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Internet Hate Speech: The European Framework and the Emerging American Haven

Christopher D. Van Blarcum

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Internet Hate Speech: The European Framework and the Emerging American Haven

Christopher D. Van Blarcum*

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In this advance, the frontier is the outer edge of the wave—the meeting point between savagery and civilization.

Frederick Jackson Turner, *The Closing of the American Frontier*.¹

I. Introduction

The civilization of the Internet has been the great quandary facing Internet regulators over the past decade. The Internet, like Turner's frontier,² was not a *tabula rasa*—at its formation, traditional laws were still available.³ But the Internet raised new problems that made the enforcement of old laws problematic, and the Internet soon developed its reputation as an entity free

1. FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* 3 (Henry Holt and Co. 1921) (1920). *But see* Paul Weingarten, *Historians Clash Over Less-Romantic View of Old West*, CHI. TRIB., Jan. 28, 1990, at C6, 1990 WL 2939410 (stating that many new historians assert that Turner's version of the frontier is "racist, sexist, overly romantic and simply wrong").

2. *See* TURNER, *supra* note 1, at 38 ("There is not *tabula rasa*. The stubborn American environment is there with its imperious summons to accept its conditions; the inherited ways of doing things are also there . . .").

3. *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1250 (1998) ("Cyberspace transactions are no different from 'real space' transnational transactions.").

from government regulation.⁴ The greatest obstacles to enforcement of traditional laws are the Internet's anonymity and its multijurisdictionality.⁵ Anonymity makes it hard for local prosecutors and victims to discover the identity of the party responsible for illegal conduct.⁶ Even if the party can be identified, however, multijurisdictionality means that the prosecutor or victim may not have jurisdiction or face great obstacles in bringing suit against the offending party.⁷

The problem with enforcement of the inherited laws was not so much a product of a defect in the language of the laws as it was a product of the inherent structure of the Internet.⁸ As a result, it should come as no surprise that despite unilateral efforts by the United States and almost every other nation to attempt to civilize the Internet, "the closing of the Internet frontier" remains far from a reality. Although governments have extended traditional laws to the Internet and have attempted to pass new laws regulating the Internet, these laws have had limited effectiveness reigning in unwanted conduct.⁹

The global accessibility of information on the Internet allows an individual or a business that disagrees with the rules in one jurisdiction to move to a more lenient country and resume its business with its website remaining accessible for viewing in the country it fled.¹⁰ The global nature of the Internet results in those countries with less civilized Internet standards becoming havens for actors who wish to continue their "savage" manners untouched by the laws of the objecting country.

4. See JOSEPH KIZZA, *CIVILIZING THE INTERNET* xi (1998) (stating that the Internet is a place "where laws are self-made and observed (or broken) at will").

5. See Lawrence Lessig, *The Law of the Horse: What Cyberlaw May Teach*, 113 HARV. L. REV. 501, 505 (1999) (stating that many believe that "[t]he anonymity and multijurisdictionality of cyberspace makes [sic] control by government in cyberspace impossible").

6. See Jay Krasovec, *Cyberspace: The Final Frontier, For Regulation?*, 31 AKRON L. REV. 101, 109-10 (1997) (stating that the use of pseudonyms and remailer services allows individuals to engage in communication on the Internet anonymously).

7. See Goldsmith, *supra* note 3, at 1216 ("The Island of Tobago can enact a law that purports to bind the rights of the whole world. But the effective scope of this law depends on Tobago's ability to enforce it.").

8. See Lessig, *supra* note 5, at 506 (asserting that those who believe government control of the Internet is impossible are wrong because they erroneously assume that the architecture of the Internet is fixed and cannot be changed).

9. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 259 F. Supp. 2d 1029, 1045-46 (C.D. Cal. 2003) (dismissing a copyright infringement suit filed against distributors of peer-to-peer file-sharing software because the software had noninfringing uses and the distributors had no control over the files shared by users of the software).

10. See Agence-France Press, *Neo-Nazi Web Sites Reported to Flee Germany*, N.Y. TIMES, Aug. 21, 2000, at A5 (reporting that ninety rightist groups had transferred their sites to the United States in the wake of German authorities cracking down on Internet hate speech).

The "haven" problem can generally be avoided in two ways. The first is for the victimized country to attempt to block odious content from reaching its Internet browsers. Spain has recently implemented this approach by passing legislation authorizing judges to block sites that do not comply with Spanish national law.¹¹ This approach, however, is onerous on the victimized country, as it forces the country to search out the content and block it, without placing a deterrent on the producer of the content to refrain from putting the content on the Internet in the first place.

The other option to solve the "haven" problem is in the form of regional and multilateral efforts to regulate the Internet. The greatest benefit of a multilateral compact is its ability to negate the multijurisdiction problem. If the offending party is located in a country also a party to the multilateral compact, it becomes much easier for the victimized country to push the host country to take action against the offender or to extradite the offender to the victimized country. The removal of the multijurisdiction obstacle, it is hoped, will make the laws much easier to enforce and is seen as more efficient than unilateral blocking of sites because it attempts to deter the objectionable content from being placed on the Internet from the outset.¹²

The first major multilateral compact aimed at Internet crimes was the Council of Europe's Convention on Cybercrime.¹³ The purpose of the Convention on Cybercrime is to pursue "a common criminal policy aimed at the protection of society against cybercrime . . . by adopting appropriate legislation and fostering international co-operation" that defends copyright holders by making the laws more uniform and providing for international cooperation in enforcement.¹⁴ The Convention on Cybercrime focuses primarily on infringements of copyright, computer-related fraud, child pornography, and violations of network security.¹⁵ As of January 11, 2004, thirty-three countries

11. See Julia Scheeres, *Europeans Outlaw Net Hate Speech*, WIRED.COM, at <http://www.wired.com/news/business/0,1367,56294,00.html> (Nov. 9, 2002) ("Spain recently passed legislation authorizing judges to shut down Spanish sites and block access to U.S. Web pages that don't comply with national laws.") (on file with the Washington and Lee Law Review).

12. See Catherine P. Heaven, Note, *A Proposal for Removing Road Blocks From the Information Superhighway By Using an Integrated International Approach to Internet Jurisdiction*, 10 MINN. J. GLOBAL TRADE 373, 400-01 (2001) (suggesting the creation of a regulatory body to propose Internet regulations for the globe).

13. Convention on Cybercrime, European Treaty Series, No. 185, at <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm> (Nov. 23, 2001) (on file with the Washington and Lee Law Review).

14. *Id.*

15. Summary of Convention on Cybercrime, Council of Europe, at <http://conventions.coe.int/Treaty/en/Summaries/Html/185.htm> (last visited Jan. 27, 2005) (on file with the

have signed the Convention, including some nonmembers of the Council of Europe (the United States, Japan, South Africa, and Canada).¹⁶

As an addendum to the Convention on Cybercrime, the Council of Europe recently has proposed an additional protocol to the Convention (Additional Protocol) that concerns Internet hate speech. That protocol is the focus of this Note. This Note first discusses the problem of hate speech generally¹⁷ and then examines the Council of Europe and the relationship of the United States to that body.¹⁸ This Note then details the provisions of the Additional Protocol and examines how they will affect current law in Europe.¹⁹ It then analyzes the ability of an implemented Protocol to reach conduct originating in the United States and considers whether the Protocol will cause the United States to become a haven for Internet hate speech.²⁰ Lastly, this Note examines solutions that the United States and Europe could adopt to reduce the probability of the United States becoming a haven for Internet hate speech.²¹

II. Hate Speech Regulations Preceding the Protocol

European regulation of hate speech can be traced to the after-effects of World War II. After the Holocaust, European countries moved to take steps to prevent similar atrocities from ever happening again, and hate speech was targeted for elimination. As a consequence of the interest in proscribing hate speech, many countries passed laws proscribing the speech and took part in international agreements aimed at eliminating the speech. The primary international agreement on hate speech is Article 4 of the International

Washington and Lee Law Review). The Summary states:

The Convention is the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security. It also contains a series of powers and procedures such as the search of computer networks and interception.

Id.

16. See Chart of Signatures and Ratifications of a Treaty, Convention on Cybercrime, European Treaty Series, No. 185, at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=14&DF=27/01/05&CL=ENG> (last visited Jan. 27, 2005) (showing a table of countries that have signed or ratified the Convention) (on file with the Washington and Lee Law Review).

17. *Infra* Part II.
18. *Infra* Part III.
19. *Infra* Part IV.
20. *Infra* Part V.
21. *Infra* Part VI.

Convention on the Elimination of All Forms of Racial Discrimination (ICERD).²² Article 4 provides that parties shall (1) criminalize the dissemination of ideas based on racial superiority or hatred, (2) declare illegal and prohibit organizations that promote and incite racial discrimination and shall recognize participation in such organizations or activities as an offense punishable by law, and (3) prohibit public authorities and public institutions from promoting or inciting racial discrimination.²³ As of January 1, 2000, 155 states have signed ICERD, including all but four members of the Council of Europe.²⁴ The list of countries that have ratified ICERD includes the United States, but the United States made a reservation indicating its refusal to undertake any measures that violate the First Amendment.²⁵

As a result of ICERD, all European nations have adopted legislation aimed at repressing hateful speech.²⁶ France's extensive legislation on combating racism includes criminalizing the following: (1) inciting hatred or discrimination on basis of race; (2) wearing emblems reminiscent of crimes against humanity; and (3) defending or disputing crimes against humanity.²⁷ The criminal law in Germany makes it a crime to incite hatred and violence against segments of the population and to disseminate publications that are morally harmful to young persons (including those that stimulate or incite racial hatred).²⁸ The laws

22. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

23. *Id.* at 220.

24. See SWISS INSTITUTE OF COMPARATIVE LAW, EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, LEGAL INSTRUMENTS TO COMBAT RACISM ON THE INTERNET 66 (2000) [hereinafter LEGAL INSTRUMENTS] (stating that 155 states were party to ICERD as of January 1, 2000, including all member states of the Council of Europe, except Andorra, Liechtenstein, Moldova, and San Marino), available at [http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/3-Legal_Research/2-Combat_racism_on_Internet/CRI\(2000\)27.pdf](http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/3-Legal_Research/2-Combat_racism_on_Internet/CRI(2000)27.pdf) (on file with the Washington and Lee Law Review).

25. See *id.* at 67 ("The United States of America indicated its refusal to accept any obligation under Art. 4 which would require restriction of the protection afforded by its constitution and laws to the freedoms of speech, expression and association.")

26. See *id.* at 13 (stating that its previous report showed that "all European countries have at their disposal a more or less effective legislative arsenal to repress hateful expressions" and that a minimum standard imposed by the United Nations Convention on the Elimination of Racial Hatred is applicable to hateful expressions disseminated via the Internet).

27. See SWISS INSTITUTE OF COMPARATIVE LAW, EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, LEGAL MEASURES TO COMBAT RACISM ON THE INTERNET (2001) [hereinafter LEGAL MEASURES] (documenting the criminal laws in France designed to combat racism), available at http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/3-Legal_Research/1-National_legal_measures/default.asp#TopOfPage (on file with the Washington and Lee Law Review).

28. See *id.* (documenting the criminal laws in Germany designed to combat racism). For a general discussion of Germany's laws combating hate speech, see generally Ronald J.

governing hate speech have generally been found to extend to the Internet to the extent the legislation is written in a technically neutral manner.²⁹

Given this background, the laws necessary to combat racism exist in Europe. The anonymity and multijurisdictionality of the Internet, however, have proved problematic for enforcement of these laws. Although all European countries regulate hate speech, they each have different laws and different levels of enforcement, frustrating countries with stronger hate speech regulations.³⁰ As a result, in order to combat hate speech most effectively, European nations desired a uniform law. The Council of Europe was given the task of drafting such a law.

III. The Council of Europe

A. Functions of the Council of Europe

Established in 1949, the Council of Europe promotes intergovernmental cooperation in securing democracy in Europe and in preventing the recurrence of gross violations of human rights.³¹ Although the Council of Europe had only ten founding members, it now has forty-five members, all of which are located in the European region.³² The Council of Europe has a larger membership than

Krotoszynski, *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549 (2004).

29. See LEGAL INSTRUMENTS, *supra* note 24, at 13 ("As a general rule, the laws governing the right of communication are drafted in a technically neutral manner, which takes into account any dissemination of information irrespective of the medium; consequently, they are fully applicable to messages distributed on the Internet.").

30. See *id.* ("[T]he problem therefore lies not so much in the absence of adequate material rules as in obstacles to their application in the form of characteristics peculiar to the network of networks, namely its polycentric structure, its ubiquity and the cover of anonymity."); see also *infra* notes 47–52 and accompanying text (detailing the problems found by the Council of Europe in its reports on hate speech).

31. See CONNIE PECK, SUSTAINABLE PEACE: THE ROLE OF THE UN AND REGIONAL ORGANIZATIONS IN PREVENTING CONFLICT 101 (1998) (stating that the Council of Europe "was set up in response to Europe's traumatic experience with the Nazi regime, and its main aim was to secure democracy in Europe and to prevent the recurrence of gross violations of human rights").

32. See *id.* at 101–02 (stating that the Council of Europe had ten founding members); see also About the Council of Europe, Council of Europe, at http://www.coe.int/T/e/Com/about_coe/ (last visited Jan. 27, 2005) (stating that the Council of Europe currently has forty-six members, including twenty-one from Central and Eastern Europe) (on file with the Washington and Lee Law Review). The Council of Europe also has one candidate for membership, Belarus, and five observer countries—Canada, the Holy See, Japan, Mexico, and the United States. See

the European Union, which has only twenty-five members.³³ For membership, the Council requires a country to achieve and maintain certain standards of democracy and human rights; these standards include a democratically-elected parliament, a legal system in line with democratic principles, and a system for the protection of national minorities.³⁴ Besides size of membership, the Council of Europe also differs from the European Union in another way: Actions by the Council of Europe have no legal effect without signature and ratification by the member countries of the Council.³⁵ As a result, the Council of Europe is primarily a treaty-making entity.³⁶ Since its formation, the Council of Europe has concluded 195 treaties.³⁷

B. The Relationship of the United States to the Council of Europe

Although the United States is not a member of the Council of Europe, participation in the Council of Europe's treaty-making process is not exclusive to its members.³⁸ The Council of Europe has granted the United States observer status, which allows the United States to appoint a permanent observer to the Council of Europe; however, observer status does not give the United States a seat on the Committee of Ministers or in the Council's Parliamentary Assembly.³⁹ The Council of Europe invites nonmember states to sign and ratify

The Council of Europe's Member States, The Council of Europe, at http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp (last visited Jan. 27, 2005) (listing the members of Council of Europe) (on file with the Washington and Lee Law Review).

