

**Comment: Censoring Hate Speech In Cyberspace: A New  
Debate in a New America**

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**Introduction:**

The emergence of the Internet has provided individuals with an increased ability to access information and news regarding a vast amount of topics. Reports suggest that “about half of the population has access somewhere, 42% of them in their homes, and another 10 to 15% elsewhere.”<sup>2</sup> In the United States alone, 79 million individuals use the Internet.<sup>3</sup> The Internet, with its precision and speed, provides individuals with both access to information and the opportunity to reach listeners they otherwise would have been unable to reach without this medium. The Internet provides every user with the potential to become a publisher.<sup>4</sup> This capability permits the content of this medium to be nearly as diverse as human thought itself.<sup>5</sup>

Along with this tremendous opportunity, however, comes the threat of abuse. With the increase in the number of people online, a significant percentage of the country’s population is exposed to

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<sup>2</sup> *Are Americans Becoming Internet Slaves?*, USA TODAY MAGAZINE, June 1, 2000, at 1.

<sup>3</sup> Anti-Defamation League, *Poisoning the Web: Hatred Online, About the Internet*, at [http://www.adl.org/poisoning\\_web/about\\_net.html](http://www.adl.org/poisoning_web/about_net.html) (last visited Nov. 28, 2001) (on file with the North Carolina Journal of Law & Technology).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

an increasing number of expressions of bigotry and hate that are readily available on the Internet.<sup>6</sup>

Following the tragic events which occurred in the United States on September 11, 2001, the threat of violence due to hate-based ideas and values has become a pressing reality. Americans have been forced to question whether hate-filled online rhetoric is simply the harmless exercise of free speech or is a preventable catalyst of illegal conduct. The death and destruction caused by terrorists who listened to and adopted anti-American views are reminders that speech can often spur dangerous actions in response.

As the national security of the United States has become increasingly important in recent months, the debate regarding the censorship of hate speech has again arisen. While many individuals remain wary of infringing upon First Amendment rights through the regulation of hate speech in cyberspace, some suggest that the expansive and pervasive nature of the Internet calls for such regulation.

The danger of free speech in cyberspace crossing over to become language that perpetuates hatred and provokes violence is a very real threat. This threat manifests itself in two primary forms. First, young Internet users who may be easily influenced are exposed to hate-filled ideals and values, often without any regulation or guidance. Secondly, hate-filled speech may go beyond simply altering an individual's thoughts and may in fact lead to crimes of death and destruction arising from the exposure to such ideas.

This Comment will attempt to illustrate the need for increased regulation of hate speech on the Internet by examining three facets

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<sup>6</sup> *Id.*

of this debate. It will first examine existing First Amendment precedent dealing with freedom of expression issues generally. It will then examine how this structure limits the government's ability to regulate hate speech on the Internet. This section will also explore other legal means that are being used to regulate hate speech. Finally, it will conclude by taking a look at alternative techniques that are being used to protect individuals from hate speech.

### **Examining the Problem: The Need for Additional Regulation of Hateful Cyberspeech**

The Internet has been and will continue to be a medium that allows individuals to interact, research, and conduct business with ease and speed. The vast majority of Americans do not need regulations to provide standards of appropriate or inappropriate behavior in cyberspace. There remains a small percentage of individuals, however, who need some type of regulation to prevent them from infringing upon other rights that individuals hold so dear. The features that make the Internet so unique have increasingly been manipulated to benefit the needs of those who spread hate-filled propoganda.

Persons who display various kinds of hate are able to relay these feelings to others on newsgroups.<sup>7</sup> Prior to the Internet, hate groups spread their propaganda through written materials, in a concerted effort to connect with others who shared the same beliefs.<sup>8</sup> With the increasingly widespread use of the Internet,

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<sup>7</sup> Anti-Defamation League, *Poisoning the Web: Hatred Online, The Internet as a Hate Tool*, at [http://www.adl.org/poisoning\\_web/net\\_hate\\_tool.html](http://www.adl.org/poisoning_web/net_hate_tool.html) (last visited Nov. 28, 2001) (on file with the North Carolina Journal of Law & Technology).

