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Free Speech & The Internet: The Inevitable Move Toward Government Regulation

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I. Introduction

{1} The explosive growth in the number of people communicating from computers around the world via the Internet ("Net") has led to the proliferation of another type of speech, namely, scholarly articles on virtually every aspect of the Net and its many influences on life in America. One topic that has received a great deal of attention is the extent to which laws applicable within the geographical territory of the United States may be applied to the freewheeling world of Cyberspace, which knows virtually no geographical limitations. Many commentators in the United States have followed one of two streams of argument: either they have restricted their analyses to the ways in which existing U.S. law should or will affect the rights and responsibilities of Net users within the United States,[1]or they have argued that *no* country's laws should apply to Cyberspace.

The former group ignores the essentially international nature of the Net and overlooks the fact that regulation of the Net likely will happen at least in part at the international level. The latter group unrealistically claims that Cyberspace should be viewed by countries around the world as a new, separate jurisdiction with both the right and the ability to govern itself. These Cyber-activists overlook the fact that virtually no country in the world is likely to agree to this approach, as it would require them to cede a degree of sovereignty to a nebulous group of self-appointed self-regulators.

{2} In this paper, I will discuss two of the arguments most commonly put forth in support of Cyber-independence; namely, that it is technologically impossible to filter out illegal or objectionable content on a country-to-country basis, and that the Net, as the world's most open and progressive democratic discourse, represents a thoroughly positive force that should not be hemmed in by governmental regulation. As to the first argument, I will discuss briefly some existing filtering technologies and their potential to effectively restrict illegal content. Then, I will give an overview of scholarly opinion and some recent U.S. court rulings on an issue that is certain to be of central importance to any future regulation of the Net, namely, what types of electronic contacts must a Net user have to a given forum before that forum can constitutionally exercise personal jurisdiction over the user? Finally, I will dedicate most of this paper to a refutation of the second argument, which I believe is false for the following reason: the argument assumes that an unfettered discourse should or will be viewed by most countries as a more democratic process than a restricted forum. I believe this assumption is disproved by the fact that every democratic country has a different assortment of restrictions on the right to freedom of speech. This indicates that the unique *limitations* on free speech actually may be the basis of a given country's democratic discourse, as they reveal that country's fundamental societal values and conception of the role of free speech within its political system.

{3} In support of this contention, I will discuss a basic difference between free speech laws in the United States and the Federal Republic of Germany, namely, the treatment of offensive and anti-Semitic speech. This discussion will demonstrate that free speech regimes vary in quite real ways, even among Western democracies, and that these differences are anything but random. Rather, they are based upon each country's unique history and its conception of the best way to foster a democratic discourse. This example will illustrate the idea that many democratic countries do not believe that restrictions on public speech harm democratic discourse; on the contrary, they often believe that such restrictions are necessary to foster such discourse. Given this fact, I believe most countries will be exceedingly resistant to any homogenizing force that would threaten to eliminate the unique aspects of their free speech regimes. The Net, in its current, largely unregulated state, is just such a homogenizing force, and it is inevitable that countries around the world will attempt to apply their existing free speech standards to Net-speech through national and international, legislative, and political initiatives. Indeed, this idea finds clear support in the vast array of regulatory efforts currently underway around the world. I will discuss some of these efforts on the prosecutorial, legislative and diplomatic levels in Germany and the European Union in order to demonstrate the strong desire of these governments to subject the Net to regulation.

{4} Based upon my belief that Net regulation is inevitable, I will argue that Cyber-advocates are committing a serious strategic error by concentrating a great deal of their collective energy on the ill-fated campaign for Cyber-independence. They would be much better advised to take an active role in the nascent regulatory process in order to ensure the enactment of the most effective and least restrictive regulatory scheme. These Net-users are not only the most knowledgeable members of their given societies about the Net, but also the ones who will feel the effects of regulation most acutely. Therefore, it is in their interests to put aside their often contemptuous attitudes toward legislators and join in guiding the regulatory process. This should be done by advising governments on the positive value of the Net for democratic processes. It should also involve cooperating in the continued development of appropriate laws and of such technologies as content filters and labeling systems in order to minimize the restrictions placed on Net speech.

II. Filtering the Net -- Possibilities and Limitations of Current Technology

{5} As mentioned above, many opponents of governmental regulation of the Net insist that any attempt to enforce laws on the Net through technological means is destined to fail. They claim that the Net is simply too flexible, decentralized, and multifaceted to be harnessed by filters or the like.[2] This position fits well with the popular image of the Net as a place without limits, a massive, multi-headed beast that will find a way around any barrier placed in its path.[3] But that image might not be completely accurate. While the effectiveness of filtering technology remains unproven, significant progress appears to have been made in the development of effective filtering systems in the past two years.

{6} Two potentially important tools that have been developed are a widely accepted standard for labeling Net documents based on their content and a hardware device that ostensibly would allow local, regional, or national officials to control what content is available to users in their domain.[4] PICS, the Platform for Internet Content Selection, was developed by the Massachusetts Institute of Technology's World Wide Web Consortium, an industry working group, to establish conventions for label formats and distribution methods.[5] The PICS conventions do not specify who should label sites nor the criteria for such labeling; rather, they simply provide consistent standards to allow both first-party and third-party labeling.[6] The conventions have been accepted by a wide range of industry players, including Microsoft, IBM, Netscape, and SurfWatch, and access providers, including AOL, CompuServe and Prodigy, have promised to develop PICS-compliant blocking software.[7] Although the PICS conventions are not a filtering tool in themselves, they should make it easier for governments, parents, or employers to implement more finely tailored content limitations, in effect making filtering software more accurate.[8] The accuracy of filters will be extremely important to Cyber-discourse, as less accurate filters are bound to restrict more speech than intended, causing a "spillover" effect on speech that is legal but for some reason looks to the filters identical to illicit speech.[9] The hardware device mentioned above would function on the basis of a labeling system such as PICS and could be fine-tuned to implement content restrictions nationwide, community-wide, or even down to the individual Net user.[10] This machine is an Internet switching device that would be housed at the site of the access provider, which means that it could apply content restrictions to all or some of the customers served via that site.[11] While the device sounds promising, it can be very expensive, and it might be prone to circumvention, as users wishing to avoid restrictions enforced by all service providers in a given country or locality probably could use a foreign provider to gain unlimited access to the Net.[12] Despite the possibility of circumvention, this device and the considerable amount of research that is being devoted to such technologies indicate that a technological means of restricting Net content to fit a country's physical borders might exist in the near future. In any event, the summary dismissal of such technologies by certain Cyber-advocates is clearly premature.[13]

III. The Campaign for Cyber-Independence

{7} The chorus of voices calling for the recognition of Cyberspace as a new, separate jurisdiction beyond the bailiwick of any existing government cites a variety of arguments in support of Cyber-independence. Many Cyber-advocates argue that the Net represents a vast democratic forum in which the right to freedom of speech trumps all governments' rights to regulate it, even turning the U.S. Supreme Court's own language against the government and arguing that the solution for objectionable speech on the Net is "more speech."[14] Others contend that the charm of the Net's unique communicative possibilities would be lost if governments were to regulate content.[15] Still others claim that Cyberspace actually *is* a separate place and cannot be tied to any geographic locations, emphasizing that the borders of Cyberspace are defined by passwords and screens and that users are not passive recipients of content but "active travelers."[16] Finally, several commentators have questioned the propriety of governments' imposing speech restrictions on the Net, arguing that a given state's assertion of personal jurisdiction over a Net user based solely upon the user's electronic contacts to the state is dubious at best.[17]

{8} I first will address the jurisdictional issue, as I believe it presents the most credible objection to enforcing existing laws against Net users. Then, I will devote the remainder of this paper to a refutation of the argument

that many Cyber-activists appear to believe provides the strongest support for Cyber-independence, namely, that the Net should be protected in its current state, as it represents the most uninhibited, and therefore most democratic, forum in the world for the discussion of virtually any issue imaginable.

A. Exactly Where is Cyberspace? -- The Problem of Jurisdiction Based on Electronic Contacts

{9} Numerous commentators have analyzed the legal problem presented when a court attempts to exercise personal jurisdiction over a defendant whose sole contacts to the forum are electronic.[18] The issue can be framed as follows: can a person who sends data via the Internet properly be forced to defend herself in court in any forum in which the data can be accessed on the Net?[19] Under U.S. law, the question is whether the mere availability of the sender's transmission in a given forum constitutes the requisite minimum contacts so as to give courts in that forum personal jurisdiction over her.[20] If not, what further contacts are required in order to meet due process requirements? This issue becomes more complicated when the defendant is neither a U.S. citizen nor physically present in the United States, as the problem of extraterritorial application of laws and the question of infringement on national sovereignty arise.

{10}In general, commentators seem to agree that personal jurisdiction cannot or should not be asserted over a defendant based solely on the availability of a defendant's Internet transmissions in a given forum.[21] Arguments against personal jurisdiction in such cases tend to be based upon the notion that such an exercise of jurisdiction would be inconsistent with the due process considerations that govern the law of personal jurisdiction.[22] Dan L. Burk, for example, argues:

> online contacts or transactions by themselves will frequently, if not routinely, fail to support an assertion of jurisdiction over the person engaging in the activity. The argument that a cybernaut exposes herself to lawsuits in any and every jurisdiction that her packets may reach is an argument unsupported by either doctrine or policy.[23]

William S. Byassee concludes that new jurisdictional and venue rules are needed in the context of Cyberspace, as "[t]raditional legal paradigms do not fit this [online] interaction because they treat the interaction as occurring entirely in the real world locations in which the participants reside."[24] Cynthia L. Counts and C. Amanda Martin, meanwhile, contend that online contacts to a forum state in the libel context often would not support personal jurisdiction in that state, as the due process requirements of minimum contacts and avoiding offense to "traditional notions of fair play and substantial justice" might not be met.[25] Counts and Martin assert that personal jurisdiction in the Internet context must be limited to those Net users who purposefully direct their communications to the forum in question.[26] Given the fact that messages sent over the Net often are not purposefully directed to any geographic location in particular, this rule apparently would mean that personal jurisdiction would lie only in the case of such directed transmissions as e-mail or commercial web sites that require users to register before accessing the sites. This stance has been adopted by a few courts, while other courts have gone beyond the limitation proposed by Counts and Martin.

{11} The crude contours of the law of personal jurisdiction in the Internet context gradually are becoming recognizable, albeit by way of a motley collection of federal and state court decisions reached without any significant guidance from the Supreme Court.