33. The EU at a Glance, Europa, at http://europa.eu.int/abc/keyfigures/index_en.htm (last visited Jan. 27, 2005) (on file with the Washington and Lee Law Review).

34. See PECK, *supra* note 31, at 102–03 (stating the requirements to become a member of the Council of Europe).

35. See JÖRG POLAKIEWICZ, TREATY-MAKING IN THE COUNCIL OF EUROPE 10 (1999) ("It should be stressed that the treaties are not legal instruments of the Organisation as such, but owe their existence to the consent of those member states that sign and ratify them.").

36. See *id.* at 7 (stating that "treaties are the most visible contribution of the Council of Europe").

37. See Complete List of the Council of Europe's Treaties, The Council of Europe, at <http://conventions.coe.int/Treaty/Common/ListeTraites.asp?CM=8&CL=ENG> (last visited Jan. 27, 2005) (stating that 196 treaties have been concluded since the formation the Council of Europe) (on file with the Washington and Lee Law Review).

38. See POLAKIEWICZ, *supra* note 35, at 33 (stating that "[p]articipation in most Council of Europe treaties is not exclusively limited to the member states of the Council of Europe").

39. See The United States of America and the Council of Europe, The Council of Europe, at http://www.coe.int/T/E/Com/About_Coe/Member_states/e_usa.asp (last visited Jan. 27, 2005) (stating that countries with observer status can "appoint a permanent observer to the Council of Europe and send observers to the committees of experts open for participation to all member states; [however,] [o]bserver status gives no right to be represented on the Committee

its treaties when the Council wishes to broaden the scope of the treaty to include non-European countries.⁴⁰ The United States has signed five treaties in the course of its contact with the Council of Europe and has ratified two of them.⁴¹ Among the most prominent treaties the United States has signed is the Council of Europe's Convention on Cybercrime, which provides a multilateral framework for combating various Internet crimes, including copyright infringement, fraud, and child pornography.⁴² The United States, however, has yet to ratify the Convention.⁴³

C. The Council of Europe's Involvement in Hate Speech

Over the past few years, the Council of Europe has become increasingly involved in the problems posed by racism, xenophobia, and anti-Semitism in Europe. In 1993, the Council of Europe issued a Declaration and Plan of Action on Combating Racism, Xenophobia, Anti-Semitism, and Intolerance.⁴⁴ The Plan of Action provided for a "European Youth Campaign against Racism, Xenophobia, Anti-Semitism and Intolerance."⁴⁵ Additionally, the Council

of Ministers or the Parliamentary Assembly unless a specific decision has been taken by one of these organs on its own behalf") (on file with the Washington and Lee Law Review).

40. See POLAKIEWICZ, *supra* note 35, at 33 (stating that open treaties are open to accession by nonmember states—even non-European states—provided that they have been formally invited to accede by the Committee of Ministers of the Council of Europe).

41. See United States: All legal acts accomplished as of Jan. 12, 2004, The Council of Europe, at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=14&MA=999&PO=USA&SI=1&CL=ENG> (last visited Jan. 27, 2005) (stating that as of Jan. 27, 2005, the United States has signed five Council of Europe treaties and has ratified two of them) (on file with the Washington and Lee Law Review).

42. See *supra* notes 10–13 and accompanying text (detailing the provisions of the Convention on Cybercrime).

43. See Chart of Signatures and Ratifications of a Treaty, *supra* note 16 (showing that the United States has not ratified the Convention). *But see* President George W. Bush, *Message to the Senate of the United States*, at <http://www.whitehouse.gov/news/releases/2003/11/20031117-11.html> (Nov. 23, 2003) (showing that President Bush only recently transmitted the Convention to the United States Senate for its consideration) (on file with the Washington and Lee Law Review).

44. Council of Europe, Declaration and Plan of Action on Combating Racism, Xenophobia, Antisemitism, and Intolerance, at http://www.coe.int/T/E/human_rights/Ecri/5-Archives/2-Other_texts/2-Vienna_Summit/Plan_of_Action/Plan_of_Action_Vienna_Summit.asp (Oct. 9, 1993) [hereinafter Declaration and Plan of Action] (on file with the Washington and Lee Law Review); see also Peck, *supra* note 31, at 108 ("Alarmed by the upsurge of racism, xenophobia, and antisemitism, the 1993 meeting of the council's Heads of State and Government adopted a Declaration and Plan of Action.").

45. See Declaration and Plan of Action, *supra* note 44 (launching "a broad European Youth Campaign to mobilise the public in favour of a tolerant society based on the equal dignity

asked governments to re-examine their legislation, and the European Commission Against Racism and Intolerance (ECRI) was established to review member states' legislation and policies and propose further action at the local, national, and regional levels.⁴⁶

In reporting on the conditions faced by minorities and immigrants, the Commission examined the rights accorded these groups, and the protections available to them, in each member country.⁴⁷ The Commission also examined portrayals in the media, including the Internet, and found several concerns. For example, the Commission expressed concern regarding the steep rise in the number of racist websites in Germany.⁴⁸ In Austria, the Commission expressed concern in regard to the amount of circulation of anti-Semitic material through the Internet.⁴⁹ The Commission cited the Internet as one of the main focal points of anti-Semitic propaganda in the Netherlands and stated that there has been a reported rise of discrimination on the Internet in that country towards Jews, Turks, and Moroccans.⁵⁰ The Commission was also troubled by the lack of enforcement of Internet-content regulations in some countries⁵¹ and by

of all its members and against manifestations of racism, xenophobia, antisemitism and intolerance"); *see also* Peck, *supra* note 31, at 108 (stating that its Plan of Action included a European Youth Campaign against Racism, Xenophobia, Anti-Semitism and Intolerance, which "includes training courses, high-profile events, seminars, and the production of educational materials").

46. *See* Declaration and Plan of Action, *supra* note 44 (inviting members to re-examine their legislation and setting up a committee of governmental experts to review members' policies, propose further action, formulate general policy recommendations, and examine international legal instruments).

47. *See, e.g.*, COMMISSION AGAINST RACISM AND INTOLERANCE, THIRD REPORT ON GERMANY *passim* (2004) (examining Germany's Constitution, citizenship laws, criminal laws, and civil and administrative laws), *available at* http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/2-Country-by-country_approach/Germany/third_report_Germany.pdf (on file with the Washington and Lee Law Review).

48. *See id.* at 15 ("ECRI is concerned about the steep rise in numbers of racist internet sites originating in Germany . . .").

49. *See* EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, SECOND REPORT ON AUSTRIA 14 (2001) ("[A]ntisemitism is still present in Austria and manifests itself in a variety of ways. These include circulation of antisemitic material (notably via the Internet) . . ."), *available at* http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/2-Country-by-country_approach/Austria/PDF_CBC2Austria.pdf (on file with the Washington and Lee Law Review).

50. *See* EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, SECOND REPORT ON THE NETHERLANDS 14, 16 (2001) (stating that, according to MDI, racist offenses have been on the rise, with most of the offenses of an anti-Semitic nature, but also discrimination against Turks and Moroccans), *available at* http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/2-Country-by-country_approach/Netherlands/CBC2%20Netherlands.pdf (on file with the Washington and Lee Law Review).

51. *See, e.g.*, EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, SECOND REPORT ON GREECE 14, *at* http://www.coe.int/T/E/human_rights/Ecri/5-Archives/1-EC

European countries with less stringent regulations acting as a safe haven for content.⁵²

In response to its findings, the ECRI adopted a general policy recommendation on December 15, 2000.⁵³ The ECRI recommended that the Council of Europe include the issue of suppression of hate speech in the pending Convention on Cybercrime in order to strengthen international cooperation and allow law enforcement to take more efficient action against the dissemination of hate speech.⁵⁴ While an Internet hate speech protocol was initially added to the Convention on Cybercrime, it was removed when it became apparent that the United States (whose signature was desired for the other provisions) would not sign the Convention if the Internet hate speech provisions were attached.⁵⁵ Instead, the Council of Europe made the Internet hate speech measure a separate protocol. On November 7, 2002, the Committee of Ministers of the Council of Europe adopted the "Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems."⁵⁶ The Additional Protocol was opened for signature on January 28, 2003, and, as of January 10, 2004, has been signed by twenty-three members of the Council of Europe, including Austria, France, Germany, the Netherlands, Poland, and

RI's_work/5-CBC_Second_Reports/Greece/CBC2%20Greece.pdf (2000) ("Although there are legal provisions condemning incitement to racial hatred in general as well as legal and other provisions aimed at combating racism and intolerance in the electronic media, these are virtually unused.") (on file with the Washington and Lee Law Review).

52. See LEGAL INSTRUMENTS, *supra* note 24, at 27 ("This problem of 'safe havens' is not limited to racist contents, but also concerns revisionist sites whose existence has to do with the fact that there is no criminal legislation in that regard in certain European countries.").

53. EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, GENERAL POLICY RECOMMENDATION NO. 6: COMBATING THE DISSEMINATION OF RACIST, XENOPHOBIC, AND ANTISEMITIC MATERIEL VIA THE INTERNET 1, at http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/1-Policy_Recommendations/Recommendation_N%B06/Rec%206%20en.pdf (2001) (on file with the Washington and Lee Law Review).

54. See *id.* at 5 (listing the recommendations of the European Commission against Racism and Intolerance).

55. See Michelle Madigan, *Internet Hate-Speech Ban Called 'Chilling'*, PCWorld.com, at <http://www.pcworld.com/resource/printable/article/0,aid,107499,00.asp> (Dec. 2, 2002) ("The Council of Europe's original Convention on Cybercrime in 2001 also contained a hate-speech measure, but it was dropped at the last minute to gain support from the United States . . .") (on file with the Washington and Lee Law Review).

56. Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, Jan. 28, 2003, Europ. T.S. No. 189 [hereinafter Additional Protocol].

Sweden; however, as of that date, only two countries had ratified the treaty.⁵⁷ The Additional Protocol will take force once five countries ratify it.⁵⁸

IV. *The Additional Protocol on Internet Hate Speech*

A. *The Provisions of the Additional Protocol*

The provisions of the Additional Protocol can be divided into five types of conduct that parties to the Protocol are required to criminalize. First, it requires each party to criminalize "distributing, or otherwise making available, racist and xenophobic material to the public through a computer system."⁵⁹ But a party may choose not to make the conduct criminal if the conduct is not associated with hatred or violence and other effective civil or administrative remedies are available.⁶⁰ A party may also reserve the right not to apply this provision to speech that is purely discriminatory, and not associated with hatred or violence, if the country cannot criminalize purely discriminatory speech because of established principles in its legal system.⁶¹ The requirement that the communication be "to the public" excludes emails and private communications from the provision.⁶² The scope of the Protocol was limited to public communications because of concerns that private communications are protected

57. Council of Europe, Chart of Signatures and ratifications of a treaty, Europ. T.S. No. 189, at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=8&DF=27/01/05&CL=ENG> (last visited Jan. 27, 2005) (on file with the Washington and Lee Law Review).

58. See Additional Protocol, *supra* note 56, at 11 (stating that the Protocol will "enter into force on the first day of the month following the expiration of a period of three months after the date on which five States have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 9").

59. *Id.* at 8.

60. See *id.* at 8–9 (stating that a party may reserve the right not to attach criminal liability where material advocates, promotes, or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available); see also Explanatory Report, Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, Jan. 28, 2003 [hereinafter Explanatory Report], ¶ 32, Europ. T.S. No. 189 (stating that such other remedies may be civil or administrative).

61. See Additional Protocol, *supra* note 56, at 9 ("[A] Party may reserve the right not to apply paragraph 1 to those cases of discrimination for which, due to established principles in its national legal system concerning freedom of expression, it cannot provide for effective remedies as referred to in the said paragraph 2.").

62. See Explanatory Report, *supra* note 60, ¶ 29 ("The term . . . makes it clear that private communications or expressions communicated or transmitted through a computer system fall outside the scope of this provision.").

by the European Convention on Human Rights.⁶³ But "to the public" does include exchanging such material in a chat room or posting similar messages in newsgroups, which can include content that would require a password to access (if the password would be given to anyone meeting certain criteria).⁶⁴

Second, the Additional Protocol requires each country to criminalize the act of directing a threat to a person through the Internet purely because of race, national origin, or religion.⁶⁵ This provision does not include the reservation right present in some of the other articles of this Protocol, so parties are not allowed to opt-out of this provision.⁶⁶ Third, the Protocol requires each country to criminalize the act of publicly insulting a person through a computer system because of the person's race, national origin, or religion.⁶⁷ A party, however, may choose to require the condition that the victim be exposed to hatred, contempt, or ridicule, or a party may reserve the right to refrain from applying this article altogether.⁶⁸

Fourth, each party must pass legislation making it a crime to distribute or make available through the Internet "material which denies, grossly minimises,

63. *See id.* (stating that private communications "are protected by Article 8 of the ECHR.").

64. *Id.* ¶ 31.

65. *See* Additional Protocol, *supra* note 56, at 9 (criminalizing racist and xenophobic motivated threats). Article 4 states:

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics.

Id.

66. *See id.* (providing for no right of reservation in Article 4); *id.* at 11 (stating that parties may only avail themselves of the reservations provided for in Articles 3, 5, and 6 of this Protocol and in Article 22 of the Convention, and that no other reservations may be made).