<sup>8</sup> *Id.*

however, individuals and hate groups are able to promote hateful conduct and speech inexpensively and easily while simultaneously reinforcing each other's hateful convictions.<sup>9</sup> The Internet also allows for the opportunity not only to post messages, but also to engage in conversation through chat rooms.<sup>10</sup> Furthermore, the Internet has served as an important recruitment tool for these individuals and groups.<sup>11</sup>

The dangers regarding hate speech through the use of the Internet are evident. There is a fine line between the exchange of values and ideas and the perpetuation of hate in the form of degradation and violence. Despite this fine distinction, the Supreme Court has continued to protect online hate speech based on rights guaranteed under the First Amendment.<sup>12</sup> In *Reno v. ACLU*, the Court held that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."<sup>13</sup> This approach has its detractors, however; former Vice President Al Gore, among others, has contended that the existing judicial and regulatory structures are no longer appropriate in the context of the hate speech issue.<sup>14</sup>

While the First Amendment guarantees a freedom of speech, no right is absolute if it infringes on other rights guaranteed under

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<sup>9</sup> *Id.*

<sup>10</sup> Christopher Wolf, *Racists, Bigots and the Law on the Internet: Introduction* (July 2000), GigaLaw.com, at <http://www.gigalaw.com/articles/wolf-2000-07-p2.html> (on file with the North Carolina Journal of Law & Technology).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

<sup>14</sup> Stephen A. Smith, *Communication and the Constitution in Cyberspace* (April 1994), COMM. EDUC. J., available at <http://www.uark.edu/depts/comminfo/ss/ccc.html> (on file with the North Carolina Journal of Law & Technology).

the Constitution. It has been suggested that hate speech is inconsistent with the principle of equality established by the Fourteenth Amendment.<sup>15</sup> If the Fourteenth Amendment is to embody an antidiscrimination principle, then anything that supports and further perpetuates racial inequality should be regulated.<sup>16</sup> This fundamental conflict between the First and Fourteenth Amendments, coupled with the boundless capacity of the Internet, calls for an exploration of solutions that re-evaluate the expansive protection of hate speech in existing constitutional precedent.<sup>17</sup> Until a more proper balance is established between the private interest in free expression and the interest of the state in preventing hate crimes, the current protections given to hate speech will continue to be subject to debate.<sup>18</sup>

While new technologies can serve as great venues for public discourse, the issues of indecency, pornography, and hate speech raise significant concerns.<sup>19</sup> In dealing with these problems, the First Amendment must be squarely addressed, since content regulation has traditionally been treated by courts as a First Amendment issue.

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>20</sup> Based on the Supreme Court's interpretation of the First Amendment, the

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<sup>15</sup> 2 STEVEN J. HEYMAN, HATE SPEECH AND THE CONSTITUTION 124 (1996).

<sup>16</sup> *Id.*

<sup>17</sup> Smith, *supra* note 14.

<sup>18</sup> 1 STEVEN J. HEYMAN, HATE SPEECH AND THE CONSTITUTION xix (1996).

<sup>19</sup> Smith, *supra* note 14.

<sup>20</sup> U.S. CONST. amend I.

government's ability to protect would-be victims from hate speech has been limited.<sup>21</sup> The First Amendment protects the rights of individuals to express their values and ideals even if they may offend others.<sup>22</sup>

If recent developments surrounding the September 11th attacks are any indication, there may be situations when values and ideals are so offensive, and the threat of criminal conduct from adhering to these values so real, that regulation is needed. Azzam Publications, which is named after Dr. Sheikh Abdullah Azzam, a mentor of Osama bin Laden, has recently had several of its sites shut down.<sup>23</sup> After a barrage of complaints and a request from the FBI, several Internet companies who hosted the sites decided to shut them down.<sup>24</sup> The public's reaction in addition to the FBI's involvement underscores the importance of further discussion of the need for hate speech regulation in cyberspace.

