unscrupulously abuse their power to block outgroup access to democratic institutions. This would have a destabilizing effect on society at large, not just on Internet users. An unbridled Internet would be detrimental to democracy and to the ideals of egalitarianism.¹³⁹ It would hoard power to the strong and provide a breeding ground for hate groups.¹⁴⁰

In sum, the Internet is a social space through which events occur via electromagnetic waves. Like other electromagnetic occurrences such as telephone conversations, illegal transactions fall within the purview of states. Much like governments are empowered to regulate activities occurring within their borders, so too they can regulate this new social space known as cyberspace. Part IV parses this latter argument in greater detail.

III. COMMON LAW LIMITS ON CONTROLLING HATE SPEECH

Hate groups have found a haven in the United States for their Internet sites because the Supreme Court has significantly limited the government's ability to prohibit the distribution of racist, provocative materials.¹⁴¹ While the Court has found statutes constitutional that augment penalties for crimes inspired by hate,¹⁴² it has held unconstitutional laws penalizing the use of hate speech against historically persecuted outgroups.¹⁴³ Therefore, groups and individuals can legally use Internet servers, located in the United States, to advocate persecution, oppression, and holy war, so long as they do not explicitly call for immediate violent

138. Cyberspace is too diverse to consider it a unified community. *See Developments In the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1598 (1999). *But see id.* at 1590 (stating that “members of . . . online groups report . . . that they experience the feeling of being part of a community”). The sense of community experienced by participants of online groups does not create a socially conscious society. No social contract obligations bind independent cyberspace users. No legal ideals of justice or essential rights govern interactions between them. *But see Kang, supra* note 4, at 1175–78 (positing the suggestion that persons who are joining certain cyberspace “communities” could be required to sign a “social contract”). Kang concedes, however, that cyberspace relationships are very rarely as close as face-to-face relationships. *See id.* at 1177.

139. *See Netanel, supra* note 137, at 498.

140. *See id.*

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

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

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

actions. This Article now turns to current United States jurisprudence on inciteful speech and its shortfalls.

A. Current Supreme Court Doctrine

This section provides a brief survey of existing First Amendment doctrines. It is not meant to be an exhaustive analysis of Supreme Court case law on pure speech regulations.¹⁴⁴ Three pivotal strands of thought affecting First Amendment jurisprudence are covered: (1) *Brandenburg v. Ohio*'s "imminent threat of harm" standard;¹⁴⁵ (2) Justice Holmes' dissent in *Abrams v. United States*, which created the "marketplace of ideas" concept;¹⁴⁶ and (3) *R.A.V. v. St. Paul*'s blanket prohibition against content based regulations.¹⁴⁷

1. Imminent Threat of Harm

Modern First Amendment jurisprudence on incitement speech begins with *Schenck v. United States*.¹⁴⁸ In a decision written by Justice Oliver Wendell Holmes, the Supreme Court held that Congress can prevent people from using language that "create[s] a clear and present danger."¹⁴⁹ Whether such public threat exists "is a question of proximity and degree."¹⁵⁰ In a dissent to a later decision, *Abrams v. United States*,¹⁵¹ Holmes clarified his doctrine on inflammatory speech. "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."¹⁵² Since Holmes' pronouncements, the Supreme Court has repeatedly reiterated the difference between abstract advocacy of violence and the preparation to act on those ideas.¹⁵³

Further, the use of "fighting words," which are statements tending to

144. There is an abundance of secondary literature on inciteful speech. See, e.g., STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT* 2-64 (1991); JOHN H. GARVEY & FREDERICK SCHAUER, *THE FIRST AMENDMENT: A READER* 351-65 (1992).

145. 395 U.S. 444 (1969) (per curiam).

146. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

147. 505 U.S. 377 (1992).

148. 249 U.S. 47 (1919).

149. *Id.* at 52.

150. *Id.* An example of speech causing a clear and present danger is a shout of "fire" that causes panic at a theater. *Id.*

151. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

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

153. See *Noto v. United States*, 367 U.S. 290, 297-98 (1961).

provoke ordinary citizens to violence, have never been protected by the Constitution.¹⁵⁴ “[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹⁵⁵ Fighting words by definition “inflict injury or tend to incite an immediate breach of the peace.”¹⁵⁶

*Brandenburg v. Ohio*¹⁵⁷ was the most recent Supreme Court declaration on the incitement doctrine. In that case, the Supreme Court enunciated the current rule for determining whether a statute, aimed at limiting volatile speech, infringes on individuals’ First Amendment rights. At issue was a film showing the defendant, who was the leader of an Ohio Ku Klux Klan chapter, making a speech which asserted that revenge might be taken against the United States government if it “continues to suppress the white . . . race.”¹⁵⁸ Reversing the defendant’s conviction, the Court held that First Amendment guarantees of free speech prohibit 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.”¹⁵⁹ The Court found that the Ohio statute, which *Brandenburg* was charged with breaking, violated the First and Fourteenth Amendments because it did not distinguish between persons who called for the immediate use of violence and those who taught an abstract doctrine about the use of force.¹⁶⁰ In explaining and analyzing its decision, the Court failed to evaluate whether it was reasonable to think that, given the Ku Klux Klan’s history of racist violence, a rally supporting “revenge” was more than just a gathering of people discussing abstract ideas.

The Court’s determination that anti-incitement laws are constitutional only when their scope is limited to preventing immediate unlawful actions is based on the false assumption that the advocacy of future violence cannot have devastating effects. Sometimes, incitements for long-term preparations are not solely ideological, but realistic about the current and future prospects of success. The planning stages of crimes against humanity, like the Nazi Holocaust and American slavery, were fomented by years of racist literature and education.¹⁶¹ After decades of indoctrination, when

154. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

155. *Id.* at 572.

156. *Id.*

157. 395 U.S. 444 (1969) (per curiam).

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

159. *Id.* at 447 (emphasis added).

160. See *id.* at 448–49.

161. See generally DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (Vintage Books 1997) (1996); JOHN WEISS,

popular culture accepted anti-Semitism and racism, charismatic leaders were able to harness bigotry to kill and enslave. Given the historical documentation showing the gradual development of group hatred through propaganda, it is simplistic, disingenuous, and cynical to argue that only immediately inflammatory speech is socially dangerous.¹⁶² "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."¹⁶³

Racism, when tolerated, is not an innocuous part of political discourse. Violence against outgroups is not perpetrated 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 systematic oppression.¹⁶⁴ Those things take time and have more impact than spontaneous acts of violence instigated by phrases uttered in the heat of the moment. The outlook of the imminent threat of harm test, on the

IDEOLOGY OF DEATH: WHY THE HOLOCAUST HAPPENED IN GERMANY (1996) (giving excellent 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 Eitinger, *The Origins of Modern Anti-Semitism*, in 2 *THE NAZI HOLOCAUST: HISTORICAL ARTICLES ON THE DESTRUCTION OF EUROPEAN JEWS* 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 WASHEM STUDIES ON THE EUROPEAN JEWISH CATASTROPHE AND RESISTANCE* 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 NAZI HOLOCAUST: HISTORICAL ARTICLES ON THE DESTRUCTION OF EUROPEAN JEWS* 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); 1 GEORGE BROWN TINDALL, *AMERICA: A NARRATIVE HISTORY* 97 (1984); LUNABELLE WEDLOCK, *THE REACTION OF NEGRO PUBLICATIONS AND ORGANIZATIONS TO GERMAN ANTI-SEMITISM* 203 (1942).

162. See generally Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 *SANTA CLARA L. REV.* 729 (2000).

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

164. See Matsuda, *supra* note 6, at 2335 (stating that violence is a "necessary and inevitable" part of racism).

other hand, is that dangerous, bigoted instigation is, in all circumstances, analogous to fist fights in which one party draws another into a spontaneous confrontation through verbal taunting.¹⁶⁵ Empirical evidence on the widespread use of hate speech by nefarious social movements shows that this view is too narrow. To give two examples: it took decades for the image of the Indian savage to develop a strong enough following in America to legitimize expropriating their lands and removing them, and centuries of dehumanizing Arabic discourse has led to the continued perpetration of black slavery in contemporary Mauritania.¹⁶⁶

Intolerant diatribes not only cause dignitary harms to targeted groups, they also decrease overall social well being. The government need not wait for an uprising to act against an inciteful organization.¹⁶⁷ The state should act against bigoted organizations before they manifest a clear and present danger of social destructiveness. Indoctrination that prepares followers for a race war is effective whether it is communicated through an in-person organizational meeting or through Internet gatherings. The message and its power to dehumanize an outgroup is the same, whether it is transmitted through sound waves or electromagnetic waves.

Hate speech seeks to undermine the egalitarian ideals of representative democracy because it adjures followers to intolerantly and inhumanely treat groups of people professedly unworthy of human rights and dignities. It is not always predictable where and when a spark of prejudice will ignite persons to commit brutal acts. As 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.¹⁶⁸

However, the Court has not followed the *Gitlow* line of reasoning where hate speech is concerned; instead, it has sided with a narrower view about the types of inciteful speech that pose a threat to society.¹⁶⁹

165. 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).

166. ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* (forthcoming Mar. 2002) (detailing how hate propaganda contributed to Indian Removal and Mauritanian Slavery).

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

168. *Gitlow v. New York*, 268 U.S. 652, 669 (1925) (regarding revolutionary utterances).

169. See, e.g., *Dennis*, 341 U.S. at 536–46 (Frankfurter, J., concurring).

Given the historical information about the long-term power of hate speech and about its lack of constructive social value, it is too dangerous to wait until there is an emergent threat to democracy.¹⁷⁰ This reasoning holds equally true for all manner of messaging, especially when there is the potential of reaching a broad audience, including children, surfing the Internet.

2. Marketplace of Ideas

The second major doctrine on speech that came out of Justice Holmes' era is his "market place of ideas":

"[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."¹⁷¹

The Supreme Court has, in numerous contexts, reiterated the continued validity of this doctrine.¹⁷²

At first, Holmes appears to be an advocate of objective truth, being tested in the ambers of dialogue and alighting like the Phoenix from the historical ash heap of false ideas. However, upon close scrutiny, Holmes' writings reveal that "truth" for him is not the absence of fallacy. Rather, it is whatever ideology is accepted by the strongest segment of society.¹⁷³ He was a moral and political relativist.

Holmes rejected "[i]nalienable human rights and absolute principles of law."¹⁷⁴ For him, the concepts of truth and common good are empty, while "desire and power are everything."¹⁷⁵ Holmes stated: "I am so

170. *But see* *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis and Holmes, J.J., concurring) (arguing that "[o]nly an emergency can justify repression" of speech), *overruled on other grounds by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

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

172. *See generally* *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (determining that the Internet was a new marketplace of ideas and holding some provisions of the Communications Decency Act unconstitutional); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (holding 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) (upholding the "fairness doctrine").

173. *See infra* text accompanying notes 174–75.

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

175. *Id.*

sceptical as to our knowledge about the goodness or badness of laws that I have no practical criticism except what the crowd wants.”¹⁷⁶ The marketplace of ideas is, then, a forum for herd mentality to direct the flow of law and to force others to follow it, regardless of whether the product is conducive to overall social well-being or only increases the happiness of those who dominate. Thus, the statement, “the best test of truth is the power of the thought to get itself accepted”¹⁷⁷ does not refer to the establishment of legal truths that will improve society for everyone. As John Dewey pointed out, “[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.”¹⁷⁸

Holmes held speech in such high regard that he thought it justifiable for “the dominant forces of the community” to impose a “proletarian dictatorship.”¹⁷⁹ He seemingly thought it irrelevant whether public discourse leads to a society striving for equal treatment of its subjects. The principal force behind laws 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 too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community. . . .”¹⁸⁰ When the will of the powerful interest conflicts with the desires of those who “competed unsuccessfully,” it is only natural that legislation should reflect interests of the “fittest.”¹⁸¹ In the competing interests of the marketplace of ideas, we should expect that dominant forces will sway public opinion to believe their doctrine(s), whether secular or religious, and when it is to their benefit, the powerful will enforce their desires and sacrifice the welfare of outgroups.

Holmes was not merely stating the fact that governments are often formed through the subordination of the weaker members of society. For him, the determining measure of government’s value is its ability to carry out the desires of powerful interests:

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,

176. See Oliver Wendell Holmes, *Letter from Oliver Wendell Holmes to Frederick Pollock*, in 1 THE POLLOCK-HOLMES LETTERS: CORRESPONDENCE OF SIR FREDERICK POLLOCK AND MR. JUSTICE HOLMES, 1874–1932 163 (Mark DeWolfe Howe ed., 1942).

177. *Abrams v. U.S.*, 250 U.S. 616, 630 (Holmes, J., dissenting).

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

179. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes and Brandeis, J.J., dissenting).

180. Oliver Wendell Holmes, *The Gas-Stokers’ Strike*, 7 AM. L. REV. 582, 583 (1873).

181. *Id.*

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.¹⁸²

In situations of conflicting interests, the rule of law should be guided by the desires of the strongest.¹⁸³ According to Holmes, the object of all legislation is “the greatest good of the greatest number,”¹⁸⁴ and the question of whether in the long run it is more beneficial to respect the highest good of minorities is as irrelevant as it is unpredictable.¹⁸⁵

What then of minorities? Did Holmes think there is any formal duty government owes them? Yes—it must enact legislation that will keep minority losses to a minimum by inculcating “an educated sympathy.”¹⁸⁶ However, Holmes had no sympathy for the passion of equality in commercial interactions nor, probably, in intellectual ones.¹⁸⁷ On the other hand, in his personal life, he was an abolitionist and despised demeaning depictions of blacks.¹⁸⁸ Nevertheless, there is an opposite, highly disturbing train of thought that runs throughout Holmes’ early and later writings. For example, Holmes was of the opinion that the powerful had the right to use sterilization¹⁸⁹ in order to rid society of the “unfit.”¹⁹⁰

Outgroups can only expect that their rights will be honored if they gain power and rewrite laws currently discriminatory against them.¹⁹¹ And then they might become the perpetrators of injustices. Force is the remedy between two groups with divergent world views.¹⁹² “If the welfare of the living majority is paramount, it can only be on the ground

182. OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 258 (1920).

183. *See id.* at 239.

184. Holmes, *supra* note 180, at 584.

185. *See id.*

186. *Id.* at 583.

187. Letter from Oliver Wendell Holmes to John Wu (June 21, 1928), in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 196, 197 (Harry C. Shriver ed., 1936).

188. *Id.*

189. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding law requiring the mentally ill to undergo sterilization).

190. *See* Letter from Oliver Wendell Holmes to John Wu (July 25, 1925), in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 180, 181 (Harry C. Shriver ed., 1936).

191. *See* Gregg, *supra* note 174, at 294.

192. *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).

that the majority have the power in their hands.”¹⁹³ In the model of the state Holmes envisioned, class and racial conflicts, struggles, and animosities are inevitable.¹⁹⁴

The argument here is not that on the whole Holmes’ judicial opinions are anticonstitutional or opposed to democratic ideals. In fact, his doctrine on the right of dominant powers required him, in his capacity as a judge, to follow the supreme law of the land, the Constitution.¹⁹⁵ But his philosophical writings indicate that he accepted with equanimity the right of groups to throw off democratic order and replace it with a state that uses its power arbitrarily and does not respect the individual rights of any but the most powerful. *Gitlow* represents Holmes’ view that any legislation passed by those in power is good, regardless of how oppressive it is to outgroups: “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.”¹⁹⁶ Holmes acknowledged and accepted that the consequences of unlimited speech might be the disintegration of fair and equitable government, and the establishment of a repressive state.¹⁹⁷ Holmes’ view on the subjugation and elimination of the weak might lead to at least authoritarianism, and at worst totalitarianism, and the denial of basic rights to minorities.¹⁹⁸ Holmes’ writings make clear that he thought it irrelevant that the free trade of ideas would not necessarily establish or maintain a just society.¹⁹⁹

His view also loses track of the overarching goals of egalitarian democracy: fairness, justice, and equal representation to all, regardless of whether they are powerful. Holmes’ model of speech, which has been

193. Holmes, *supra* note 180, at 584.

194. See SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 141 (1989).

195. See Gregg, *supra* note 174, at 291.

196. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes and Brandeis, J.J., dissenting).

197. See Murray Dry, *The First Amendment Freedoms, Civil Peace and the Quest for Truth*, 15 CONST. COMMENT. 325, 350 (1998).

198. On how Holmes’ philosophy can lead to totalitarianism see, for example, Gregg, *supra* note 174, at 294; Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569, 571 (1945). See generally Philip B. Kurland, *Portrait of the Jurist as a Young Mind*, 25 U. CHI. L. REV. 206, 206 n.4 (1957–58) (reviewing MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841–1870* (1957)) (listing a series of articles on Holmes and totalitarianism). But see Yosai Rogat & James M. O’Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1366–67 (1984) (arguing that Holmes’ brand of authoritarianism is contrary to anti-individualistic totalitarian ideals).

199. See Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 458 (1988).

adapted by the Court in pure speech cases, stands in sharp contrast to the Madisonian tradition of speech as a facilitator for civil liberties, political representation, and exchange of ideas.²⁰⁰ Under the latter model, the government has an interest in maintaining open dialogue. Holmes' market of ideas, on the other hand, is a virtually unregulated arena in which dominant groups are given license to indoctrinate and impose any political order, regardless of its selfish and intolerant propensities. Holmes acknowledges that a well-functioning democracy can be destroyed from within and does nothing to curtail that possibility.

