HATE SPEECH OVER THE INTERNET: A TRADITIONAL CONSTITUTIONAL ANALYSIS OR A NEW CYBER CONSTITUTION?

> But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation - those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.[1]

I. INTRODUCTION

The First Amendment of the United States Constitution provides that the content of speech may not be regulated, prohibited, nor censored by the government. This provision embodies the theory that "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than encourage it."[2] While the Internet[3] receives strong First Amendment protection, the Supreme Court has restricted First Amendment protection of hate speech[4] in certain circumstances. Although the Court has not yet explicitly defined the level of protection to be afforded to hate speech transmitted over the Internet, the Court should ultimately uphold the First Amendment right to free speech on the Internet, including hate speech, using the same legal tests and analysis which it has used for other modes of communication.

This Note will illustrate that despite hate speech's often violent and offensive content, the Court's existing analysis is appropriate for regulating hate speech on the Internet. Section I will explain the protections and regulations which cur-

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[1] John Stuart Mill, *On Liberty, reprinted in* SOCIAL & POLITICAL PHILOSOPHY 283-84 (John Arthur & William Shaw eds., 1992).

[2] Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2351 (1997).

[3] In *Reno v. American Civil Liberties Union,* Justice Stevens defines the Internet as:

> an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program . . . which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another . . . by redundant channels even if some portions of the network were damaged in a war. [This program] provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is 'a unique and wholly new medium of worldwide human communication.'

Id., 117 S. Ct. at 2334 (citations omitted).

[4] In this note, hate speech will refer to offensive, racist, hate-laden speech that disparages racial, ethnic, religious, or other discrete groups, including women, lesbians, or homosexuals.

rently exist for hate speech under the First Amendment. Section II will examine the Court's rulings on the regulation of the Internet in contexts other than hate speech. Section III will analyze why the Court's treatment of hate speech on the Internet should be consistent with the Court's holdings regarding other media. Section IV will show that alternatives to complete censorship, such as filtering systems, may effectively screen out offensive material. Section IV will also discuss the costs and benefits of these filtering systems and ultimately propose a less controversial, more beneficial system. This Note will conclude by assessing the value of a free marketplace of ideas on the Internet with the potential social costs of such a freedom.

Cyberspace has been and continues to be used to perpetuate hate speech. This hate speech is disseminated through the many modes of communication available on the Internet. Some groups or individuals who espouse hate-laden ideas have their own Internet sites, which are accessible to any Internet user. Others disperse hate messages directly to targeted individuals. For example:

> Richard Mochado, a nineteen-year-old, former University of California, Irvine ("UCI") student allegedly sent over 60 hate-laden e-mail messages to Asian American students at UCI whom he wanted to hunt down and kill. Mochado challenges his indictment of 10 counts of violating a federal law which criminalizes using race or ethnicity as a basis for interfering with a federally protected activity, such as attending a public university. Mochado claims that this law violates his First amendment right to free speech.[5]

Another illustration of hate speech over the Internet is exemplified by this message sent to a personal e-mail account: "Subject: Idiotic Jews who waste their lives away. All you pathetic Jews should go to hell, with your lame-ass skull caps. I've killed 2 Jews in my life, and I'll make sure to continue killing you . . . . DIE YOU WORTHLESS GOOD FOR NOTHING CHRIST KILLERS!!"[6]

The upsetting and disconcerting nature of these two examples of hate speech compels a serious discussion of the existence, consequences, and possible remedies of hate speech over the Internet.

II. BACKGROUND: THE FIRST AMENDMENT'S PROTECTION OF HATE SPEECH

A. *Theories of Free Expression*

The First Amendment protects the freedoms of speech, expression, assembly and association.[7] Different theorists explain why the Constitution places such a high value upon these freedoms. Justice Oliver Wendell Holmes developed the

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[5] Jeff Kramer, *Free Speech to be Issue in Case of Hate E-mail*, ORANGE COUNTY REG., Aug. 30, 1997, at B8.

[6] David S. Hoffman, *High-Tech Hate: Extremist Use of the Internet* (Anti-Defamation League, New York, N.Y. 1997) at 6 (discussing this message, not exceedingly rare on the Internet, which was forwarded to the Anti-Defamation League).

[7] *See* U.S. CONST. amend. I.

"marketplace of ideas" theory to justify freedom of expression.[8] He stated that "the best test of truth is the power of thought to get itself accepted in the competition of the market."[9] The Internet is "a true 'marketplace of ideas', in which individuals around the globe come together to organize, debate, and share information unrestricted by geographical distances or national borders."[10]

Political theorist Professor Alexander Meiklejohn proposed another theory which posits "that the freedom of speech protected by the First Amendment is essential to intelligent self government in a democratic system."[11] This theory is pertinent to an analysis of the Internet since the Internet is "the most democratizing medium yet created, as ordinary citizens – not just large media conglomerates – have an inexpensive platform for communicating with millions of persons at once . . . ."[12] Harvard Law Professor and constitutional scholar Lawrence Tribe expressed a third theory for protecting freedom of expression, the "proclamation of individual and group identity."[13] Tribe seemingly failed to consider hate speech within the realm of this definition because hate speech harms an individual's or group's self-realization. The increasing popularity of the Internet makes this debate over the limits of free speech even more complex because the Internet represents "the most mass participatory medium yet invented."[14]

B. *The Importance of a Hate Speech/Hate Crimes Analysis*

Distinguishing between hate crimes and hate speech is a crucial aspect of a constitutional analysis. Hate crimes are criminal activity that receive enhanced punishment, while hate speech is permissible speech unrestricted by the First Amendment. When hate speech is transmitted over the Internet, it may threaten

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

> [T]he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams, 250 U.S. at 630. *See also* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (applying the marketplace concept).

[9] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[10] Ann Beeson, *Privacy in Cyberspace: Is Your E-mail Safe from the Boss, the SysOp, the Hackers, and the Cops?*, American Civil Liberties Union (visited June 6, 1996) <http://www.aclu.org>.

[11] CIVIL LIBERTIES AND THE CONSTITUTION: CASES AND COMMENTARIES 137 (Lucius J. Barker & Twiley W. Barker, Jr., eds., 1994) [hereinafter CIVIL LIBERTIES].

[12] Beeson, *supra* note 10.

[13] CIVIL LIBERTIES, *supra* note 11, at 137. *See also* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 576-79 (2d ed., 1988). Tribe criticized both Holmes and Meiklejohn for being so academic in their analysis that they ignored the "emotive role of free expression . . . its place in the evolution [and] definition" of group identity. *Id.*

[14] Amy Harmon, *The Self-Appointed Cops of the Information Age*, N.Y. TIMES, Dec. 7, 1997, § 4, at 2.

a specific person and become a hate crime, or it may remain constitutionally protected hate speech.[15]

The United States favors a pluralistic society strengthened by diversity of thought. However, offensive speech has adverse effects on the nation as well as on specific communities.[16] Therefore, when racist words become violent manifestations of bigotry, the First Amendment may no longer protect them.[17] Thus, a dilemma results: although hate speech over the Internet is not a hate crime, it allows hate groups to spread their message, which may incite hate crimes. The Court should not overlook this impact of hate speech on the Internet.

Hate crimes "demand a priority response because of their special emotional and psychological impact on the victim and the victim's community."[18] The Court explains the penalty enhancement provisions applied to hate crimes by asserting that "bias motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[19] By generating fear, anger, and suspicion, hate crimes damage the fabric of our society and fragment communities.[20]

The Internet has now emerged as "a major tool of organized hate movements,"[21] which these groups use to disseminate their views. The Anti-Defamation League of B'nai Brith ("ADL"), an organization dedicated to fighting anti-Semitism, does not include web sites containing anti-Semitic messages

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[15] *See, e.g.,* United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997).