67. *See id.* at 9 (criminalizing racist and xenophobic motivated insults). Article 5 states:

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics.

Id.

68. *See id.* (providing for options for parties to limit the scope of Article 5).

approves or justifies acts constituting genocide or crimes against humanity."⁶⁹ This provision includes not only the Holocaust, but also genocides and crimes established by other international courts, such as the tribunals established to study genocides in the former Yugoslavia and in Rwanda.⁷⁰ The Protocol provides, however, that a country may reserve the right not to have this section apply to it.⁷¹ A country may also choose to require that the conduct be committed with the intent to "incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion."⁷² Finally, the Protocol requires parties to criminalize "aiding or abetting" the commission of any of the offenses established by the Protocol.⁷³

In addition to criminalizing conduct, the Protocol also makes prosecution of offenders easier because it provides for extradition between parties by extending the scope of the extradition provisions of the Convention on

69. *See id.* at 9–10 (criminalizing denial, gross minimization, approval or justification of genocide or crimes against humanity). Article 6 states:

Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 April 1945, or any other international court established by relevant international instruments and whose jurisdiction is recognised by the Party.

Id.

70. *See Explanatory Report, supra* note 60, ¶ 40 (stating that the scope of the provision is not only limited to crimes committed by the Nazi regime and established as such by the Nuremberg Tribunal but also extends "to genocides and crimes against humanity established by other international courts," such as the International Criminal Tribunals for the former Yugoslavia, for Rwanda, and the Permanent International Criminal Court); *see also* Jonathan Band, *Banning Hate Speech Poses Hidden Risks*, THE JERUSALEM REP., Dec. 30, 2002, at 55 (expressing concern that the language of the Protocol could be held to include genocides recognized by the Arab League and subjecting to liability those historians and reporters who deny Israel's guilt for the plight of Arab refugees or for minimizing the scope of Jenin).

71. *See Additional Protocol, supra* note 56, at 5 (stating that a party may "reserve the right not to apply, in whole or in part, paragraph 1 of this article").

72. *Id.*

73. *See id.* (criminalizing aiding and abetting). Article 7 states:

Each party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, aiding or abetting the commission of any of the offences established in accordance with this Protocol, with intent that such offence be committed.

Id.

Cybercrime to include the Internet hate speech crimes established by the Additional Protocol.⁷⁴

B. Liability Under the Protocol: Internet Users and Internet Service Providers

The Protocol primarily provides for liability of individuals who actually post the racist content on the Internet, and limits the liability of Internet Service Providers (ISPs) who serve as mere conduits of the speech. All of the offenses listed in the Protocol have a requirement that the conduct be "intentional."⁷⁵ The Protocol does not define what can be considered "intentional" conduct and leaves its meaning up to each party.⁷⁶ The Explanatory Report, however, states that the "intent" requirement will limit the liability of ISPs that merely serve as a conduit for a website or bulletin board containing the racist or xenophobic material.⁷⁷ As a result, the effect of the requirement should be to limit the liability of ISPs. Individuals who post the material will generally meet the intent requirement as long as they intentionally posted the material on the Internet, and liability therefore will fall on Internet users.

Although the Protocol limits the liability of ISPs, if a country adopts an expansive definition of "intent," an ISP could be held liable. For instance, nothing in the Protocol prevents a country from finding a "permissive intent" when an ISP receives notification of the racist or xenophobic speech by a country or third party and fails to take steps to remove the odious content.⁷⁸

74. *See id.* ("The Parties shall extend the scope of application of the measures defined in Articles 14 to 21 and Articles 23 to 35 of the Convention, to Articles 2 to 7 of this Protocol."); *see also* Convention on Cybercrime, Europ. T.S. No. 185 (Nov. 23, 2001) (providing, in Article 24, for parties to include criminal offenses described as extraditable offenses), *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm> (on file with the Washington and Lee Law Review); *see also* Explanatory Report, *supra* note 60, ¶ 3 (stating that one of the purposes of the Additional Protocol is to facilitate extradition).

75. *See* Explanatory Report, *supra* note 60, ¶ 25 ("All the offences contained in the Protocol must be committed 'intentionally' for criminal liability to apply.").

76. *See id.* ("The drafters of the Protocol, as those of the Convention, agreed that the exact meaning of 'intentionally' should be left to national interpretation.").

77. *Id.* The Explanatory Report states:

It is not sufficient, for example, for a service provider to be held criminally liable under this provision, that such a service provider served as a conduit for, or hosted a website or newsgroup containing such material, without the required intent under domestic law in the particular case. Moreover, a service provider is not required to monitor conduct to avoid criminal liability.

Id.

78. *See id.* (stating that an ISP cannot be held liable as a conduit "without the required

This situation is similar to Germany's Information and Communications Service Act of 1997, which holds ISPs liable if they know of the content, have the ability to block it, and fail to take remedial action.⁷⁹

Although the Protocol does not require countries to define "intent" in any particular manner, members of the European Union⁸⁰ that sign the Protocol must implement the Protocol in accordance with the European Union's Directive on Electronic Commerce—this Directive limits the liability of ISPs. Article 12 of the Directive says that ISPs are not liable for information transmitted on the condition that the provider "(a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission."⁸¹ The Directive additionally provides that ISPs have no duty to monitor conduct; Article 15 states that countries may not impose "a general obligation on providers . . . to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."⁸²

In addition to limiting the liability of ISPs acting as mere conduits and providing that ISPs have no duty to monitor content, the Directive limits the liability of ISPs when they are hosting information. Nonetheless, ISPs still have obligations. Article 14 of the Directive states that providers are not liable for information that they store, on the condition that the provider does not have actual knowledge of illegal activity or acts expeditiously to

intent under domestic law in the particular case").

79. See JOSEPH KIZZA, CIVILIZING THE INTERNET: GLOBAL CONCERNS AND EFFORTS TOWARD REGULATION 121 (1998) ("Service providers are not responsible for outside content that they keep ready for usage without having an influence on it unless the content is known to them and they have the technical capabilities to prevent its dissemination.").

80. See *supra* notes 32–33 and accompanying text (stating that the Council of Europe has a larger membership than the European Union; the Council of Europe has forty-five members, and the European Union has only twenty-five).

81. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market 12, at http://europa.eu.int/ISPO/ecommerce/legal/documents/2000_31ec/2000_31ec_en.pdf (2000) [hereinafter EU Directive on Electronic Commerce] (on file with the Washington and Lee Law Review). But this Article does not "affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement." *Id.* at 13.

82. *Id.* at 13. Member states may, however, "establish obligations for ISP's [sic] to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements." *Id.*

remove or disable access to the information upon obtaining such knowledge.⁸³

As a result, when Germany implemented the Directive, it kept its provisions requiring ISPs to remove illegal content of which they are aware and which they have the capability of removing. Section 10 of Germany's Act on Utilization of Teleservices⁸⁴ states that an ISP will not be liable for storing third-party information if the ISP "acts expeditiously to remove or to disable access to the information."⁸⁵

The limited liability of ISPs for criminal conduct will also govern how countries implement the Protocol for the crime of "aiding and abetting" the commission of any of the offenses.⁸⁶ The Protocol requires the same *mens rea* for aiding and abetting as for the other offenses.⁸⁷ The explanatory report states that "although the transmission of racist and xenophobic material through the Internet requires the assistance of service providers as a conduit, a service provider that does not have the criminal intent cannot incur liability under this action."⁸⁸ This is consistent with the way "aiding and abetting" has been defined in other European countries, for purposes of establishing liability of ISPs. For instance, in Switzerland, a director of a telephone company was convicted for aiding and abetting by failing to take

83. *See id.* (stating when ISPs can be held liable for hosting illegal content). Article 14 states:

Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

Id.

84. In Germany, this Act is entitled Elektronischer Geschäftsverkehr-Gesetz (EGG). The text of the Act is available in German at <http://www.rws-verlag.de/volltext/01egg01.pdf>.

85. Shigenori Matsui, *The ISP's Liability for Defamation on the Internet 7*, at http://www.ias.or.jp/research/res_houmodel/20021129/820Matsui.pdf (last visited Jan. 27, 2005) (on file with the Washington and Lee Law Review).

86. *See supra* note 73 and accompanying text (concerning the criminalization of aiding and abetting).

87. *See* Explanatory Report, *supra* note 60, ¶ 45 ("Liability arises for aiding or abetting where the person who commits a crime established in the Protocol is aided by another person who also intends that the crime be committed.").

88. *Id.* The Explanatory Report further states that there is no duty on a service provider to monitor content actively to avoid criminal liability under this provision. *Id.*

corrective action to thwart sex chatlines operated by his company after the company was notified of the criminal conduct by the Attorney General.⁸⁹

C. Civil Liability Under the Protocol

The Additional Protocol primarily contemplates criminal liability for engaging in conduct prohibited by the Protocol.⁹⁰ The lone contemplation of civil liability in the text of the Protocol is a provision allowing parties the option not to create a criminal offense for distributing racist and xenophobic material to the public through a computer system if the conduct is not associated with hatred or violence and other effective remedies are available (including civil remedies).⁹¹ Despite the Protocol's very limited reference to civil liability, offenders can still face civil liability as a result of the Protocol.

France, a signator of the Protocol, allows persons who have been victimized by the commission of a criminal offense to commence an *action civile* (civil action) against the party who has committed the criminal offense.⁹² As the result of an *action civile*, the victim can receive damages, restitution, and recovery of legal costs.⁹³ Although an *action civile* is generally reserved only for those victims who have "personally suffered the harm directly caused by the offence," France allows associations to commence the action where provided for by law.⁹⁴ Most relevantly, French law provides that antiracism groups may commence an *action civile* with respect to certain offenses.⁹⁵ The ability of an antiracist group

89. See LEGAL INSTRUMENTS, *supra* note 24, at 47 (stating that a PTT director was convicted of aiding and abetting the publication of obscene material because of the sex chatlines operated by individuals via the telephone networks (making them accessible to minors) and that the Attorney General's department had on several occasions drawn the PTT's attention to the possibility that children might listen to or participate in pornographic conversations and the criminal conduct, but PTT took no action).

90. See *supra* notes 59–73 and accompanying text (discussing the Protocol's criminalization of certain hate speech).

91. See *supra* note 60 and accompanying text (noting a condition of the Protocol under which parties can choose not to make certain conduct criminal).

92. See CHRISTIAN DADAMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 201–03 (2d ed. 1996) (stating generally the procedures for commencing an *action civile* in France).

93. See *id.* at 201 (stating remedies available to victims who commence an *action civile*).

94. See *id.* at 202 (stating who has the right to commence an *action civile*).

95. See THE FRENCH CODE OF CRIMINAL PROCEDURE, REV. 41 art. 2–1 (Kock and Frase, trans. 1988) (providing under which Penal Code statutes and under what conditions an association that proposes to fight racism may exercise the rights granted a civil party); see also DADAMO & FARRAN, *supra* note 92, at 202 (stating that consumer associations, antiracism, antisexual violence, and protection of children associations have the right to sue in respect of certain offenses); Richard Vogler, *Criminal Procedure in France*, in COMPARATIVE CRIMINAL

to commence an *action civile* was most prominently displayed in *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*.⁹⁶ In this case, two French student unions, La Ligue Contre Le Racisme et L'Antisemitisme (LICRA) and L'Union Des Etudiants Jurifs de France (UEJF) brought an *action civile* against Yahoo! because Yahoo!'s website advertised Nazi memorabilia for sale, in violation of a French criminal statute.⁹⁷

Given France's generous laws allowing associations formed to combat racism to bring civil actions against producers of hate speech, in implementing the Protocol, France will probably continue to allow these associations to bring an action against individuals or corporations. As a result, although the Protocol primarily contemplates criminal sanctions for violations, violators may also find themselves subject to civil liability.

D. Impact of the Additional Protocol in Europe

All European countries have in place laws aimed at repressing hate speech, and these laws often extend to hate speech posted on the Internet.⁹⁸ However, the

PROCEDURE 14, 26 (John Hatchard et al. eds., 1996) ("A group or organisation (e.g. a bank of society) may become a civil party provided that its overall interests, and not merely those of individual members, have been clearly prejudiced.").

96. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004). La Ligue Contre Le Racisme et L'Antisemitisme (LICRA) and L'Union Des Etudiants Juifs De France (UEJF) are French nonprofit organizations dedicated to eliminating anti-Semitism. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1183 (N.D. Cal. 2001), *rev'd*, 379 F.3d 1120 (9th Cir. 2004). On April 5, 2000, LICRA sent a "cease and desist" letter to Yahoo!'s Santa Clara headquarters informing Yahoo! that the sale of Nazi- and Third Reich-related goods through its auction services violates French law and threatening Yahoo! with legal action unless it took corrective action. *Id.* at 1184. LICRA and UEJF subsequently utilized the United States Marshal's Office to serve Yahoo! with process in California and filed a civil complaint against Yahoo! in French court. *Id.* The French court found that approximately 1000 Nazi- and Third Reich-related objects were being offered for sale on Yahoo!'s auction site. *Id.* The French court concluded that the Yahoo! auction site violated the French Criminal Code, which prohibits exhibition of Nazi propaganda and artifacts for sale, and issued an order requiring Yahoo! to prohibit French citizen access to those auctions. *Id.* at 1184-85. Yahoo! subsequently commenced action in the United States District Court seeking a declaratory judgment that the French order was not enforceable. *Id.* at 1186. The United States District Court granted the declaratory judgment on the grounds that the posting of the material on Yahoo!'s website was protected speech. *Id.* at 1193-94. The Ninth Circuit reversed on the ground of lack of personal jurisdiction over LICRA and UEJF. *Yahoo!, Inc.*, 379 F.3d at 1123.

97. *See id.* at 1184 (stating that LICRA and UEJF filed a civil complaint against Yahoo! in the Tribunal de Grande Instance de Paris for Yahoo!'s violation of Section R645-1 of the French Criminal Code).