Although a great admirer of Holmes, Justice Louis Brandeis' notions on the role of speech in United States democracy diverge from Holmes' notions. Brandeis was more inclined to "social and economic equality." On the other hand, Holmes' perspective is closely allied to Social Darwinism.²⁰¹ While Brandeis believed that increased speech is beneficial for society, he observed that the role of discussion is to expose falsehoods and avert social evils like "tyrannies of governing majorities."²⁰² This is in direct contrast to Holmes, who contended that the masses have the right of power to manipulate speech to create any political system, including a dictatorship.²⁰³ Brandeis' concern for repressing speech was that it could destabilize the United States: "[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"²⁰⁴ Thus, Brandeis' view of free speech follows the Madisonian tradition, while Holmes' view does not.

Hate speech does not further the interests of democracy because it advocates that certain social elements should be denied fundamental rights. Furthermore, passing legislation prohibiting it, like existing laws abridging other forms of discrimination, would likely reduce hate and facilitate mutual understanding.²⁰⁵ False statements of fact about outgroups

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

201. Howard Owen Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930*, 35 EMORY L.J. 59, 132 (1986).

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

203. See *supra* text accompanying notes 179-83.

204. *Whitney*, 274 U.S. at 375 (Brandeis and Holmes, J.J., concurring).

205. See ALLPORT, *supra* note 163, at 472 (discussing the improvement of ethnic relations from laws prohibiting discrimination in housing, employment, education, and health services).

or individuals do not advance “uninhibited, robust, and wide open”²⁰⁶ dialogue about social improvement.²⁰⁷ Like fighting words, hate speech, plays “no essential part of 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.”²⁰⁸ Purveyors of hate speech aim at spreading degrading falsities and proposing intolerant solutions which, like defamation, can be limited without violating the First Amendment.²⁰⁹ The Internet is a new forum for the worldwide circulation of messages intended to recruit and consolidate forces bent on discriminating, degrading, and destroying outgroups. 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. It is not a separate social community, but one that impacts and is impacted by others in the real world.

Beyond the theoretical difficulties of Holmes’ marketplace of ideas it is simply untrue that the dissemination of vitriol defuses racism, sexism, or anti-Semitism.²¹⁰ Experience disproves the notion that falsehood is always vanquished by truth.²¹¹ To the contrary, history teems with examples of times when lies, distortions, and propaganda empowered groups like the Nazis to repress speech and perpetrate mass persecutions. Years of anti-Semitic speech in Germany preceded the rise of National Socialism and the perpetration of the Holocaust.²¹² The foundation of death camps like Auschwitz was established on years of rhetoric dehumanizing and condemning Jews for German misfortunes. Even when both true and false beliefs are available, persons often cling to the false to retain power. In spite of the availability in the United States of literature against slavery,²¹³ that institution did not end through rational

206. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

207. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (involving defamation against a person who was not a public figure or public official).

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

209. *See Powell*, *supra* note 7, at 35.

210. *See* RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?* 71–72, 89 (1997).

211. *See* JOHN STUART MILL, *ON LIBERTY* 89 (Pelican Classics 1980) (1859); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 26–27 (1982) (arguing that in reality 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) (stating 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”).

212. *See* ALLPORT, *supra* note 163, at 57.

213. Even before the Revolution, leading orators denounced slavery. Thomas Paine and James Otis fervently argued that blacks were endowed with the same natural rights

discourse but through a bloody civil war.

Society derives no benefit from deliberately falsified scientific data, fabricated fallacies about the intellectual and economic attributes of people, and concocted stereotypes.²¹⁴ The use of the Internet by Holocaust deniers and groups demeaning blacks as subhumans²¹⁵ does not strengthen democracy. Hate propaganda injures targeted groups because, instead of informing and edifying through dialogue and deliberation, it debases and foments insensitivity and brutality.²¹⁶ Propagandists are interested in control, not truth; so when it is opportune for them, they resort to violence rather than discussion to settle their disagreements and differences. Bigotry has strengthened and helped to establish tyrannical, demagogic, and arbitrary regimes.²¹⁷ It has shown itself, time and time again, to be essential in instigating violence against identifiable groups. Even if, after many injustices, truth eventually wins out, that is no consolation for the victims. Their sufferings are irreversible, in spite of future rectifications.²¹⁸

3. Content Regulations

The most recent trend of the Supreme Court jurisprudence on freedom of expression is the seemingly blanket prohibition against legislation targeting speech based on its racist content. Any cause of action against hate speech on the Internet must address the seminal case on this point, *R.A.V. v. St. Paul*.²¹⁹

The majority opinion represents the views of five Justices and differs

to liberty as the white colonists. See WILLIAM SUMNER JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 23–24, 33 (Peter Smith 1960) (1935). In his letter to General Lafayette, written on November 25, 1820, James Madison acknowledged that the “original sin” of participating in the African slave trade had resulted in perplexing laws that took away the civic rights of “persons of colour.” See Letter from James Madison to General Lafayette (Nov. 25, 1820), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 189, 190 (1865).

214. See Mahoney, *supra* note 165, at 798.

215. See *supra* Part II.C.

216. 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 211, at 177.

217. See David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 447 (1987).

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

219. See generally 505 U.S. 377 (1992); see also *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (another leading case prohibiting the censure of speech based on its content).

substantially from the three concurrences. The case arose when some juveniles set fire to a cross on a black family's lawn. The youths were charged under a St. Paul ordinance that made it a misdemeanor to display, in public or private places, symbols (like Nazi swastikas and burning crosses) which are known to "arouse[] anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender."²²⁰ Justice Scalia, writing for the majority, held the ordinance was unconstitutional "content discrimination."²²¹ He reasoned that it violated the First Amendment because the ordinance targeted only certain enumerated forms of inciteful speech, while unenumerated forms, like those about people's political affiliations, were tolerated.²²² Scalia acknowledged that St. Paul had a compelling interest in protecting the human rights of the "members of groups that have historically been subjected to discrimination."²²³ To accomplish that end, the City could enact a blanket prohibition against fighting words, but it could not single out hate speech.²²⁴

Justice White, who wrote a concurrence to *R.A.V.*, asserted that the majority opinion deviates from Supreme Court precedents.²²⁵ His concurrence recognized that the Court had long accepted content-based legislation, targeting low-level speech. It is disingenuous, in his view, to argue that St. Paul could constitutionally regulate an entire class of utterances (i.e., fighting words) but that it could not regulate a subset of that class which "by definition [is] worthless and undeserving of constitutional protection."²²⁶ Social harms can be diminished by banning all or some fighting words without limiting the potential for ideas to compete in the marketplace.²²⁷ Justice White believed that the majority ignored "the city's judgment that harms based on race, color, creed, religion, [and] gender are more pressing public concerns than the harms caused by other fighting words."²²⁸ The majority's approach "invites" persons to express themselves with racist expressions, which, in terms of the First Amendment, are worthless.²²⁹

Justice White voiced his concern that the majority's decision would

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

221. *R.A.V.*, 505 U.S. at 387.

222. *Id.* at 391.

223. *Id.* at 395.

224. *See id.* at 395–96.

225. *Id.* at 401 (White, J., concurring in judgment).

226. *Id.* (White, J., concurring in judgment). Notice how this language almost mimics the Court writing on "fighting words" in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

227. *See R.A.V.*, 505 U.S. at 401 (White, J., concurring in judgment).

228. *Id.* at 407.

229. *Id.* at 402.

negatively impact future First Amendment case law.²³⁰ The majority opinion implies that racists' and bigots' expressions deserve more governmental protections than the peace and tranquility of targeted groups.²³¹ The majority places hate speech on the level of political and cultural discourse by calling fighting words a form of "debate."²³² Although White acknowledged that the speech forbidden under the ordinance was unprotected by the First Amendment, he nevertheless contended that the law was overbroad since it prohibited expressions simply because they hurt people's feelings and caused offense or resentment.²³³

Justice Blackmun, in a separate concurrence, agreed with White that the St. Paul ordinance was constitutionally overbroad.²³⁴ On the other hand, he thought it constitutional for cities to prevent hooligans from "driving minorit[y] residents from] their homes by burning crosses on their lawns."²³⁵

In yet another concurrence, Justice Stevens pointed out that many regulations are constitutional even though they target utterances based on content. For example, "a city can prohibit political advertisements in its buses while allowing other advertisements."²³⁶ Therefore, the majority's contention that all content-based regulations are unconstitutional is insupportable by First Amendment jurisprudence.²³⁷ Justice Stevens believed that just as a governmental entity could constitutionally restrict only certain forms of commercial speech, so too St. Paul could regulate only some forms of fighting words and not others.²³⁸ A city can determine which fighting words to prohibit based on the different social harms caused by them. In spite of his conclusions about the propriety of regulating hate speech, Justice Stevens found that the St. Paul ordinance violated R.A.V.'s First Amendment rights because it was overbroad.²³⁹

All three concurrences complained that the majority deviated from precedents permitting some content-based restrictions on speech. Scalia's opinion is committed to a government which is neutral to the

230. *See id.*

231. *See id.*

232. *Id.*

233. *Id.* at 411, 414.

234. *See id.* at 416 (Blackmun, J., concurring in judgment).

235. *Id.* (Blackmun, J., concurring in judgment).