[16] The Hate Crimes Statistic Act ("HCSA"), enacted in 1990, "requires the Justice Department to acquire data on crimes which 'manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity' from law enforcement agencies across the country and to publish an annual summary of the findings." *See* The Hate Crimes Statistic Act of 1990, 28 U.S.C.A. § 534(b)(1) (West Supp. 1998). *See also* Debbie N. Kaminer, *Hate Crime Laws,* (Anti-Defamation League, New York, N.Y. 1997). "The FBI documented 4,558 hate crimes in 1991, reported by almost 2,800 police departments in 32 states," including the District of Columbia. *Id.* at 7. The FBI's 1992 data, released in 1994, documented 7,442 hate crime incidents reported by 6,181 agencies and 42 states, including the District of Columbia. *See id.* The 1993 data included 7,587 reported incidents of hate crimes from 6,865 agencies in 47 states, including the District of Columbia. *See id.* The FBI documented 5,932 reported hate crimes in 1994 from 7,356 agencies across the country. *See id.* The FBI's 1995 statistics document 7,947 hate crimes reported by 9,584 agencies across the country. *See id.* These statistics represent only 60% of the 16,000 law enforcement agencies regularly reporting crime data to the FBI. *See id.* The vast majority of participating agencies affirmatively reported zero hate crimes committed in their jurisdictions. *See id.* Of the 9,584 departments in the 1995 HCSA data collection effort, only 1,560 (16%) reported even one hate crime. *See id.*

[17] *See, e.g., Alkhabaz,* 104 F.3d at 1505 (Krupansky, J., dissenting) and discussion *infra* Section III.

[18] Kaminer, *supra* note 16, at 1.

[19] Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993).

[20] *See, e.g., id.*

[21] Jesse Lunin-Pack, *Audit of Anti-Semitic Incidents* (Anti-Defamation League, New York, N.Y. 1996) at 1.

in its Audit of Anti-Semitic Incidents because it recognizes that the Court would likely view such web sites not as hate crime but as mere hate speech.[22]

C. *Defining Hate Speech*

No universally agreed upon definition of hate speech exists.[23] Human Rights Watch, a non-profit advocacy organization dedicated to protecting human rights around the world,[24] defines hate speech as "a form of expression offensive to women, ethnic and religious groups, and other discrete minorities."[25] Professor Rodney Smolla, a First Amendment authority and Director of the Institute of Bill of Rights Law at the College of William and Mary - Marshall Wythe Law School, defines hate speech as a "generic term that has come to embrace the use of [verbal] attacks based on race, ethnicity, religion and sexual orientation or preference."[26] Another definition describes racist hate speech as persecutorial, hateful, degrading speech with a message of racial inferiority directed against a historically oppressed group.[27] Such speech has been given many names. "In the late 1920s and early 1930s, it was known as 'race hate.' Beginning in the 1940s it was generally called 'group libel.' "[28] In the 1980s, the prevalent term became "hate speech" and "racist speech."[29] No matter what term is used, the message is always the same: offensive, racist, hate-laden speech which disparages racial, ethnic, religious, or other discrete groups, including women, lesbians, and homosexuals.

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[22] *See id.*

[23] *See* SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 8 (1994).

[24] The Human Rights Watch web page further defines their mission as follows:

> We stand with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice. We investigate and expose human rights violations and hold abusers accountable. We challenge governments and those who hold power to end abusive practices and respect international human rights law. We enlist the public and the international community to support the cause of human rights for all.

Human Rights Watch (visited Jan. 1998) <http://www.hrw.org>.

[25] WALKER, *supra* note 23, at 8 (citing Human Rights Watch, *"Hate Speech" and Freedom of Expression: A Human Rights Watch Policy Paper*).

[26] *Id.* (citing RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 152 (1992)).

[27] *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Note that Matsuda defines hate speech without using the word "speech," rather she uses the word "message." She purposely does not use "speech" terminology since she believes racist speech should be censored. *See id.*

[28] WALKER, *supra* note 23, at 8 (citing FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY (1981)).

[29] *See id.*

1. Hate Speech is Generally Protected

Although hate speech articulates racist, hateful sentiments repulsive to most of society, the First Amendment definitively protects such speech. The United States committed itself to the protection of speech in 1791 when it "enshrined" freedom of speech "in the First Amendment."[30] The First Amendment explicitly states that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble . . . ."[31] The Supreme Court first analyzed the scope of the First Amendment in the 1930s, affirming First Amendment protection of free speech and the press and incorporating the First Amendment into the Fourteenth, extending those protections to the states.[32] In *Stromberg v. California*,[33] the Supreme Court invalidated a state statute that prohibited the display of a red flag "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character."[34]

However, the holding of *Stromberg* was limited, permitting States to punish those whose utterances incite violence and threaten to overthrow government by unlawful means.[35] The Court held that the statute was overbroad, indefinite, ambiguous and therefore invalid.[36] The Court explained as follows:

> The maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.[37]

Thus, the first decision protecting offensive or troublesome speech articulated the value of intellectual pluralism of speech and thought.

Two weeks after the *Stromberg* decision, the Court further defined freedom of speech by "extending . . . freedom of the press in *Near v. Minnesota*."[38] In *Near*,[39] the appellant was convicted under a state statute which "provid[ed] for the abatement, as a public nuisance, of a 'malicious, scandalous and defamatory newspaper, magazine or other periodical.' "[40] Near was a journalist prosecuted for accusing specific city officials of being lax and neglectful of their duties.[41]

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[30] *Id.* at 14.

[31] U.S. CONST. amend. I.

[32] *See* WALKER, *supra* note 23, at 10 (citing Stromberg v. California, 283 U.S. 359 (1931); Near v. Minnesota, 283 U.S. 697 (1931)).

[33] 283 U.S. 359 (1931).

[34] *Id.* at 361 (citing § 403a of the California State Penal Code).

[35] *See id.* at 368-69.

[36] *See id.* at 369.

[37] *Id.*

[38] WALKER, *supra* note 23, at 29 (citing Near v. Minnesota, 283 U.S. 697 (1931)).

[39] 283 U.S. 697 (1931).

[40] *Id.* at 701-02 (citations omitted).

[41] *See id.* at 704.

The Court held that the statute's effect was "of the essence of censorship"[42] and declared it unconstitutional. Justice Hughes, writing for the majority, stated that "[s]ome degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. . . . [T]he world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression."[43]

Near became the basis of modern law on freedom of the press and has also had important implications for hate speech.[44] Significantly, Near was not prosecuted under the statute because of the anti-Semitic content of his articles, but rather because of his attack on public officials.[45] Verbally attacking a public official was a criminal offense in Minnesota whether it was achieved through hate speech or mere antagonism. If Near's articles had embodied only messages of hate, probably he would never have been prosecuted.[46] As a cornerstone of the First Amendment's protection of hate speech, *Near* illustrates the considerable value placed on freedom of speech as well as the problem of selective enforcement by authorities who "prosecuted the powerless whose principal crime was offending the powerful."[47]

2. Hate Speech In Limited Circumstances is Criminal Conduct Unprotected by the First Amendment

a. Clear and Present Danger

The earliest decisions of the Supreme Court articulated the broad protections of the First Amendment regarding hate speech. However, the Court never held the First Amendment protection absolute. Rather, the Court held that hate speech would be unprotected if it fit into an "unprotected category." One such was speech that created a "clear and present danger" to others.[48] The Court articulated this early limitation upon the protections afforded speech by the First Amendment in *Schenck v United States*.[49] Justice Holmes, writing for a majority, held:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. . . .The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[50]

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[42] *Id.* at 713.

[43] *Id.* at 718.

[44] *See* WALKER, *supra* note 23, at 30.

[45] *See id.*

[46] *See id.* Walker points out that other anti-Semitic publications of that time, such as Henry Ford's newspaper and book, were not challenged.

[47] *Id.* at 31.

[48] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[49] 249 U.S. 47 (1919).

[50] *Id.* at 52.