98. *See* LEGAL INSTRUMENTS, *supra* note 24, at 13 (stating that its previous report showed

Council of Europe's Additional Protocol would make significant changes to the legislation already in place. The most visible change is greater restrictions on posting revisionist literature challenging the existence of genocides.⁹⁹ The Additional Protocol includes broad language making it a crime to deny or minimize genocides.¹⁰⁰ However, only France and Switzerland currently have in place legislation comparative in its breadth to that of the Council of Europe's.¹⁰¹ Germany, Belgium, and Austria have in place similar legislation, but it is limited to denials of genocide committed by the Nazis.¹⁰² However, the Additional Protocol does allow countries the option not to apply that Article, so it is unclear how many countries will choose to reserve that right.¹⁰³

The other major effect of the Protocol will be to further intergovernmental cooperation in prosecution of offenders by removing obstructions to prosecutions when the source is located in another European country.¹⁰⁴ The Explanatory Report states that one of the primary reasons for the adoption of the Protocol is to facilitate international cooperation, especially extradition and mutual legal assistance.¹⁰⁵ A complaint present in the reports of the European Commission on Racism and Intolerance was the disparity in the enforcement and the language of the laws.¹⁰⁶ The Protocol should provide the increased cooperation and the uniformity needed to close that gap.

that all European countries have at their disposal an effective legislative arsenal to repress hateful expressions, and that a minimum standard imposed by the United Nations Convention on the Elimination of Racial Hatred is applicable to hateful expressions disseminated via the Internet); *id.* at 30 (stating that in many European countries, Internet sites are treated like the press).

99. *See id.* at 27 (stating that revisionist sites have a safe haven in those countries that do not criminalize posting revisionist literature on the Internet).

100. *See* Additional Protocol, *supra* note 56, at 9–10 (requiring parties to criminalize distributing, through a computer to the public, material that denies, grossly minimizes, approves, or justifies acts constituting genocides or crimes against humanity).

101. *See* LEGAL INSTRUMENTS, *supra* note 24, at 14 (stating that in France it is an offense to "dispute crimes against humanity," and that Switzerland punishes the offense).

102. *See id.* (stating that in Germany, Belgium, and Austria, it is a crime to deny genocide committed by the Nazis).

103. *See supra* notes 69–71 and accompanying text (discussing a provision in the protocol that states that a country may choose to opt-out of the provision requiring countries to criminalize speech minimizing or denying the existence of a genocide).

104. *See* Explanatory Report, *supra* note 60, ¶ 3 (stating that the Additional Protocol facilitates international cooperation, especially extradition and mutual legal assistance).

105. *Id.*

106. *See* EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE, SECOND REPORT ON GREECE, *supra* note 51, at 14 ("Although there are legal provisions condemning incitement to racial hatred in general as well as legal and other provisions aimed at combating racism and intolerance in the electronic media, these are virtually unused."); *see also* LEGAL INSTRUMENTS,

Although the Protocol will create greater uniformity of laws, the reservations present in the Protocol will still result in some disparity. The Protocol does not state whose law would control in a conflict, but in a dispute involving an ISP and a conflict of law between two countries that are members of the European Union,¹⁰⁷ the European Union Directive on Electronic Commerce would govern. Article 3 of the European Union Directive on Electronic Commerce provides that ISPs are governed by the laws of the member state in which they are established.¹⁰⁸ However, the Directive provides for an exception to that choice of law when the recipient country's choice of law is necessary for the prevention, investigation, detection and prosecution of criminal offenses, including "the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons."¹⁰⁹ This exception is likely to encompass criminal Internet hate speech legislation, so the general rule that ISPs are only subject to the law of the country in which they are established does not appear to apply to Internet hate speech. But even if Internet hate speech falls into this exception, the European Union Directive still governs the procedure that a country must follow before taking action against an ISP established in another member country. The Directive provides that the enforcing country must first ask the country of establishment to take action, and if the country of establishment does not take such measures, or the measures taken are inadequate, the enforcing country must notify the Commission and the country of establishment of its intention to take such action against the ISP.¹¹⁰

supra note 24, at 27 ("This problem of 'safe havens' . . . also concerns revisionist sites whose existence has to do with the fact that there is no criminal legislation in that regard in certain European countries.").

107. See *supra* notes 32–33 and accompanying text (stating that the Council of Europe has forty-five members and the European Union has only twenty-five members).

108. See EU Directive on Electronic Commerce, *supra* note 81, at 9 ("Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State."); *id.* at 4 ("[I]n order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established.").

109. *Id.* at 9.

110. See *id.* at 10 (listing the steps a Member State must take before commencing action against an ISP established in another member State). Article 3(b) states:

[B]efore taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member state has:

- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,
- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

The Protocol will only have effect if it is actually ratified by the members of the Council of Europe. So far, only two countries have ratified the Additional Protocol.¹¹¹ However, this should not be taken as a sign of dilatoriness of European countries to implement the Additional Protocol, nor does this mean these treaties will not be implemented. The Council of Europe has a good track record for implementation of its agreements.¹¹² Of the 195 treaties approved by the Council of Europe, only 35 of them have not yet entered into force, and many of those treaties have only been opened for signature within the past five years.¹¹³ It is common for ratification of treaties and their entering into force to take a few years, so the lack of rapid accession to the Protocol is not unusual.¹¹⁴ Additionally, because many European countries have prior laws regulating hate speech on the Internet, animosity to the Additional Protocol in Europe is unlikely. The problem of hate speech in Europe was also recently highlighted by the publication of photographs of Prince Harry wearing a Nazi swastika at a costume party.¹¹⁵ Because of the European interest in curbing hate speech, ratification is likely.¹¹⁶

E. Attempts by European Countries To Enforce Their Internet Laws Against Foreign Content

The effect of the Protocol and the hate speech legislation adopted by Europe is likely to extend beyond the parties to the agreement. European nations have a history of attempting to enforce their Internet content laws

Id.

111. See Chart of Signatures and Ratifications of a Treaty, Europ. T.S. No. 189, at <http://conventions.coe.int/Treaty/EN/searchsig.asp?NT=189&CM=8&DF=24/11/03> (last visited Jan. 27, 2005) (showing that only two countries have ratified the Additional Protocol) (on file with the Washington and Lee Law Review).

112. See POLAKIEWICZ, *supra* note 35, at 14 ("It can be said, however, that the record of ratifications of Council of Europe treaties is more favourable than that of many other international or European organisations.").

113. See Complete List of the Council of Europe's Treaties, *supra* note 37 (listing all of the treaties opened for signature and stating when they entered into force).

114. See *id.* (showing the date the treaty was opened for signature and the date the treaty entered into force).

115. See Alan Cowell, *A Prince Who Forgot History Angers Many*, N.Y. TIMES, Jan. 14, 2005, at A12 (concerning photographs published by the British tabloid *The Sun* of Prince Harry wearing a Nazi swastika armband).

116. See LEGAL INSTRUMENTS, *supra* note 24, at 13 (stating that "all European countries at their disposal have a more or less effective legislative arsenal to repress hateful expressions," and that these criminal provisions are applicable to hateful expressions disseminated via the Internet).

against content uploaded from sources outside Europe, and they view their jurisdiction based on where the content was read. Such litigation has produced three high-profile cases: *Toben*, *Somm*, and *Yahoo!*.

1. Toben

Frederick Toben is an Australian immigrant from Germany.¹¹⁷ From Australia, he runs the Adelaide Institute and its companion website, but the site appears to be hosted on an American server.¹¹⁸ One of the arguments of the Institute is that the Nazis never used gas chambers to murder Jews and others during the Holocaust.¹¹⁹ Although the website is not maintained in Germany and is written in English, this site is accessible by German Internet users and contains content in violation of a German law prohibiting the dissemination of material challenging the existence of the Holocaust.¹²⁰ Frederick Toben was arrested in 1999 when he was on a visit to Germany and was charged for violating the German statute because of the content of his site and because of pamphlets he had distributed while in Germany.¹²¹ A lower court sentenced Toben for the distribution of the pamphlets, but held that the German statute

117. See Robyn Weisman, *Germany Bans Foreign Web Site for Nazi Content*, NEWSFACTOR NETWORK, at http://www.newsfactor.com/story.xhtml?story_id=6063 (last visited Jan. 27, 2005) ("Though German-born, Toben has lived in Australia for most of his life and is a citizen of that country.") (on file with the Washington and Lee Law Review).

118. See Adelaide Institute, at <http://www.adelaideinstitute.org> (last visited Dec. 1, 2004) (hosting the website of the Adelaide Institute) (on file with the Washington and Lee Law Review); see also Terry Lane, *Censoring the Adelaide Institute's Web Site is Futile*, ONLINEOPINION, at <http://www.onlineopinion.com.au/view.asp?article=1126> (Nov. 30, 2000) ("Now we have the Internet, and Dr. Toben's Adelaide Institute website appears to be located on an American server.") (on file with the Washington and Lee Law Review). The location of the Adelaide Institute's website on an American server stems from Australian law. Australia, like Germany, prohibits hate speech, and it has ordered Frederick Toben to shut down his website. See generally *Toben v. Jones* (2003) 129 F.C.R. 515 (affirming determination of the Australian Human Rights and Equal Opportunity Commission that Toben's website is likely to offend, insult, humiliate, or intimidate Jews, and that website was not reasonable and in good faith academic belief).

119. See *Jones v. Toben*, (2002) 71 A.L.D. 629 ("We are not "holocaust deniers." We proudly proclaim that to date there is no evidence that millions of people were killed in homicidal gas chambers." (quoting *About the Adelaide Institute*)).

120. See Arrest Warrant for Dr. Frederick Toben, Institute for Historical Review, at <http://www.ihr.org/other/990409warrant.html> (last visited Jan. 27, 2005) (stating that German authorities had downloaded the content from the Adelaide Institute's website and charging that the content is in violation of the German Criminal Code) (on file with the Washington and Lee Law Review).

121. See *id.* (stating the facts on which Frederick Toben was arrested).

could not reach Toben's website because the site was based in Australia.¹²² However, this determination was reversed on appeal, and Germany's High Court, the Bundesgerichtshof, ruled that "German authorities may take legal action against foreigners who upload content that is illegal in Germany—even though the Websites may be located elsewhere."¹²³ The outcome of this case demonstrates that Germany views its jurisdiction broadly and will determine jurisdiction based on where the content was viewed rather than on where it was published or targeted.

2. *Somm*

The *Somm* case raised a similar question concerning liability for content entering German borders from outside the country; however, *Somm* involved the liability of an ISP for content stored on a server in a foreign country, rather than the liability of the individual who posted the content. Felix *Somm* was an executive of CompuServe Deutschland.¹²⁴ *Somm* was prosecuted by German authorities for providing access to illegal pornographic material to CompuServe subscribers, on the grounds that he should have filtered out the contents.¹²⁵ Although *Somm* was found guilty, his conviction was reversed on appeal.¹²⁶ The conviction was reversed because *Somm* was only the manager of a subsidiary of CompuServe and did not have the power to block the content,¹²⁷ a necessary element required by Germany's Information and Communications Services Act of 1997 in order to hold an ISP liable for content.¹²⁸ This case adds to the rule of the *Toben* case: Although Germany will determine jurisdiction based on where the content is posted, Germany will not assign liability to officers of foreign subsidiaries who have no control over the content.

122. See Weisman, *supra* note 117 (stating that a lower court ruled that only websites based in Germany were liable).

123. *Id.*

124. Edmund Andrews, *German Court Overturns Pornography Ruling Against CompuServe*, N.Y. TIMES, Nov. 18, 1999, at C4.

125. See *id.* (stating that a Munich court sentenced *Somm* to two years probation and a fine of 100,000 marks (\$180,000) because CompuServe could have done more to block access to illegal pornographic websites).

126. *Id.*

127. See *id.* (stating that the Bavarian court found *Somm* "a slave of the parent company" and that he could not have done much more than he did to block the content).

128. See KIZZA, *supra* note 79, at 121 ("Service providers are not responsible for outside content that they keep ready for usage without having an influence on it unless the content is known to them and they have the technical capabilities to prevent its dissemination.").

3. Yahoo!

ISP liability for content originating from the United States was also at issue in *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme* (LICRA).¹²⁹ Two French student organizations, LICRA and UEJF, instituted an action in French court against Yahoo! for violating a French law prohibiting the offering for sale of Nazi merchandise.¹³⁰ Yahoo! offered the merchandise for sale on its auction website.¹³¹ The court issued an order requiring Yahoo! to "eliminate French citizens' access to any material on the Yahoo.com auction site that offers for sale any Nazi objects, relics, insignia, emblems, and flags."¹³² On a motion to reconsider the Order, the court affirmed its earlier judgment and stated that although it is difficult to identify the national identity of the Internet user, a combination of geographical identification of the IP address and declaration of nationality would result in a filtering success rate of 90%.¹³³ The court ordered that Yahoo! had three months to comply with the Order or it would be subject to a penalty of 100,000 francs per day.¹³⁴

In response to this Order, Yahoo! sought and received in U.S. District Court for the Northern District of California a declaratory judgment stating that French authorities cannot impose and collect fines on Yahoo!.¹³⁵ Before deciding the merits of the case, the district court first concluded that it had jurisdiction to hear the dispute based on the actions of LICRA in targeting Yahoo!'s California headquarters with a cease and desist letter, effecting

129. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004).

130. *See Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1184 (N.D. Cal. 2001) (stating that two French student unions filed a civil complaint against Yahoo! alleging that Yahoo! violated French law), *rev'd*, 379 F.3d 1120 (9th Cir. 2004).

131. *See id.* (finding that items for sale included Adolf Hitler's *Mein Kampf*, *The Protocol of the Elders of Zion*, and purported evidence that the gas chambers of the Holocaust did not exist).