236. *Id.* at 423 (Stevens, J., concurring in judgment).

237. *Id.* at 425 (Stevens, J., concurring in judgment).

238. *See id.* at 434 (Stevens, J., concurring in judgment).

239. *See id.* at 436 (Stevens, J., concurring in judgment).

content of competing messages.²⁴⁰ It discounts or ignores the numerous instances of laws that discriminate based on the substance of communications. Content-based limitations have been found constitutional for the following forms of speech: operating adult theaters,²⁴¹ threatening the President,²⁴² electioneering within 100 feet of a polling place on election day,²⁴³ using trade names,²⁴⁴ burning draft cards,²⁴⁵ and distributing obscene materials.²⁴⁶ It is arguable that, like obscenity or threats made against the President, hate speech has little or no social and political value.²⁴⁷ Furthermore, like fighting words, hate speech, whether it aims at long- or short-term harms, is “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.”²⁴⁸

The *R.A.V.* majority is fixated on the First Amendment to the exclusion of considerations of how that bulwark of freedom fits into the grand scheme of United States constitutional democracy. The opinion is based on a paradigm which places free speech in a nebulous realm, impervious to concerns for social, political, economic, and substantive equality.²⁴⁹ Its absolutist treatment of expression guards against depriving speakers of their autonomous right to communicate ideas but leaves untouched the diminution of freedom experienced by the victims of hate speech.²⁵⁰ Neither does Scalia’s opinion reflect on the violent racist history associated with burning crosses nor about the psychological effect on the victims and other black families living nearby.²⁵¹ Scalia’s holding focuses on the value of speech, while giving short shrift to the social harms associated with hate speech.

R.A.V. creates the illusion that cross burning and other bigoted forms of expression are legitimate types of political debate. To the contrary,

240. See Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 66 (1994).

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

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

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

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

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

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

247. See Charles J. Ogletree Jr., *The Limits of Hate Speech: Does Race Matter?*, 32 GONZ. L. REV. 491, 502 (1996–97).

248. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

249. See *R.A.V. v. St. Paul*, 505 U.S. 377, 393–96 (failing to discuss participation or equality); CATHARINE A. MACKINNON, *ONLY WORDS* 71 (1993); John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. 97, 101 (1998).

250. See *R.A.V.*, 505 U.S. at 393–96.

251. See Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 778 (2000) (reviewing STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999)).

hateful expressions, especially when they are advanced before private residences belonging to members of a victimized outgroup, destabilize the multifaceted racial and ethnic fabric of United States culture. Unrestrained bias foments disunion and endangers the civil liberties guaranteed under the Constitution.

Supreme Court precedents leave Internet hate speech ample pathways to become acceptable discourse in the United States. Hate speech does not contribute to dialogue on social and political justice; instead, it detracts by spreading rumors, innuendos, and outright libels. Current Supreme Court precedents, which prohibit legislation aimed at limiting hate speech, tolerate consequences that can ultimately prove destructive to democracy. Discrimination and intolerance should not be given the opportunity to win in the power market. Even if tolerance will eventually rise to the top, the harms victims experience while waiting for justice to burgeon are too heavy a price to pay for Holmes' social experiment.²⁵² The potential long-term dangers of bigotry can be measured from numerous historical examples of gradually inculcated linguistic paradigms that fomented injustices.²⁵³ The multiplying hate propaganda, transmitted through the Internet at the speed of light, should be checked because it threatens to popularize hatred and catapult the forces of inequality. The ideal of inviolable fundamental rights should not be sacrificed at the altar of an absolutist reading of the First Amendment.

B. The Dangers to Democracy Posed by Outgroup Stereotypes

Racial prejudice breeds animosities that are manifest in accepted discourse, attitudes toward minorities, and institutional injustices. In times of distress, those sentiments, which are nurtured in the cradle of a bigoted society, mature into full-grown injustice, intolerance, and oppression.²⁵⁴ The repeated, unquestioned delegitimization of outgroup rights is at the foundation of many discriminatory laws and destructive actions. Without previous indoctrination and preparation it is impossible to ignite popular movements bent on denying minorities legislative, political, judicial, medical, and economic equality. Propaganda is essential for developing widespread adverse inclinations, harsh judgments, and aggressive practices.

252. For a discussion of Holmes' views, see *supra* Part III.A.2.

253. See Tsesis, *supra* note 162, at 729.

254. See Kretzmer, *supra* note 217, at 464.

Bigotry is not cathartic. To the contrary, it is inflammatory. The longer a group goes unopposed in communicating its aggressive hatred of minorities, the more it becomes habituated in defamatory statements and unjust acts.²⁵⁵ Social attitudes are entrenched in negative images about outgroups and popular dialogue incorporates stereotypes into puns and expletives. Once individuals perceive members of identifiable groups as legitimate targets of aggression, their personal dislikes are reinforced by negative social attitudes and rationalizations.²⁵⁶ When definitions and stereotypes are culturally established and personally internalized through oft repeated fallacies about outgroup characteristics, they facilitate arbitrary stratification and action. Racist, anti-Semitic, sexist, and gay-bashing messages embellish negative social mores and behaviors, prolonging their vitality and passing their malignant venom to succeeding generations.²⁵⁷

Placing hate speech on the level of political discourse, as Justice Scalia did in *R.A.V.*,²⁵⁸ increases entrenched intolerance²⁵⁹ and legitimizes hate group participation in the political process. Hate speech is elicited to introduce and reinforce unjust biases, intolerance, and discrimination.²⁶⁰ When the rubrics used to describe cultural diversity are framed as undesirable and dangerous to ingroup interests, they increase disparagement and can lead to institutional and individual discrimination and violence.²⁶¹ Systematic murder, genocide, and enslavement are justified through aspersion discourse about the dangers to society posed by outgroups.²⁶² The myth of inferiority is told and retold in the framework of accepted and popularized discourse. It desensitizes common people to the plight of victimized minorities and justifies unequal treatment of them. Therefore, hate speech is detrimental and tends to undermine democratic ideals and institutions.

Democracies are ruled by representative governments whose responsibilities include protecting the rights of all their subjects, whether

255. See generally ALLPORT, *supra* note 163, at 354–66, 497 (enunciating the view that “the display of aggression is not a safety valve, rather it is habit-forming—the more aggression one shows, the more he has”).

256. See Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate Speech: How Valid?*, 23 N. KY. L. REV. 475, 478 (1996).

257. See Delgado, *supra* note 211, at 135–36.

258. See *supra* Part III.A.3.

259. See Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 878–79 (1994).

260. See Kretzmer, *supra* note 217, at 462.

261. See 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).

262. See *id.*

they be members of a minority group or part of the majority.²⁶³ Representative governments are obligated by the social contract to respect human rights and thereby secure well-being and enable people to fulfill the full range of their potentials. Civil liberties are secured through the constitutionally fair, nonprejudicial operation of laws and institutions.²⁶⁴

This, at least, is the ideal. The reality is that democracies are not immune to social injustice and inequalities. What makes them preferable to other governmental systems is the existence of political mechanisms to amend unjust laws and rectify past wrongs. The United States is an example of this process. It has evolved from a nation with institutionalized slavery to one that is deeply committed to eliminating continued vestiges of inequality.²⁶⁵ Legitimate political debate seeks to decrease the incidents of discrimination, while hate speech intends to eliminate and infringe upon individuals' civil rights.

Without constitutional and legislative checks on power, the majority can run "roughshod" over the rights of minorities to life, liberty, and property.²⁶⁶ An unregulated system of speech, in which more powerful forces have greater access and control over informational distribution systems, might produce what Justice Holmes called a "proletarian dictatorship."²⁶⁷ It would be an abuse of representative democracy to use its institutions to destroy its foundations.²⁶⁸

The purveyors of hate on the Internet cannot be trusted to safeguard the rights of minorities. Their support of bigoted theories and preparations for a race war are opposed to equal treatment under the law. Their Web sites and chat rooms should not remain self-regulating.²⁶⁹ To the contrary, criminal laws should be enacted acknowledging that hate propaganda harms individuals and society as a whole.²⁷⁰ Hate groups

263. See Netanel, *supra* note 137, at 407; see also CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996) (discussing the two ideals of liberal democracy: the participatory political process and the ideal of a limited government that cannot encroach upon certain individual rights).

264. See Netanel, *supra* note 137, at 407.

265. This has been accomplished, for example, through affirmative action. See, e.g., *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (discussing affirmative action in higher education).

266. Netanel, *supra* note 137, at 421.

267. *Gitlow v. New York* 268 U.S. 652, 673 (Holmes and Brandeis, JJ., dissenting); see *supra* text accompanying notes 179–89.

268. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1962).

269. See Netanel, *supra* note 137, at 421.

270. For a model criminal law of this type, see *infra* Part V.B.

pose a threat, though not always an immediate threat, to representative democracy. They use slogans that have repeatedly been successfully employed to recruit and incite crowds against outgroups.