The Supreme Court's decisions in this area indicate that the Court does not want to destroy the marketplace of ideas concept in which good and bad ideas are presented with the truth prevailing.<sup>25</sup> The Internet has long been recognized as a true marketplace of ideas, in which people around the world are able to present, debate,

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<sup>21</sup> DANIEL A. FARBER, *THE FIRST AMENDMENT* 103 (1998).

<sup>22</sup> Anti-Defamation League, *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech* (2000), at [http://www.adl.org/Civil\\_Rights/newcyber.pdf](http://www.adl.org/Civil_Rights/newcyber.pdf) (on file with the North Carolina Journal of Law & Technology).

<sup>23</sup> Stephanie Gruner & Gautam Naik, *Extremist Sites Under Heightened Scrutiny* (Oct. 8, 2001), available at <http://msn.zdnet.com/msn/zdnet/story/0,12461,2816661-hud00025hm3,00.html> (on file with the North Carolina Journal of Law & Technology).

<sup>24</sup> *Id.*

<sup>25</sup> See Anti-Defamation League, *supra* note 22.

and organize information.<sup>26</sup> If recent decisions are any indication, online hate speech will continue to be examined under the traditional constitutional framework established to look at speech in other forms of the media.<sup>27</sup> However, the global interconnection of numerous jurisdictions via the Internet makes existing state and federal laws (and even constitutions) less equipped to handle the threat of hate crimes.<sup>28</sup>

With existing laws becoming less significant with respect to problems in cyberspace, there is a push to revitalize or restructure present approaches in dealing with hate speech on the Internet. In order to find a balanced solution to the unique problems that hate speech on the Internet creates, it is important to understand the existing structure of dealing with such issues.

### Flaws in Existing First Amendment Analysis

The Supreme Court rulings on hate speech have left limited room for the government to protect against assaultive speech.<sup>29</sup> While “fighting words” (or words that tend to incite an immediate breach of the peace) were initially labeled as speech that was not

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<sup>26</sup> Ann Beeson, *Privacy in Cyberspace: Is Your E-mail Safe from the Boss, the Hackers, and the Cops?* (June 6, 1996), at <http://www.aclu.org/issues/cyber/priv/privpap.html> (on file with the North Carolina Journal of Law & Technology).

<sup>27</sup> See generally *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>28</sup> Smith, *supra* note 14.

<sup>29</sup> FARBER, *supra* note 21, at 103. See *Gooding v. Wilson*, 405 U.S. 518 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

protected by the First Amendment,<sup>30</sup> subsequent cases have substantially narrowed this doctrine.<sup>31</sup>

The Supreme Court's current approach toward the "fighting words" doctrine is embodied by its decision in *Texas v. Johnson*.<sup>32</sup> In *Johnson*, the Court found that a principal function of free speech is to invite dispute, which may create dissatisfaction and unrest.<sup>33</sup> From this, the Supreme Court concluded that it would not be rational under First Amendment principles to limit freedom of expression based on the presumption that an audience which takes offense to certain statements may commit a disturbance of the peace.<sup>34</sup>

Even with this conclusion, the Court still seems to recognize the less-protected nature of "fighting words." The "fighting words" doctrine was first established in *Chaplinsky v. New Hampshire*, in which the Court stated that fighting words were those that provoked the average person to retaliate, those which were a direct insult in nature, and those which were an invitation to a physical altercation.<sup>35</sup> It seems that hate speech would fall under this doctrine. However, the burden of convincingly showing that a fight would have ensued is a high hurdle for the prosecution.<sup>36</sup>

The principles established in *Chaplinsky* and *Johnson* become even more problematic when combined with the imminent

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<sup>30</sup> *Chaplinsky*, 315 U.S. at 572.

<sup>31</sup> FARBER, *supra* note 21, at 104. See *Texas v. Johnson*, 491 U.S. 397 (1989); *Gooding*, 405 U.S. at 518; *Feiner v. New York*, 340 U.S. 315 (1951).

<sup>32</sup> FARBER, *supra* note 21, at 105.

<sup>33</sup> *Johnson*, 491 U.S. at 408.