132. *Id.*

133. *See La Ligue Contre Le Racisme et L'Antisemitisme v. Yahoo!, Inc.*, T.G.I. Paris 14 (Nov. 20, 2000) ("The combination of two procedures, namely geographical identification of the IP address and declaration of nationality, would be likely to achieve a filtering success rate approaching 90%."), *available at* <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (on file with the Washington and Lee Law Review).

134. *See id.* at 20 ("We order YAHOO Inc. to comply within 3 months from notification of the present order with the injunctions contained in our order of 22nd May 2000 subject to a penalty of 100,000 Francs per day of delay effective from the first day following expiry of the 3 month period.").

135. *See Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001) (granting Yahoo!'s motion for a declaratory judgment prohibiting the enforcement of the French order against Yahoo!), *rev'd*, 379 F.3d 1120 (9th Cir. 2004).

service through the use of United States Marshals, and garnering a French judgment that requires Yahoo! to perform specific physical acts in California.¹³⁶ In granting summary judgment for Yahoo!, the district court stated that the enforcement of foreign judgments is based on the "comity of nations."¹³⁷ The district court issued the declaratory judgment because the content is protected by the First Amendment, and the court "may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders."¹³⁸ On appeal, the Ninth Circuit reversed and found that there was no basis for jurisdiction because LICRA and UEJF had insufficient contacts with the forum state.¹³⁹

In an *amici curiae* brief filed to the United States Court of Appeals for the Ninth Circuit by the United States Chamber of Commerce and several industry associations, an alternative reason for issuing the declaratory judgment was offered: the lack of jurisdiction of the French court.¹⁴⁰ The lack of jurisdiction argument was based on the notion that Yahoo! was an American company that "provides Internet services in English, targeted at American citizens, from host computers located in the United States."¹⁴¹ The brief pointed to decisions holding that the maintenance of a passive website is not sufficient to meet the requirements of the "minimum contacts" test for jurisdiction.¹⁴² The brief also stated that requiring Internet users to search out laws of all foreign nations and block illegal content from visibility in that nation is technologically impossible

136. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168, 1174 (N.D. Cal. 2001) (stating that LICRA sent a cease and desist letter to Yahoo!'s California headquarters, requested that a French court require Yahoo! to perform specific physical acts in Santa Clara, and effected service through United States Marshals, leading to purposeful availment by LICRA of California laws).

137. See *Yahoo!*, 169 F. Supp. 2d at 1192 ("The extent to which the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice, governed by 'the comity of nations.'" (quoting *Hilton v. Guyot*, 159 U.S. 113, 163 (1895))).

138. *Id.*

139. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 379 F.3d 1120, 1123 (9th Cir. 2004).

140. Brief *Amici Curiae* of Chamber of Commerce of the United States et al., *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, at 18 (9th Cir. 2002) (Case No. 01-17424) [hereinafter Brief] (stating that the French court's judgment "is unenforceable for a second, independent reason—the French court's expansive jurisdiction is inconsistent with due process requirements"), available at <http://www.cdt.org/jurisdiction/020507yahoo.pdf> (on file with the Washington and Lee Law Review).

141. *Id.* at 19–20.

142. See *id.* at 20 ("As this court has held, the maintenance of a passive website does not, as a matter of law, demonstrate that the corporation has 'purposefully' (albeit electronically) directed his activity in a *substantial* way to the forum state." (quoting *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997)) (emphasis added by Brief)).

and, even if possible, would be expensive to implement.¹⁴³ Given these problems, the filers were troubled by the chilling effect that could result from enforcement: "Faced with the fear of such prosecution, companies and individuals would inevitably feel pressured to remove material that might be unlawful in any jurisdiction, thus giving the most restrictive jurisdictions in the world a de facto veto over the content available."¹⁴⁴ The district court and the Ninth Circuit did not reach this question because the case was decided on other grounds. As a result, it is unclear to what extent lack of jurisdiction can act as an alternative bar to enforcement.

After the decision by the district court, a second action was filed against Yahoo! and its former Chief Executive Tim Koogle, charging that the sale of Nazi memorabilia on Yahoo!'s website justified war crimes.¹⁴⁵ This action was commenced by French Holocaust survivors.¹⁴⁶ However, Yahoo! was found not guilty in this second suit.¹⁴⁷ The dismissal was not based on a finding of lack of jurisdiction, but a failure to meet the merits. The French court said that the auction pages on Yahoo!'s site did not meet the description of glorifying or favorably presenting Nazi war crimes.¹⁴⁸

F. *The United States and the Protocol*

Although the Council of Europe has made the Additional Protocol available for the signature of the United States¹⁴⁹ and the United States has

143. *See id.* at 13–14 (stating that it is not technologically possible to identify with certainty the geographic location of an Internet user, and even if it were, it is not economically feasible for the vast majority of web publishers to deploy).

144. *Id.* at 11.

145. *French Court Clears Yahoo in Nazi Case*, SILICONVALLEY.COM, at <http://www.siliconvalley.com/mld/siliconvalley/news/editorial/5156629.htm> (Feb. 11, 2003) (stating that plaintiffs accused Yahoo! of justifying war crimes and crimes against humanity) (on file with the Washington and Lee Law Review).

146. *See id.* (stating that this action was launched by French Holocaust survivors, who were joined by a group called the Movement Against Racism and For Friendship Between People).

147. *See id.* (stating that the French court threw out the accusations leveled against Yahoo!).

148. *See id.* ("But the Paris court said Tuesday that 'justifying war crimes' means 'glorifying, praising, or at least presenting the crimes in question favorably.' Yahoo and its auction pages did not fit that description, the court said.")

149. *See* Additional Protocol, *supra* note 56, at 10 (providing in Article 9 that the protocol is open for signature to all states that have signed the Convention).

signed the underlying treaty,¹⁵⁰ the Bush Administration has indicated that the United States will not become a party to the Additional Protocol.¹⁵¹ A Department of Justice spokesman said of the Additional Protocol: "The important thing to realize is that the U.S. can't be a party to any convention that abridges a constitutional protection."¹⁵² The decision of the United States to refrain from signing the Additional Protocol is not surprising as the United States had indicated that it would not have signed the underlying treaty if the Internet hate speech language was included.¹⁵³ The Additional Protocol also faced strong opposition from interest groups on both sides of the American political spectrum, including the American Civil Liberties Union and the Heritage Foundation.¹⁵⁴

V. Enforcement of European Internet Hate Speech Laws Against United States Internet Users and Providers

A. Hate Speech and the First Amendment

Although the United States has decided against signing the Protocol, the Yahoo! case and the other cases mentioned above illustrate that this does not necessarily mean that Europe will refrain from attempting to hold the United States liable for hate speech posted from the United States.¹⁵⁵ Europe has a

150. See Council of Europe, Chart of Signatures and ratifications of a treaty, Europ. T.S. No. 185, at <http://conventions.coe.int/Treaty/EN/searchsig.asp?NT=185&CM=8&DF=23/11/03> (last visited Jan. 27, 2005) (showing that the United States signed the Convention on Cybercrime on Nov. 23, 2001) (on file with the Washington and Lee Law Review). The Convention on Cybercrime concerns copyright infringement, computer-related fraud, and child pornography on the Internet. Convention on Cybercrime, Europ. T.S. No. 185 (Nov. 23, 2001), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm> (on file with the Washington and Lee Law Review).

151. See Declan McCullagh, *U.S. Won't Support Net "Hate Speech" Ban*, CNET NEWS.COM, at http://news.com.com/U.S.+won't+support+Net+%22hate+speech%22+ban/2100-1023_3-965983.html (Nov. 15, 2002) (stating that the Bush Administration will not support the Additional Protocol) (on file with the Washington and Lee Law Review).

152. *Id.*

153. See Madigan, *supra* note 55 ("The Council of Europe's original Convention on Cybercrime in 2001 also contained a hate-speech measure, but it was dropped at the last minute to gain support from the United States . . .").

154. See *id.* (quoting a Heritage Foundation fellow concerned about the vagueness of the protocol); McCullagh, *supra* note 151 (quoting an American Civil Liberties Union director applauding the decision of the United States not to sign the Additional Protocol).

155. See *supra* Part IV.E (discussing the prosecutions of Frederick Toben, Felix Somm, and Yahoo! for content posted to the Internet outside the enforcing country).

broad reading of its jurisdiction based on where the content was viewed. The Yahoo! case demonstrates that the First Amendment can play an important role in determining the enforceability of judgments against American users and providers for hate speech content posted in America.¹⁵⁶ Therefore, an overview of the protections accorded to hate speech by the First Amendment is necessary. In many cases, the First Amendment will decide the ability of a foreign nation to enforce a judgment in an American court. Generally, the First Amendment protects hate speech from government regulation. Speech is subject to proscription in some instances, but the contexts are limited.¹⁵⁷ In *Chaplinsky v. New Hampshire*,¹⁵⁸ the Supreme Court said that restrictions upon the content of speech are allowed where the speech 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."¹⁵⁹ For hate speech, there are two primary tests for determining if the speech is proscribable: (1) if the speech presents a true threat,¹⁶⁰ or (2) if the speech equates to "fighting words."¹⁶¹

156. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001) (stating that the court "may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders"), *rev'd*, 379 F.3d 1120 (9th Cir. 2004).

157. See Mari J. Matsuda, *Public Response to Racist Speech*, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 17, 34–35 (Mari J. Matsuda et al. eds., 1993) (stating that unprotected speech includes some false statements, private facts about a private individual, defamatory speech, obscene speech, "fighting words," and "true threats").

158. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *Chaplinsky* was alleged to have told the City Marshal that the Marshal was a "God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." *Id.* at 569–70. *Chaplinsky* was charged and convicted for violating a New Hampshire statute prohibiting any person from addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name." *Id.* at 569. The Supreme Court upheld the statute and *Chaplinsky's* conviction. *Id.* at 574. The Court stated that the First Amendment does not protect "fighting" words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. The Court upheld the statute because it was "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace." *Id.* at 573.

159. *Id.* at 572.

160. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or promoting lawless action and is not likely to incite or produce such action); see also *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1086 (9th Cir. 2002) (holding that the posting of names and addresses of abortion providers on a website of anti-abortion organization constituted a "true threat" and was not entitled to First Amendment protection).

161. See *Chaplinsky*, 315 U.S. at 574 (upholding conviction under a New Hampshire

The "true threat" test was established in *Brandenburg v. Ohio*.¹⁶² The *Brandenburg* test states that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁶³ The Supreme Court held that a Ku Klux Klan meeting involving the burning of a cross, derogatory comments about Negroes and Jews, and the presence of weaponry was not sufficient to rise to the level of inciting "imminent lawless action" because it was "mere advocacy," and reversed the conviction on First Amendment grounds.¹⁶⁴

The *Brandenburg* test faces questionable application to the Internet, as the Internet's impersonal contact cannot be seen as readily meeting the "true threat" requirement of being likely to incite "imminent lawless action."¹⁶⁵ The first real application of the "true threat" test to the Internet was in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*.¹⁶⁶ The

statute that made it a crime to use in a public place words likely to cause a breach of peace). *But see* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (holding unconstitutional a Minnesota ordinance that prohibited the display of a symbol that one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender").

162. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 445–49 (1969) (reversing the conviction of a KKK rally organizer because the statute he was convicted under purported to proscribe mere advocacy of speech, which is protected by the First Amendment). In *Brandenburg*, the defendant was convicted for violating the Ohio Criminal Syndicalism Statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 444–45. The defendant was identified by videotapes as a speaker at a KKK rally, at which KKK members were gathered around a wooden cross, that they burned, made derogatory statements about Negroes and Jews, and carried weapons. *Id.* at 445–47. The Supreme Court held the Ohio Criminal Syndicalism Statute unconstitutional. *Id.* at 449. The statute purported "to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action," and did not distinguish between mere advocacy and incitement to imminent lawless action. *Id.* at 448–49. Advocacy of the use of force can only be proscribed "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Because the Ohio statute failed to make this distinction, it was ruled unconstitutional. *Id.* at 449.

163. *Id.* at 447.

164. *Id.* at 449.

165. *See* Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 J. TRANSNAT'L L. & POL'Y 253, 273 (2003) ("Indeed, it does not seem highly probable that impersonal, or even personal messages on the computer screen would directly cause someone to get involved in violence or disorder.").

166. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002). The ACLA published "Deadly Dozen" posters containing

American Coalition of Life Activists (ACLA) published posters and also provided the names and locations of abortion providers to a website (the "Nuremberg Files").¹⁶⁷ After being featured on posters, three abortion providers were murdered.¹⁶⁸ On the website, the names of abortion providers who had been murdered were lined through in black, and names of those who had been wounded were lined through in gray.¹⁶⁹ Given the context of the posters and the Files, the Ninth Circuit held that the Nuremberg Files constituted a "true threat" because the defendants knew that the doctors would feel threatened by them.¹⁷⁰ As a result, the content was not protected by the First Amendment.¹⁷¹

In addition to "true threats," "fighting words" are also proscribable and are not protected speech. In *Chaplinsky*, the Supreme Court defined "fighting

information on physicians who perform abortions. *Id.* at 1064–65. The ACLA also published on its website the "Nuremberg Files," containing the names of 200 physicians and 200 judges, politicians, law enforcement officers, spouses, and abortion rights supporters. *Id.* at 1065. The "Nuremberg Files" crossed out in black the names of abortion providers who had been murdered, and lined through in gray those who had been wounded. *Id.* at 1080. Dr. David Gunn, Dr. George Patterson, and Dr. John Bayard Britton had been shot after posters containing their name and workplace had been circulated. *Id.* at 1063–64. Physicians brought suit against the ACLA under the Freedom of Access to Clinics Entrances Act (FACE), 18 U.S.C. § 248, which provides aggrieved persons a right of action against whoever by "threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services." *Id.* at 1062. ACLA argued that the poster and the Nuremberg Files were protected political speech, and were not "true threats." *Id.* at 1072. The Ninth Circuit applied a "reasonable speaker" true threat test to determine the definition of "threat of force" under FACE: [W]hether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *Id.* at 1074. The court concluded that the posters were not just political statements, even if the first couple of posters were purely political messages; "the poster format itself had acquired currency as a death threat for abortion providers." *Id.* at 1079. As a result, the court held that the use of the posters and the listing in the Nuremberg Files constituted a "true threat." *Id.* at 1088. However, the Nuremberg Files still constitute "protected speech" and personal information may only not be used "with the specific intent to threaten" the physicians. *Id.*

167. See *id.* at 1064–65 (stating that the ACLA published a "Deadly Dozen" poster listing the names and offices of a dozen abortion providers, and provided information on abortion providers to a website hosting the names of abortion providers).