There is cause for concern that through repeated exposure to bigotry, the populace will be so desensitized that it will accept oppression as a matter of course. Stereotyping endeavors to create a cultural climate that is immune to empathy for anyone other than members of the ingroup. Its function is opposed to the groundings of the First Amendment.

John Stuart Mill, the philosophical source of Holmes' marketplace of ideas doctrine, posited that open debate offers the opportunity to examine the validity of accepted opinions.²⁷¹ The Internet is a remarkable facilitator for exchanging ideas and testing them against opposing points of view. On the other hand, the Internet has also provided hate mongers a huge forum to develop networks of destruction-minded communicators, awaiting the opportunity to repress outgroups' rights.²⁷² The extent to which dialogue furthers equality is more telling of its First Amendment value than is a competing marketplace in which the strongest forces always win, ambivalent to what beneficent or nefarious social program the winners support.²⁷³

A disturbing pattern in the Supreme Court's pure speech jurisprudence is that it typically lacks any analysis of the historical impact of hate speech upon victims and society generally.²⁷⁴ Moreover, the Court, in cases like *R.A.V.*,²⁷⁵ fails to recognize that hate speech not only harms the individual against whom it is directed, but also intimidates other members of the targeted group, making them concerned for the safety of their families and friends.²⁷⁶

Violent hate speech not only advocates anti-democratic ideals, it is an intrinsic part of an overall scheme to overthrow democratic institutions by attacking cultural diversity and inciting acts of destruction.²⁷⁷ Thus,

271. See MILL, *supra* note 211, at 108.

272. When there is substantial information indicating that it is reasonably probable that the hate-mongers might succeed in their malevolent plans, the state should take criminal action. See discussion *infra* Part V.B.

273. See Shiffrin, *supra* note 240, at 88 (stating that the truth value of statements is better tested against the premise of equality than whether racists win in the marketplace of ideas).

274. See Powell, *supra* note 7, at 3. But see *Beauharnais v. Illinois*, 343 U.S. 250, 258-63 (1952) (upholding a group libel law after analysis about history of bigotry in Illinois).

275. See discussion *supra* Part III.A.3.

276. See Matsuda, *supra* note 6, at 2377 ("The constitutional commitment to equality and the promise to abolish the badges and incidents of slavery are emptied of meaning when target-group members must alter their behavior, change their choice of neighborhood, leave their jobs, and warn their children off the streets because of hate group activity.") (citation omitted).

277. See Cotter, *supra* note 216, at 254.

hate speech on the Internet, which is disseminated by groups or individuals through a medium capable of distributing electronic messages anywhere in the world, represents a worldwide assault on outgroup safety and aspirations. The unrestricted creation and transmission of these messages threatens to destabilize and upset the political importance and involvement of diverse groups, whose participation is critical to the popular input aspect of the democratic process.²⁷⁸ The very purpose of bigotry is to exclude weaker groups from political debate and to deny them social boons like personal integrity and economic stability.²⁷⁹ Aspersions are intended to reduce participation in governmental discourse²⁸⁰ and destructive messages are intended to intimidate and injure. Racial hierarchies, working to the disadvantage and detriment of the less powerful, are maintained, reinforced, and revived by a state that legitimates the use of racist dialogue,²⁸¹ especially when that dialogue makes no secret about its ultimate goal to discriminate and oppress the targeted victims.

Defamatory remarks about a person's membership in a particular outgroup are often aimed against the entire group, not just the individual to whom they are addressed.²⁸² Jurisprudence that views bigoted deprecations as harmful only to individuals fails, in the face of voluminous empirical evidence,²⁸³ to recognize the social harms connected to racist dialogue.²⁸⁴ Hate propaganda dehumanizes an identifiable group by deploying unverifiable innuendo and unsubstantiated statements. Once the stamp of suspicious and dangerous outsider is imprinted on the accepted linguistic paradigm, it lays the groundwork for future oppression and violence.²⁸⁵ Violent social movements, like Nazism, exploit stereotypes

278. See Kretzmer, *supra* note 217, at 487.

279. See Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371, 390 (1992).

280. See Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 54 (1997) [hereinafter Lasson, *Holocaust Denial and the First Amendment*].

281. See Powell, *supra* note 249, at 126.

282. See Kenneth Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77, 117 (1984).

283. See Tsesis, *supra* note 162, at 740-63 (presenting and analyzing the verbal propaganda contributing to the Holocaust, Native American dislocation, and black slavery); Tsesis, *supra* note 165, at chapters 2-4.

284. See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 384-85 (1991).

285. See Mahoney, *supra* note 165, at 792.

to gradually diminish rights, enslave, and kill outgroups.²⁸⁶

Representative government is obligated to prevent social deterioration which preys on a whole group of people. Action should be taken, if possible, before hate propaganda has ingrained itself into popular culture. Herd mentality is best avoided by strong laws, making clear society's disapprobation of inequality and injustice. Legislation ensures minorities will not be tyrannized and exploited by powerful interests. Hate speech does not further political discourse; instead, it escalates the threat to law and order. With the ever increasing number of hate groups running Internet sites, the government must act rather than wait until, after a period of indoctrination and desensitization, the rights of outgroups are so eroded that there remains only a short step to violent persecution. The social interest of maintaining order outweighs the right of individuals to spread false and degrading statements about a particular group.²⁸⁷

IV. HATE SPEECH LAWS IN OTHER DEMOCRACIES

Many western democracies have determined that their societies are better served by laws against expressions designed to silence and defame minorities than they would be by the virtually unlimited license for hate speech that exists in the United States. There is a general consensus among the international community that bigotry perpetuates racism and anti-Semitism.²⁸⁸ While the United States Supreme Court has determined that the First Amendment protects most racist speech,²⁸⁹ many other countries have enacted legislation recognizing that hate propaganda threatens both outgroup participation in democracy and their rights and dignities.²⁹⁰ Countries that have enacted laws penalizing the dissemination of hate speech include Austria, Belgium, Brazil, Canada, Cyprus, England, France, Germany, India, Israel, Italy, Netherlands, and Switzerland.²⁹¹ International treaties also support this principle. For instance, the U.N. Convention on the Elimination of Racial Discrimination, which the United States signed in 1966, obligates party states to criminalize “‘all dissemination of ideas based on racial superiority or hatred’ and ‘incitement to racial

286. See *id.*; Lasson, *Holocaust Denial and the First Amendment*, *supra* note 280, at 70; ALLPORT, *supra* note 163, at 14–15.

287. See *Beauharnais v. Illinois*, 343 U.S. 250, 255–57 (1952) (weighing the value of group libel against “social interest in order and morality”).

288. Mahoney, *supra* note 165, at 803.

289. See *supra* Part III.A.3.

290. Ogletree, *supra* note 247, at 501.

291. THOMAS DAVID JONES, *HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS* 189–224, 259–313 (1998) (concerning group defamation laws in England, Canada, India, and Nigeria); Lasson, *Holocaust Denial and the First Amendment*, *supra* note 280, at 72 n.286; Mahoney, *supra* note 165, at 803.

discrimination."²⁹²

The Internet poses a problem for countries with such antidiscrimination laws. It enables bigots to post Web sites; interact through real time chat rooms; and send e-mails from the United States, where they are legal, to other countries where they are illegal. The messages can be received in any country around the world since the electromagnetic transmissions travel across borders. So, an Internet site set up in Texas expressing neo-Nazi sentiments is accessible in Canada and Germany, where public neo-Nazi expressions are criminally punishable.²⁹³ The United States Supreme Court's short-sightedness is, therefore, causing waves around the world. In effect, United States jurisprudence, along with the incitement and danger to democracy attached to it, makes it more difficult for other countries to eliminate hate speech.

In order to enforce laws against hate propaganda, the Commissioner of the Canadian Human Rights Commission, Max Yalden, has stated that the Commission can prevent Internet sites from transmitting hate messages even when the source servers are based in other countries.²⁹⁴ Canada has jurisdiction over such cases so long as people receive Internet signals in Canada, regardless of where the messages originate.²⁹⁵ The Commission on Human Rights has found that recent technological advances, like the Internet, have made it more difficult for law enforcement agencies to prevent the dissemination of hate messages.²⁹⁶ The

292. KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 145 (1995) (quoting Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341 (1989)). The Senate did not ratify the Convention until 1994, and only then with many eviscerating reservations. See DAVID A. J. RICHARDS, *FREE SPEECH AND THE POLITICS OF IDENTITY* 4-5 (1999).

293. See Netanel, *supra* note 137, at 490; 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) (discussing Germany being first in Europe 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: Combatting 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).