The Court later implemented the "clear and present danger" test in *Abrams v. United States*.[51] *Abrams* held that anti-American, pro-Communist pamphlets were "obviously intended to provoke and to encourage resistance to the United States in the war . . .,"[52] which would cause a clear and present danger to the security of the United States.[53] The pamphlets, therefore, were not protected by the First Amendment.[54] In a vigorous dissent, Justice Holmes argued that the defendant was wrongfully denied constitutional protection because "nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."[55]

b. Minimal Social Value

Speech with minimal social value is a second unprotected category of speech. In *Chaplinsky v. New Hampshire*,[56] the Court carved out an exception to First Amendment freedom of speech. The Court stated that speech that causes injury or incites violence is not an "essential part of any exposition of ideas, and [is] of *such slight social value as a step to truth* that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality . . . ."[57] *Chaplinsky* was the Supreme Court's first enunciation of what Professor Kalven termed the " 'two level' theory of speech, under which speech is either 'protected' or 'unprotected' by the First Amendment according to the court's assessment of its relative 'value.' "[58] Speech falling into that lower category may be censored, while speech falling into the higher category must be protected. Thus, while the First Amendment protects hate speech generally, in a few limited circumstances, the First Amendment does not provide viable protection.

c. Group Libel

The Court further limited free speech, without relying on the "clear and present danger" test, when the speech had the potential to cause a harmful, emotional impact. For example, in *Beauharnais v. Illinois*,[59] Justice Frankfurter upheld an Illinois group libel statute that declared the distribution of publications that disseminate hate-laden information to be an act of criminal libel. The Court concluded that the Constitution does not protect libelous utterances because

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[51] 250 U.S. 616 (1919).

[52] *Id.* at 624.

[53] *See id.*

[54] *See id.*

[55] *Id.* at 628 (Holmes, J., dissenting).

[56] 315 U.S. 568 (1942).

[57] *Id.* at 572.

[58] STONE ET AL., CONSTITUTIONAL LAW 1149 (1996) (*citing* KALVEN, THE METAPHYSICAL LAW OF OBSCENITY, 1 SUP. CT. REV. 10 (1960)).

[59] 343 U.S. 250 (1952).

States have an interest in protecting the public interest from hate speech.[60] The Court used a balancing test to arrive at the conclusion that Illinois had the appropriate authority to censor group libel. This decision can be distinguished from the previously discussed cases because the aforementioned cases concerned speech that posed a threat to the government or to public officials, whereas *Beauharnais* concerned speech directed to racial and religious minorities. However, *Smith v. Collin*,[61] in addition to other subsequent cases, overturned *Beauharnais*.

3. Hate Speech is Protected in Most Circumstances

Smith[62] "pull[ed] the rug out from under *Beauharnais*."[63] In 1977, the Village of Skokie, a northern Chicago suburb, had a population of about 70,000 persons, 40,000 of whom were Jewish.[64] Approximately 5,000 of the Jewish residents were survivors of Nazi concentration camps during World War II.[65] In March 1977, Frank Collin, leader of the National Socialist Party of America, a neo-Nazi organization, informed village officials that his party intended to hold a march in which members would wear Nazi Soldier uniforms.[66] Village officials filed suit to enjoin the marchers from wearing the uniforms and from distributing or displaying materials that "incite or promote hatred against persons of Jewish faith or ancestry."[67] The Village's "primary legal line of defense against Frank Collin lay entirely with the theory known as the 'heckler's veto.' "[68]

In addition to asserting that the march would incite violence by Skokie residents, the Village asserted that the display of the swastika would be an intentional infliction of emotional harm.[69] Ultimately, the Illinois appellate court enjoined the Party from displaying the swastika but allowed it to march.[70] The Illinois Supreme Court held the injunction invalid.[71]

During the injunction litigation, the Village of Skokie enacted ordinances designed to prevent the march.[72] These ordinances were held to violate the First

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[60] *See id.* at 258-59.

[61] 436 U.S. 953 (1978).

[62] *See id.* The Supreme Court denied the stay requested by the Village of Skokie, thus allowing the National Socialist party to march.

[63] STONE, *supra* note 58, at 1301.

[64] *See id.* at 1152.

[65] *See id.*

[66] *See id.*

[67] *Id.*

[68] DAVID HAMLIN, THE NAZI/SKOKIE CONFLICT: A CIVIL LIBERTIES BATTLE 57 (1980).

[69] *See* STONE, *supra* note 58, at 1153.

[70] *See id. See also* Skokie v. National Socialist Party of America, 366 N.E.2d 347 (Ill. 1977).

[71] *See* Skokie v. National Socialist Party of America, 373 N.E.2d 21 (Ill. 1978).

[72] *See* STONE, *supra* note 58, at 1153. These ordinances (1) required applicants for parade permits to procure property damage insurance; (2) prohibited the "dissemination of any material [including signs and clothing of symbolic significance] which promotes

Amendment.[73] The Village requested the Supreme Court stay the ruling of the court of appeals, but the Court denied the stay.[74] Collin canceled the march in Skokie but demonstrated in Chicago with twenty-five Nazi demonstrators.[75] Four-hundred riot-helmeted police protected the demonstrators.[76] Seventy-two people were arrested but no serious violence ensued.[77]

> [U]pholding a right of free speech in . . . the Skokie case seems to make the most sense . . . because the danger of intolerance towards ideas is so pervasive an issue in our social lives . . . that it makes sense somewhere in the system to attempt to confront that problem and exercise more self-restraint than may be otherwise required.[78]

The Skokie case is vastly significant because it represents the Court's current perception of hate speech: speech, no matter how offensive, must and should be tolerated as mandated by the First Amendment.

D. *Defining Hate/Bias Crimes*

Hate speech is protected by the First Amendment until the hatred manifests as harassment, threats, or violence. An important distinction exists between hate speech and hate crimes.[79] Hate crimes inherently embody a verbal or expressive articulation of hatred. Communication that accompanies a violent criminal act "raises difficult First Amendment questions."[80] The Court has been reluctant to deny protection of such speech when the accompanying activity is punishable under other laws that do not restrict free speech.[81]

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and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so"; and (3) prohibited anyone to demonstrate "on behalf of any political party while wearing a military-style uniform." *Id.*

[73] *See* STONE, *supra* note 58. *See also* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *aff'd* 477 F. Supp. 676 (N.D. Ill. 1978).

[74] *See* STONE, *supra* note 58. *See also* Smith v. Collin, 436 U.S. 953 (1978) (Blackmun, J., and Rehnquist J., dissenting).

[75] *See* STONE, *supra* note 58, at 1154.

[76] *See id.*

[77] *See id.*

[78] Lee C. Bolinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617, 630-31 (1982).

[79] *See* WALKER, *supra* note 23, at 9. *See also* Kaminer, *supra* note 16, at 2.

> Expressions of hate protected by the First Amendment's free speech clause are not criminalized. However, criminal activity motivated by hate is subject to a stiffer sentence. A defendant is subject to an enhanced penalty if he or she intentionally selects his victim based upon his perception of the victim's race, religion, national origin, sexual orientation or gender.

Id.

[80] WALKER, *supra* note 23, at 9.

[81] *See id.* (*citing* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)).

E. *The Current Legal Status of the First Amendment's Protection of Hate Crimes Statutes*

Two significant cases define when anti-hate crime statutes can withstand First Amendment scrutiny, *R.A.V. v. City of St. Paul*[82] and *Wisconsin v. Mitchell*.[83] In *R.A.V.*, the Supreme Court evaluated a free speech challenge to a hate crime statute. The petitioner and several others burned a cross on the yard of a black family's home.[84] The City charged the petitioner under a Bias-Motivated Crime Ordinance,[85] which criminalized so called "fighting words,"[86] as expression unprotected by the First Amendment. The Court held that, although cross-burning qualified as "fighting words," "the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[87] Therefore, after *R.A.V.*, statutes that criminalize bias-motivated or symbolic speech are unlikely to survive constitutional scrutiny. Cross-burning statutes are particularly suspect after this decision.[88] This holding reaffirms the Court's protection of speech regardless of its content or its harmful consequences to society. Thus, if hate crime statutes similar to those in *R.A.V.* were applied to hate crimes perpetrated over the Internet, courts would likely hold the statutes unconstitutional.

Although the Court in *R.A.V.* indicated that hate crime statutes would be struck down as unconstitutional, the Court in *Mitchell* unanimously upheld penalty enhancements for perpetrators of hate crimes.[89] *Mitchell* upheld a penalty enhancement statute that punished a defendant who "[i]ntentionally selects the person against whom the crime . . . is committed or selects the property which is damaged . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property."[90] In *Mitchell*, the defendant incited a group of black men to assault a

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[82] 505 U.S. 377 (1992).