{12} The following principles have been recognized:

{13} 1. Personal jurisdiction does lie if a defendant makes data available in a given forum via the Net and if she knows that people within that forum actually are accessing the data (for example, if the sender requires other users to register and through the registration process discovers the users' locations).[27] In *Minnesota v. Granite Gate Resorts, Inc.*, a Minnesota state court held that it had personal jurisdiction over the defendant, a

Nevada corporation that was running a gambling service over the Internet, whereby users could register with the defendant, pay a fee and deposit a requisite amount of money in an account, and then place bets through the defendant's service. The Minnesota Attorney General sought injunctive and declaratory relief, seeking an order barring the defendant from sending electronic advertisements to the state or requiring the defendant to state in the ads that the service is void in Minnesota (because it is illegal under state law). The Court held that the defendant did have the requisite minimum contacts to the state, as it knew that Minnesota Net users were accessing the site and using the service. The Court stated, in a bit of an exaggeration, that the defendant had made a direct marketing campaign to Minnesota, and that it was, therefore, reasonable to require the defendant to defend itself in a court in that state.

{14} This ruling is supplemented by a public announcement issued via the Internet by the Minnesota Attorney General, which was entitled a "warning to all Internet users and providers."[28] This document asserts that "persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws."[29] This broad assertion of jurisdiction appears to include every single Net transmission that is not specifically limited to a particular recipient (such as e-mail), as Net users around the world certainly know that their web sites, homepages and contributions to chat rooms, bulletin boards and the like are potentially accessible by every user with a Net connection, including those in Minnesota. The statement would be slightly amusing in its boldness and overreach, if it were not accompanied by the attorney general's successful suit against Granite Gate Resorts, which indicates that the state fully intends to implement this policy. Needless to say, if every state and country assumed this broad jurisdictional right, Net users would be under constant threat of prosecution for violating laws of which they might never have heard. This case reaffirms the need for a clarification of the jurisdictional issue, not only among nations but also among the 50 States.[30]

{15} 2. In some circumstances, personal jurisdiction may be exercised by a court in a forum to which the defendant's only contacts are the unrestricted availability of his website in that forum.

{16} In *Playboy Enterprises, Inc. v. Chuckleberry* [31], the defendant, a resident of Italy, had established a web site on a server in Italy bearing the name "Playmen" featuring sexually explicit photographs of women. Fifteen years earlier, the same court had issued a permanent injunction against the defendant from using the same name "Playmen" in the title or subtitle of a magazine published, distributed, or sold in the United States.[32] The website had a less explicit part that could be accessed without the defendant's knowledge and a more explicit part that required payment of a fee and registration of the user with the defendant. The defendant argued that although the site could be accessed via the Net in the United States, he was not actively selling or distributing his products here because users had to "come to Italy" to access the photos. Thus, he argued, his act of posting images on a server in Italy could not be viewed as selling or distributing those images in the United States.

{17} The Court disagreed with the defendant, holding that the defendant had actively sought out customers in the United States for both parts of his site. Customers had to register with him and receive a password, so the defendant had reason to know that some users were located in the United States. The Court admitted that it did not have the power to order the defendant to close down his site, because both the defendant and the server are located in Italy and stated that an attempt to do so merely because the site was illegal in the United States would be "tantamount to a declaration that this Court, and every other court throughout the world, may assert jurisdiction over all information providers on the global World Wide Web."[33] The Court ordered, however, that the defendant must refrain from accepting customers from the United States. The defendant pointed out that the less explicit part of his site was available without a password, and therefore did not require any contact between users and the defendant. Therefore, he had no notice of users' locations.[34] Despite this, the Federal Court held that even that part of the site violated the injunction, because the less explicit part of the site contained many of the same images as and was intended as an advertisement for the

more explicit part. Therefore, the Court ordered that the defendant must either shut down the site completely or prevent U.S. users from accessing it. The Court suggested that passwords be required for both parts of the site and that, if technology is incapable of identifying where users who request passwords reside, the defendant should require all password requests to be sent by regular mail.

{18} The Court's holding in *Playboy Enterprises, Inc. v. Chuckleberry* represent a tremendous, and quite dubious, assertion of authority by the Court. These rulings effectively require an Italian content provider to either shut down his site to the entire world or to force all potential customers from around the world to send their password requests by regular mail. The holdings present two very difficult questions. First, how does the Court intend to enforce its orders if the defendant simply ignores them? Second, would the Court expect an American content provider who transmits data that is fully legal under U.S. law to comply with a similarly intrusive ruling from a court in Rome or Tehran? If anything, the Court's rulings illustrate the exceedingly complex problem presented by the Internet. Despite the Court's language to the contrary, its decisions do reflect the horrifying idea that any court anywhere could assert jurisdiction over any content provider anywhere in the world. This problem is moderated somewhat by the unlikelihood that courts around the world actually could enforce their judgments. However, one wonders whether a decision like *Playboy Enterprises, Inc. v. Chuckleberry* creates a dangerous precedent. Will the next *Satanic Verses*,[35] for example, be published by an American author via the Net, leading to a death sentence on the author by a government that feels deeply blighted by the work? Is it sensible to rely on the idea that we are beyond the reach of a government that would issue such a sentence, considering that the U.S. government itself has resorted to brutality and kidnapping in order to bring a wanted suspect before an American court? [36]

{19} 3. Personal jurisdiction does lie if a Net user repeatedly sends data to a server in a given forum, knowing that the server is located there, and has a contract with the owner of the server to market and distribute his data (shareware) over the server, where the contract explicitly states that the legal relationship created thereby is governed by the law of that forum. In CompuServe, Inc. v. Patterson, the Federal Court of Appeals for the 6th Circuit held that the defendant, a Texas resident who marketed and distributed his software via CompuServe's server in Ohio, could be subjected to personal jurisdiction in Ohio.[37] The Court found the constitutionally requisite minimum contacts to the state, as the defendant "consciously reached out from Texas to Ohio to subscribe to CompuServe, and to use its service to market his computer software on the Internet, and he entered into a contract which expressly stated that it would be governed by and construed in light of Ohio law."[38]

{20} 4. Personal jurisdiction does not exist in a trademark infringement case in which the defendant's advertising site is accessible in the plaintiff's forum, but the likelihood that the site will produce any commercial results in that forum is negligible (e.g., because the product advertised can be obtained and used only in a location that is geographically remote from the plaintiff's forum).[39] The defendant in *Bensusan Restaurant Corp. v. King*[40] was the owner of a night club called "The Blue Note" in Columbia, Missouri and was sued for infringement by the owner of the "Blue Note" jazz club in New York City. The defendant maintained a web site to promote his club, and the site was accessible to Net users around the world, including those in New York. The court held that it did not have personal jurisdiction over the defendant, as the alleged infringement occurred in Missouri. Although the court's reasoning behind this conclusion is anything but pellucid, the finding appears to be based on the idea that the defendant had no intention or possibility to sell his product (i.e., tickets to shows in his club) in New York. The web site included a telephone number for customers to order tickets, but any potential customer from New York would have had to travel to Missouri to pick up the tickets and attend the show. This, the court apparently believed, was so unlikely that the defendant's web site, although available around the world, was bound to create commercial effects only within a small radius around Columbia, Missouri. Therefore, the court held that it did not have personal jurisdiction under the New York long-arm statute. The court also found that jurisdiction was improper under the Due Process Clause, as the defendant's creation of a web site, though felt in New York, could not be seen as an act purposefully directed at New York.

{21} As this discussion shows, U.S. courts generally have been willing to exercise personal jurisdiction over Net users only when the users have some contacts to the forum beyond the mere availability of the users' Net transmissions, although some dicta in the *Playboy Enterprises, Inc. v. Chuckleberry* decision suggests a more expansive jurisdictional stance might prove tempting to courts and prosecutors. It should be noted that the cases upon which this analysis is based occurred primarily in the commercial context, and it remains uncertain whether courts will be so restrained in their jurisdictional analyses in the criminal context. *Minnesota v. Granite Gate Resorts*, one of the few Internet jurisdiction cases that involves criminal laws, creates a frightening precedent under which Net users could incur criminal liability in every single jurisdiction in which Net access exists.[41] This rule would lead to massive uncertainty and a likely chilling effect on Net speech, as Net users would not be able to assess the probable legal effects of their participation in Cyber-discourse and commerce. If these cases teach us anything, it is that interstate and international agreements governing the issue of personal jurisdiction must be reached for the sake of legal certainty and the further development of the Net.

B. The Role of Free Speech in Democratic Discourse -- Why Even Democracies Will Resist Unfettered Net-Speech

{22} A basic argument of many advocates of Cyber-independence is that the Internet provides the most unfettered, and therefore, most *democratic* forum in the world for the discussion of all issues under the sun. This argument is based upon what I think is a faulty understanding of the role of speech restrictions in democratic societies, as it presumes that democracies naturally should and will consider Net dialogue *more democratic* the fewer restrictions placed on it. This idea is belied by the fact that every democracy in the world imposes a myriad of restrictions on free speech, and that the particular restrictions vary considerably from country to country. While it is true that a relatively open public discourse is the foundation of every democracy, I believe the unique combination of restrictions on this discourse reveals the soul of a given democracy. Therefore, countries will not adopt the view that an absolutely unfettered Internet deserves protection because it is so democratic. Rather, countries will try to impose their existing speech restrictions on the Net in order to preserve their own democracies. In the remainder of this paper, I will try to support this view. To this end, I will discuss a basic difference between U.S. and German free speech law, namely, laws relating to offensive and anti-semitic speech. This example will illustrate the extent to which laws differ among democracies and the fact that these differences are perceived as central to each country's democracy. Then, I will discuss the wide array of efforts currently underway to regulate the Net in order to support my contention that regulation of Net speech is inevitable. I will conclude by arguing that the inevitability of such regulation makes it essential that avid Net users put aside their opposition to any and all forms of Net regulation and take an active and positive role in the development of effective and minimally restrictive regulatory schemes and technologies.