<sup>34</sup> See *id.*

<sup>35</sup> See *Chaplinsky*, 315 U.S. at 572-74.

<sup>36</sup> FARBER, *supra* note 21, at 106.

incitement principle established in *Brandenburg v. Ohio*.<sup>37</sup> The Court in *Brandenburg* ruled that the constitutional freedoms of speech and press prevent states from prohibiting advocacy for the use of force or the violation of laws except in instances when such advocacy is initiated to create lawless action and such action is likely to occur.<sup>38</sup> This makes it exceedingly difficult to regulate hate speech expressed over the Internet. Through postings on the Internet, individuals can place threats or propose violent solutions to societal problems. Unless such speech is actually likely to invite immediate violence, then the speech will be protected.<sup>39</sup>

Since the speaker and listener in Internet communication are separated and often will never know each other, it is improbable that an immediate violent reaction will occur.<sup>40</sup> Therefore, even if hate speech is communicated through an interactive chat room where the speech is more direct, the likelihood that an *immediate* violent act will ensue is very small.

The Court has suggested that, under the First Amendment, the government may regulate only the manner in which an individual exercises his or her right to speech, not the message that the speech conveys.<sup>41</sup> In regulating the manner in which speech is conveyed, the government, under the “captive audience” doctrine, may prohibit the intrusion of otherwise protected views and ideas into the privacy of an individual’s home.<sup>42</sup>

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<sup>37</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>38</sup> *Id.* at 447.

<sup>39</sup> See Anti-Defamation League, *supra* note 22.

<sup>40</sup> *Id.*

<sup>41</sup> *Cohen v. California*, 403 U.S. 15, 19 (1971).

<sup>42</sup> *Id.* at 21.

Since 42% of the population has access to the Internet at home,<sup>43</sup> it seems that regulation over the intrusion of hate-filled ideas is possible. Any person using the computer at home can accidentally access a hate site. Internet sites which intentionally misrepresent their purposes only exacerbate this problem. One site purporting to be an examination of the life of Dr. Martin Luther King Jr. is actually a site full of racist propaganda.<sup>44</sup>

For the Court to uphold a regulation of speech simply because others are going to hear it, the prosecution must show that “substantial privacy interests are being invaded in an essentially intolerable manner.”<sup>45</sup> This creates a heavy burden for the prosecution because the Court has suggested that it is up to the viewer to avoid these intrusions by “averting [his or her] eyes.”<sup>46</sup> With this requirement, it becomes even more difficult for the prosecution to prove that a substantial privacy interest has been invaded in situations in which a person comes across hate-filled text over the Internet, because these images can usually be removed with the click of a mouse.

In *R.A.V. v. City of St. Paul*, the Court held that, with a few exceptions, the First Amendment prevents the regulation of speech because of its content.<sup>47</sup> Even those types of speech which are not protected by the First Amendment cannot be regulated based on

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<sup>43</sup> *Are Americans Becoming Internet Slaves?*, *supra* note 2.

<sup>44</sup> See Christopher Wolf, *Racists, Bigots and the Law on the Internet: Assessing the Problem* (July 2000), GigaLaw.com, at <http://www.gigalaw.com/articles/wolf-2000-07-p3.html> (on file with the North Carolina Journal of Law & Technology).

<sup>45</sup> *Cohen*, 403 U.S. at 21.

<sup>46</sup> *Id.* See FARBER, *supra* note 21, at 108.

<sup>47</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

the underlying message that is being conveyed.<sup>48</sup> On the other hand, speech that is not protected by the First Amendment may be regulated in a limited number of situations in which content discrimination occurs for the same reason that a specific class of speech is not protected.<sup>49</sup> This ability to apply content discrimination to unprotected speech may not go beyond that into actual viewpoint discrimination.<sup>50</sup> Even when this principle is applied properly, what constitutes a threat in person and what equates to a threat over the Internet are not always the same.<sup>51</sup>

### Regulating Hate Speech Over the Internet

Some commentators read *R.A.V.* to allow the opportunity to implement content neutral speech regulations.<sup>52</sup> These types of regulations are generally based on time, place or manner of speech, which can be applied broadly to all types of speech without consideration of the message being conveyed.<sup>53</sup> Time, place and manner restrictions are difficult to apply to communication over the Internet. Due to the fact that hate speech can be posted at numerous places on the Internet at any time of the day, time and place regulations do little to limit hate speech on the Internet.<sup>54</sup> Regulations pertaining to manner of speech, such as audible

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<sup>48</sup> *Id.* at 386. See FARBER, *supra* note 21, at 110.