168. See *id.* at 1063–64 (stating that Dr. David Gunn, Dr. George Patterson, and Dr. John Bayard Britton had all been shot and killed after appearing on posters).

169. See *id.* at 1080 ("[N]ames of abortion providers who have been murdered because of their activities are lined through in black, while names of those who have been wounded are highlighted in grey.").

170. See *id.* at 1088 (stating that the posters and the "Nuremberg Files" constitute true threats, and the ACLA realized that the posters had a threatening meaning that physicians would take seriously).

171. See *id.* at 1086 ("Like 'fighting words,' true threats are proscribable.").

words" as words that by their very utterance "inflict injury or tend to incite an immediate breach of the peace."¹⁷² The Supreme Court has recently fleshed out this doctrine in *R.A.V. v. City of Saint Paul*,¹⁷³ which held unconstitutional a Saint Paul ordinance that criminalized "plac[ing] on public or private property a symbol . . . including, but not limited to, a burning cross or Nazi swastika, which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."¹⁷⁴ The Court said that even if the statute only reached speech proscribable under the "fighting words" doctrine, it was still unconstitutional because it prohibited speech based purely on the basis of the subjects the speech addressed.¹⁷⁵ The statute only criminalized "fighting words" on the basis of "race, color, creed, religion, or gender," and permitted the use of "fighting words" on every other subject.¹⁷⁶ As a result, the statute created "the possibility that the city is seeking to handicap the expression of particular ideas."¹⁷⁷

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

173. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Petitioner, R.A.V., allegedly assembled a cross and burned the cross inside the fenced yard of a neighbor who lived across the street from R.A.V. *Id.* at 379. Petitioner was charged for violating a Saint Paul ordinance that provides that it is disorderly conduct to "place[] on public or private property a symbol . . . including, but not limited to, a burning cross or Nazi swastika, which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380. Petitioner moved "to dismiss this count on the ground that the Saint Paul ordinance was substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment." *Id.* The trial court granted this motion, but the Minnesota Supreme Court reversed. *Id.* The Minnesota Supreme Court said that the statute was not overbroad because it was limited to content that is proscribable under the *Chaplinsky* "fighting words" doctrine. *Id.* Further, the Minnesota Supreme Court said that the statute was not impermissibly content-based because it was narrowly tailored. *Id.* at 381. The United States Supreme Court reversed the determination of the Minnesota Supreme Court. *Id.* For its review, the Court assumed that the only content the statute could reach was content proscribable as "fighting words" under the *Chaplinsky* formulation. *Id.* However, the Court held that the statute was impermissibly content-based because it prohibited speech purely on the basis of the subjects the speech addresses. *Id.* Although the statute prohibited "fighting words" on the basis of "race, color, creed, religion, or gender," it did not reach political affiliation, union membership, or homosexuality. *Id.* at 391. The Court said that the "First Amendment does not permit Saint Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.*

174. *Id.* at 380.

175. *See id.* at 381 ("Assuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.").

176. *See id.* at 391 ("Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.").

177. *Id.* at 394.

The Court did say that Saint Paul could prohibit cross burning consistent with the First Amendment; the city just failed to do so in that case.¹⁷⁸ Another attempt to prohibit cross burning was found unconstitutional in *Virginia v. Black*.¹⁷⁹ Although *R.A.V.* is a "fighting words" case, *Virginia v. Black* is a "true threat" case.¹⁸⁰ Unlike the ordinance in *R.A.V.*, Virginia's cross burning statute did not single out any particular individual or group;¹⁸¹ instead, it generally provided that it "shall be unlawful for any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place."¹⁸² Given the history of cross burnings as a form of intimidation, the Court said that it was consistent for Virginia to outlaw cross burnings done with the intent to intimidate, as it met the "true threat" threshold.¹⁸³ However, the Court held the statute unconstitutional because it provided that any burning of a cross constituted "prima facie evidence of an intent to intimidate."¹⁸⁴ The Court stated that the history of cross burnings indicates that a burning cross is "not always intended to intimidate,"¹⁸⁵ and the

178. See *id.* at 396 ("St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.").

179. *Virginia v. Black*, 538 U.S. 343 (2003). Defendants were convicted separately for violating Virginia's cross-burning statute, which provides that it is unlawful for any person "with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place." *Id.* at 348. The statute further provides that any "such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." *Id.* The Supreme Court held that it is consistent with the First Amendment for a state to ban cross burning carried out with the intent to intimidate. *Id.* at 363. However, by making the burning of a cross prima facie evidence of intent to intimidate, the statute crossed the line between what may be proscribable threatening speech, and what is merely core political speech. *Id.* at 365–66. Even though a cross burning at a political rally may arouse anger in a vast majority of citizens, that is not sufficient to ban all cross burnings. *Id.* at 366. Because the statute fails to distinguish between cross burnings directed at an individual from cross burning directed at a group of like-minded believers, the statute was ruled unconstitutional. *Id.* at 365–66.

180. See *id.* at 360 (stating that intimidation is a type of "true threat" and that respondents do not contest that some cross burnings fit within this meaning of intimidating speech).

181. See *id.* at 362 ("Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics.'").

182. *Id.* at 348.

183. See *id.* at 363 ("Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.").

184. See *id.* at 367 ("For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in *Barry Black's* case, is unconstitutional on its face.").

185. *Id.* at 365.

statute failed to distinguish between "a cross burning at a public rally or a cross burning on a neighbor's lawn."¹⁸⁶ The prima facie evidence provision, the Court stated, "ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate."¹⁸⁷ In order to be a "true threat," there must be intent to intimidate, and the prima facie evidence provision constituted an impermissible shortcut.¹⁸⁸

One could argue that *Black* backtracks from the Court's opinion in *R.A.V.* that the First Amendment cannot be proscribed based on the content of the speech. The prohibition on cross burnings seems aimed particularly at cross burnings done with a racial animus. However, the Court does distinguish the two statutes, likely preserving the *R.A.V.* rule. Justice O'Connor distinguished the Virginia statute from the St. Paul ordinance by saying that in the Virginia statute, "[i]t does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's 'political affiliation, union membership, or homosexuality.'"¹⁸⁹ As a result, the statute did not result in a targeted prohibition because it targeted all cross burnings and not just those directed to intimidate a particular group, and the Court cited a few cases where cross burnings were intended to intimidate but were not done with a racial animus.¹⁹⁰ This distinction seems to indicate that the Court is not backtracking on its statement in *R.A.V.* that the First Amendment does not allow the government to proscribe speech on the basis of the subject of the speech.

B. The Protocol and the First Amendment

The preceding cases demonstrate that for the United States to proscribe hate speech, the United States must meet the high burden required by the tests for "true threat" or for "fighting words." Even though the United States has stated it will not enact the Protocol, the constitutionality of the provisions will affect the ability of a party to enforce its hate speech legislation in American

186. *Id.* at 366.

187. *Id.* at 367.

188. *See id.* ("The First Amendment does not permit such a shortcut.").

189. *Id.* at 362 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)).

190. *See id.* at 362–63 (noting instances of cross burnings directed at union members, the case of a defendant who burned a cross in the yard of a lawyer who had previously represented him and who was currently prosecuting him, and the case of defendants who burned a cross in a neighbor's yard possibly because they were angry that their neighbor had complained about the presence of a firearm shooting range in defendants' yard).

courts.¹⁹¹ As a result, an analysis of the constitutionality of each of the provisions of the Protocol is necessary. Given the high burden set by the Court, if the United States were to enact the Protocol, most of the provisions of the Protocol would likely be held unconstitutional.

Article 3 of the Protocol requires each party to criminalize "distributing, or otherwise making available, racist and xenophobic material to the public through a computer system."¹⁹² This Article does not distinguish between purely political speech and speech intended to intimidate, so it would not meet the constitutional requirements of a "true threat." This statute is analogous to the statute ruled unconstitutional in *Black*: Like Virginia placed a blanket prohibition on cross burning,¹⁹³ the Council of Europe is placing a blanket prohibition on distribution of racist and xenophobic materials. The Virginia statute failed to distinguish between cross burnings at a political rally for the benefit of like-minded individuals and a cross burning on a neighbor's lawn.¹⁹⁴ The Council of Europe has failed to distinguish between racist and xenophobic materials directed to other racists and xenophobes and material intended to intimidate. As a result, this Article will not meet the "true threat" test.

Article 3 also will not meet the requirements of the "fighting words" test. *Chaplinsky* limits the "fighting words" doctrine to those words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹⁹⁵ It is doubtful the mere distribution of racist material over the Internet will result in an "immediate breach of the peace."¹⁹⁶ However, even if it is accepted that the distribution of racist and xenophobic material on the Internet would cause an "immediate breach of the peace," the Article would run into the *R.A.V.* problem of singling out certain speech for criminalization. The Protocol only criminalizes racist and xenophobic speech, which is similar to how the

191. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1184 (N.D. Cal. 2001) (issuing a declaratory judgment that a French order requiring Yahoo! to disable French access to auctions of Nazi memorabilia is unenforceable in the United States because of the protections afforded speech by the First Amendment), *rev'd*, 379 F.3d 1120 (9th Cir. 2004).

192. Additional Protocol, *supra* note 56, at 8.

193. See *Virginia v. Black*, 538 U.S. 343, 348 (2003) ("It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.").

194. See *id.* at 366 ("It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers.").

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

196. See *Timofeeva*, *supra* note 165, at 272 ("Indeed, it does not seem highly probable that interpersonal, or even personal messages on the computer screen would directly cause someone to get involved in violence or disorder.").

Saint Paul ordinance only criminalizes the posting of symbols likely to arouse anger on the basis of "race, color, creed, religion or gender."¹⁹⁷ The Saint Paul ordinance was held unconstitutional on this basis because the First Amendment "does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."¹⁹⁸ Given this precedent, even if the Protocol were found to criminalize only conduct rising to the level of "fighting words," it will be held unconstitutional because it only criminalizes speech concerning certain disfavored subjects.

A similar analysis would lead to the unconstitutionality of Article 6, which criminalizes the denial or minimization of a genocide.¹⁹⁹ The denial of genocide is not likely to result in intimidation, and, even if it does, the statute does not distinguish between denials of genocide intended to intimidate and denials not intended to intimidate. As a result, it is not likely to meet the *Black* "true threat" test. The Article does allow a country to reserve the right to require that the denial be accompanied by "intent to incite hatred, discrimination or violence against any individual or group."²⁰⁰ However, even with a requirement of intent, this Article is still likely to be found unconstitutional under a "true threat" analysis. The reservation still requires criminalization of intent to incite hatred and discrimination, which are not true threats—only intent to incite violence is a true threat.²⁰¹ Even if it can be assumed that denials of genocide are likely to lead to an "immediate breach of peace" under the "fighting words" analysis and the other problems did not exist, this Article still would be unconstitutional because it is singling out a particular viewpoint for criminalization. The Article states that only denials of genocide are to be criminalized under the Protocol, so it is criminalizing a "disfavored subject" based on the speaker's viewpoint, which is unconstitutional under *R.A.V.*²⁰²

Article 5, criminalizing the act of publicly insulting a person for the reason that they belong to a group distinguished by race, is also likely to be

197. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992).

198. *Id.* at 391.

199. *See supra* notes 69–71 and accompanying text (stating that Article 6 requires each party to criminalize the denial or minimization of a genocide, unless the party reserves the right not to apply this Article).

200. Additional Protocol, *supra* note 56, at 10.

201. *See Planned Parenthood of Columbia/Willamette v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2002) (stating that the Nuremberg Files are only unprotected to the extent physicians are threatened with being next on a hit list).

202. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) ("The First Amendment does not permit St. Paul to impose special prohibitions on those who speakers who express views on disfavored subjects.").

unconstitutional.²⁰³ Insulting someone in public is likely to result in an "immediate breach of the peace," which would make it a candidate for proscription under *Chaplinsky*.²⁰⁴ However, the Internet involves less reason for thinking that a public insult would lead to an immediate breach of the peace, so it is doubtful this would rise to the level of "fighting words" in the context of the Internet.²⁰⁵ Even if it did rise to the level of "fighting words," this Article would be unconstitutional because it impermissibly concerns the subject of the speech. In *R.A.V.*, the Supreme Court assumed that the ordinance only reached conduct proscribable as "fighting words," but held the ordinance unconstitutional because it only criminalized conduct likely to arouse anger on the basis of "race, color, creed, religion or gender."²⁰⁶ Similarly, the Protocol only criminalizes publicly insulting someone on the basis of the person's "race, colour, descent or national or ethnic origin."²⁰⁷ Because the Article singles out for punishment those speakers who "express views on disfavored subjects," it will likely be found unconstitutional.²⁰⁸

The Article that comes the closest to being constitutional is Article 4, which requires parties to criminalize "threatening . . . with the commission of a serious criminal offense . . . (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin . . . or (ii) a group of persons which is distinguished by any of these characteristics."²⁰⁹ This Article seems to make the necessary distinction between speech likely to result in "imminent lawless action" and speech not likely to result in such action because it is limited only to cases where a person threatened another person with the "commission of a serious criminal offense." As a result, the conduct described in this Article appears to be proscribable as a true threat. However, even though it is proscribable conduct, the statute is likely to fail the First

203. See Additional Protocol, *supra* note 56, at 4 (requiring parties to adopt measures criminalizing "insulting publicly . . . persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin").

204. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 573 (1942) (holding that it is constitutional for New Hampshire to criminalize addressing any offensive word to any other person in a public place because it is likely to result in an "immediate breach of the peace").

205. See *Timofeeva*, *supra* note 165, at 272 ("Indeed, it does not seem highly probable that impersonal, or even personal messages on the computer screen would directly cause someone to get involved in violence or disorder.").

206. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380, 396 (1992) (holding the St. Paul ordinance unconstitutional).

207. Additional Protocol, *supra* note 56, at 5.

208. See *R.A.V.*, 505 U.S. at 391 ("The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.").

209. Additional Protocol, *supra* note 56, at 9.

Amendment analysis because it violates the *R.A.V.* rule that it is impermissible to proscribe speech based on the subject of the speech. The Protocol only targets true threats where the threat was instigated because of the person's "race, colour, descent or national or ethnic origin," making it a regulation of the basis of speech, and not a regulation based on the conduct or effect of the speech. One could argue that, in *Black*, the Supreme Court became more receptive to regulation based on the subject of the speech, but the statutes appear to be distinguishable enough to the point where *R.A.V.* remains good law.²¹⁰

C. Enforcement of Criminal Liability

The First Amendment analysis demonstrates that each of the provisions of the Protocol would likely be found unconstitutional under American law if the United States adopted these provisions, with the possible exception of Article 4's true threat provisions. However, the United States has indicated that it will not sign the Protocol, so a legislative enactment is not presently at issue.²¹¹ Instead, the First Amendment jurisprudence provides insight into the enforceability of European judgments in American courts. Because of the protections the First Amendment accords speech, it is doubtful the European nations that enact the Protocol will be able to reach most hate speech posted from the United States.

American Internet users who post hate speech on the Internet generally do not need to worry about criminal liability unless they engage in foreign travel. As the *Toben* case illustrates, European courts view their jurisdiction broadly, and hold users who post speech on the Internet liable under their nations' law, even if the content is uploaded to the Internet from outside their nations.²¹² However, *Toben* made the mistake of visiting Germany and was arrested while on German soil.²¹³ For a criminal trial, the defendant generally must be present.²¹⁴ If *Toben* never visited Germany, in order for Germany to press

210. See *supra* notes 189–90 and accompanying text (analyzing the differences between the statutes at issue in *R.A.V.* and in *Black*).

211. See McCullagh, *supra* note 151 (stating that the Bush Administration will not support the additional protocol).

212. See *supra* Part IV.E.1 (concerning the criminal prosecution by Germany of Frederick *Toben*).

213. See Matthew Abraham, *History's Rewriter Faces German Jail*, THE AUSTRALIAN, July 8, 1999, at 4 (stating that *Toben* was arrested while making a visit to the local prosecutor's office to discuss his Holocaust research).

214. See DADAMO & FARRAN, *supra* note 92, at 193 ("Moreover, unlike in a civil trial, the

criminal charges against Toben, the prosecutors would have needed to extradite Toben from Australia to Germany.

Extradition in the United States is governed by treaties; the United States cannot seize a fugitive criminal and surrender him to a foreign power in the absence of a treaty.²¹⁵ Extradition treaties are either multilateral or bilateral. An example of a multilateral extradition treaty would be the underlying Convention on Cybercrime's extradition provisions.²¹⁶ However, a party to the Convention on Cybercrime is not obligated to extradite defendants sought for prosecution for violating provisions of the Additional Protocol,²¹⁷ and there are no other multilateral treaties on point.²¹⁸ Therefore, a country seeking a fugitive defendant from the United States would need to rely on its bilateral treaty with the United States.

The United States does not have any bilateral extradition treaties with European nations that would obligate it to hand over defendants to be charged in connection with the posting of hate speech on the Internet. The United States' bilateral extradition treaty with Germany contains a list of thirty-three extraditable offenses, and, additionally, provides for extradition for any offense not listed, provided it is punishable under the federal laws of the United States and Germany.²¹⁹ The posting of hate speech on the Internet neither falls within any of the listed extraditable offenses, nor is it a crime punishable under the federal laws of the United States, so it would not be an extraditable offense.

defendant must be personally present at his trial before a criminal court . . . and cannot be simply represented as in civil proceedings.").

215. See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936) ("[I]n the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power."); M. CHERIF BASSOUINI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 36 (4th ed. 2002) ("[T]he United States requires a treaty, as does the United Kingdom and most common law countries.").

216. See *Convention on Cybercrime*, Nov. 23, 2001, art. 24, Europ. T.S. No. 185 (providing in Article 24 for extradition for crimes established by the Convention), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm> (on file with the Washington and Lee Law Review).

217. See *id.* (stating that the extradition provisions of the Convention on Cybercrime only concern criminal offenses established in accordance with Articles 2–11 of the Convention); see also *Additional Protocol*, *supra* note 56 (stating in Article 8 that the scope of application of measures defined in Article 24 is extended to signatories of the Additional Protocol).

218. See BASSOUINI, *supra* note 215, at 913–23 (listing multilateral conventions containing provisions on extradition).

219. See *Extradition*, Jun. 20, 1978, U.S.-F.R.G., art. 2, 32 U.S.T. 1485, 1489 (providing extradition for offenses described in the Appendix to the treaty, and for offenses, whether listed in the Appendix or not, provided they are punishable under the laws of the United States and the laws of the Federal Republic of Germany).

The extradition treaty of the United States with France has similar language to the treaty with Germany, with a list of extraditable offenses, on the condition that acts are punished as crimes or offenses by the laws of both States.²²⁰ As a result, just like with Germany, the United States cannot extradite an individual to France for posting hate speech on the Internet.

The other extradition treaties of the United States with European nations contain similar language.²²¹ Because there are no treaties providing for extradition by the United States of individuals sought for criminal prosecution for posting hate speech on the Internet, the prosecuting country will be unable to extradite the offender from the United States. This bars criminal prosecution unless, like Toben, the defendant engages in foreign travel.

Although the individual poster of the content would need to engage in foreign travel, an ISP may have an office or subdivision in the country that is charging the defendant for the conduct. However, the *Somm* case demonstrates that liability is not likely to be imposed on corporate subdivisions for conduct of the parent company. Because the German subdivision in that case had no control over servers located in America, the charges were dismissed against Felix Somm.²²² If courts follow this precedent, no liability is likely to be imposed on American ISPs or their foreign subdivisions for content posted on American servers.

D. Enforcement of Civil Liability

Although the defendant must be present for a criminal trial, no presence is required for a civil trial. If the defendant is not present, a court is likely to issue a default judgment against an Internet user who posts hate speech on the Internet once the judge determines that the claim is admissible and well founded.²²³ However, this judgment will be helpful to the enforcing country only if the defendant has assets in the country issuing the default judgment.²²⁴

220. See Extradition, Feb. 12, 1970, U.S.-Fr., art. 2, 22 U.S.T. 407, 409 (providing that extradition shall be granted for certain acts if they are punished as crimes or offenses by the laws of both countries).

221. See Goldsmith, *supra* note 3, at 1220 ("A pervasive feature of modern extradition treaties is the principle of double criminality. This principle requires that the charged offense be criminal in both the requesting and the requested jurisdictions.").

222. See *supra* Part IV.E.2 (stating that Felix Somm's conviction was reversed on appeal because he had no control over content posted on American servers).

223. See DADAMO & FARRAN, *supra* note 92, at 178 ("A judgment may be entered in the absence of the defendant once the judge has ensured that the claim is admissible and well founded.").

224. See Goldsmith, *supra* note 3, at 1217 (stating that the defendant's physical presence or

Otherwise, the issuing country would need to attempt to enforce the judgment in the United States, if all the assets of the defendant are located there.

If a country seeks to enforce a civil judgment in an American court against an individual who posts hate speech on the Internet, a court is likely to refuse to enforce the judgment. Enforcement of foreign judgments is based on comity.²²⁵ However, the outcome would likely be the same as that reached in the *Yahoo!* case. The First Amendment protections accorded free speech will likely be enough to prevent enforcement of foreign civil judgments in American courts.²²⁶ However, it is questionable whether the First Amendment protects all of the provisions of the Protocol—particularly Article 4's true threat provisions. Even if a court were to find that the true threat on the basis of race is proscribable based on *Black*, the court may still fall back on the second reason offered by the amici curiae in the *Yahoo!* case: The foreign court has no jurisdiction over a web site posted in the United States and targeted at American Internet users.²²⁷ In the United States, the mere passive presence of a website as viewable in another jurisdiction will not be enough for a court to allow jurisdiction.²²⁸ For jurisdiction, American courts generally require that the website target the forum or that the website is highly interactive.²²⁹ Because presence is not sufficient, unless one of these other requirements is met, even if the content is proscribable, the judgment is still unlikely to be enforced because

assets within the territory remains the primary basis for a nation or state to enforce its laws, and that the large majority of persons who transact in cyberspace have no presence or assets in the jurisdictions that wish to regulate their information flows in cyberspace).

225. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001) ("The extent to which the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice, governed by 'the comity of nations.'" (quoting *Hilton v. Guyot*, 159 U.S. 113, 163 (1895))), *rev'd*, 379 F.3d 1120 (9th Cir. 2004).

226. See *id.* at 1193 ("Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment.").

227. See *supra* notes 140–43 and accompanying text (concerning the alternative argument promoted by the amici curiae for granting *Yahoo!* the declaratory judgment: The lack of jurisdiction of the French court).

228. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) ("A passive Website that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction.").

229. See *id.* at 1126–27 (holding that the Pennsylvania court has jurisdiction over a case filed against a California website, after finding that the website is highly interactive, has subscribers in Pennsylvania, has contracts with Internet-access providers to furnish its services to customers in Pennsylvania, and the harm occurred in Pennsylvania). *But see Hy Cite Corp. v. Badbusinessbureau, L.L.C.*, 297 F. Supp. 2d 1154, 1158–67 (W.D. Wis. 2004) (rejecting the sliding scale of website interactivity approach adopted in *Zippo*, and instead applying traditional jurisdiction tests).

of the lack of jurisdiction of the foreign court. As a result, given the protections accorded free speech by the First Amendment and America's requirements for establishing personal jurisdiction, it is doubtful that a foreign judgment would be enforceable in an American court against an individual who posts hate speech on the Internet from America.

If the person posting the hate speech is not a unique individual, but instead a corporation or an ISP, the same analysis would apply. Although the foreign court would likely find jurisdiction to hear the case and issue a judgment, unless the corporation has foreign assets available, the judgment would need to be enforced in an American court, and the outcome would be the same as in the *Yahoo!* case.²³⁰ The American court would find the judgment contrary to the First Amendment or would find that the foreign court has no jurisdiction over the matter.²³¹

E. Effect of Inability of European Laws To Reach American Conduct

As European countries are unable to extradite American offenders and are not able to enforce civil judgments in American courts, the posting of hate speech from American servers will go largely unpunished. The effect of the protections accorded racist speech by American laws will be that America will become a haven for hate speech. An American haven can take two possible forms: (1) no foreign web sites will come to America, but American web sites will provide a leak to European web users; or (2) European webmasters, fearing liability for posting hate speech in Europe, will be attracted to America. If the former occurs, America will not face a policy problem, as it will not result in an escalation of hate speech taking place on its territory. However, if the latter occurs, more hate-speakers will come to America, which could create a potential policy problem for America.

America does act as a leak of hate speech to the world: Before the Protocol, it was already the case that most hate sites on the Internet were based in America.²³² This number largely represents sites, such as

230. See Goldsmith, *supra* note 3, at 1217 ("A defendant's physical presence or assets within the territory remains the primary basis for a nation or state to enforce its laws.").

231. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1193 (N.D. Cal. 2001) ("Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment."), *rev'd*, 379 F.3d 1120 (9th Cir. 2004).

232. See Scheeres, *supra* note 11 (stating that, according to a Council of Europe report,

Stormfront.org,²³³ that target an American audience. However, the number also includes sites that have moved to America in response to hate speech legislation in other countries: Reports indicate that Germany's actions against hate speech led many hate groups to transfer their sites from Germany to the United States.²³⁴ As a result, it appears that an American haven does have the effect of causing some hate-speakers to move their sites to America to take advantage of America's protection of free speech.

If the trend of transferring sites from European countries to the United States continues, with a greater crackdown on racist sites in Europe, more of these websites will likely flee to the United States. Given the protections accorded hate speech by the First Amendment, the United States will have no constitutional way to combat them. This may or may not pose a policy problem for the United States. If the speakers are merely utilizing American servers, and otherwise maintaining their presence in foreign territory, then the site will have minimal effect on American culture. The greatest effect would be greater animosity toward the United States from countries that have criminalized the content and are seeking to remove such content from the Internet. However, if these individuals continue to maintain presence outside the United States, then foreign countries would be able to assert jurisdiction over these individuals based on presence even if the website is not located in the enforcing country.²³⁵

But if the transference of websites to the United States alone proves insufficient to protect speakers of hate from liability under the growing global framework against hate speech, then the speakers may take the next logical step—transference of their presence to the United States. Although the United States has a rich tradition for the protection of free speech and the welcoming of different ideological viewpoints, the transference of presence could pose a policy problem for the United States. An influx of hate speakers into the United States would likely result in an increase of hate groups in the United States, which would have the effect of increasing racial tension. As a

2500 out of 4000 racist websites were created in the United States).

233. Stormfront, at <http://www.stormfront.org> (last visited Jan. 27, 2005) (on file with the Washington and Lee Law Review).

234. See Agence-France Press, *Neo-Nazi Web Sites Reported to Flee Germany*, N.Y. TIMES, Aug. 21, 2000, at A5 ("In a report on neo-Nazi activities, [N.D.R.] radio said that around 90 rightist groups had transferred their sites to the United States . . .").

235. See Goldsmith, *supra* note 3, at 1216–17 (stating that a nation can enforce its laws against a person with physical presence or assets within the territory).

result, steps consistent with the Constitution may be necessary to help prevent the United States from becoming a haven for Internet hate speech.