1. The Illegal and the Merely Obnoxious -- Offensive Speech in the United States and Germany

{23} In this section, I will draw a general picture of the contours of free speech rights in America and Germany as they relate to "offensive" speech, i.e., speech that is likely to offend the listener. Then, I will focus on one particular type of offensive speech that would be constitutionally protected in the United States but illegal in Germany. I will use the test case of a speaker who disseminates anti-semitic messages, in particular, a denial that the Holocaust occurred. Through this test case, I intend to illustrate the variance in free speech rules even between countries with similar political and legal systems and to discuss the foundations of such variance.

a. Freedom of Speech in the United States: Offensive Speech and Fighting Words

{24} Any discussion of freedom of speech in America must begin with the broad language of the First Amendment, which mandates that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[42] The Supreme Court has interpreted this broad mandate as a general prohibition against content-based restrictions on speech, which the Court repeatedly has found to be presumptively unconstitutional.[43] This does not mean, however, that all content-based restrictions are unconstitutional. The most common examples of permissible content-based restrictions are laws against fraud, defamation, obscenity and the like. But beyond these and a few other well-known and (with the possible exception of obscenity laws) widely accepted laws, the Court has been very resistant to laws that restrict speech because of its content.

i. *Chaplinsky v. New Hampshire*

{25} Perhaps the most controversial content-based restriction on speech that has passed constitutional muster is the so-called fighting words doctrine, which allows for the criminalization of speech that is likely to cause the average addressee to retaliate violently. The Court first upheld the constitutionality of such a law in 1942, in *Chaplinsky v. New Hampshire*.[44] In that case, the defendant had been charged with violating New Hampshire's law forbidding offensive, derisive, or annoying speech directed toward another person.[45] The defendant, a member of the Jehovah's Witnesses, had been arrested for calling a police officer "a God damned racketeer" and "a damned fascist".[46] The Court framed its analysis by stating that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem".[47] The Court described those classes of speech as "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[48] The Court upheld the law under the state supreme court's narrow interpretation of the statute to outlaw only those "face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker . . . ."[49]

{26} The *Chaplinsky* decision appears to create considerable room under the Constitution for laws forbidding obnoxious or highly offensive speech. But the Court's jurisprudence in recent years has greatly limited the permissibility of such laws. Indeed, a review of some recent decisions presents a strikingly different picture of the range of permissible restrictions on offensive speech than *Chaplinsky* might lead one to expect.

{27} The heart of the *Chaplinsky* decision is the Court's emphasis on the effect of a speaker's words on the addressee (or, more accurately, on a hypothetical, average addressee). Indeed, it is difficult to imagine what a prohibition on fighting words would mean if the effect on the addressee were not decisive. But this very principle has been undermined by subsequent case law, thus, in the words of one commentator, "eviscerating" the doctrine recognized in *Chaplinsky*.[50]

ii. *Texas v. Johnson*

{28} In two recent cases, the Court struck down laws forbidding the burning of the American flag, holding in one case that, while such an act may be offensive to the viewer, it does not constitute incitement to immediate violence or fighting words and, therefore, cannot be restricted based upon the message expressed. In *Texas v. Johnson* [51] the Court held that the defendant's burning of the flag was expressive conduct, which is entitled to First Amendment protection as a form of speech.[52] The Court stated that, while the state has greater leeway to restrict expressive conduct than verbal speech, the state's interest in doing so must be "unrelated to the suppression of expression."[53]

{29} The statute at issue in *Johnson* forbade, *inter alia*, desecration of the American flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."[54] The state of Texas argued that the state interest served by this statute was the prevention of an act that would so greatly

offend viewers that they would be moved to disturb the peace.[55] The Court rejected the legitimacy of this interest out of hand, stating that an expressive act may not be prohibited simply because it will cause such serious offense that it will move viewers to breach the peace.[56] The Court forcefully defended the freedom of speakers to make statements that are unpopular and will "'stir . . . people to anger.'"[57] The Court quoted its decision in *Brandenburg v. Ohio*[58] relating to a rally by the Ku Klux Klan for the idea that offensive expression may be prohibited only when it is "'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'"[59]

{30} The *Johnson* Court thus seriously undermined the idea that offensive speech may be forbidden in order to prevent breaches of the peace. The Court limited such prohibitions to speech that has not only the likelihood, but also the *purpose*, of inciting unrest. This holding clearly shifts the focus of the inquiry from the effect of the speech on the listener to the speaker's intent and is, therefore, a marked narrowing of the *Chaplinsky* precedent.

{31} The *Johnson* Court likewise dismissed the state's argument that the defendant's burning of the flag could be considered fighting words under *Chaplinsky*. The Court stated that "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs."[60] Again, the Court's ruling shifts the focus from the listener to the speaker. It no longer is decisive, as it was in *Chaplinsky*, whether the words are "plainly likely"[61] to cause the listener to retaliate with violence. Rather, the speaker must be directly insulting the listener's person or "invit[ing him] to exchange fisticuffs."[62] Moreover, there appears to remain no trace of the idea expressed in *Chaplinsky* that a fighting words law may prohibit speech that is itself a breach of the peace in that it is so offensive as to inflict injury by its very utterance.

iii. *United States v. Eichman*

{32} The litigation in *United States v. Eichman*[63] was based upon several prosecutions under a revised Federal Law forbidding flag burning passed in response to the Court's ruling in *Johnson*. The law forbade, *inter alia*, knowingly burning the flag, with the exception of "any conduct consisting of the disposal of a flag when it has become worn or soiled."[64] The government claimed that the law served its interest in protecting the "physical integrity of the flag' . . . in order to safeguard the flag's identity 'as the unique and unalloyed symbol of the Nation.'"[65]

{33} The government conceded, as in *Johnson*, that flag burning is expressive conduct, thus recognizing its constitutionally protected status.[66] But the government claimed that the revised law, unlike the statute in *Johnson*, passed constitutional muster, as it did not target expressive conduct on the basis of its message.[67] The government's argument was, essentially, that the new law avoided the fatal flaw of the Texas statute by eschewing any element that depended upon the effect of an act of flag burning on viewers. It therefore was not, the government argued, in any way related to the actor's motives, his intended message or the message perceived by onlookers.[68] But the Court rejected this contention outright, stating that "the Government's asserted *interest* is 'related to the suppression of free expression' and concerned with the content of such expression."[69] The Court based this finding on two grounds: (1) the law's aim to preserve the symbolic value of the flag betrays an interest in the message conveyed by the destruction of a particular manifestation of the symbol, as the burning of one particular flag does not affect the symbol itself in any way; (2) the law's language ("mutilates," "defaces," "defiles," etc.) connotes a focus on disrespectful treatment of the flag and its meaning for the flag's symbolic value, and the exception for disposal of worn flags makes clear that only destruction of the flag with a particular mindset is to be punished.[70] The Court concluded that the new Federal law suffered from the same constitutional flaw as the Texas law, namely, that it "suppresse[d] expression out of concern for its likely communicative impact."[71]

{34} Given its finding that the law was related to the suppression of expression, the Court subjected the

government's stated interest to the highest level of constitutional scrutiny.[72] The Court held that the law did not pass constitutional muster, as the government's interest did not justify the intrusion on First Amendment rights.[73] The Court rejected the government's argument that the law should be given special consideration because there existed a "national consensus" in favor of a ban on flag burning, holding that a law suppressing speech may not be viewed more favorably simply because of popular opposition to that speech.[74] The Court concluded by comparing flag burning to "virulent ethnic and racial epithets," "vulgar repudiations of the draft" and "scurrilous caricatures" to emphasize the principle that the government "'may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'"[75] Although *Eichman* was not decided based on the fighting words doctrine, the Court's ruling once again limited the extent to which the effect of potentially offensive speech on listeners may justify restrictions on such speech.

iv. *R.A.V. v. City of St. Paul, Minnesota*

{35} The Court continued its resistence to restrictions on offensive speech in *R.A.V. v. City of St. Paul*,[76] in which it overturned a law[77] prohibiting, *inter alia*, burning crosses or displaying the Nazi swastika or other symbols that arouse anger, alarm or resentment in others based on race, religion, or other factors. The Court declared that it was bound by the state supreme court's finding that the statute prohibited only fighting words within the meaning of *Chaplinsky*; thus, the Court considered whether prohibiting fighting words was unconstitutional under *Chaplinsky*.[78] The Court quoted *Chaplinsky* for the idea that certain speech may be restricted because the slight social value of its content is outweighed by the "social interest in order and morality." The Court noted, however, that those categories of speech are not "entirely invisible to the Constitution."[79] Thus, fighting words, as a category, may be restricted under the Constitution; however, a law that prohibits only fighting words with a certain content would be unconstitutional, unless "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."[80] This means that an obscenity law could proscribe only that obscenity that appeals in the strongest way to the prurient interest, but a libel law could not make punishable only that libelous speech that is critical of the government. Based on this principle, which appears to be a new creature in the menagerie of First Amendment jurisprudence, the Court held that the St. Paul ordinance was facially unconstitutional, as it proscribed only those fighting words that offend or provoke violence "on the basis of race, color, creed, religion or gender."[81]

{36} As in the flag burning cases discussed above, the *R.A.V.* ruling reflects the Court's recent resistance to speech restrictions that emphasize the effect of speech on listeners.[82] It is important to bear in mind that the ordinance at issue in *R.A.V.* did not prohibit fighting words that were *motivated* by racial or other bias; rather, it proscribed fighting words that would be likely to offend the *listener* based on their racist or other biased content. Since the flag burning cases and *R.A.V.*, it is difficult to determine what remains of the fighting words doctrine established in *Chaplinsky*. That doctrine now seems to stand only for the narrow proposition that speech that amounts to direct incitement to immediate breaches of the peace may be proscribed, albeit without any distinction related to the basis of the speech's offensiveness.

v. *Applying U.S. Law to the Test Case: The Permissibility of Anti-semitic Speech*

{37} First, a statement of the test case: a U.S. citizen sitting before her computer in Carbondale, Illinois creates a web site containing messages of extreme anti-semitic content, including allegations of a world-wide Jewish conspiracy, a "revisionist" history of World War II refuting the occurrence of the Holocaust and a crude swastika formed by repeatedly typing the letter K to form the shape of that symbol of Nazism. The user's site is accessible throughout the world via the Net, and its contents are not censored in any way by her access provider.

{38} Based upon the Supreme Court's recent First Amendment jurisprudence relating to offensive speech, it seems clear that this user's messages could not be proscribed based upon their content. The speech, although

exceedingly repugnant, informed by racism and clear falsehoods, and certain to offend virtually every potential reader, does not fit within the narrow confines of the fighting words doctrine. It does not amount to incitement to an immediate breach of the peace, and it, therefore, cannot be proscribed based on its content. As to the denial of the Holocaust, U.S. law simply does not contemplate, and the Constitution would not permit, restrictions on the expression of untrue factual allegations in this context. For better or for worse, people in the United States are free to deny the Holocaust, insist that John F. Kennedy was murdered by the Central Intelligence Agency or claim that blacks are genetically destined to possess lower intelligence than whites.