[83] 508 U.S. 476 (1993).

[84] *See R.A.V.*, 505 U.S. at 379.

[85] *See id.* at 380.

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or a Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. (citing MINN. STAT. § 292.02 (1990)).

[86] Kaminer, *supra* note 16, at 4. " '[F]ighting' words . . . by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight . . . ." Chaplinsky v. U.S., 315 U.S. 568, 572-74 (1942) (citations omitted).

[87] *R.A.V.*, 505 U.S. at 381.

[88] *See* Kaminer, *supra* note 16, at 4. *See generally, R.A.V.*, 505 U.S. at 377.

[89] *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476 (1993).

[90] *Id.* at 480 n.1 (citing WIS. STAT. § 939.645 (1)(b) (1989-1990)).

white man.[91] Mitchell led the group that beat the victim so severely that he was "rendered unconscious and remained in a coma for four days."[92]

Mitchell was convicted of aggravated battery.[93] The jury found that Mitchell had "intentionally selected his victim because of [his] race" and increased the maximum sentence for Mitchell's offense from two to seven years.[94] "[C]hallenging the constitutionality of Wisconsin's penalty enhancement provision on First Amendment grounds . . . that the statute punishes bigoted thought and not conduct,"[95] Mitchell appealed his conviction and sentence. The Court disagreed with Mitchell, stating that the enhancement was in fact directed at his conduct.[96] The Court stated that "our cases reject the 'view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' "[97] *Mitchell* confirms that physical assault is not expressive speech protected by the First Amendment.

Furthermore, the Court held that "the First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."[98] Judges consider many factors, in addition to evidence bearing on guilt, in determining what sentence to impose upon a convicted defendant.[99] The Constitution does not prevent the admission of evidence concerning one's beliefs at sentencing because those beliefs are protected by the First Amendment.[100]

The Court also justified its affirmation of penalty enhancement statutes because states punish a crime more severely when the crime causes greater harm to society.[101] "Bias motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[102] The Court found that bias motivated crimes inflict a greater harm to society and therefore deserve greater punishment.[103] The Court carefully distinguished hate crimes from hate speech, thus indicating that penalty enhancement statutes apply only to individuals who have committed a criminal act motivated by hate. A person conveying hate speech would receive neither an enhanced penalty nor punishment because hate speech is fully protected speech.

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[91] *See id.* at 480.

[92] *Id.*

[93] *See id.*

[94] *Id.*

[95] *Id.* at 481-83.

[96] *See* Kaminer, *supra* note 16, at 4-5.

[97] Wise v. Mitchell, 508 U.S. 476, 484 (1993) (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).

[98] Kaminer, *supra* note 16, at 5 (quoting *Mitchell*, 508 U.S. at 484).

[99] *See Mitchell*, 508 U.S. at 485 (citing Payne v. Tennessee, 501 U.S. 808, 820-21 (1991)).

[100] *See id.* at 489.

[101] *See id.* at 488.

[102] *Id.*

[103] *See id.*

Finally, the Court held that because the bias motivation had to be connected to a specific act, there was little risk that the statute would be overbroad or chill protected speech.[104] The Court determined that the "chill envisioned here is far more attenuated and unlikely than that contemplated in traditional 'overbreadth' cases."[105]

Mitchell largely foreclosed First Amendment challenges to penalty enhancement statutes for hate motivated crimes.[106] Thus, an individual committing a crime motivated by hate over the Internet, such as a threat of violence toward a specific individual, may receive an enhanced penalty.

III. THE COURT'S PERCEPTION AND CLASSIFICATION OF THE INTERNET

A. *The Internet*

The Internet is "an international network of interconnected computers which has experienced extraordinary growth."[107] The number of "host" computers that store information and relay communication has increased from roughly 300 in 1981 to nearly 9,400,000 in 1996.[108] Approximately sixty percent of these hosts are located in the United States.[109] About forty million people use the Internet, "a number that is expected to mushroom to 200 million by 1999."[110] Individuals can access the Internet from numerous sources, usually as hosts themselves or through entities with host affiliations.[111] The Internet offers many modes of communication and information retrieval.[112] These methods include electronic mail ("e-mail"),[113] automatic mailing list services ("mail exploders" or "list-

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[104] *See id.* at 488-89.

[105] *Id.* at 488. "We are left, then, with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell's overbreadth claim." *See id.* at 489.

[106] *See* Kaminer, *supra* note 16, at 5.

[107] Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2334 (1997).

[108] *See id.*

[109] *See id.*

[110] *Id.*

[111] *See id.*

> Most colleges and universities provide access for their students and faculty; many corporations provide their employees with access through an office network; many communities and local libraries provide free access; and an increasing number of 'computer coffee shops' provide access for a small hourly fee. Several major national 'online services' such as America Online, Compuserve, the Microsoft Network, and Prodigy offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet. These commercial online services had almost 12 million individual subscribers at the time of trial.

Id. at 2334.

[112] *See id.*

[113] Of all on-line activities, the transmission of e-mail is the most common. E-mail is

servs"),[114] "newsgroups,"[115] "chat rooms,"[116] and the "World Wide Web" ("Web").[117] Taken together, these tools constitute "cyberspace," located in no particular geographical location but available to anyone, anywhere in the world, who has access to the Internet.[118]

B. *The Supreme Court's Constitutional Analysis of the Internet*

The Internet, because it is so vast and continuously expanding, is extremely difficult to regulate. Moreover, perpetrators of hate speech on the Internet are difficult to find. The Supreme Court established the need to find means of filtering hate speech when it granted the Internet full constitutional protection.[119] In *Reno v. American Civil Liberties Union*,[120] the Court held unconstitutional two provisions of the Communications Decency Act of 1996 ("CDA"),[121] which purported to "reduce regulation and encourage the 'rapid deployment of new telecommunications technologies.' "[122] The Court determined that the "indecent

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written correspondence between two people on the computer. *See* Joseph N. Campolo, *Childporn.Gif: Establishing Liability for On-Line Service Providers*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 721, 739-41 (1996) (citing Laura Evenson, *Everybody Wanted It: Internet Access*, S.F. CHRON., Dec. 24, 1995, at 29 (stating that more than four million e-mail messages are sent daily on America Online alone).

[114] Mail exploders or listservers are similar to e-mail groups except that they have the capability of e-mail conferencing. *See id.*

[115] In a newsgroup, messages are posted on a common, publicly accessible bulletin board. There are thousands of groups fostering exchange of information or opinion on a particular topic. In most newsgroups, postings are automatically purged at regular intervals by supervisors who review the received messages to ensure that the messages are relevant to the particular subject of the newsgroup. *See* Joseph F. Ruh, Jr., *Introduction to the Internet, in* THE INTERNET AND BUSINESS: A LAWYER'S GUIDE TO THE EMERGING LEGAL ISSUES 1, 8 (Joseph F. Ruh, Jr., ed., 1996) [hereinafter A LAWYER'S GUIDE].

[116] Chat rooms provide direct lines of communication for Internet users. Two or more people desiring to quickly communicate can enter a chat room to "engage in real-time dialogue in other words, by typing messages to one another that appear almost immediately on the others' computer screens." *Id.* at 8-9.

[117] *See Reno*, 117 S. Ct. at 2334; The Web "allows users to search for and retrieve information stored in remote computers, as well as, in some case, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world." *Id.* at 2335. Today, the Web is primarily a publishing and communications tool set up by organizations as an additional means of communicating with constituents. *See* A LAWYER'S GUIDE, *supra* note 115, at 10.

[118] *See, e.g., Reno*, 117 S. Ct. at 2334.

[119] *See id.*

[120] 117 S. Ct. 2329 (1997).

[121] 47 U.S.C.A. § 223 (West Supp. 1998), *as amended by* Pub. L. No. 104-104, 110 Stat. 133, Feb. 8, 1996.

[122] *Reno*, at 2337-38 (citing The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56) (repealed 1997).

transmission" and "patently offensive" provisions[123] were content-based blanket restrictions on speech and therefore could not be properly analyzed on First Amendment grounds.[124] The "indecent transmission" provision prohibited the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age."[125] The second provision, the "patently offensive" provision, prohibits the "knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."[126] Thus, if society wishes to protect an Internet user from encountering offensive messages on the Internet, it must consider alternative solutions because the Court's decision in *Reno* foreclosed one statutory avenue for affording the Internet full First Amendment protection.

