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Proposal for Regulating Hate Speech in the United States: Balancing Rights under the International Covenant on Civil and Political Rights

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A Proposal for Regulating Hate Speech in the United States: Balancing Rights Under the International Covenant on Civil and Political Rights

I. INTRODUCTION

This Note seeks a better approach to regulating hate speech in the United States—an approach comporting with our notions of freedom of speech under the First Amendment, but also drawing inspiration from the international approach, which protects the rights and needs of the listener in free speech controversies. By comparing the United States Supreme Court's approach to speech with the international approach exemplified in the United Nations International Covenant on Civil and Political Rights ("ICCPR"),¹ I hope to synthesize the best of both approaches into a workable exception to our broad freedom of speech, an exception promoting antidiscrimination principles and specifically recognizing the harm to the victim.

To this end, Part II describes the conflict between free speech and hate speech prohibitions, and demonstrates the need for reconciliation of the opposing views. It includes a description of the confusion and inconsistency in this area today, which not only calls for a solution, but shows that the search for a workable solution is still taking place, even in the Supreme Court. Part III describes the current broad interpretation of the First Amendment with respect to hate speech, especially as demonstrated in *R.A.V. v. St. Paul*.² Part IV defines the international approach and how the United States has failed to apply it. Part IV also demonstrates how and why the ICCPR can be used to refocus our approach to hate speech. Part V synthesizes the United States and international

1 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], reprinted in MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1987). The ICCPR entered into force internationally on March 23, 1976; the Senate gave its advice and consent on April 2, 1992; the United States deposited its instrument of ratification with the United Nations [hereinafter U.N.] on June 8, 1992; and the ICCPR entered into force for the United States on September 8, 1992. See David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77, 77 (1993).

2 112 S. Ct. 2538 (1992).

approaches into a workable alternative solution by providing a set of factors that should be balanced against each other when regulating hate speech.

II. THE PROBLEM

A. *The Two Sides of the Problem—Free Speech v. Hate Speech*

Congress shall make no law . . . abridging the freedom of speech³

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.⁴

The first quoted statement, the First Amendment free speech clause, has been extended by the United States Supreme Court⁵ to protect hate speech.⁶ The second statement demonstrates the

3 U.S. CONST. amend. I.

4 ICCPR, *supra* note 1, art. 20(2), *reprinted in* BOSSUYT, at 403.

5 The United States Supreme Court can "extend" the meaning and application of constitutional provisions because it is the ultimate interpreter of the Constitution. This idea was first articulated by Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The Court is also the final reviewing authority for all state acts under the Constitution, laws, and treaties of the U.S. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

6 "Hate speech" is generally defined in words similar to those used in Article 20 of the ICCPR—speech "advocating" or "inciting" acts of discrimination or violence towards a group of people or an individual based on hatred for their nationality, race, religion, or any other immutable characteristic. *See* ICCPR, *supra* note 1, art. 20, *reprinted in* BOSSUYT, at 403; *see also* International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 4, 660 U.N.T.S. 195. "Hatred is an active dislike, a feeling of antipathy or enmity connected with a disposition to injure." Karl J. Partsch, *Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination*, in *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION* 21, 22 (Sandra Coliver ed., 1992).

Hate "speech" includes expressive conduct like crossburning. Nonverbal speech was first recognized as "speech" in *Stromberg v. California*, 283 U.S. 359 (1931). While there are various nuances in the differing treatments of speech and conduct in First Amendment jurisprudence, this Note utilizes a generalized free speech notion that assumes similar protection for all types of expression. Therefore, throughout this Note, "speech," "expression," "expressive conduct," and "advocacy" are used interchangeably. First Amendment speech protection is applicable not only to Congress, but also to the states through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

It is difficult to define hate speech categorically and rigidly because it necessarily depends on the circumstances, and on the reactions and intentions of the parties involved. For example, "A black family enters a coffee shop in a small . . . town. A white man places a card on their table. The card reads, 'You have just been paid a visit by the Ku Klux Klan.'" Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2320 (1989) (footnote omitted). As another example: "A

general international approach to hate speech—the prohibition of hate speech by law. At first glance, our First Amendment jurisprudence and the ICCPR do not seem compatible.⁷

However, the international approach and hate speech legislation should not be dismissed as inconsistent with the First Amendment.⁸ The Supreme Court can directly address the negative ef-

law student goes to her dorm and finds an anonymous message posted on the door, a caricature image of her race, with a red line slashed through it." *Id.* These examples depict the kinds of situations in which hate speech regulations will be relevant. However, even these scenarios may not categorically and definitely represent hate speech, especially as the "speaker" is using his freedom of speech. *See infra* Parts II.B. and III.D.1 (describing various considerations for hate speech regulation).