{39} The reasons cited by courts and commentators to justify broad constitutional protection of such apparently valueless statements generally are based upon the idea that the best way to pursue truth and justice within the American version of democracy is to have as few restraints on the marketplace of ideas as possible. The most famous statement of the function of free speech within American democracy comes from Justice Brandeis' concurring opinion in *Whitney v. California*[83] and reads as follows:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.[84]

{40} The Court in *Texas v. Johnson* quoted Brandeis' formulation and asserted that its rejection of the flag burning prohibition at issue represented "a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength."[85] The Court concluded that it could "imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns. . . ."[86]

{41} Commentators have found various other ways to describe the principles that underlie First Amendment law. Donald Alexander Downs argues that the "content neutrality rule"--the general prohibition on content-based speech laws -- "reflects the logic of 'procedural justice,'" which stresses equal access to political processes for all groups within society, including those with unpopular views.[87] Mari J. Matsuda has summarized existing First Amendment law, as follows: "[U]nder our system, there is 'no such thing as a false idea.' All ideas deserve a public forum, and the way to combat anti-democratic ideas is through counter-expression. When all ideas are voiced freely, we have the greatest chance of obtaining the right results."[88] Furthermore, Owen Fiss identifies the underlying logic of protecting free speech as "collective self-determination," in which people ". . . choose the form of life they wish to live and which presupposes that this choice is made against a background of wide-open public debate. . . ."[89]

{42} The Court's and the commentators' explanations of the purpose of American judicial resistance to content-based limitations on speech reveal an almost unlimited faith in the power of an unfettered public discourse to correct falsehoods.[90] The idea that lies, even vicious racist lies, are best dealt with by allowing other speakers to reveal such lies for what they are is in sharp contrast to the German position. The following section will discuss German free speech jurisprudence with a focus on regulation of offensive speech and outright lies.

b. Free Speech in Germany: Untrue Speech and Protected Rights

{43} German constitutional law relating to freedom of expression differs in two fundamental ways from American free speech law. First, Article 5 of the German Basic Law does not establish a right to freedom of

speech; rather, it permits freedom to express one's *opinion*.[91] Second, the Basic Law itself names two state interests upon which limitations on the freedom of expression can be based: the protection of minors and the protection of personal honor.[92] Both of these distinctions from American law are more than mere formal or linguistic differences. Both differences affect the contours of German freedom of expression in substantial ways. The first distinction means that certain speech lies outside of the Basic Law's protective field and, therefore, can be proscribed without raising constitutional concerns. The second distinction means that the Basic Law itself prescribes certain state interests that may take precendence over the right to freedom of expression. Thus, speech can be restricted under German law either because it lies completely outside of the Basic Law or because it implicates one of the interests privileged by the Basic Law itself.

i. Speech Beyond the Basic Law: Distinguishing Fact From Opinion

{44} The difference between Article 5's protection of the right to express one's opinion and the right to freedom of speech in the U.S. Constitution is striking. The U.S. Constitution protects essentially all types of speech and any restriction must be justified by a sufficient state interest.[93] In contrast, the German Basic Law does not offer blanket protection to all speech. Rather, certain speech -- namely, factual statements that are evidently or known to be untrue -- may be proscribed without implicating the Basic Law in any way.[94]

{45} The Federal Constitutional Court has expressed the reasoning behind this principle as follows:

> It is the purpose of expressions of opinion to convey an intellectual effect on one's surroundings and to convince others and contribute to the formation of opinion. Value judgments are accordingly protected without its depending upon whether the expression is valuable or worthless, true or false, emotional or rational. Factual claims also are protected by the fundamental right to express an opinion to the extent that they are the basis for the formation of opinions. Only a consciously untrue factual claim falls outside the zone of protection of the fundamental right, as it cannot contribute to the constitutionally contemplated formation of opinion.[95]

{46} The exclusion of untrue factual claims from constitutional protection reveals the German court's belief that certain speech, even if it does not implicate other protected rights, can be removed from democratic discourse without damaging the quality of that process. Indeed, the court seems to believe that removing such speech will improve the discourse, as it reduces the risk that a listener will be misled by false factual claims. Dieter Grimm, a judge on the Federal Constitutional Court, explains that expressions of opinion do not present this same risk of being misleading because listeners can identify them as subjective statements and can distance themselves from them, whereas factual claims bear the guise of objectivity and do not appear to be tied to the subjective speaker.[96] This conception of shielding public discourse from counterproductive speech is in contrast with the American view that no speech should be excluded unless it harms other state interests. Whereas the American solution to false speech is "more speech" in order to educate the original speaker and other listeners, the German answer is that such speech endangers the process and that its proscription actually improves the discourse.

ii. Permissible Prohibitions on Constitutionally Protected Speech

aa. Abusive Speech -- the "Schmähkritik" Doctrine

{47} As the preceeding discussion shows, the Basic Law protects true factual statements and all statements of opinion unless they implicate another protected right that deserves to be given precedence over the freedom of expression. This "weighing of rights" idea was first enunciated by the Federal Constitutional Court in the famous *Lüth* decision from 1958.[97] The *Lüth* court called the principle a "weighing of rights," because one's freedom of expression must yield when another person's protected interests of a higher priority would

be harmed by such expression.[98] The Court did not specify which protected interests or rights would justify such restrictions on expression, but the starting point for such an analysis in the Court's subsequent jurisprudence has been the language of the Basic Law.

{48} As stated above, Article 5 of the Basic Law contemplates the restriction of the freedom of expression for the protection of minors or personal honor.[99] The latter consideration, protection of personal honor, presents the clearest contrast to U.S. constitutional law regarding freedom of expression. Constitutional Judge Grimm has written that U.S. law differs most essentially from German constitutional law in that German law does not presume that freedom of expression enjoys a privileged position *vis a vis* other protected rights.[100] In the balancing process, the right to freedom of expression is viewed by German courts as equally important, not more important, than such other rights as the protection of personal honor.[101]

{49} Although the equal status of protected rights requires German courts to approach the collision of rights in a case-by-case manner, certain general principles have been established in the case law of the Constitutional Court to deal with conflicting rights.[102] In general, freedom of expression must yield when the expression would impugn human dignity, the value underlying all other fundamental rights.[103] In addition, the right to personal honor enjoys general priority over freedom of expression when the expression takes the form of a "formal insult" or "Schmähkritik," which can be translated as abusive speech.[104] Proscribable abusive speech is narrowly defined as that which is intended not to address a topic of debate, but to attack a person himself.[105] An example of such speech was presented in the case of a literary critic who, in a magazine review of a new edition of deceased author Heinrich Böll's works, called Böll "dumb as a rock," "talentless," "fake, even corrupt," and "an in part pathological, in part harmless idiot" and derided his works as "often repulsive crap."[106] The Court held that the reviewer's words were abusive of Böll's person, and that they could be sanctioned, as they did not appear in the context of a content-based or aesthetic treatment of Böll's works. Rather, the Court, in applying the Schmähkritik doctrine, found the reviewer's words "stand [only] for themselves and exhaust themselves in their abuse of Böll's person, and that they could be sanctioned, as they did not appear in the content."[107]

{50} "Schmähkritik" has become one of the most volatile battlegrounds for commentators advocating different balancing acts between the competing rights of free expression and personal honor. Much of the debate has focused on the Federal Constitutional Court's rulings in four cases in which the defendants were accused of harming individual soldiers' personal honor by displaying in varying forms a quote from the writer Kurt Tucholsky to the effect that "soldiers are murderers."[108] The Court indicated that it understood these statements to be expressions of the ideas that war in general is bad and that conscientious objection should be encouraged.[109] However, the Court declined to rule definitively on the defendants' liability, remanding the cases for the lower courts to reconsider the various possible meanings of the statements other than a purely abusive one.[110]

{51} The ruling in the soldiers' honor case and two related rulings from the early 1990s[111] have inspired a steady stream of critical commentary from both advocates of greater freedom of expression and of increased protection of personal honor.[112]

{52} The "Schmähkritik" doctrine, although it has been fairly narrowly construed by the German Court in recent years, illustrates that German law permits somewhat greater restrictions on offensive speech than the "eviscerated" fighting words doctrine in U.S. law. However, an even more telling distinction between U.S. and German free expression law is presented in another type of speech found by the German Court to be proscribable because it implicates personal honor, namely, denials of the Holocaust.

bb. Forbidden Lies -- Prohibition of Holocaust Denials

{53} The body of law regarding the restriction of speech that may implicate the personal honor of another

person gained a new limb in 1994 when the German legislature passed a law forbidding speech denying that the Holocaust occurred. The law, which took the form of an amendment to section 130 of the Criminal Code, provides for imprisonment for up to five years for anyone who "publicly or before a gathering endorses, denies or portrays as harmless an act [of genocide] committed under the rule of National Socialism in such a way that is suited to cause a breach of the peace."[113] It should be noted that much anti-semitic speech and certain denials of the Holocaust were punishable under the German Criminal Code before the passage of this amendment in 1994; the amendment's main innovation was to criminalize the so-called "simple Auschwitz Lie" in which the speaker's denial of the Holocaust is not stated as part of a larger opinion or theory (but note that section 130 also covers Holocaust denials that are couched in broader historical views and that go beyond simple factual statements).[114]

{54} Although the requirement that the speech be "suited to cause a breach of the peace" might appear to place a significant limitation on the law and make it similar to U.S. laws forbidding incitement to direct breaches of the peace, this requirement is actually far lighter than it seems; it means only that the speech *potentially* could cause a breach of peace, not that it concretely endangers the public peace in reality.[115] This is an important distinction for a comparative look at German and American free speech law, as this means the 1994 law almost certainly would be found unconstitutional by the U.S. Supreme Court under the flag burning cases and *R.A.V. v. City of St. Paul*.[116]

{55} The law forbidding the Auschwitz Lie finds its constitutional grounding in two basic principles of the German Basic Law. First, the Auschwitz Lie is viewed as a false factual statement and, therefore, not protected by Article 5 of the Basic Law.[117] This idea applies only to the simple Auschwitz Lie, as a denial of the Holocaust that is embedded in a more complex historical or even purely racist argument likely would be viewed as a mixture of factual allegation and opinion and, therefore, would enjoy the protection of Article 5. Second, the law has been found to protect the personal honor of Jews still living in Germany, which places it within one of the constitutionally recognized categories of permissible limitations on freedom of expression.[118] Both foundations are important, as the simple Auschwitz Lie can be barred as a false factual statement, but a Holocaust denial presented in the context of an opinion must be found to implicate some other protected right in order to permit its proscription under Article 5 jurisprudence.