<sup>49</sup> *R.A.V.*, 505 U.S. at 387.

<sup>50</sup> *Id.* at 391-92.

<sup>51</sup> Jeri Clausing, *To Fight Hate Speech Online, U.S. Turns to Housing Law* (Jan. 21, 2000), New York Times Online, at <http://www.nytimes.com/library/tech/00/01/cyber/cyberlaw/21law.html> (on file with the North Carolina Journal of Law & Technology).

<sup>52</sup> FARBER, *supra* note 21, at 112.

<sup>53</sup> Anti-Defamation League, *supra* note 22.

<sup>54</sup> *See id.*

volume, are also problematic in the context of communications over the Internet.<sup>55</sup> In addition to the obstacles put in place by the courts, the nature of this medium makes it difficult to regulate unprotected speech.<sup>56</sup> The ability to recreate and relocate hate-filled websites, often within hours, makes it very difficult to trace those who commit online hate crimes.<sup>57</sup>

Even with the difficulties surrounding the regulation of hate speech on the Internet, there have been a handful of successful prosecutions.<sup>58</sup> These cases have been won, however, not based on a First Amendment rationale, but based on various constitutional principles that often help to regulate hate speech without regulating the content of the speech.<sup>59</sup>

Anti-harassment laws have been held to be valid regulators of hate speech because these laws direct their efforts not at the content of the speech but instead their intent and effect.<sup>60</sup> Furthermore, federal laws prohibiting racially motivated crimes have helped to regulate hate speech over the Internet. In *United States v. Machado*, a man who sent threatening e-mail messages directed at Asian students was convicted for violating the students' civil rights.<sup>61</sup> Richard Machado was convicted under 18 U.S.C. 245 because his actions were racially motivated and directed toward people who, by attending a public university, were engaged in a federally protected activity.<sup>62</sup>

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<sup>55</sup> *See id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> FARBER, *supra* note 21, at 116-117.

<sup>60</sup> *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

<sup>61</sup> *United States v. Machado*, 195 F.3d 454 (9th Cir. 1999).

<sup>62</sup> *Id.* *See* 18 U.S.C. 245 (2001).

While hate crime legislation has helped to regulate hate speech, it is still unclear whether a person can be punished for putting hate speech on the Internet on which some other individual acted.<sup>63</sup> This is an important concept because founders of these extremist sites need to be held accountable for their words and the messages those words convey.

Following the September 11th attacks, investigators discovered that a suspect named Said Bahaji, who has been linked to that terror, had spent time at a jihad-related site.<sup>64</sup> With President George W. Bush proclaiming to bring all those who aided in the attacks to justice, it should be a priority to seek out those who disseminate and perpetuate hateful ideas. Because the unique nature of the Internet makes it difficult to track down these perpetrators, Internet hate speech regulation is necessary as a preemptive measure.

Another tool used to regulate hate speech has been the enhancement of penalties when the offense is racially motivated.<sup>65</sup> If a racially motivated threat to kidnap or injure another person is included in a hate-filled website, then that expression is not offered protection under the First Amendment.<sup>66</sup> Federal law also prohibits communications containing threats to injure or kidnap others when transmitted through interstate or foreign commerce.<sup>67</sup>

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<sup>63</sup> See CHRISTOPHER REINHART, OLR RESEARCH REPORT: HATE SPEECH ON THE INTERNET, H.R. DOC. 99-R-0945 (Conn. Sept. 10, 1999), available at <http://www.cga.state.ct.us/ps99/rpt/olr/htm/99-r-0945.htm> (on file with the North Carolina Journal of Law & Technology).