VI. *Ways To Mitigate the United States as a Haven for Internet Hate Speech*

Although the Protocol will be largely ineffective against hate speech originating in America and the First Amendment prevents America from joining in the Protocol, there are several policy alternatives available to policymakers that could mitigate the ability of the United States to act as a haven for Internet hate speech. These policies include steps Europe can take to clog the American leak, and steps America can implement to prevent an escalation of racist speech.²³⁶

A. *European ISPs Blocking Foreign Hate Speech Sites*

European nations can adopt the approach that Spain has taken with American websites. Spain has passed a law authorizing judges to order the blocking of websites that do not comply with national law.²³⁷ The increasing use of blocking software may lead some racist speakers to determine that setting up a racist website in the United States is not worth the effort if the site will not be available around the globe. However, as stated above, this approach can be problematic. Namely, it is onerous on the victimized country because it forces the victimized country to search out the illegal content.²³⁸ As a result, this approach may not be effective in deterring the content from being placed on the Internet in the first place.

236. In addition to the policy proposals suggested below, there are also means users can take to block hate speech from their computers. The Anti-Defamation League has developed a free filter available for download, which blocks websites of those organizations which, in the judgment of the Anti-Defamation League, advocate hatred, bigotry, or violence towards Jews or other groups on the basis of their religion, race, ethnicity, sexual orientation, or other characteristics. For more information on the Anti-Defamation League's HateFilter, see <http://www.adl.org/hatefilter/default.asp>.

237. See Scheeres, *supra* note 11 ("Spain recently passed legislation authorizing judges to shut down Spanish sites and block access to U.S. Web pages that don't comply with national laws.").

238. See *supra* note 11 and accompanying text (stating that the Spanish law does not place a deterrent on the producer of the content to not put the content on the Internet on the first place).

B. Increased Cooperation by American ISPs Against Hate Speech

European countries can also increase dialogue with American ISPs and try to create voluntary agreements for the suppression of hate speech. Even though the United States government cannot proscribe most hate speech, the First Amendment does not require a private party to publish and make available the speech.²³⁹ As a result, ISPs are able to restrict the speech published on their websites. In recognizing the limitations the Protocol would have in reaching conduct originating in the United States, the European Commission on Racism and Intolerance endorsed this approach.²⁴⁰ ISPs have indicated a willingness to cooperate on this front: In the wake of the French actions against Yahoo!, Yahoo! announced that it would ban auctions of Nazi artifacts on its site.²⁴¹ However, the cooperation of ISPs would only be successful to the extent the websites in question do not maintain their own server. Even if they are not on their own server, this may only just lead to displacement of hate speech, with speakers leaving censored servers and placing their content on uncensored servers.

C. Extradition Treaty

Another policy solution would be for the United States to enter into a treaty providing for the extradition of speakers of hate speech.²⁴² However, this approach is unlikely to pass constitutional muster under the current framework proposed by the Council of Europe. Extradition must be done by treaty.²⁴³ A

239. See *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976) (holding that striking union members have no First Amendment right to enter a mall for the purpose of advertising their strike against one of the stores therein because a mall is not a state actor).

240. See LEGAL INSTRUMENTS, *supra* note 24, at 90 ("The prudent course, therefore, would be to enter into a dialogue with all service providers, in particular the Americans, in order to convince them that they themselves must take the appropriate measures to combat racist sites (by blocking sites, filtering, refusing anonymity to authors of sites, etc.).").

241. See Lori Enos, *Yahoo! to Ban Nazi-Related Auctions*, E-COMMERCE TIMES, <http://www.ecommercetimes.com/perl/story/6432.html> (Jan. 3, 2001) ("Responding to pressure from anti-hate groups and concerned users, Yahoo! announced . . . it will ban auctions of Nazi artifacts and other items 'that are associated with groups which promote or glorify hatred and violence.'") (on file with the Washington and Lee Law Review).

242. See Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5, ¶ 89 (2002) (proposing an extradition treaty as a way to prevent the United States from becoming a safe harbor for hate speech), available at <http://www.vjolt.net/vol17/issue2/v7i2a05-Tsesis.pdf>.

243. See BASSOUINI, *supra* note 215, at 36 ("[T]he United States requires a treaty, as does the United Kingdom and most common law countries.").

court would be unlikely to allow the extradition of a defendant to a foreign country if the extradition would be inconsistent with the Bill of Rights. Although Congress can sometimes accomplish by treaty what it cannot legislate under the Commerce Clause,²⁴⁴ a treaty must still be consistent with the Bill of Rights.²⁴⁵ An extradition treaty would likely be ruled unconstitutional if the crime for which the fugitive was being sought would result in an action unconstitutional in the United States.²⁴⁶ It appears as though none of the provisions of the Protocol would be constitutional, with the possible exception of the Article concerning true threats.²⁴⁷

However, an extradition treaty can still provide a solution. Even though the "true threat" Article of the Protocol would likely be found unconstitutional because it impermissibly regulates on the basis of the subject of the speech, "true threats" are proscribable in the United States. The United States could enter an extradition treaty providing for extradition of "true threats," as long as the criminal statute in question is not subject-based. As a result, it is possible for Europe to rewrite the language of the "true threat" Article in a way that would be consistent with the First Amendment, allowing the United States to take part in an extradition treaty if it chooses to do so.

D. A Constitutional Moment?

A final policy alternative would be for the United States to adopt the tort action suggested by Richard Delgado and the administrative and criminal remedies suggested by Mari Matsuda. Delgado argued for the creation of a tort action available to victims of hate speech in his seminal Article, *Words that*

244. See *Missouri v. Holland*, 252 U.S. 416, 434–35 (1920) (holding constitutional the Migratory Bird Treaty Act, which gives effect to a treaty between the United States and Great Britain, even though Congress has no power to legislate migratory birds under the Commerce Clause).

245. See *Reid v. Covert*, 354 U.S. 1, 17–19 (1957) (holding unconstitutional an executive agreement authorizing military jurisdiction for crimes committed abroad by civilian dependents of servicemen, as a violation of rights guaranteed by the Bill of Rights).

246. Cf. BASSOUNI, *supra* note 215, at 929 (stating that in July 1996, the Italian Constitutional Court declared its extradition treaty with the United States unconstitutional because the United States recognizes the death penalty, which is unconstitutional under Italian law).

247. See *supra* Part IV.B (analyzing the constitutionality of each of the crimes provided for by the Protocol); see also Tsesis, *supra* note 242, ¶89 (stating that the United States would likely qualify its participation in an extradition treaty to those cases where incitements pose an imminent threat of harm).

Wound.²⁴⁸ Delgado's cause of action is not based so much on the idea of "true threat" or "fighting words" that characterizes most legislation aimed at repressing racist speech, but instead on the idea of harassment and emotional distress.²⁴⁹ To bring a cause of action under Delgado's tort theory, the plaintiff would be required to prove that: "Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult."²⁵⁰

Expanding on Delgado's tort action, Mari Matsuda argues for criminal and administrative sanctions for hate speech.²⁵¹ Matsuda's approach provides for three prerequisites to prosecution for hate speech: (1) "The message is of racial inferiority;" (2) "The message is directed against a historically oppressed group;" and (3) "The message is persecutory, hateful, and degrading."²⁵² According to Matsuda, her approach would restrict redress to only the most serious hate speech, and would appease civil libertarians' concerns of censorship, by leaving many forms of racist speech to private remedies.²⁵³

However, the adoption of the approaches suggested by Delgado and Matsuda has had mixed results, and despite the efforts of Delgado and Matsuda to propose their causes of action in line with the First Amendment,²⁵⁴ the First Amendment has proved problematic. Outside of true threats and fighting words, racial insults have generally only been found actionable when they constitute battery, harassment, or emotional distress.²⁵⁵ Delgado's and

248. See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 149 (1982) ("Because racial attitudes of white Americans 'typically follow rather than precede actual institutional [or legal] alteration,' a tort for racial slurs is a promising vehicle for the eradication of racism.").

249. See *id.* ("The psychological, sociological, and political repercussions of the racial insult demonstrate the need for judicial relief.").

250. *Id.* at 179.

251. See Matsuda, *supra* note 157, at 17 ("Taking inspiration from Delgado's position, I make the further suggestion that formal criminal and administrative sanction—public as opposed to private prosecution—is also an appropriate response to racist speech.").

252. *Id.* at 36.

253. See *id.* at 50 ("[This chapter] suggests criminalization of a narrow, explicitly defined class of racist hate speech to provide public redress for the most serious harm, leaving many forms of racist speech to private remedies.").

254. See Delgado, *supra* note 248, at 172–79 (concluding that the government interest in regulating racial insults outweighs the speaker's free speech interests, as racial insults do not meet any of the four free speech interests articulated by Professor Emerson); Matsuda, *supra* note 157, at 35 ("In the following section I suggest that an explicit and narrow definition of racist hate messages will allow restriction consistent with first amendment values.").

255. See *Fisher v. Carousel Motor Hotel, Inc.*, 424 S.W.2d 627, 628–30 (Tex. 1967) (holding that the snatching of a plate from a Negro because he could not be served in the

Matsuda's causes of action run into problems with the First Amendment because they are based on the subject of the speech, as they both refer to targeting insults at a person on the basis of that person's race, running afoul of *R.A.V.*²⁵⁶

But if hate speech becomes a debilitating social problem in the United States, a "Constitutional moment" could occur. The exigencies of the Great Depression led to a Constitutional moment, according to Ackerman, that resulted in the United States Supreme Court abandoning a restrictive view of the Commerce Clause, expanding it to its modern interpretation as a broad bestowal of power to Congress.²⁵⁷ Given the historical protections accorded free speech,²⁵⁸ and the Court's generally strict adherence to precedent,²⁵⁹ it is questionable if even a major influx of hate speech websites in America can provoke such a reassessment of the First Amendment. However, it remains possible. For instance, the Supreme Court has viewed with increasing favor the principles of the European Convention of Human Rights,²⁶⁰ and the Convention's opposition to hate speech may be viewed favorably by the

cafeteria was a battery because the tort is designed to protect dignity as well as physical security); *see also* *Contreras v. Crown Zellerbach Corp.*, 565 P.2d 1173, 1177 (Wash. 1977) (holding that a Mexican-American stated a claim for the tort of outrage—or intentional infliction of emotional distress—when continuously subjected to racial jokes and slurs by fellow employees).

256. *See supra* notes 173–76 and accompanying text (stating that in *R.A.V.*, the Supreme Court held unconstitutional a St. Paul ordinance because, even if the statute only regulated "fighting words," the statute impermissibly prohibited speech based purely on the basis of the subject of the speech).

257. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 488 (1989) (asserting that there have been three constitutional regimes in American history, and that these regimes were inaugurated by three constitutional moments: Founding, Reconstruction, and the New Deal).

258. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or promoting lawless action and is not likely to incite or produce such action). *But see* *Abrams v. United States*, 250 U.S. 616, 624 (1919) (upholding convictions of defendants who published material containing language disloyal about the form of the government). The Court's opinion in *Abrams* is famous for the dissent of Justice Oliver Wendell Holmes, who laid out the test the Court would later apply in *Brandenburg*: "[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Id.* at 630 (Holmes, J. dissenting).

259. *See* Ackerman, *supra* note 257, at 488 (naming only three Constitutional moments in American history).

260. *See* *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing a decision of the European Court of Human Rights finding sodomy laws in violation of the European Convention on Human Rights).

Court.²⁶¹ The protections the United States accords speech increasingly counter the values and regulations of the rest of the world, and the Court could view American exceptionalism as a persuasive reason to change the interpretation of the First Amendment.

This approach does not necessarily mean that the United States entirely needs to throw out the *Brandenburg* "true threat" framework: The effect could be as minimal as tossing out the rule in *R.A.V.* that speech cannot be proscribed on the basis of the subject of the speech. If that requirement is eliminated, then the United States could have more discretion to proscribe "true threats" that harm or target a particularly vulnerable group. The rule has been challenged by some for making limited logical sense because the Court acknowledges that "true threats" are not protected, but nevertheless finds content-based statutes unconstitutional because the statutes treat some "true threats" different from others.²⁶² If content is allowed to be proscribed on the basis of the subject of the speech, then it would be possible for the remedies offered by Delgado and Matsuda to be adopted. Even if the United States does not join the Protocol, the adoption of their proposals would give the United States the ability to proscribe some hate speech and enable the United States to enact a deterrent to hate speech, making the United States a less attractive haven for hate speech.

VII. Conclusion

Although the Council of Europe's Internet Hate Speech Protocol is not likely to result in any additional criminal or civil liability for American Internet users and providers, it will still have an effect on American society. With the increased cooperation of European countries to combat hate speech on the Internet in Europe, America is likely to become a haven for hate speech. This would be caused by both the visibility of pre-established American sites in Europe and America's status as an attractive home for European sites escaping the restrictions on speech present in Europe. However, there are steps that can

261. See The European Convention on Human Rights, art. 10 (Nov. 4, 1950) (stating that everyone has the right to freedom of expression, but that is limited by those restrictions necessary in a democratic society, including the protection of health or morals and for the protection of the reputation or the rights of others), available at <http://www.hri.org/docs/ECHR50.html> (on file with the Washington and Lee Law Review); *id.* art. 14 (stating that the enjoyment of rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as race, colour, national origin, or association with a national minority).

262. See STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 63 (1999) (stating that Scalia's content-neutral alternative in *R.A.V.* would drive from the marketplace the very same ideas and viewpoints, along with others).

be taken to mitigate the problem. Most effectively, European nations should engage in a discourse with ISPs and seek their voluntary assistance in trying to cut down on the speech. If that approach does not work, and the problem becomes extremely severe, it may lead to a Constitutional moment, where the Supreme Court reverses its First Amendment jurisprudence. This would allow speech proscriptions on the basis of the subject of the speech, giving the United States greater constitutional authority to proscribe hate speech.

TRIBUTE



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