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

295. See *id.*

296. See Canadian Human Rights Commission, *1996 Annual Report Summary—Issues in Human Rights: Race, Origin, and Religion*, available at <http://www.chrc->

Commission has already investigated inciteful Web sites like those maintained by Ernst Zundel²⁹⁷ and Heritage Front.²⁹⁸ To pursue these and other propagandists, Canada enacted the Canadian Human Rights Act, which prohibits the technological distribution of hate materials.²⁹⁹ The Act prohibits persons or groups from using telecommunications to expose any identifiable group to hatred or contempt or to incite others to discriminate.³⁰⁰

The Human Rights Act follows a line of Canadian laws prohibiting the use of hate propaganda and recognizing its tendency to incite others to act destructively. The Canadian Criminal Code contains a cause of action against the public incitement of others to hatred:

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.³⁰¹

Moreover, the willful promotion of hatred through public statements about an identifiable group is punishable by up to two years imprisonment.³⁰² Incitement to commit genocide is punishable by up to five years imprisonment.³⁰³

Canada's hate propaganda law has been upheld by the Supreme Court of Canada.³⁰⁴ In *Regina v. Keegstra*,³⁰⁵ the Court found section 319(2),³⁰⁶ which bars the willful promotion of hatred, is constitutionally justified.³⁰⁷ The case involved a social studies teacher who was disseminating hate propaganda on students by telling them that Jews were "child killers" who fabricated the Holocaust.³⁰⁸ The Court held that it was legitimate to criminalize this type of speech since it harms both individual victims and society as a whole. The Supreme Court of Canada affirmed the

ccdp.ca/ar-ra/ar1996/issues-e.html (last visited July 11, 2000).

297. *See id.*

298. *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).

299. *See* Canadian Human Rights Act, R.S.C., ch. H-6, § 13(1) (1985) (Can.), available at <http://laws.justice.gc.ca/en/H-6/26085.html>.

300. *See id.*

301. *Id.* § 319(1).

302. *Id.* § 319(2).

303. *Id.* § 318(1). Genocidal acts are defined as those done to destroy all or part of "any identifiable group." *Id.* § 318(2).

304. *See* JONES, *supra* note 291, at 210.

305. [1990] 3 S.C.R. 697. The Supreme Court of Canada reaffirmed its commitment to this case in *Regina v. Keegstra*, [1996] 1 S.C.R. 458, 459.

306. R.S.C., ch. C-46, § 319(2) (1985) (Can.).

307. *Keegstra*, [1990] 3 S.C.R. at 698.

308. *See id.* at 713-14.

constitutionality of section 319(2) a second time in *Regina v. Andrews*.³⁰⁹ The Court upheld the conviction of two white nationalists who published the *Nationalist Reporter*, which promoted white supremacy.³¹⁰ Their publication contained messages like "Nigger go home," "Hoax on the Holocaust," "Israel stinks," and "Hitler was right[,] Communism is Jewish."³¹¹ In *Andrews*, the Court found that the guarantee to the freedom of speech in the Charter of Rights is not absolute, and limitations on hate propaganda are constitutional and compatible with a free democratic society.³¹²

In Canada, judges are authorized to issue warrants for the confiscation of hate propaganda from premises where they are kept.³¹³ The Canadian Justice Department considers electromagnetic materials, like computers and computer disks, containing such propaganda to be subject to confiscation.³¹⁴

Germany is another democracy committed to free expression which, nevertheless, recognizes the social menace posed by hate speech and penalizes it. The German Basic Law, upon which its constitutional system is based,³¹⁵ includes a provision, Article 5, guaranteeing freedom of expression. Article 5 covers the right to freedom of speech via "audiovisual media,"³¹⁶ like television broadcasts and Internet messages.

309. [1990] 3 S.C.R. 870, 885.

310. *Id.*

311. See [1990] 3 S.C.R. 870, available at http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol3/html/1990scr3_0870.html (last visited October 20, 2000).

312. See *id.* The Court determined that hate propaganda was valueless in spite of the protection for speech in Canada's Charter of Rights & Freedoms, which is more "comprehensive" than that in the First Amendment. Lasson, *Holocaust Denial and the First Amendment*, *supra* note 280, at 72.

313. See R.S.C., ch. C-46, § 320(1) (1985) (Can.).

314. Department of Justice Canada, Information Technology Security Strategy (ITSS) Legal Issues Working Group, *Integrity and Accuracy of Published Government Information*, at <http://canada2.justice.gc.ca/en/ps/ec/chap/ch06.txt> (last visited July 11, 2000).

315. See McGuire, *supra* note 293, at 764.

316. CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY 107 (Albert P. Blaustein & Gisbert H. Flanz eds., official trans. 1994) (quoting GRUNDGESETZ [GG] [Constitution] art. 5.1 (F.R.G.)) [hereinafter CONSTITUTIONS]. The full text of Article 5 is:

Article 5 of the Basic Law provides:

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

However, this constitutional right is not absolute. It is subject to “limitations embodied in the provisions of general legislation, statutory provisions for the protection of youth, and the citizen’s right to personal respect.”³¹⁷

Germany has passed several laws designed to allay the short and long term risks of unchecked hate speech. Internet users are personally responsible for the content they transmit, but Internet service providers are not accountable for third-party information that they automatically and temporarily store.³¹⁸ Individuals and groups are subject to imprisonment for attacking the human dignity of others by: (1) inciting people to hate particular segments of the population; (2) advocating “violent or arbitrary measures against them”; and (3) slandering them.³¹⁹ Further, it is criminal to publicly distribute or supply any “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.”³²⁰ These laws can be brought to bear against persons who use the Internet to post, exhibit, and otherwise make accessible denigrating messages about outgroups. Germany has codified the tenet that the right to personal and group dignity outweighs the interest of persons wanting to express destructive messages.³²¹

Other German laws also balance the right to free speech against the preservation of democratic institutions. The German Criminal Code forbids persons from using “flags, insignia, parts of uniforms, slogans

(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.

Id.

317. *Id.* (quoting GG art. 5.2).

318. See Information and Communications Services Act, art. 1, § 5(3) (1997) (F.R.G.), available at <http://www.iid.de/rahmen/iukdgebt.html> (last visited June 23, 2000).

319. Juliane Wetzel, *The Judicial Treatment of Incitement Against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany* (Gerald Chapple trans.), in UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES 83, 105 n.12 (Louis Greenspan & Cyril Levitt eds., 1993) (quoting art. 130 STRAFGESETZBUCH [StGB] [Penal Code]).

320. Eric Stein, *History Against Free Speech: The New German Law Against the “Auschwitz”—and Other—“Lies,”* 85 MICH. L. REV. 277, 322–23 (1986) (quoting art. 131 StGB) (citation omitted).

321. See Lasson, *Holocaust Denial and the First Amendment*, *supra* note 280, at 74. See also Paul Lansing & John D. Bailey, *The Farmbelt Fuehrer: Consequences of Transnational Communication of Political and Racist Speech*, 76 NEB. L. REV. 653, 655 (1997).

and forms of greeting" to propagate undemocratic political parties like the National Socialist party.³²² Article 21.2 of the Basic Law bans political parties that pose a threat to democratic order.³²³ Nonpolitical organizations are also banned from overthrowing constitutional order.³²⁴

These examples suggest that United States pure speech jurisprudence is anomalous and that it is generally accepted, by democracies like Canada and Germany, that preserving human rights supersedes the right of bigots to spread their venomous messages.³²⁵ 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 the socially held ideal of equality. Even though the Declaration of Independence promises liberty and justice for all, not all groups have shared equally in that bounty. Safeguards should be enacted to prevent the forces of bigotry from harnessing Internet resources to strengthen socially regressive movements.

V. REGULATING HATE SPEECH ON THE INTERNET

The Internet is a mixed blessing. On the one hand, it makes easier and more efficient education, research, and debate. On the other hand, it poses a new threat to representative democracies because it provides access to more national and international hate speech forums than ever before. The spread of invective on such a grand scale is not innocuous,³²⁶ nor is it necessary for ascertaining truth.³²⁷ The long-term effects of hate speech³²⁸ ought to give pause to those who wish to leave the Internet unregulated. When the consequence of inaction is the persecution and oppression of an identifiable group, social norms, markets, and computer architecture are not enough.³²⁹ What is needed is a legal scheme to regulate the Internet because the messages transmitted through that

322. Wetzel, *supra* note 319, at 104–05 n.11 (quoting art. 86a StGB).

323. CONSTITUTIONS, *supra* note 316, at 115 (quoting GG art. 21.2). "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." *Id.*

324. *Id.* at 109 (quoting GG art. 9.2).

325. For further detail on the hate speech laws of other common law democracies see JONES, *supra* note 291, at 190–223.

326. See *supra* Part III.

327. See *supra* Part III.A.2.

328. See *supra* Part III.A.1.

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

social space have physical, psychological, and cultural effects on real places and real people.³³⁰ Free speech may be limited when it is intentionally manipulated to negatively impact the fundamental rights of others.³³¹

A. Commercial Solutions

Several commercially available filtering devices block Internet sites based on their contents. One way of limiting the audience to which bigots' messages are spread is for users to voluntarily install filters.³³² Some persons have argued that the availability of these devices makes it unnecessary and undesirable for the government to become involved in censoring the Internet.³³³ Instead, so the argument goes, individuals can purchase and activate any of the available filtering software comporting with their individual moral or social perspectives.³³⁴ The filters are considered preferable to regulations, and less likely to raise First Amendment issues, because companies, groups, and individuals, rather than the government, maintain control over message transmissions and receptions.³³⁵ This view has become increasingly widespread.³³⁶

330. On the issue of how the Internet functions in space, see Part II.B.

331. 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) (offering a theory that holds "free speech is a right that is limited by the fundamental rights of other persons and the community").