<sup>64</sup> Gruner & Naik, *supra* note 23.

<sup>65</sup> See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

<sup>66</sup> REINHART, *supra* note 63.

<sup>67</sup> 18 U.S.C. § 875(c) (2001).

While these tools have indirectly helped limit the transmission of hate speech over the Internet, proposals directly seeking to regulate such communications have not fared so well. In 1996, the Communications Decency Act was enacted to prevent the availability of obscene materials which were “patently offensive” to individuals under the age of 18.<sup>68</sup>

The Supreme Court in *Reno* found the CDA to be unconstitutional because it served as a “content-based blanket restriction on speech” and abridged the freedom of speech protected by the First Amendment.<sup>69</sup> While this legislation was aimed at obscene materials on the Internet, it is likely that the Court would rule in the same manner when confronted with issues pertaining to hate speech.<sup>70</sup>

While the Supreme Court’s decision in *Reno* struck down two provisions of the CDA which would have banned the online transmission of obscene materials to minors, a small section of this legislation is being revived.<sup>71</sup> Section 223(a)(1)(A), which survived *Reno*, prohibits the use of a telecommunications device to transmit messages that are obscene, lewd, or indecent with the intent to annoy, threaten, or harass another person.<sup>72</sup> A New York Internet company, About.com, has attempted to use this section as

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<sup>68</sup> 47 U.S.C. § 223 (2001).

<sup>69</sup> *Reno v. ACLU*, 521 U.S. 844, 868 (1997). See Jonathan D. Wallace, *Extinguishing the CDA Fire*, at <http://www.spectacle.org/cda/cdanl.html> (last visited Nov. 28, 2001) (on file with the North Carolina Journal of Law & Technology).

<sup>70</sup> REINHART, *supra* note 63.

<sup>71</sup> Carl S. Kaplan, *Suit Against Anonymous Pest Revives Online Speech Law* (Apr. 21, 2000), New York Times Online, at <http://www.nytimes.com/library/tech/00/04/cyber/cyberlaw/21law.html> (on file with the North Carolina Journal of Law & Technology).

<sup>72</sup> 47 U.S.C. § 223(a)(1)(A) (2001).

a means to track down an individual who has been entering a number of their chat rooms and posting obscene messages which are threatening in nature.<sup>73</sup>

This search is conducted by following the IP addresses to the Internet service provider who may have information about the individual. The purpose in uncovering this masked speaker is based on the idea that people often conduct themselves differently in cyberspace because it is anonymous and that identifying these people will cause them to stop.<sup>74</sup> This does little in preventing hate speech over the Internet since it does not seem to punish perpetrators; it only uncovers their identity with the hope that self-regulation will result.<sup>75</sup>

While these other methods have been used to attack hate speech over the Internet, a more direct approach may be feasible. In examining government regulation in the areas of print and media, it seems possible that some of these principles could be applied in cyberspace. Recent Supreme Court decisions supporting the concept of programming regulation on cable television have opened the door to censorship on the Internet.<sup>76</sup>

The United States has been awarding government subsidies based on whether or not television scripts and programming include an anti-drug message.<sup>77</sup> This type of incentive-based

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<sup>73</sup> Kaplan, *supra* note 71.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Jonathan D. Wallace, *Supreme Court's Rulings Threaten Free Speech*, USA TODAY MAGAZINE, March 1, 1999, at 32 (citing *Playboy Entm't Group v. U.S.*, 520 U.S. 1141 (1997); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996); *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994)).