1. The Lower Court's Analysis of the Communications Decency Act

After the CDA was signed into law, twenty plaintiffs filed suit attacking the constitutionality of the provisions.[127] Following an evidentiary hearing, the lower court, in a unanimous three part opinion, entered a preliminary injunction against enforcement of both provisions.[128] The court applied a traditional constitutional

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[123] *Id.* at 2349.

[124] *See id.* at 2329.

[125] *Id.* at 2338. The "indecent transmission" provision, codified in 47 U.S.C.A. § 223 (a) (West Supp. 1997) provides in pertinent part:

> (a) Whoever— (1) in interstate or foreign communications—(B) by means of telecommunications device knowingly— (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

Id.

[126] *Id.* In pertinent part, § 223(d) provides that:

> (d) Whoever—(1) in interstate or foreign communications knowingly—(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

Id. at 2338-39.

[127] *See id.* at 2339.

[128] *See id.*

analysis to the Internet. It maintained that the statute was overbroad because it unnecessarily chilled the expression of adults and that the terms "patently offensive" and "indecent" were "inherently vague."[129] The court further held that the affirmative defenses available to those who take "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to the prohibited communications were not "technologically or economically feasible for most providers."[130] The court specifically considered and rejected an argument that providers could avoid liability by tagging their material to allow potential readers to screen out unwanted transmissions.[131] Finally, the court rejected the government's argument that by narrowly tailoring the statute to apply only to commercial pornographers, it could avoid the risk of overbreadth.[132]

The District Court found four related characteristics of Internet communication which illustrate the facial unconstitutionality of the CDA. First, the Internet presents low barriers of entry such that almost anyone can participate and communicate on the Internet.[133] Second, the barriers for entry are the same for both speakers and listeners.[134] Third, diverse content and material is available on the Internet as a result of the low barriers to entry.[135] Fourth, "the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers."[136] The court concluded that characteristics that assert the similarity between the Internet and other methods of communication demonstrated that Congress may not regulate indecency on the Internet in any manner.[137] As a restriction of the Internet, the CDA would have stifled constitutionally-protected speech by individuals who may have no other forums in which to express their ideas.[138]

2. The Supreme Court's Analysis of the Communications Decency Act

The Supreme Court affirmed the lower court's opinion and effectively struck down the portions of the CDA relating to Internet access on grounds of vagueness and overbreadth.[139] The Court held the CDA unconstitutional for two reasons. First, the Court held that the vagueness of the CDA's terminology makes it difficult to promulgate and thus unconstitutionally vague. The Court also held that because the CDA sought to prevent certain content from availability on the Internet, it effectively consisted of an impermissible content-based regulation of speech. Further, as a criminal statute with penalties of up to two years imprison-

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[129] *Id.* at 2340.
[130] *Id.*
[131] *See id.*
[132] *See id.* at 2340 n.30.
[133] *See id.*
[134] *See id.*
[135] *See id.*
[136] *Id.*
[137] *See id.*
[138] *See id.*
[139] *See id.* at 2341.

ment, the CDA may "cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[140] Thus, the punitive sanction of such a vague statute poses a significant threat to the First Amendment.

Additionally, the Court held that the CDA will "unquestionably silence some speakers whose messages would be entitled to constitutional protection."[141] The Court held that the CDA's chilling of speech cannot be justified even by redrafting a more precise statute. The CDA may inevitably suppress protected speech that the Court would not deem offensive. The Court has consistently held that where obscenity is not involved, "the fact that protected speech may be offensive to some does not justify its suppression."[142]

Therefore, the Court's ruling implicates hate speech. Hate speech, though not obscene, is offensive to others. Hate speech usually proclaims the superiority of one group of people, while focusing on the inferiority and defectiveness of another group. The effect of the speech is that it is offensive to many and alluring to some. "Hate speech, regardless of the effect it has on the listener and society, usually falls into that protected category."[143] Applying a fundamental premise of constitutional law to the Internet, the Court ruled:

> As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest of encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[144]

Thus, hate speech will be protected on the Internet just as it is protected in other forms of communication and media.

The Supreme Court has applied the same level of constitutional protection of speech on the Internet as it has done for other modes of communication. The same doctrinal underpinnings that have shaped the legal analysis of speech should not be divorced from new technological advances. Speech on the Internet, specifically hate speech, now has a wider audience than other media, and, therefore, the societal costs will be higher.

3. The Supreme Court Should Not Ban Hate Speech from the Internet

a. A Free Flow of Ideas is Essential to a Democratic Society

By holding that hate speech may be articulated on the Internet, the Court has maintained and perpetuated important values essential to a pluralistic society. Permitting hate speech to be communicated over the Internet promotes democracy.[145] Individuals are empowered to vote to determine who shall represent

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[140] *Id.* at 2345.

[141] *Id.* at 2346.

[142] *Id.*

[143] Hoffman, *supra* note 6, at 9.

[144] Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2351 (1997).

[145] *See* CIVIL LIBERTIES, *supra* note 11, at 137 (citing Alexander Meiklejohn).

them; therefore, they must have full access to all information. In order to make an intelligent, informed choice, individuals must sift through opposing views and ultimately determine which view they deem as correct.[146] Further, a free flow of information empowers people to make the choices that a democratic society demands.[147] An uncensored Internet is important specifically because the Internet is an equalizing power.[148] The Internet equalizes individuals because it makes the transmission of information to vast numbers of individuals both easy and inexpensive. Traditional media, such as print publishing or broadcasting are prohibitive to most individuals not possessing political or academic clout or vast financial resources. In contrast, anyone who has access to a computer and who commands at least a limited knowledge of computers can transmit information to many people through the Internet. Thus, the restriction of speech on the Internet would ultimately inhibit the growth of a democratic society.[149]

Allowing a plurality of views to be offered on the Internet promotes the perpetuation of truth. The concept of the Internet as a marketplace of ideas provides that the Internet allows for a free market and thus a competition of ideas.[150] Just as in any competitive market, the free market of ideas on the Internet will dictate which ideas will ultimately prevail. In theory, when two opposing ideas exist, the competitive market will ultimately choose the truth. The Internet transcends power and financial disparities which dominate all other modes of communication and existence. On the Internet, for example, websites exist that deny the holocaust. Such websites have incited anger and activism, which have led to the existence of many other websites that discuss the historical reality and tragedy of the holocaust. The marketplace of ideas thesis asserts that the most truthful perspective will ultimately prevail, and the most rigorously-supported ideas will quash ill-founded sentiments.[151] This view heavily relies upon an individual's morality and rationality to dictate that truth will prevail. In a democratic society, such perceptions of human nature must be assumed and relied upon if the society allows for the empowerment and participation of its citizens.

The Government does regulate speech in the form of defamation and libel laws, but it does so only when the harmful speech is aimed at specific individuals.[152] Most individuals espousing the marketplace of ideas concept "acknowledge that government is permitted to regulate the various well-defined categories of controllable speech, such as obscenity, false or misleading commercial

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[146] *See* CASS SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 170 (1997).

[147] *See id.*

[148] *See* Beeson, *supra* note 10.

[149] *See* SUNSTEIN, *supra* note 146.

[150] *See* STONE, *supra* note 58. *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

[151] *See* STONE, *supra* note 58.

[152] *See* New York Times v. Sullivan, 376 U.S. 254 (1964) (holding that the Alabama libel statute was not adequately protective of the First Amendment's protection of speech). *See also* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

speech, and libel."[153] The government intervenes when individuals are harmed, not when a general group is defamed. Thus, the Court has embraced Mill's Harm Principle which asserts that government should interfere with a person's liberty only when another individual is harmed.[154] The Court has determined that a verbal remark expressing animosity toward a specific religious or ethnic group does not constitute a harm compelling government intervention.[155]

The existence of an offensive idea also challenges those holding the opposite view to articulate why their view is the correct one. The marketplace of ideas concept places great value on the debate between differing views because the debate itself forces people to better articulate their positions.[156] For instance, hate speech forces people to actualize and articulate their perception of the issue. The debate also encourages people, who would not have even contemplated the issue, to think about it and form their own opinions.[157] Without the existence of a plurality of views, it is possible that individuals will not form their own views but will follow one persuasive person or ideology.[158] Therefore, allowing a marketplace of ideas on the Internet will prevent some individuals from merely following persuasive rhetoric. The Internet provides vast informational resources such that every view can be represented.