332. See generally Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS 629 (1998) (arguing for the need to prevent exploiting the Internet as a place to display pornography by altering computer architecture). 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 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://whatis.techtarget.com/definition/0,289893,sid9_gci211838,00.html (last visited Aug. 21, 2001).

The code system Lessig has in mind is analogous to the V-Chip, which makes it easier for parents to control what their children are watching on television, or a design enabling law enforcement agencies to tap telephones. See Lessig, *supra* note 329, 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, Part V.A, voluntary application of hardware or software is insufficient protection for society.

333. 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).

334. See *id.*

335. 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, 914-15 (1997).

There are several relatively effective filters on the market including CyberPatrol, NetNanny, SurfWatch, and HateFilter.³³⁷ These enable parents to block objectionable messages from being received by their browsing youngsters. They censor for particular words or contents indicating the undesirability of particular Internet messages or sites. For example, when it is activated, the HateFilter denies access to Internet sites "advocat[ing] hatred, bigotry or violence against Jews, minorities and homosexuals."³³⁸ One problem with these filters is that they cast too wide a net and, inappropriately, block out nondiscriminatory Web sites. America Online learned this lesson when it prevented people from accessing sites with the word "breast."³³⁹ Unfortunately, the blocked areas included sites dealing with subjects like breast cancer.³⁴⁰ This was far afield from the intended outcome, which was to keep pornography out of children's hands. Likewise, using word sensitive filters to block out hate propaganda is a good beginning, but it might also prevent researchers from exploring necessary historical and sociological information on the Web. Students, for example, would be blocked from accessing sites containing racist terms but posing no danger of inciting anyone to commit acts of violence.

The parameters of these filtering devices are drafted by organizations bound by mission statements, altruism, and marketing considerations. The filters are riddled with software bugs. CyberPatrol classifies the following useful and innocuous Web sites as "FullNude" and/or "SexActs": (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.³⁴¹ The inaccuracy with which automatic tools filter out useful materials makes it impossible for those running the software to reach

336. 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).

337. 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.

338. Gearty, *supra* note 337, at 11.

339. Krantz, *supra* note 337, at 48.

340. *Id.*

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

helpful speech on important subjects.³⁴² Furthermore, it is difficult for the purchasers of filtering devices to find out everything that is blocked and the guidelines that went into the equation since that information is considered proprietary.³⁴³

Beyond the technical problems of regulating hate speech with filters, there is the reality that the bigotry remains accessible to everyone who does not have one of the filtering devices. Even though some people choose to avoid Internet communications with hate groups, the many venomous Web sites, news groups, and e-mails continue disseminating violent messages to anyone interested in meeting other prejudiced people.³⁴⁴ Filtering devices are inadequate for repelling the socially destabilizing force of hate messages. The filters do not prevent unstable people from accessing those hate-filled Internet sites to draw ideological sustenance, further inflame their bigotry, and feed and tantalize their insatiable hunger for violence against outgroups. Laws preventing dangerous forms of hate speech, enforceable by state and federal governments, not just voluntary purchases and installations of commercial products, are necessary to protect individual rights and to guarantee social welfare.

Other commercial arrangements also provide tenuous, though well-intentioned, limits on hate speech. Internet service providers like America Online have a policy against the use of hate speech.³⁴⁵ Offenders can have their accounts revoked.³⁴⁶ However, the vast number of messages that bombard search engines like Yahoo! make them unwilling breeding grounds for neo-Nazi groups.³⁴⁷ 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.³⁴⁸ This case is novel because it imposed French law on a Web site located outside the country.³⁴⁹ 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.³⁵⁰

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

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

344. See Weintraub-Reiter, *supra* note 333, at 170.

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

346. See *id.*

347. See Keith Perine, *The Trouble With Regulating Hate*, INDUSTRY STANDARD, July 24, 2000, available at 2000 WL 31584076.

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

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

350. Yahoo! Recently filed a legal challenge in a U.S. District Court in San Jose, arguing that France cannot enforce the decision because the French court lacked personal

The World Wide Web Consortium, an organization hosted by the Massachusetts Institute of Technology, originated yet another way of restricting access to Internet sites. It developed software for rating materials containing subjects like pornography and violence.³⁵¹ The system does not actually filter materials; instead, it establishes rules for transmitting them.³⁵² Organizations, governments, and agencies can develop Platform for Internet Content Selection (PICS) based systems, tailored to their particular agendas.³⁵³ But these systems are far from perfect. An extreme example of an undemocratic manipulation of PICS is the Chinese government's prevention of Internet users from accessing United States government sites simply by blocking all Internet addresses ending in ".gov."³⁵⁴

It would be a mistake to exclusively place in the hands of commercial interests the power of deciding whether and to what extent hate speech should be blocked. When civil liberties are at stake, the power to preserve them rests squarely on democratically elected governments.³⁵⁵ Filters are a positive development for the maintenance of civil society; however, they fall short of the mark because they rely on private organizations to bear the torch 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, a representative democracy is

jurisdiction over Yahoo!" *Courts*, WASH. INTERNET DAILY, Aug. 14, 2001, available at LEXIS, News Group File, All; David McGuire, *Groups Rally to Defend Yahoo Against French Court Ruling*, NEWSBYTES, Aug. 13, 2001, available at LEXIS, News Group File, All.

351. See Weintraub-Reiter, *supra* note 333, at 169; Denise Caruso, *The Problems of Censorship Only Increase When Moved to the Private Sector*, N.Y. TIMES, Dec. 15, 1997, at D6. Professor Lessig, an expert on cyberspace law, believes 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.

352. 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).

353. See Weintraub-Reiter, *supra* note 333, at 169.

354. See Nadine Strossen, Symposium, *Should Cyberspace Be a Free Speech Zone?: Filters, "Family Friendliness," and the First Amendment*, 15 N.Y.L. SCH. J. HUM. RTS. 1 (1998); Weintraub-Reiter, *supra* note 333, at 169.

355. Cf. Caruso, *supra* note 351, at D6 (writing about the government obligation to guarantee free speech).

obligated to increase overall well-being while preserving civil rights.³⁵⁶ Overreliance on the tender mercies of private powers relegates governmental duties to private prejudices, incentives, and priorities.³⁵⁷ Already, there is an elitism on Internet sites limiting access based on profession, knowledge, and affiliation.³⁵⁸ 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.³⁵⁹

The extent of the social impact from derogatory Internet transmissions and membership requirements depends on the historical significance of various degrading and inciteful stereotypes.³⁶⁰ Portrayals of outgroups are most dangerous when they exploit images that have been extensively developed over long periods of time. Some examples of this are the depiction of Jews as ruthlessly power hungry, of blacks as uncontrollably sex-depraved, of Native Americans as drunken savages, and of Gypsies as thieves. Web sites that are designed to perpetuate these sorts of stereotypes³⁶¹ and to induce others to act against the objects of the defamatory statements have an impact on real people. They do not exist in a nonspacial world whose boundaries are separate from the world of actions and reactions. Hate crime is the end result of averse paradigms about minorities coupled with the promotion of actions against them.³⁶² Orators calling for oppression and persecution against identifiable groups increase racial and ethnic tensions.³⁶³ The potential dangers to harmonious democratic order posed by widespread hate propaganda³⁶⁴ call for laws punishing its dissemination.³⁶⁵

356. See Alexander Tsesis, *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).

357. See Netanel, *supra* note 137, at 452.

358. See Kang, *supra* note 4, at 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 WL4387760 (discussing various elitist online discussion groups).

359. See Netanel, *supra* note 137, at 454.

360. See *id.* at 455; Rubin, *supra* note 261, at 178.

361. See generally *supra* Part II.C for a discussion of Internet sites run by hate groups.

362. See Kretzmer, *supra* note 217, at 463.

363. See Rubin, *supra* note 261, at 178.

364. See *supra* Part III.B.

365. But see Johnson & Post, *supra* note 9, at 1392–93 (using a non-physical-world metaphor for cyberspace to conclude that the Net should be self-governed by system operators).

B. Establishing a Cause of Action

In light of the dangers posed by hate speech and the insufficiency of commercial solutions, the most viable alternative to reducing discrimination is a criminal statute punishing the dissemination of hate speech on the Internet. Gordon Allport, one of the foremost experts on the psychology of bigotry, points out that since it is manifest that discriminatory laws increase prejudice, it is logical to think laws prohibiting discrimination will decrease the incidence of prejudice.³⁶⁶ Likewise, since hate speech increases racism,³⁶⁷ laws are the best incentive for reducing intolerance and for altering social outlooks because such legislation makes clear that hate propaganda is not a legitimate form of political discourse.³⁶⁸ It is the paradox of any legal reform that remedies for social evils raise the possibility of new dilemmas.³⁶⁹ However, abstract uncertainties about potential evils should not constrain legislators from passing laws narrowly designed to curb expressions whose only object is to endanger the lives, professions, properties, and civil liberties of the less powerful.