{56} The Constitutional Court upheld the 1994 law under both of these propositions, first restating the familiar proposition that false factual statements do not enjoy constitutional protection.[119] The Court then pointed out that it can be difficult to distinguish purely factual statements from expressions of opinion, which finding required an analysis of the law as a restriction on protected expressions of opinion.[120] The Court held that the law is constitutional as a restriction on protected speech, as it protects the personal honor of Jews currently living in Germany, stating that "Jews living in Germany, because of the fate to which the Jewish population was subjected under the rule of National Socialism, constitute a group that is vulnerable to insult; the denial of the persecution of Jews is found to be an insult to this group."[121] The Court's decision, however, has been controversial, as commentators have pointed out that the 1994 law, based on its legislative history and plain language, is not intended to protect the personal honor of anyone; rather, they argue, its purpose is to protect the public peace.[122] The Court's purpose in basing its ruling on personal honor and not public peace may have been to give the law a more unassailable constitutional pedigree, as personal honor (stated in Art. 5 as a basis for restricting free expression) seems to bear greater constitutional weight than public peace in a balancing test *vis a vis* freedom of expression.

{57} The law and the Court's decision upholding it have come under fire from commentators who oppose the law on both constitutional and political grounds.[123] One particularly sharp critique by Daniel Beisel argued that the prohibition of Holocaust denials comes very close to a state-mandated prohibition on thought.[124] Moreover, Beisel argued that the law is a bad idea in political terms, as "the prohibition of any discussion of the events that occurred in Auschwitz can readily lead over a longer period of time to a complete questioning of the truth of the Nazi genocide, as it is not permissible to debate this issue publicly and this questioning of

the truth can ferment out of sight."[125] Beisel asserted that "[i]n a free democracy, it must also be possible to express provably false opinions" and questioned why it is not illegal to deny other instances of genocide.[126] In my view, this very question reveals the key to understanding the 1994 law, namely, that it is intimately related to Germany's unique role in 20th-century history.

{58} I believe this law represents an outlier within Germany's constitutional law, undertaken by the legislature and endorsed by the Constitutional Court for the purpose of showing an enduring awareness and preventing a recurrence of Germany's horrific past. No other false historical claim that I know of is specifically forbidden by federal law. So, for example, a German citizen could deny without violating the law that slavery ever occurred in the United States or that Stalin had millions of people murdered in the Soviet Union. But the law does not merely distinguish between false claims based upon geography. A German citizen could just as well deny that Germany had any role in World War I or deny that any East Germans were shot by border guards during escape attempts before the fall of the Berlin Wall.[127] The fact that the Bundestag chose to forbid only this particular historical lie, and that the Constitutional Court has provided the law with such a formidable constitutional foundation indicate that the law reflects very deeply held beliefs in German society (assuming, as I do, that the democratic process in Germany functions well).

{59} I believe this law is an excellent example of the fact that speech regimes do not differ for random or unimportant reasons, but for reasons that relate directly to the defining values of a given nation. It is, therefore, precisely in the differences among nations' free speech laws that each nation's unique central beliefs are reflected, which means that nations generally will be exceedingly resistent to any influence that threatens to iron out the intentional wrinkles in their speech regimes. The Internet, in its current, largely unregulated form, poses just this threat. For example, neo-Nazi speech, including Holocaust denials, now can be freely accessed by any Net-user in Germany.[128] It is, therefore, no surprise that many countries around the world, including Germany, are attempting to find ways to apply their current speech regimes to Net-speech. This process, I believe, is inevitable, and the extensive governmental efforts currently underway to regulate the Net affirm this belief. In the following section, I will give an overview of some such efforts in Germany and the European Union.[129]

C. Muzzling the Net -- The Inevitable Move Toward Regulation

1. German Regulation

{60} The activities of a wide range of German authorities in the last three years have left little doubt that Germany intends to apply its existing speech restrictions to the Internet. Prosecutors have investigated and filed criminal charges against Net users for transmitting or providing access to content that is illegal under German law. Politicians have called for the development of federal and international regulatory schemes to regulate illegal content on the Net. In addition, the federal legislature is considering legislative initiatives to bring the Net under the umbrella of existing law and to create Net-specific laws. This broad spectrum of activity suggests that the German government is determined to regulate Net content that violates existing limits on freedom of expression.

a. Prosecutional Activity

{61} The first major attempt by German authorities to apply existing content laws to the Net arose in the context of child pornography. In late 1995, the Office of the District Attorney for Munich launched an investigation into the German subsidiary of CompuServe, based on a suspicion that the company had violated laws forbidding the distribution of child pornography.[130] The prosecutors searched CompuServe's Munich offices, including some electronically stored data.[131] At the prosecutors' urging, the company shut down

access world wide to some 200 newsgroups that the German authorities identified to CompuServe as containing content in violation of German law.[132] CompuServe later found a more limited, technological solution in which the company denied its customers in Germany access to the newsgroups.[133] More recently, Bavaria set up a commission for the prevention of criminal activity over the Net.[134]

{62} Prosecutors have not limited their attention to access providers, but recently have targeted Net users as well. Bavaria, which is known as a politically conservative state, has not been the only locus of prosecutorial activities relating to Net content. For example, in early February 1997, a 23-year-old student in Bonn was charged by the local district attorney with abetting criminal activities by allegedly loading a "terrorist handbook" onto the Net via an American server.[135]

{63} In addition, in the most controversial prosecution relating to the Net in Germany, Angela Marquardt, a former leader and current member of the Party of Democratic Socialism, has been charged with, *inter alia*, abetting the direction of a criminal act by providing a link on her homepage to a Dutch online magazine that contained allegedly illegal information.[136] Marquardt was acquitted in June of 1997 of some charges but on November 14, 1997 was ordered to pay a fine of 1000 marks for distributing reports about an ongoing judicial proceeding over the internet.[137] The Dutch magazine, "radikal", contained an article called "A Small Guide to the Hinderance of All Types of Train Transports," which dealt with plans to sabotage German railways as a means to hinder the rail transportation of radioactive material.[138] Marquardt's homepage included a short text that she had written in opposition to violence in political activism and that called for a dialogue on militancy.[139] Her page was shut down at the demand of the Federal State's Attorney's Office, and the entire server that provided access to "radikal" also was closed. This shut off access not only to "radikal" but to thousands of other homepages as well.[140]

{64} The Marquardt case illustrates two important points about current efforts to regulate the Net. First, the will to regulate is very strong, and authorities are prepared to pursue not only access providers, but also users for providing access to illegal content. Second, the authorities' methods and current laws are inadequate to effectively close off access to illegal content. Despite the fact that CompuServe shut down Marquardt's homepage at the request of German authorities, the page quickly became available again with the same links via a different service provider.[141] And access to "radikal" by Net users around the world (including in Germany), if anything, has expanded greatly since the site was supposedly closed off to German users. The "radikal" homepage is now accessible via more than 50 servers around the world.[142] Given the clear will of German authorities to apply existing laws to the Internet, one can imagine that cases such as this will only lead to more urgent calls for effective mechanisms of regulating Net content.

b. Political Activity

{65} With one notable exception, federal politicians have been consistent in their public stance that illegal and harmful content on the Internet must be regulated through national legal reform and international agreements. The one exception is Justice Minister Edzard Schmidt-Jortzig, a member of the liberal Free Democratic Party, who has spoken out against efforts by the German government to regulate Net content. Schmidt-Jortzig said in an interview with the news magazine "Der Spiegel" that he wishes "we could get away without regulation based on the responsible actions of users."[143] The Minister recognized that the German state has legitimate interests to protect its citizens through such regulation, but argued that legislation limited to one country is bound to fail, because the Net "knows no borders."[144] He concluded that "for better or for worse, we must take leave of the idea that we can enforce German laws on the Internet."[145]

{66} Schmidt-Jortzig's ideas, however, appear to be well outside of the mainstream of German political thought. The most well-publicized statement in favor of Net regulation came from Family Minister Claudia Nolte, who called for the United Nations to aid in the development of international standards in order to prevent the dissemination of child pornography and neo-Nazi propaganda via the Net.[146] Nolte stated that,

"because the Internet knows no national borders, we will be able to protect youth only through international standards."[147] Nolte was calling for international standards, because she said such standards are necessary to enforce laws that are specifically German, such as laws against neo-Nazi speech. This apparently means that she wants a unified international free speech standard created by international enforcement agreements, but without a dilution of Germany's speech restrictions.

{67} The administration of Chancellor Helmut Kohl seems to agree with Nolte's approach, as it has called for a European Union-wide conference to discuss ways of controlling offensive content on the Net.[148] In addition, the Children's Council of the Bundestag and its chairman, Johannes Singhammer, have called for tougher regulations regarding Net content that could be harmful to children.[149]

{68} The notion that the German government fully intends to apply existing speech restrictions to the Net finds further support in a lengthy statement by the Federal Minister for Education, Science, Research and Technology, Jürgen Rüttgers. In the statement, Rüttgers addressed the legal framework for the legislative initiatives discussed below. He stated that "[t]he Federal Government will not tolerate the misuse of the global information highway for the dissemination of illegal content such as child pornography and extremism. National action is necessary, but it is not enough."[150] He proposed changes to the Criminal Code to include the Net within its scope, international agreements (through the G-7), a clarification of who can be held responsible for illegal content, and voluntary self-regulation to the extent that it can be effective, noting that the state should step in only when self-regulation fails.[151]

c. Legislative Activity

{69} Several legislative initiatives have been undertaken to create rules specific to the Internet and to codify existing laws to ensure their applicbility to the Net. The Bundestag (lower house of parliament) passed a law on July 22, 1997 called the Information and Communications Services Act, which holds Internet access and service providers liable for illegal content in two situations: (1) when the access or service provider is the source of the content; or (2) when the provider is not the source of the content but knows that the content is available through its service, and it is technologically feasible through reasonable efforts to restrict access to the content.[152] The law which was approved by the Bundesrat (upper house) on July 4, 1997 and which took effect on August 1, 1997, releases providers from liability for illegal content if the provider is not its source and is unaware of its existence.[153] The Act clearly presupposes that existing German speech restrictions apply to the Net and are to be enforced when possible. This presupposition becomes clearer in a later article of the law, which amends the Criminal Code and two civil laws relating to, *inter alia*, the dissemination of words that could be harmful to youth.[154] The changes to those laws insert language making it clear that the laws' existing provisions apply to the Internet.[155]

{70} The second major German legislative initiative is a so-called "State Treaty" among all 16 Federal States of Germany, which creates unified Internet regulations in all of the states.[156] This agreement, which was signed by the states in January and February of 1997 and took effect on August 1, 1997, includes the identical rules governing the legal liability of service and access providers as the Federal Information and Communications Services Act discussed above.[157] Similarly, the state agreement explicitly apllies existing limits on free speech to the Internet, including laws for the protection of personal honor.[158] It specifically restates some of the provisions of the law against racist speech (i.e. § 130 of the Criminal Code, previously discussed in this paper) and proscribes Internet content that promotes hatred of racial or ethnic groups or portrays as harmless gruesome acts against such groups.[159] Finally, the agreement permits individual states to forbid illegal content on the Net and to order that access to such content be terminated.[160] This "State Treaty" and the federal law discussed above demonstrate the clear determination of the federal and state governments in Germany to apply existing speech restrictions to the Net, including those restrictions that are unique to Germany.