Allowing the Internet to present all differing and opposing perceptions promotes an analytically-aware citizenry who will instill this awareness in their children as well. Offering many perceptions of issues will remind parents to discuss these issues with their children. Further, a democratic society depends upon citizens, and thus children to have the ability to determine which perspective they wish to embody as well as which historical information is accurate information.[159] Responsible parents and schools must bear the burden of clarifying the true historical reality because children are particularly susceptible to false and rhetorical perspectives. However, the burden upon adults does not outweigh the importance of giving children access to differing views and perspectives over the Internet, which will then give the children skills to determine their own perspectives.

b. Censorship is Inherently Dangerous

Censorship is inherently dangerous. Once the government determines what information is acceptable to be communicated, it intrudes upon the life of its citizens. Individuals must have the liberty to decide for themselves what informa-

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[153] SUNSTEIN, *supra* note 146.

[154] *See* John Stuart Mill, *On Liberty, reprinted in* MORALITY AND MORAL CONTROVERSIES 368-69 (John Arthur ed., 3rd ed., 1993).

[155] *See* Smith v. Collin, 436 U.S. 953 (1978).

[156] *See* STONE, *supra* note 58.

[157] *See* Mill, *supra* note 1.

[158] *See* SUNSTEIN, *supra* note 146, at 171-72.

[159] *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

tion they wish to receive.[160] A deliberative democratic society places great importance upon the freedom of individuals to exercise their own intellectual processes, and it "seeks to promote as a central democratic goal, reflective and deliberative debate about possible courses of action."[161] Thus, a government that denies individuals the ability to deliberate not only frustrates the actualization of democracy but also strips individuals of their fundamental freedom.

c. The Nature of Hate Speech on the Internet Inhibits Regulation

A statute that banned hate speech from the Internet could not withstand constitutional scrutiny because any regulation would sweep too broadly. Specifically, if the statute's purpose was to insulate and protect children from offensive hate speech, the statute could never be tailored narrowly enough to protect children without inhibiting adult access to information. The government "may not reduce the adult population to only what is fit for children."[162]

In *Reno*, one of the factors leading the Court to strike down the CDA was that under the CDA, "neither a parent's consent - nor even their participation—in the communication would avoid the application of the statute."[163] The Court distinguished the CDA from a New York statute that was held constitutional. Whereas the CDA sought to protect minors from access to obscenity over the Internet by banning all obscene material from the Internet, the New York statute prohibited only the sale of obscene material to minors.[164] The Court asserted that a parent could still purchase any obscene material for their child under the New York statute. In contrast, under the CDA a parent could not choose to allow their children to view obscene material over the Internet.[165] Thus, to withstand constitutional scrutiny, a statute that aims to prevent children's access to hate speech on the Internet must also allow parents to determine what their children may view on the Internet. Such a statute would be almost impossible to draft because it would be either too narrow or too broad to benefit both age groups.

Further, a statute that bans hate speech must be carefully defined to avoid vagueness. In *Reno,* the Court found that the CDA did not adequately define the term "indecent."[166] A statute banning hate speech from the Internet would likely suffer similar inadequacies. Defining terms in such a statute may be even more difficult than in an obscenity statute because the Court has not defined the term hate speech. Hate speech's inherent subjective and emotional nature poses a barrier to defining it. Some people may find certain speech hateful and offensive while others may find the same speech so preposterous that it is not offensive. Therefore, while hate speech could be defined in general terms to encompass

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[160] *See* CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 122 (1993).

[161] SUNSTEIN, *supra* note 146.

[162] Reno v. A.C.L.U., 117 S. Ct. 2329, 2346 (1997).

[163] *Id.* at 2341.

[164] *See* Ginsberg v. New York, 390 U.S. 629 (1968).

[165] *See Reno*, 117 S. Ct. at 2341.

[166] *See id.*

speech that could be found offensive, this generality would render the statute unconstitutionally vague.

d. The Internet is not as Intrusive as Other Forms of Regulated Media

The Internet differs significantly from other highly regulated media. Broadcasting, for example, has been historically regulated because of its invasive nature.[167] However, the Internet is not as intrusive as television or radio.[168] Communications over the Internet do not appear on computer screens without the user taking a series of affirmative steps. Furthermore, while a child can be bombarded with a sexually explicit or offensive television program by merely turning the television on, no such surprise can occur through the Internet.[169] Therefore, the most compelling justification for regulating the broadcast medium, that it is intrusive and invades one's home, does not apply to the Internet. Thus, the Internet does not require extensive governmental regulation.

IV. A NARROW CLASS OF HATE SPEECH PERPETUATED OVER THE INTERNET IS CRIMINAL CONDUCT

The Supreme Court has asserted that the Government extends different levels of First Amendment protection to different forms of speech.[170] Certain types of speech are entirely bereft of constitutional protection and may be criminalized.[171] A "true threat" is recognized as a form of speech that is not protected by the First Amendment.[172] A "true threat" can be hate speech directed at a specific person in the form of a threat of abuse or violence.[173] Title 18 of the United States Code § 875(c) articulates the elements of a "true threat."[174] Section 875 prohibits interstate communications that convey threats to kidnap or injure another.[175] It states that "[w]hoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years or both."[176] Penalty enhancement statutes for hate crime can also

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[167] *See id.*

[168] *See id.* at 2343.

[169] *See id.*

[170] See NAACP v. Claiborne Hardware Co., 458 U.S. 866, 927-28 (1982). *See also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 760-62 (1976).

[171] *See* United States v. Alkhabaz, 104 F.3d 1492, 1505 (6th Cir. 1997) (Krupansky, J., dissenting).

[172] *See id.*

[173] *See, e.g., id.*

[174] *See id.* at 1494.

[175] *See id.*

[176] 18 U.S.C.A. § 875(c) (West Supp. 1998). In order to support a conviction under § 875, the Government must prove three elements of the crime: a transmission in interstate or foreign commerce, a communication containing a threat, and a threat to injure or kidnap the person of another. *See id.*

apply to increase the sentence if the threat is in the form of hate speech.[177]

Courts have interpreted § 875(c) to require evidentiary proof that a reasonable person would perceive the defendant's transmitted message as a "serious expression of an intention to inflict bodily harm."[178] However, a literal interpretation of the statute's language would lead to absurd results. In *United States v. Alkhabaz*,[179] the Sixth Circuit agreed that a literal interpretation of § 875(c) is untenable. The court defined threats as "tools that are employed when one wishes to have some effect or achieve some goal, through intimidation."[180] Thus, if an individual were to direct a hate-laden message through the Internet to a specific person with the intent of harming them, the individual may be prosecuted under a statute such as § 875(c).

However, courts interpret statutes that limit speech narrowly and find few communications that fall within their purview. For example, the court in *Alkhabaz* found that the misogynistic e-mails between two university students did not constitute a threat in violation of § 875(c) because "[e]ven if a reasonable person would take the communications between [the two students] as serious expressions of an intention to inflict bodily harm, no reasonable person would perceive such communication as being conveyed to effect some change or achieve some goal through intimidation."[181]

A vigorous dissent included the entire contents of Alkhabaz's sadistic and violent e-mails, which defined in detail his preferred method of sexual and physical torture of a young girl. The dissent argued that the majority embraced an unnecessarily narrow definition of a "threat" which excluded the generally accepted definition of a threat "a simple credible declaration of a intention to cause injury to some person, made for any reason, or for no reason whatsoever . . . ."[182] The dissent articulated that focusing on whether the author of the communication actually intended to intimidate someone avoids the crux of the issue, namely "whether a jury could find that a reasonable recipient of the communication would objectively tend to believe that the speaker was serious about his stated intention."[183] The dissent found that a jury could reasonably infer that Alkhabaz transmitted his e-mail over the Internet so that his threat would intimidate and

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[177] *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993).