Some laissez-faire is preferable for commercial transactions, but the stakes involved in protecting human rights are more valuable to a representative democracy and require uniform federal laws to ensure them.³⁷⁰ Legislation will help purge bigotry and make democracy safer against unprincipled groups seeking its demise.³⁷¹ Representative government implies the protection of civil rights through counter-majoritarian laws, drafted to guard against the unprincipled and wanton

366. See ALLPORT, *supra* note 163, at 469.

367. See *supra* Part III.A.

368. See Matsuda, *supra* note 6, 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.

369. *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952). Later decisions, like *New York Times v. Sullivan*, 376 U.S. 254, 254 (1964) (establishing an “actual malice” requirement for defamation against public officials), have put into doubt the extent to which *Beauharnais* is still effective. However, the Supreme Court has never formally abandoned the doctrine of group defamation. See *Smith v. Collin*, 436 U.S. 953, 953 (1978); DELGADO & STEFANCIC, *supra* note 210, at 62–63; JONES, *supra* note 291, at 90–97.

370. 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).

371. See JONES, *supra* note 291, at 5.

abuse of power.³⁷²

Legislators should not wait until the forces of hatred harness their followers to act violently. A carefully tailored law should be enacted even though, like any other law in real space, it may fall short of complete effectiveness.³⁷³ An overactive zeal for caution against infringing upon First Amendment rights should not deter legislators from taking steps to prevent the downfall of liberal democracy.³⁷⁴ Society's interest in stability and diversity outweighs individual and group interests in expressions intended, eventually, to destroy constitutional institutions. Unrestricted speech, especially when it is exploited to increase the privileges of the most powerful, should not trump other's fundamental rights to personal safety and equal participation in representative democracy.³⁷⁵ Laws against hate speech, while reducing the autonomy of some, will augment the freedoms of persons traditionally holding less power on account of their color, race, ethnic group, sexual orientation, or gender.³⁷⁶

The following is a model criminal law³⁷⁷ against the use of hate propaganda on the Internet. It takes into account the spacial quality of cyberspace and the increased dangers associated with the spread of vitriol to a wide audience:

- (1) Anyone using the Internet, an electromagnetic media, whether in this state or in a foreign state, to communicate or post statements calling for the discrimination, violence, persecution, or oppression of an identifiable group;
- (2) Where it is substantially probable or reasonably foreseeable that the dissemination of such communications could elicit such acts; and
- (3) Where the communicator intends the message(s) to promote destructive behavior;
- (4) Shall receive a term of imprisonment of at least three months and not exceeding three years;
- (5) In addition to the term of imprisonment, the court may impose

372. See Netanel, *supra* note 137, at 415.

373. See Lessig, *supra* note 89, at 1405.

374. See Matsuda, *supra* note 6, at 2380–81.

375. See Heyman, *supra* note 331, at 1280.

376. Carlos Santiago Nino argues persuasively that “one may restrain the autonomy of some if this results in increasing the autonomy of people who are less autonomous than those whose autonomy is being diminished.” NINO, *supra* note 263, at 61. Nino's view is based on John Rawls' “difference principle” which maintains that “[s]ocial and economic inequalities are to be arranged so that they are both . . . to the greatest expected benefit of the least advantaged.” JOHN RAWLS, A THEORY OF JUSTICE 72 (rev. ed. 1999).

377. This model is based on the Canadian and German legislation presented in Part IV of this Article.

community service not to exceed four hundred hours.

- (6) Defenses: No one shall be convicted under this law if: the statements were uttered as an expression of opinion on a scientific, academic, or religious subject and/or the statements were made to eliminate the incidence of hatred toward an identifiable group. Nothing in this section shall be construed to mean that Internet Service Providers may be held responsible for the information communicated by other information content providers.³⁷⁸

C. Obtaining Personal Jurisdiction

Courts only have authority to adjudicate criminal matters about the proposed Internet hate speech statute if they have personal jurisdiction over defendants. The laws of the United States, and many other countries, require that criminal trials commence in the defendant's presence.³⁷⁹ Several exceptions permit trials to proceed even when a defendant cannot be at court throughout the proceedings.³⁸⁰ However, in most cases, jurisdiction over Internet hate propaganda cases will require that the defendant either be present in the United States or that she or he be extradited here.³⁸¹

Traditionally, extradition treaties were limited to listed offenses,³⁸² but

378. 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 defined as: "[A]ny 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. See also Sunstein, *supra* note 200, at 1796. But see *supra* text accompanying notes 354–57.

379. 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).

380. For example, defendants can be removed from the courtroom for disruptive conduct. FED. R. CRIM. P. 43(b)(3). The trial will also proceed without the defendant if she or he fled after its commencement. FED. R. CRIM. P. 43(b)(1).

381. 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) (stating that one way the United States can get jurisdiction of defendants present in foreign countries is by requesting formal extradition pursuant to a treaty).

382. See 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.

the recent trend in the United States has been to make extradition available when “the offense is punishable by a specified minimum sentence.”³⁸³ To request extradition, the United States must have probable cause that a crime has occurred, and the sought person must be properly identified.³⁸⁴ As in international criminal cases, states that have ratified the Uniform Extradition Act can also request cosignatories to extradite criminals.³⁸⁵ The proper venue for trying such cases is either at the location of the crime or, where the crime affects several districts, the defendant can be tried in all of the affected districts.³⁸⁶

The United States can try citizens or noncitizens for actions taken outside this country that have consequences within it.³⁸⁷ It is a well-established principle that a state has the jurisdiction to punish acts taken outside the jurisdiction but intended to affect or affecting someone or something within it.³⁸⁸ A nation has an extraterritorial right to protect its interest from criminal acts undertaken outside its limits.³⁸⁹ Hate speech sent from a computer in one jurisdiction to another, where the sender should have known or knew such a message would violate significant public interest, like a prohibition against the incitement of bigotry, should be criminally sanctioned.³⁹⁰

If the model criminal statute proposed in Part V.B is adopted, the proper jurisdiction for the trial will be the place where the hate propaganda was posted on the Internet (which can be determined by the IP address of the source) or the jurisdiction(s) where the message(s) cause a negative impact. Even if the United States chooses not to adopt that statute, it should nevertheless honor extradition requests from other countries, like Germany and Canada, where hate speech is illegal. The

383. *Id.* at 383, 384.

384. *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).

385. *See* 18 U.S.C. §§ 3182–3196 (2000).

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

387. *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 within the United States”), *aff’d* by *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

388. *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.”).

389. *See* *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804).

390. *See* MODEL PENAL CODE § 1.03 (1999). 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).

United States should not continue being a safe harbor for hate groups distributing harmful messages to countries where they are not permitted to operate. Information sent on the Internet does not only exist in a virtual world, it touches the lives and increases the potential for violence in the real world. It matters not that the information is sent through a flow of electrons³⁹¹ or through words on paper. Both are physical processes engaging audiences and calling them to action.

VI. CONCLUSION

The Internet is a global network providing connections for many forms of speech. All the processes of message transmission occur in real space through a system of identifiable algorithms. The information is posted on the Web by individuals or groups intending it to be read by and to affect a limited or expansive audience.

The worldwide potentials for the Internet offer a mechanism for spreading democracy and commercial entrepreneurship throughout the world. However, the Internet is also a breeding ground for hate groups who use it to expand their membership and to solidify their forces. The packages of information about how to instigate a racial war or to limit the opportunities for identifiable groups do not exist in a virtual world, absent from reality. False messages which are intended to stifle and exploit existing negative stereotypes impact individuals' lives and the societies where they reside. They strengthen the purveyors of racism, anti-Semitism, sexism, and gay-bashers. They also intimidate traditional scapegoats and limit their ability to exercise the full extent of their fundamental right to autonomy.

Criminal penalties should be imposed on persons who intend harm and violence against identifiable groups. Hate speech is not only dangerous when it calls for immediate action. History is replete with examples of extensive, organized manipulation of hate propaganda that, over a long term, became part of the accepted social dialogue, making hate movements popularly accepted. The Holocaust, Native American removal, and black slavery developed after years of indoctrination made active anti-Semitism and racism socially and legislatively acceptable.³⁹²

Tolerance and egalitarianism should not be sacrificed at the altar of an

391. Cf. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996) (explaining that Internet commerce occurs through a "stream of electrons").

392. See *Tsisis*, *supra* note 162, at 740–55.

absolutist free speech doctrine. It is in the public interest to manifest disapprobation for hate speech and to distinguish it from legitimate forms of political dialogue. False statements about identifiable groups do nothing to further mutual respect for inalienable rights. Government should not allow Internet users to foment worldwide intolerance and inequality. Instead, it should realize the potential global threats posed by hate speech on the Internet, the very purpose of which is to destroy democracy and oppress outgroup members.