2. European Union Regulatory Initiatives

{71} The European Union (E.U.) has produced a wealth of reports and studies relating to the regulation of illegal content on the Internet, but it has yet to take any action.[161] The European Parliament recently hired a British engineering firm to conduct a six-month study of the feasibility of using technological mechanisms to regulate pornographic and racist materials on the Net. In a 1996 report, the European Commission discussed ongoing initiatives at the national level throughout the E.U. and concluded that the authority to prosecute and punish people responsible for illegal Net content should remain with the member states.[162] While the Commission supported self-regulation, including a code of conduct for service providers, it emphasized that national laws still apply to the Net and that self-regulation does not excuse Net users and service providers from prosecution for violations of existing laws.[163] Finally, the Commission endorsed the idea of international agreements allowing cooperation among police and judicial systems beyond the borders of the E.U.[164] This idea found additional support among the telecommunications ministers of the E.U. member states, who called for international cooperation through the World Trade Organization and the Organization for Economic Cooperation and Development.[165]

{72} The ideas expressed in these reports were echoed in another report from late 1996, which called for international agreements, a clarification of responsibility for illegal content and limited self-regulation.[166] This report stressed that national laws do apply to the Net and asserted that the Net "does not exist in a legal vacuum."[167] In addition, this report addressed the difficulty of enforcing laws in the Internet context and called for an agreement among all service providers around the world to remove content that a government decides is illegal in its country.[168] If this idea seems implausible, the report suggested, "an alternative might be to block access at the level of access providers."[169]

{73} Yet another study on this topic, called a "Green Paper", was written by the European Commission in late 1996. In this study, the Commission called for an E.U.-wide definition of what content should be considered illegal on the Net and for expanded police and judicial cooperation and emphasized international approaches to illegal Net content.[170] Like most of the other reports discussed here, the Green Paper endorsed the PICS labeling standards and the use of filtering systems to control illegal content.[171]

{74} In a resolution passed on February 17, 1997, the European Council noted the contents of these reports in calling for self-regulation, the continued development of filtering mechanisms and rating of sites, and more study of the question of legal liability for Net content.[172] Given the wealth of information that has been gathered by the E.U.'s various bodies, it is apparent that the E.U. takes seriously the issue of Internet regulation. Its work up until this time has shown a recognition of the intention of member states to apply their own speech laws to Net content, and one can expect any E.U. regulatory effort to preserve the differences among member states' speech regimes.

IV. Conclusion

{75} The Internet represents an unparalleled forum for locating information, establishing contact with people from around the world and engaging in discussion of virtually any topic imaginable. However, its very openness also means it presents unequalled opportunities for the dissemination of speech which would be outlawed by various countries were it to be expressed by means of a different medium. As an American, I believe in the idea that the best antidote for poisonous hate speech is more speech. But I am less convinced that this maxim applies with equal force to other societies. The German example is telling. A law forbidding the Auschwitz Lie would fail constitutional challenge in the United States because we believe our democratic discourse functions best without prohibitions on such historical lies. But such a law has passed constitutional muster in Germany because much of German society believes public discourse in that country is improved by

the prohibition of that particular lie.

{76} The example may be obvious, but I propose it reveals that democracies do not necessarily view an unregulated Internet as a more democratic institution than a Net with particular speech restrictions. Rather, democratic societies are almost certain to impose their existing speech regimes on the Net precisely because they believe such restrictions will ensure the Net's positive role in their democracies. The myriad regulatory efforts currently underway support this contention. Given the inevitability of Net regulation, I think Net users in every country, despite their wish that the Net could remain in its current, largely unregulated state, should take a leading role in guiding regulation. These users know far more about the positive aspects of the Net than an average member of the U.S. Congress or the German Bundestag, and they are the segment of society that will be most directly affected by future regulation. Net users have both the knowledge and the incentive to help their governments find the most effective, yet least restrictive, regulatory scheme possible. If the thought of any regulation of the Net causes users to shudder, the idea that laws will be written by Net-ignorant legislators without the benefit of those users' experience and knowledge should give them nightmares.

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[**]**NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

James J. Black, Free Speech & The Internet: The Inevitable Move Toward Government Regulation, 4 RICH. J.L. & TECH. 1, (Winter 1997), *at* http://www.richmond.edu/~jolt/v4i2/black.html.

[1] *See*, *e.g.*, Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 Yale L.J. 1619 (1995); Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 Conn. L. Rev. 1137 (1996); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 Harv. L. Rev. 1062 (1994).

[2] *See*, *e.g.*, Franz C. Mayer, *Recht und Cyberspace*, NJW 1996, at 1782, 1789; Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 Geo. L.J. 1969, 1980, 1987 (arguing that filtering software cannot effectively implement such laws as those banning obscenity because "[s]creening software cannot possibly determine whether an online conversation, story, or image appeals to prurient interest and, taken as a whole, lacks serious literary, artistic, political, or scientific value. Still less can it determine whether the posting offends 'community standards.'"); Online Interview with Ken McVay & Jamie McCarthy, Nov. 2, 1996 (visited Feb. 15, 1998) <http://www.spiegel.de/archiv/> . For online campaigns against filtering of Net content for a variety of reasons, see, for example, *The Campaign for Internet Freedom* (visited Feb. 15, 1998) <http://www.easynet.co.uk/cam/censorship/index.html> ; *The Net Labelling Delusion* (visited Feb.

15, 1998) <http://www.pobox.com./~rene/liberty/label.html>.

[3] *See*, *e.g.*, Meyer, *supra* note 2, at 1989 (quoting a Cyberspace aphorism popular among computer hackers to the effect that, for every roadblock, there is a detour.).

[4] *See* Paul Resnick, *Filtering Information on the Internet*, Sci. Am., Mar. 1997, 106-08; Paul Resnick & James Miller, *PICS: Internet Access Controls Without Censorship* (visited Mar. 29, 1998) <http://www.w3.org/PICS/iacwcv2.htm>; *PICS Statement of Principles* (visited Mar. 29, 1998) <http://www.w3.org/PICS/principles.html>; Will Rodger, '*Censorship Server*' *Could Enforce Decency Act*, Interactive Week, Mar. 25, 1996, (visited Feb. 15, 1998) <http://www.zdnet.com/intweek/print/960325/upfront/doc7.html>.

[5] *See* Resnick & Miller, *supra* note 4; *PICS Statement of Principles*, *supra* note 4.

[6] *Id*.

[7] *See generally* Resnick & Miller, *supra* note 4; *The Ratings Game: Making the Web Safer with PICS*, (visited Feb. 15, 1998) <http://www.ibm.com/Stories/1997/03/pics1.html>.

[8] *See generally* Resnick & Miller, *supra* note 4.

[9] *See* Eugene Volokh, *Speech and Spillover* (visited Feb. 15, 1998) <http://www.slate.com/Feature1/96-07-18/Feature1.asp>.

[10] *See* Rodger, *supra* note 4.

[11] *See id*.

[12] *See id*.

[13] For an upbeat assessment of the possibility of a technological solution, see Mike Godwin & Hal Abelson, *Response to Volokh Article "Speech and Spillover"*, July 30, 1996 (visited Feb 15, 1998) <http://www.eff.org/pub/Publications/Mike_Godwin/HTML/960730_godwin_abelson_filter_letter.html>. For a description of a ratings service that has rated over 300,000 sites, see *About the Content Rating Service*, 1997 (visited Mar. 2, 1998) <http://www.w3.org/PICS/>. *See also* Albert Pang, *To Block or Not to Block: Corporations Wrestle with Filtering Internet Use*, ZD Internet Magazine, Apr. 1997, (visited Sept. 30, 1997) <http://www.zdimag.com/icom/contents/anchors/199704/28/3.html>; Eamonn Sullivan, *Controlling Net Usage Effectively with Tattleware*, PCWeek Online, Apr. 7, 1997 (visited Feb. 15, 1998) <http://www.pcweek.com/opinion/0407/07isigh.html>.

[14] *See Position Paper of the Electronic Frontier Foundation to the U.S. Dept. of Commerce's National Telecommunications and Information Administration*, Apr. 26, 1993 <http://www.eff.org/> (quoting Justice Brandeis' concurring opinion in Whitney v. California, 274 U.S. 357 (1927) ; Online Interview with Ken McVay & Jamie McCarthy, *supra* note 2.

[15] *See* Gerd Rollecke, *Der Rechtsstaat für einen Störer! -- Erziehung vs. Internet?*, NJW 1996, at 1801.

[16] *See*, *e.g.*, David R. Johnson, *Taking Cyberspace Seriously: Dealing with Obnoxious Messages on the Net* (visited Feb. 15, 1998) <http://www.eff.org/pub/Censorship/content_regulation_johnson.article>; David R. Johnson & David G. Post, *Law and Borders -- The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996).

[17] *See* Douglas Barnes, *The Coming Jurisdictional Swamp of Global Internetworking*, (visited Feb. 15,

1998) <http://www.eff.org/pub/Legal/anon_juris.article>; Johnson & Post, *supra* note 16; David R. Johnson, *Jurisdictional Quid Pro Quo and the Law of Cyberspace*, July 12, 1994 (visited Feb. 15, 1998) <http://www.eff.org/pub/Legal/cyberjuris_quidproquo_johnson.article>.

[18] The very question of whether a given court may exercise jurisdiction over a Net user presupposes that one can reliably trace illegal Net content to its origin. Another problem that has received some scholarly attention and that could undermine any regulatory efforts, is the possibility of user anonymity, whereby the source of any given content would be virtually untraceable. This issue, however, is beyond the scope of the present article. For comments on the topic, see Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 Yale L.J. 1639 (1995); A. Michael Froomkin, *Anonymity and Its Enmities*, 1995 J. Online L. art. 4 (visited Feb. 15, 1998) <http://www.law.cornell.edu/jol/froomkin.htm>.