[178] *Alkhabaz*, 104 F.3d at 1494 (citing United States v. DeAndino, 958 F.2d 146, 148 (6th Cir. 1992)).

[179] 104 F.3d 1492.

[180] *Id.* at 1495.

[181] *Id.* From November 1994 until January 1994 Abraham Alkhabaz, a.k.a. Jake Baker, and Arthur Gonda exchanged e-mail messages over the Internet. The content of these messages expressed in lurid and specific detail, a sexual interest in violence against women and girls. Baker had also posted fictional stories on an interactive Usenet news group. *See id.* His stories involved the "abduction, rape, torture, mutilation, and murder of women and young girls." *Id.* On January 9, Baker posted a story describing the "torture, rape and murder of a young woman who shared the name of one of Baker's classmates at the University of Michigan." *Id.* at 1493.

[182] *Id.* at 1502 (Krupansky, J., dissenting).

[183] *Id.* at 1504 (Krupansky, J., dissenting).

harm the intended victim.[184] Furthermore, the dissent found the ongoing communication between Alkhabaz and Gonda violated § 875(c) because the two students had agreed to threaten at least one woman.[185] Thus, if a hate-laden message communicated over the Internet includes within it a true threat, the hate speech does not receive First Amendment protection and may be criminalized.

V. FILTERING DEVICES: THE REPERCUSSIONS OF *RENO V. AMERICAN CIVIL LIBERTIES UNION*

The Supreme Court's decision in *Reno*[186] has had two significant effects. The Supreme Court ruled that because the CDA restricted the ability of adults to use the Internet, it was an unconstitutional infringement of the freedom of speech. Thus, the first significant effect of Reno is that it granted full constitutional protection to the Internet. The second effect of the Court's holding in *Reno* transcends the power of the Court. Since the Court's decision, President Clinton, the private computer industry, and public interest organizations have been in the midst of a new Internet controversy: whether individuals may use filtering technologies to channel what they wish to view on their own explorations of the Internet. The Court relied on the Holmesian notion[187] that the Internet is a forum for a true marketplace of ideas. However, this notion collapses at the door of a private home because an individual can determine what they wish to see, hear, or view. An individual should be able to have access to any part of the Internet she wishes[188] and to screen out anything they find offensive or contradictory.

In response to the Supreme Court's decision in *Reno,* President Clinton, in a press conference on July 16, 1997, suggested the possibility that the filtering system "pave the way to a family-friendly Internet without paving over the constitutional guarantees of free speech and free expression."[189] The President asserted that private individuals, through the use of commercially available software, can control what they and their families access on the Internet. "With a combination of technology, law enforcement, and responsibility, we have the best chance to ensure that the Internet will be both safe for our children and the greatest educational resource we have ever known."[190] President Clinton envisions the use of voluntary software that filters out objectionable material on the Internet. The President sponsored a conference in December 1997, entitled Internet/Online Summit: Focus on Children.[191] This summit provided a forum for

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[184] *See id.*

[185] *See id.* at 1504 n.10 (Krupansky, J., dissenting).

[186] 117 S. Ct. 2329 (1997).

[187] *See, e.g.,* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[188] Most likely, such accessible parts of the Internet would not include information that could threaten national security.

[189] Office of the Press Secretary, *Remarks By the President at Event on the E-chip for the Internet* (July 16, 1997).

[190] *Id.*

[191] *See* Jeri Clausing, *Conference on Children and Net Finds Little Consensus*, N.Y.

discussion of the controversy inherent in filtering systems. The theme of the summit was parental empowerment and providing parents with the education, tools, and support necessary to protect their children.[192]

The Supreme Court in *Reno* seemed to predict such technology by inferring to the use of filtering systems in its opinion. The Court found, however, that at the time of the trial, "existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying adults."[193] The Court appeared to embrace such a filtering device since it would solve the overbreadth dilemma embodied in the CDA. One ground upon which the Court objected to the CDA was the fact that the CDA denied certain material to all Internet users, rather than merely protecting children. Thus, a voluntary filtering device "is free of the taint of government-imposed censorship."[194] Individuals will have the choice to filter out whatever material they find offensive.

A. *Private Corporate Action to Prevent the Communication of Hate Speech over the Internet*

Many private corporations are now including methods of restricting Internet access. For example, Prodigy, an Internet home computer service corporation, requires its subscribers to accept the terms of their membership agreement. The agreement, in pertinent part, states that "[m]embers agree not to . . . display . . . any defamatory, inaccurate, abusive, obscene, profane, sexually explicit, threatening, ethnically offensive, or illegal material . . . . Prodigy reserves the right to review and edit any material submitted for display . . ."[195] In response to accusations that Prodigy's guidelines violated the First Amendment, Prodigy argued that "[t]he First amendment protects private publishers . . . [and] bestows no rights on readers to have their views published in someone else's private medium. What the Constitution does give readers is the right to become publishers themselves."[196]

When a Prodigy subscriber alerted the Anti-Defamation League ("ADL") of several anti-Semitic postings on their electronic bulletin board,[197] Prodigy reformed its bulletin board management. "Overall, the service was moving toward more control and supervision on the part of the users, and less by Prodigy management."[198] Thus, the Internet is considered a public forum imbued with full

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TIMES, Dec. 2, 1997, at B10 (visited Jan. 14, 1998) <http://search.nytimes.com/search/daily/bin/fastweb?getdocsite 12316 2 wAAA jeri%7Eclausing%7Eand%7Echildren>..

[192] *See id.*

[193] Reno v. A.C.L.U., 117 S. Ct. 2324, 2347 (1997).

[194] Hoffman, *supra* note 6, at 10.

[195] Lynn Sharp Paine, *Prodigy Services Company,* at 6A (Harvard Business School, 1993).

[196] *Id.*

[197] *See id.* at 1A.

[198] *Id.* at 2C.

constitutional protection; however, a private corporation or an individual can determine what is accessible.

B. *The Software Available*

"The idea behind this technological fix is simple: have a computer program act as a gatekeeper between the user and the Internet."[199] One possible filtering service technology is the Platform for Internet Content Selection ("PICS"), which was proposed by the World Wide Web Consortium, an international computer industry organization hosted by the Massachusetts Institute of Technology.[200] PICS is computer software that "makes it possible to filter the Internet by creating a consistent way to rate and block access to various kinds of material, including pornography and violence."[201] PICS does not dictate the standards used to filter material but rather "sets rules for establishing and transmitting"[202] such systems. Filtering software now available includes Net Nanny, Surf Watch, and Cyber Patrol, all of which filter out adult-oriented material.[203]

The ADL and the Learning Company, one of the most innovative filtering software developers in the nation,[204] have developed a filter that will screen out hate sites on the Internet.[205] The ADL will provide a list of specific hate sites to be incorporated into the filtering software.[206] Internet users who have installed ADL's filter will be redirected to ADL's website if they attempt to access the specified hate sites.

C. *Arguments Supporting the Use and Development of Filtering Systems*

At its inception, PICS was embraced by some opponents of the CDA as "a neutral alternative to government censorship because any group, from the Christian Coalition to the American Civil Liberties Union to the American Nazi Party, could devise its own PICS-based system."[207] Floyd Abrams, a First Amendment scholar, asserted that "the only problem with private filters is to make sure they don't become public filters."[208] The First Amendment prohibits government censorship, not the choices of individuals to regulate what they wish to view. Filtering devices do not pose a First Amendment problem because they

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[199] Hoffman, *supra* note 6, at 10.

[200] *See id.*

[201] Denise Caruso, *The Problems of Censorship Only Increase When Moved to the Private Sector*, N.Y. TIMES, Dec. 15, 1997, at D6.

[202] Hoffman, *supra* note 6, at 10.

[203] *See* Rajiv Chandrasekaran, *A Game of Hide vs. Seek: There's No Consensus About Systems for Rating Internet Sites*, WASH. POST, Dec. 3, 1997, at B11.

[204] *See* ADL Press Release, *ADL and the Learning Company Develop Educational Filter Software to Combat Hate on the Internet* (Dec. 16, 1997).