<sup>77</sup> Harold Furchtgott-Roth, *Big Brother Is Programming*, at [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/Statements/2000/sthfr026.html](http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/2000/sthfr026.html)

program seems to convey the message that the government is able to advance its perception of what types of ideas are better than others.<sup>78</sup> The Federal Communications Commission has been given the ability to levy penalties for the broadcasting of obscene or indecent material.<sup>79</sup> 18 U.S.C. § 1464 forbids the use of obscene, indecent, or profane language by radio communication.<sup>80</sup> While this statute does not totally ban indecent broadcasts, obscene speech can be completely banned because the First Amendment does not protect it.<sup>81</sup>

The Communications Act of 1934 governs broadcast speech in television and radio. The Supreme Court has interpreted speech regulations based on the concept of “pervasiveness.”<sup>82</sup> The increasing presence of the Internet in American life should be recognized as a unique, pervasive presence in our lives. If this is true, speech over the Internet should be able to be regulated in the same manner. This is a plausible argument despite the Supreme Court’s analysis, which concluded that the Internet is not uniquely pervasive because “odds are slim” that an accidental intrusion into the privacy of a home will occur without prior warning of the program content.<sup>83</sup> The Court’s analysis can be challenged with

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(last visited Nov. 28, 2001) (on file with the North Carolina Journal of Law & Technology).

<sup>78</sup> *See id.*

<sup>79</sup> 18 U.S.C. § 1464 (2001).

<sup>80</sup> *Id.*

<sup>81</sup> *See Miller v. California*, 413 U.S. 15, 19-24 (1973) (defining obscene speech as speech which contains material that an average person views as appealing to “prurient interest” and that depicts or describes sexual conduct that lacks “serious literary, artistic, political, or scientific value”).

<sup>82</sup> *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

<sup>83</sup> *Reno v. ACLU*, 521 U.S. 844, 854 (1997) (quoting *ACLU v. Reno*, 929 F.Supp. 2d 824, 845 (E.D. Pa. 1996)).

the idea that the increased use of the Internet coupled with the speed and anonymity that the Internet encompasses seems to make it much more invasive than a radio broadcast.

### **In Search of an Effective Solution**

With future battles in the courtroom regarding the regulation of online hate speech probable, other efforts are being made to protect those who wish to avoid such communication.<sup>84</sup> These include filtering techniques to analyze the contents of online materials. One such technique, Platform for Internet Content Selection (PICS), would allow website creators to electronically distribute descriptions of specific sites. This system would allow a Web user to have control over what he or she views by allowing them to screen material without the government censoring the type of information. PICS would be conducted through the use of labels. The labels identify the content of sites by measuring levels of decency through a ratings system, implementing privacy vocabulary which describes a website's information practices, or other similar techniques.<sup>85</sup> While these methods would offer some help in navigating through cyberspace, some obstacles still exist which hinder its effectiveness. The greatest concern of PICS labeling is the lack of trustworthiness because there are questions such as who will decide on the labels for each site and upon what criteria are these labels based. To solve this problem, a mandatory net rating system could be implemented. This would not necessarily constitute censorship, as long as users have a choice to

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<sup>84</sup> Wallace, *supra* note 69.

<sup>85</sup> Paul Resnick, *Filtering Information on the Internet*, SCIENTIFIC AMERICAN, Mar. 1997, available at <http://www.sciam.com/0397issue/0397resnick.html> (on file with the North Carolina Journal of Law & Technology).

ignore the labels and enter the websites.<sup>86</sup> Therefore, in balancing the interest of preserving the freedom of speech against a variety of interests including limiting minors' exposure to hate-filled ideals, national security, and the preservation of other freedoms that people hold dear, rating systems may be the most effective solution at this present time.

## Conclusion

The First Amendment and the peripheral rights that it embodies severely restrict the government's ability to regulate hate speech. The nature of the Internet further complicates this issue due to the anonymity, vast exposure, and expediency that it encompasses. While the Constitution is often referred to as a living document, it seems improbable that the Framers could have possibly imagined a medium such as the Internet. Therefore, the dangers that exist because of its increasing presence in the lives of Americans calls for implementation of legislation (regulation of Internet-based hate speech) or private procedures (use of filtering systems) to protect youth who lack the sophistication to truly carry out the marketplace of ideas concept. Furthermore, American society deserves protection from those ideas highly likely to incite others to perform acts that result in death and destruction. If the September 11th attacks on America have not conveyed any other message, they have reminded people that some rights we have come to value may have to be limited to maintain safety and order in this nation.

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<sup>86</sup> *Id.*