[19] *Id*.

[20] This discussion will be limited to U.S. jurisdictional principles and U.S. court rulings.

[21] *See, e.g*., Dan L. Burk, *Federalism in Cyberspace*, 28 Conn. L. Rev. 1095, 1123 (1996); William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 Wake Forest L. Rev. 197, 219 (1995); Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in this New Frontier*, 59 Alb. L. Rev. 1083, 1130 (1996) (quoting International Shoe Co. v. Washington, 326 U.S. 310)

[22] *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that the Due Process Clause of the Fourteenth Amendment mandates that state courts may exercise personal jurisdiction over only those defendants who have sufficient "minimum contacts" to the forum state).

[23] Dan L. Burk, *Federalism in Cyberspace*, 28 Conn. L. Rev. 1095, 1123 (1996).

[24] William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 Wake Forest L. Rev. 197, 219 (1995).

[25] Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in this New Frontier*, 59 Alb. L. Rev. 1083, 1130 (1996), (quoting International Shoe Co. v. Washington, 326 U.S. 310). <http://www.eghs.com/albany1.html>

[26] *See id*. at 1133.

[27] *See* Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 715, 719 (Minn. Ct. App. 1997), *aff'g* 65 U.S.L.W. 2440 (D. Minn. Dec. 11, 1996) (No. C6-95-7227) available at <http://www.jmls.edu/cyber/cases/ggorder.html>

[28] Minn. Atty. Gen. Hubert H. Humphrey, III, *Memo on Jurisdiction*, (visited Feb. 15, 1998) <http://www.state.mn.us/ebranch/ag/memo.txt>.

[29] *Id*.

[30] *See also* United States v. Thomas, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 74 (1996) (holding that the defendants, who ran a company that distributed sexually explicit images via the Internet from their home in California, could be prosecuted under the anti-pornography laws and based on the community standards of the Eastern District of Tennessee, as the defendants knew that their Internet transmissions were being received by customers in that locale). The Court held that, if the defendants had wished to avoid being

subject to the laws and community standards of Tennessee, they should have rejected registration applications from potential customers who lived there. *See id*. <http://laws.findlaw.com/6th/960032p.html>

[31] 939 F.Supp 1032 (S.D.N.Y. 1996).

[32] Playboy Enterprises, Inc. v. Chuckleberry, 511 F. Supp. 486 (S.D.N.Y. 1981).

[33] Playboy Enterprises, Inc. v. Chuckleberry, 939 F.Supp 1032, 1039 (S.D.N.Y. 1996). <http://www.jmls.edu/cyber/cases/playmen.txt>

[34] *Id*. at 1040.

[35] Salman Rushdie, The Satanic Verses (1989) (referring to the death sentence that the fundamentalist Islamic government of Iran handed down in absentia for Rushdie's allegedly blasphemous novel).

[36] *See* United States v. Alvarez-Machain, 504 U.S. 655, 112 S. Ct. 2188 (1992) <http://laws.findlaw.com/US/504/655.html>.

[37]. Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) <http://laws.findlaw.com/6th/960228p.html>.

[38] *Id*. at 1266.

[39] *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996).

[40] *See id*.

[41] Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 415 (1997). *See also* Statement of Minn. Atty. Gen., *supra* note 26. <http://www.bna.com/e-law/cases/granite.html>

[42] U.S. CONST., amend. I. <http://www.findworld.com/data/Constitution/amendments.html>

[43] *See e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) <http://laws.findlaw.com/US/505/377.html>; Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) <http://laws.findlaw.com/US/502/105.html>; Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980) <http://laws.findlaw.com/US/447/530.html>.

[44] 315 U.S. 568. <http://laws.findlaw.com/US/315/568.html>

[45] *Id*. at 569.

[46] *Id*.

[47] *Id*. at 571-72.

[48] *Id*. at 572.

[49] *Id*. at 573.

[50] *See* DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT 174 n.30 (1985). Downs discusses a line of cases that arose in the context of the civil rights movement and established the principle that a hostile crowd could not be allowed to silence an unpopular

speaker, thus requiring police protection of such speakers, see *id*.., and cites Edwards v. South Carolina, 372 U.S. 229 (1963) <http://laws.findlaw.com/US/372/229.html>, Cox v. Louisiana, 379 U.S. 536 (1965) <http://laws.findlaw.com/US/379/536.html>, Gregory v. Chicago, 394 U.S. 111 (1969) <http://laws.findlaw.com/US/394/111.html>, and Cohen v. California, 403 U.S. 15 (1971) <http://laws.findlaw.com/US/403/15.html>. Downs argues that these cases, which essentially declared that a local or state government's failure to prevent a so-called "heckler's veto" would amount to a violation of an unpopular speaker's free speech rights, shifted the emphasis in cases involving arguably offensive speech from the effects on the addressee to the protection of the speaker's rights. He argues further that the *Chaplinsky* decision properly emphasized substantive justice (based on judgments as to the social value of a speaker's words and the harm to the addressee of offensive speech), while the *Cohen* decision and its progeny wrongly favor the idea of procedural justice (which eschews substantive judgments of the value of a given speaker's offensive speech). Downs maintains that *Cohen* and subsequent decisions undermine the *Chaplinsky* fighting words doctrine in three ways: (1) by limiting the application of the fighting words doctrine to cases involving a captive audience; (2) by ignoring the *Chaplinsky* court's idea that some speech may itself inflict harm on addressees; and (3) by expressing "extreme moral skepticism" in refusing to differentiate between offensive speech that deserves protection and that which does not, see *id*., at 11.

[51] 491 U.S. 397 (1989).

[52] *Id*. at 406.

[53] *Id*. at 407 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968) <http://laws.findlaw.com/US/391/367.html>).

[54] Texas Penal Code Ann. § 42.09 (West 1989), *quoted in* 491 U.S. at 400, n.1.

[55] 491 U.S. at 407-08.

[56] *Id*. at 408.

[57] *Id*. at 408-09 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

[58] 395 U.S. 444 (1969)

[59] 491 U.S. at 409.

[60] *Id*.

[61] 315 U.S. 568, 573 (1942).

[62] 491 U.S. at 409.

[63] 496 U.S. 310 (1990) <http://laws.findlaw.com/US/496/310.html>.

[64] 18 U.S.C. § 700 (1994) (*quoted in* 496 U.S. at 314, n.3) <http://www.law.cornell.edu/uscode/18/700.shtml>.

[65] 496 U.S. at 315 (quoting Brief for the United States at 28, 29).

[66] 496 U.S. at 315.

[67] *Id*.

[68] *See id*.

[69] *Id*. (emphasis in original) (quoting Johnson, 491 U.S. at 410).

[70] *Id*. at 316-17.

[71] *Id*. at 317.

[72] *See id*. at 318.

[73] *See id*.

[74] *Id*. (quoting Brief for United States at 27).

[75] *Id*. at 318-19 (quoting Johnson, 491 U.S. at 414) (other citations omitted).

[76] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[77] The law in question provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or 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. at 380 (quoting ST. PAUL, MINN., LEGIS.CODE § 292.02 (1990)).

[78] *Id*. at 381.

[79] *Id*.

[80] *Id*. at 386-88. For spirited refutations that such a principle exists in American constitutional law, see *id*. at 397, the opinions of Justices White, Blackmun and Stevens concurring in the judgment.

[81] The Court held that the ordinance was unconstitutional because the ordinance only prohibited fighting words that were related to "race, color, creed, religion, or gender," but did not prohibit fighting words that were based on other topics such as "political affiliation, union membership, or homosexuality." *Id*. at 391.

[82] This is not to say that the Court's movement to limit the range of permissible content-based restrictions on offensive speech began with the three cases discussed here. *See*, *e.g*., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) <http://laws.findlaw.com/US/485/46.html>; FCC v. Pacifica Foundation, 438 U.S. 726 (1978) <http://laws.findlaw.com/US/438/726.html>; Hess v. Indiana, 414 U.S. 105 (1973) <http://laws.findlaw.com/US/414/105.html>; Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780 (1971) <http://laws.findlaw.com/US/403/15.html>; Terminiello v. Chicago, 337 U.S. 1.(1949) <http://laws.findlaw.com/US/337/1.html>

[83] 274 U.S. 357 (1927) (overruled in part by Brandenberg v. Ohio, 395 U.S. 444 (1969).

[84] *Id*. at 377.

[85] Texas v. Johnson, 491 U.S. 397, 419 (1989) <http://laws.findlaw.com/US/491/397.html>.

[86] *Id*. at 420.

[87] DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT 3 (U. Notre Dame Press 1985).

[88] MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT, 31-32 (Westview Press, 1993) (citations omitted)(arguing that counter expression is the preferred means of exposing disfavored speech).

[89] OWEN M. FISS, THE IRONY of Free Speech, 3 (Harvard Univ. Press, 1996).

[90] *See generally* Texas v. Johnson, 491 U.S. 397; DOWNS; FISS; MATSUDA.

[91] The Basic Law states: "Everyone has the right to freely express his opinion in word, writing and image . . . . " Art. 5(1) GG. (NB: All translations from German-language texts are from the author of this article).

[92] *Id*. at Art. 5(2) GG.

[93] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (holding that even categories of speech that may be proscribed under the Constitution are not entirely beyond the Constitution) <http://caselaw.findlaw.com/scripts/getcase.pl?navby=case&court=US&vol=505&page=377>.

[94] *See*, *e.g*., Ruling of Jan. 11, 1994, NJW 1994, 1781, 1782; Dieter Grimm, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts*, NJW 1995, 1697, 1699.

[95] Ruling of Jan. 11, 1994, NJW 1994, 1781, 1782, citations omitted; *see also* Grimm, *supra* note 87, at 1699.

[96] Grimm, *supra* note 87, at 1702.

[97] Ruling of Jan. 15, 1958, NJW 1958, 257, 258.

[98] *Id*.; *see also* Grimm, *supra* note 87, at 1700.

[99] GG Art. 5(2).

[100] *See* Grimm, *supra* note 87, at 1702.

[101] *Id*.

[102] *Id*.

[103] *Id*. at 1703; *see also* GG, Art. 1 (1); Ruling of October 10, 1995, NJW 1995, 3303, 3304.

[104] Grimm, *supra* note 87, at 1703.

[105] *Id*. at 1703; *see also* Ruling of October 10, 1995, NJW 1995, 3303, 3304.

[106] Ruling of Feb. 25, 1993, NJW 1993, 1462.

[107] *Id*.