[205] *See id.*

[206] *See id.*

[207] Caruso, *supra* note 201.

[208] Harmon, *supra* note 14, at 1, 6.

are installed by individuals and thus do not constitute the requisite state-action. In an interview on "Nightline," Floyd Abrams said that filtering software is permissible as long as it is used at home and individuals are making their own choices as to what blocking device they choose.[209] Thus, filters empower individuals without the presence of government involvement.

Furthermore, the use of filters is equivalent to the use of v-chips in televisions or the refusal to buy certain newspapers. They represent an independent choice to limit what one wishes oneself or one's family to view. In a press release announcing their filtering software, ADL stated that they "hope to foster an atmosphere of responsibility on-line and to set standards within the framework of the First Amendment that will give assurances to parents, educators and communities that there are means with which to help children safely navigate the Internet."[210]

One of the essential goals of the CDA was to prevent children from having access to offensive and pornographic Internet sites. Filters allow parents, rather than the government, to control what their children access as they "surf the net." "Industry executives defend use of the software at home, saying that parents generally would rather limit their children to a small but safe list of Web sites than a large one with the possibility of unseemly material."[211] Thus, filters protect children and satisfy and empower parents and educators, while not infringing on the content of the Internet universe nor upon the freedom of speech.

D. *Arguments Against Filtering Systems*

While filtering systems reconcile some of the concerns expressed by the Supreme Court and President Clinton, they are not universally effective nor desired. Filtering systems may not solve all of the problems arising from hate speech on the Internet. Hate-laden websites, news groups, and e-mail messages will continue to exist even though an individual or an individual's family no longer has access to them. Hate speech may incite others to violence, resulting in a substantial effect upon the individual and her family.

Barry Steinhardt, the Associate Director of the ACLU noted that "[t]he Internet has changed the nature of the issue . . . [i]n order to preserve free speech values, you have to concern yourselves with the actions of the dominant private companies that will structure this medium."[212] Opponents of filtering systems argue that "the technology turns the Internet into a censorship machine."[213] While PICS allows families to restrict what their children can view, PICS also "enables content providers like Microsoft Corp. and the Walt Disney Co., search engines like Yahoo or Excite, Internet service providers, the government of Singa-

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[209] *See Nightline: Hate and the Internet* (ABC television broadcast, Jan. 13, 1998).

[210] ADL Press Release, *supra* note 204.

[211] Rajiv Chandrasekaran, *Voluntary Curbs on Net Gain Backing: Online Firms to Offer Own Curbs on Net,* WASH. POST, Dec. 1, 1997, at A1.

[212] Harmon, *supra* note 14, at 1, 6.

[213] Caruso, *supra* note 201.

pore or any other company, government or institution to do the same thing."[214]

Opponents of filtering systems fear that the technology will be used for evil rather than for good. First, because of the exponential growth of the Internet, filtering systems may not be entirely effective and up to date. Second, some filtering systems produced by commercial Internet filtering programs reflect "their political and social biases and users do not necessarily know what areas of the Internet are being fenced off."[215] Third, some filtering systems may inadvertently filter out meaningful discourse on topics that, in other forms, could be offensive. Finally, "there is a real concern that the average user, frequently intimidated by computer tools and without a comprehensive picture of the content of the tens of thousands of Web sites, will not feel comfortable altering the basic" settings accompanying the filtering software.[216] Further, PICS, unlike other available filtering services, does not articulate which sites they are blocking, leading some critics to argue that PICS is "the most effective global censorship technology ever designed."[217]

Lawrence Lessig, a visiting professor at Harvard Law School and the Department of Justice's special expert in their anti-trust suit against Microsoft, argues that "PICS set up a universal censorship system, not one that was tailored to the narrow classes of speech that government might be interested in regulating."[218] Lessig asserts that private regulation of the Internet is now a greater threat to free speech than public regulation would be.[219]

> "Yet ceding to industry and to technology the government's role as protector of rights strikes many . . . as dangerous. In a deeply commercial culture, where people are more often perceived as consumers than as citizens and where lobbyists and politicians barter citizens' interests every day, PICS and other filters raise a profound question.[220]

E. *Reconciling the Filtering System Dilemma*

Implicit in any filtering system must be its voluntariness. Once a state legislature, Congress, the Supreme Court, or the President mandates the use of filters, the First Amendment's guarantee of freedom of speech is violated. Individuals in the Internet industry do not believe that government regulation of the Internet is necessary or effective. Rather, Steve Case, America Online's chief executive, stated that America Online "want[s] to show that the interactive world is being proactive in building a medium we can all be proud of."[221] Individuals should

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[214] *Id.*

[215] Hoffman, *supra* note 6, at 10.

[216] *Id.* at 11.

[217] Caruso, *supra* note 201.

[218] *Id.*

[219] *See id.*

[220] *Id.*

[221] Chandrasekaran, *supra* note 211.

choose an advocacy organization, religious group, or commercial product that embodies their own beliefs and use their formulated list of acceptable and unacceptable sites.[222]

In order to constitutionally and effectively protect children and society in general from offensive material on the Internet, more filtering systems need to be developed. Such filtering systems should offer a wider selection of screenable topics or sites.[223] In addition, the screening code words should not be so general as to filter out any site containing specific words, regardless of whether the words are used in an offensive manner. For example, Surf Watch, which has sold over seven million copies, censors non-offensive sites, such as the National Organization for Women.[224] Filtering software, like the software designed by ADL and America Online should include a list of all sites blocked by the filter, thus enabling the parent to be fully aware of what they are preventing their families from viewing.[225] Further, filtering software should be malleable: the user should be able to change the items to be filtered so that if parents do not find a specifically listed site offensive, they can remove the blocker. Filtering devices should be used by individual families, not by public institutions or government. While not all families have the computer knowledge to implement and modify filtering software, private filters are the most effective means to limit accessibility to offensive material.

Filters will not prevent individuals from accessing all offensive sites or material. Filters do not purport to terminate the existence of hate speech on the Internet. Some children who use the Internet at school, in libraries, or at their friends' homes will not be afforded the benefits of filtering systems. However, a society that embraces coexistence of pluralistic views must, as a consequence, be able to accept that hate speech will exist. Parents must accept that they can neither control nor fully regulate the information that influences their children. Parents must instead be able to instill their children with certain values, such as tolerance and rationality. In achieving this feat, parents may help their children ascertain that hate speech, and the offensive views perpetuated by hate speech, directly conflicts with what they hold as socially and morally good.

The fear that filters will get into the wrong hands does not justify removing filtering software from the market. Individuals should be able to control their own Internet accessibility. The Internet should be unregulated by government. Individuals should have the choice and the ability to decide whether they wish to view certain material or not.

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[222] *See* Chandrasekaran, *supra* note 203. For example, ADL and Learning Company have developed filter software that screens out hate sites on the Internet and educates about the dangers of prejudice. ADL Press Release, *supra* note 204.

[223] *See Nightline: Hate and the Internet*, *supra* note 209.

[224] *See id.*

[225] *See id.*

VI. CONCLUSION

The Supreme Court has interpreted the First Amendment to protect all speech, except in very narrow circumstances. From the earliest formulation of its First Amendment analysis, the Court protected offensive speech. Some argue that the Court's traditional analysis should not apply to the Internet because of the Internet's vast communicative abilities. However, this argument hardly supports deviation from the Court's traditional analysis. Despite the fact that the Internet is a unique mode of communication, it should not be censored, and the same First Amendment principles should apply. Individuals can voluntarily choose to filter out offensive material; therefore, the government should not paternalistically intrude upon an individual's freedom of speech. Individual users of the Internet may determine their own Internet accessibility. Thus, an individual's own personal perspectives and moral sensibilities dictate what parts of the Internet to access. Filtering software, when used responsibly and voluntarily, preserves speech over the Internet and, at the same time, protects children from offensive material. Furthermore, a plurality of ideas strengthens a democratic society and empowers people to better articulate their own perspectives. The Internet, as a democratizing and communicative medium, should not be censored because the consequences of censorship, the stifling of ideas and government intrusion, are vastly detrimental to a democratic society. The freedom of speech is an essential democratic value that cannot be abridged by government censorship.

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