[108] *Id*. at 1463; *see also* Ruling of June 26, 1990, NJW 1991, 95; Ruling of March 25, 1992, NJW 1992, 2073.

[109] *See* Ruling of October 10, 1995, NJW 1995, 3303, 3307.

[110] *Id*. at 3307-09.

[111] *See* Ruling of June 26, 1990, NJW 1991, 95; Ruling of March 25, 1992, NJW 1992, 2073.

[112] For arguments in favor of greater restrictions on speech in the interest of providing broader protection for personal honor, *see*, *e.g*., Martin Kriele, *Ehrenschutz und Meinungsfreiheit*, NJW 1994, 1897 ("In the zeal of its stepping in for freedom of expression, (the Court) has overlooked the importance of protecting personal honor for human dignity and for democracy."); Ralf Stark, *Die Rechtsprechung des BVerfG zum Spannungsverhältnis von Meinungsfreiheit und Ehrenschutz*, JuS 1995, 689 (arguing that the Court's decisions wrongly privilege freedom of expression over personal honor, which is "another step in the direction of an honorless society."). For arguments in support of the Court's recent decisions or in favor of expanded free expression rights, *see*, *e.g*., Georgios Gounalakis, "*Soldaten sind Mörder*", NJW 1996, 481 (arguing that such questions as the legitimacy of the armed forces and their actions in wartime are "central societal problems that no court, including the Federal Constitutional Court, can . . . solve. . . . They must be discussed by society in open discourse."); Jörg Soehring, *Ehrenschutz und Meinungsfreiheit*, NJW 1994, 2926 (criticizing Kriele's "onesided," "polemical" and potentially "misleading" treatment of the Court's recent rulings and defending those rulings.

[113] § 130 III Strafgesetzbuch (Penal Code).

[114] *See,* Daniel Beisel, *Die Strafbarkeit der Auschwitzlüge*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 997, 1001 (1995).

[115] *Id*. at 999.

[116] 505 U.S. 377 (1992) <http://laws.findlaw.com/US/505/377.html>.

[117] *See*, *e.g*., Ruling of April 13, 1994, NJW 1779, 1780 (1994); for prior judicial recognition of the truth of the Holocaust, *see* Ruling of the German Supreme Court of September 9, 1979, NJW 45 (1980); Ruling of the Constitutional Court of June 9, 1992, NJW 916 (1993).

[118] *See* Grundgesetz [Constitution] [GG] art. 5(2) (F.R.G.).

[119] *See*, *e.g*., Ruling of April 13, 1994, NJW 1779 (1994).

[120] *Id*.

[121] *Id*. at 1780.

[122] *See*, *e.g*., Stefan Huster, *Das Verbot der "Auschwitzlüge", die Meinungsfreiheit und das Bundesverfassungsgericht*, NJW 487, 488 (1996); Beisel, *supra* note 105, at 1000.

[123] Beisel, *supra* note 105, at 1000.

[124] *Id*.

[125] *See id*. at 1001.

[126] *See id*. at 1000.

[127] These statements, of course, could be forbidden without constitutional implications if the prohibition applied only to purely factual statements (as in the simple Auschwitz Lie). My point, however, is that such statements likely could not be forbidden if stated as part of a broader opinion (bringing the statements under constitutional protection), as that would require a weighing of rights in order to justify the limitation of free expression. I doubt seriously that the Constitutional Court would find that the prohibition of such lies would be justified for the sake of protecting another constitutional right such as personal honor.

[128] *See* Spiegel Online Interview with Ken McVay & Jamie McCarthy, *supra* note 2 <http://www.spiegel.de/archiv/>.

[129] I will not address U.S. regulatory efforts, as they have been widely discussed in other articles. The Supreme Court's ruling in ACLU v. Reno, 117 S.Ct. 2329 (1997), is available on-line at <http://www.eff.org/pub/Legal/Cases/ACLU_v_Reno/>. In that decision, the Supreme Court struck down the Communication's Decency Act of 1996, (Pub.L. No. 104, Stat. (1996), as an unconstitutional limitation on first amendment free speech rights. The law sought to ban, inter alia, "indecent" net speech. See also lower court rulings in Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y 1996) (avail. online at <http://www.eff.org/pub/Legal/Cases/Am_Reporter_v_DoJ/960729.decision>.) and ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (avail. online at <http://www.eff.org/pub/Censorship/Internet_censorship_bills/HTML/960612_aclu_v_reno_decision.html>.) A transcript of Supreme Court oral arguments is available on-line at <http://www.aclu.org/issues/cyber/trial/sctran.html>. In addition, it is difficult to assess the American situation, as the legality of the primary federal regulatory effort remains unresolved at the time of this writing. The Communications Decency Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56 (1996) (partially overruled by ACLU v. Reno, 117 S.Ct. 2329 (1997)) which would ban, among other things, "indecent" communications via the Internet, was quickly challenged on various grounds, most notably over breadth, in the federal district courts for the Southern District of New York and the Eastern District of Pennsylvania. (Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y 1996) avail. online at <http://www.eff.org/pub/Legal/Cases/Am_Reporter_v_DoJ/960729.decision>; ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), avail. online at <http://www.aclu.org/issues/cyber/trial/sctran.html>. <http://www.eff.org/pub/Censorship/Internet_censorship_bills/HTML/960612_aclu_v_reno_decision.html>.) Both courts found the law unconstitutional, and the United States has appealed the Pennsylvania ruling to the Supreme Court. Oral arguments were heard on March 19, 1997 in that appeal, (Transcript of Oral Arguments in Reno v. ACLU, avail. online at <http://www.aclu.org/issues/cyber/trial/sctran.html>.), and a decision is forthcoming.

[Editor's Note: The Supreme Court affirmed Reno v. ACLU on June 26, 1997, Justice Stevens wrote the opinion for the Court. (Reno v. ACLU, 117 S. Ct. 2329 (1997) (O'Conner, J., concurring in judgement in part and dissenting in part; Rehnquist, C.J., joined).]

[130] *See NJW-CoR Online Computerreport* 130 (Feb. 1996) <http://www.beck.de/njw-cor/>.

[131] *Id*.

[132] *Id*.

[133] *Id*.

[134] *NJW-CoR Online Computerreport* 182 (Mar. 1997) <http://www.beck.de/njw-cor/>.

[135] *NJW-CoR Online Computerreport* 123 (Feb. 1997) <http://www.beck.de/njw-cor/>.

[136] *See NJW-CoR Online Computerreport* 115 (Feb. 1997) <http://www.beck.de/njw-cor/>; *Internet-*

Magazin 18-20 (Apr. 1997) <http://www.teleserv.co.uk/dmv/int_mag.htm>; *see also* Angela Marquardt, *Willkommen auf meiner HausSeite!!* (visited Oct. 5, 1997) <http://yi.com/home/MarquardtAngela/>.

[137] *NJW-CoR Online Computerreport*, *supra* note 124.

[138] *See* Angela Marquardt, *Charging Letter of the Berlin District Attorney's Office of Oct. 29, 1996* (visited Oct. 5, 1997) <http://yi.com/home/MarquardtAngela>.

[139] *NJW-CoR Online Computerreport*, *supra* note 125.

[140] *Internet-Magazin*, *supra* note 125, at 20.

[141] *NJW-CoR Online Computerreport*, *supra* note 125.

[142] *Internet-Magazin*, *supra* note 125.

[143] Der Spiegel, *Willkommen beim Spiegel-Archiv* 102-04 (Nov. 1996) <http://www.spiegel.de/archiv/>.

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[145] *Id*.

[146] *NJW-CoR Online Computerreport* 392 (June 1996) <http://www.beck.de/njw-cor/>.

[147] *Id*.; *see also* Claudia Nolte, *Information on Nolte Online* <http://206.2.58.40/close-up/nolte.htm>; Claudia Nolte, *A report about Nolte's statements* <http://fight-censorship.dementia.org>.

[148] *NJW-CoR Online Computerreport*, *supra* note 135.

[149] *NJW-CoR Online Computerreport* 148 (Mar. 1996) <http://www.beck.de/njw-cor/>.

[150] Schwerpunktthema aktuelles, *Statement von Bundesminister Dr. Jürgen Rüttgers zu den Rechtlichen Rahmenbedingungen für neue Informations- und Kommunikationsdienste* (visited May 2, 1996) <http://www.bmbf.de/>.

[151] *Id*.

[152] Gesetz zur Regelung der Rahmenbedingungen für Informations - und Kommunikationsdienste, BGBI. I.S. 1870, Art. 5, *avail. online at* <http://www.iid.de/rahmen/iukdgk.html>.

[153] *Id*.; *see also*, Press Release of July 4, 1997, *avail. online at* <http://www.iid.de/aktuelles/presse/presse/pm040797.html>.

[154] *See id*.,Art. 4-6.

[155] *See id*.

[156] Mediendienste - Staatsvertrag, *avail. online at* <http://www.uni-muenster.de/Jura.itm/netlaw/mdsvnw.html>.

[157] *Id*. at § *5*.

[158] *Id*. at § 7(1).

[159] *Id*. at § 8.

[160] *Id*. at § 18(2).

[161] See Internet Magazin, *supra* note 154.

[162] *European Commission, Report of the Working Party on Illegal and Harmful Content on the Internet, 1996*, (visited Oct. 5, 1997) <http://www2.echo.lu/legal/en/internet/content/wpen.html>. For various official reports on the European Ministerial Conference entitled "Global Information Networks" which took place July 6-8, 1997 in Bonn, see <http://www2.echo.lu/bonn/conference.html>; for the latest European Commission documents on Net regulation, see <http://www2.echo.lu/best-use/best-use.html>.

[163] *Id*.

[164] *Id*.

[165] *See Gemeinschaftliche Regelung des Internet, Bundesministerium für Bildung, Wissenschaft, Forschung und Technologie, 1996*, (Oct. 5, 1997) <http://www.bmbf.de/>.

[166] *European Commission, Illegal and Harmful Content on the Internet, Communication to the European Parliament, the Council, the Economic and Social Committees and the Committee of the Regions, 1996*, (visited Oct. 5, 1997) <http://www2.echo.lu/legal/en/internet/content/communic.html>.

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[168] *Id*.

[169] *Id*.

[170] *European Commission, Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services, 1996*, (visited Oct. 5, 1997) <http://www2.echo.lu/legal/en/internet/content/gpen-toc.html>.

[171] *Id*.

[172] Council Resolution of February 17, 1997, 40 O.J. C70/1, March 6, 1997; *see also* Council Conclusions of February 17, 1997, 40 O.J. C70/1.

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