In addition, hate speech and its broad consequences seem to cross the boundaries of traditional speech categories—political, scientific, libel, fighting words, incitement to crime or violence. Thus, a closely defined hate speech category would overlap and further confuse these other various categories. Perhaps such confusion is the reason for the courts' current inability to effectively define and address hate speech. As Justice Harlan stated: "Every communication has an individuality and 'value' of its own [I]n the nature of things every . . . 'suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressible" *Roth v. United States*, 354 U.S. 476, 497 (1957) (Harlan, J., dissenting). This distaste for categorically defining speech also surfaces in the Canadian approach to speech controversies. *See infra* Part V. At any rate, I will define hate speech through the case-by-case balancing test developed in Parts IV and V.

7 The cases and statutes under which this conflict in approaches and terms would become relevant, and possibly dispositive, include hate speech ordinance challenges under the Constitution, such as *R.A.V.*, or enforcement challenges under Civil Rights Statutes, such as 42 U.S.C. 1983 (1988).

8 While some Supreme Court Justices have advocated a strict, absolutist view of free speech—notably Justices Black and Douglas (*see, e.g.,* *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961))—most do not fully subscribe to it; rather, most Justices would generally leave open narrow exceptions under which freedom of speech can be balanced away to accommodate some higher right or need. Justice Harlan, for example, is also noted for the balancing approach he expounded in *Konigsberg*. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 942-44 (4th ed. 1991).

However, freedom of speech does occupy a heavily "preferred position." *See* *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). "[T]he United States affords more legal protection than is even conceivable in most (and probably all) other democratic countries." Floyd Abrams, *Hate Speech: the Present Implications of a Historical Dilemma*, 37 VILL. L. REV. 743, 743 (1992). While not providing absolute protection to all speech in every given situation, the Court has protected a broad range of expression, including some speech that is often arguably detrimental to the common good of society. *See, e.g.,* *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992) (protecting crossburning); *United States v. Eichman*, 496 U.S. 310 (1990) (protecting flag burning as expressive conduct); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (protecting a newspaper publishing the name of a rape victim); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (protecting libelous news articles about a private citizen by expanding *New York Times Co. v. Sullivan* to include anyone of special prominence in the community); *Gooding v. Wilson*, 405 U.S. 518 (1972) (protecting a defendant's speech addressing a policeman, "you son of a bitch I'll choke you to death"); *Cohen v. California*, 403 U.S. 15 (1971) (protecting the wearing of

fects of hate speech by expanding its First Amendment jurisprudence to include the international approach. International jurisprudence provides strong, but less absolutist, protection of speech, especially when the rights of others in the community conflict with that protection.⁹ The question is whether the First Amendment requires protection of hate speech under the broader protection of free speech.¹⁰ Can we realize a need to eradicate hate speech without infringing on "valid" free speech?

B. *Confusion and Opposition*

Under recent Supreme Court jurisprudence, the ICCPR approach would seemingly die a stillborn death.¹¹ Protection of racist hate speech, though, is hard to explain to humane and sensitive citizens, especially in light of ongoing racial problems in the United States and the various efforts made towards correcting them.¹²

Allowing hate speech is similarly incongruous with the United

a jacket bearing the words "Fuck the Draft" in a courthouse); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (protecting KKK members' speech advocating political reform through violence and teaching criminal syndicalism); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (protecting libelous newspaper articles about government officials as free speech, unless the high standard of "actual malice" is met); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (protecting speech denouncing Jews and blacks by striking down an ordinance that prohibited breaches of the peace).

9 *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939), provided for similar community interests:

The privilege of a citizen of the United States to use the streets and parks for communication . . . may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16.

10 Hate speech is not necessarily limited to racism. The ICCPR also speaks of national origin and religion, which could be expanded to include all hate-based speech, such as hate speech addressed to gender or sexual preference. This Note focuses on racist hate speech as the most prominent and exemplary type of hate speech. Because "[r]acism . . . comprises [consciously and unconsciously] . . . the mechanisms for keeping selected victim groups in subordinated positions," it serves as a model for how hate expression affects all targeted individuals and groups. Matsuda, *supra* note 6, at 2332 (footnote omitted).

11 See *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992); see also *infra* Part III.D.

12 Such corrective efforts have been taken by state legislatures and by universities and colleges around the United States. See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, in *STRIKING A BALANCE*, *supra* note 6, at 284, 286 n.2; Ronna Greff Schneider, *Hate Speech in the United States: Recent Legal Developments*, in *STRIKING A BALANCE*, *supra* note 6, at 269, 269-76.

States ratification of the ICCPR. As a member of the United Nations, the United States has agreed to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language, and religion."¹³ By ratifying the ICCPR, the United States has agreed to follow the covenant's substantive ideals and underlying precepts.¹⁴ The preamble to the ICCPR, for example, states that:

[I]n accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, . . . these rights derive from the inherent dignity of the human person, . . . [and] the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights¹⁵

These ideals depict a broader view of the importance and effects of speech; they take into account the rights of the listener as well as those of the speaker.¹⁶ This approach recognizes that living in community requires a certain level of consideration for others, as any one person's actions necessarily affect his neighbors.

The international approach is especially important with respect to racism and discrimination. All forms of discrimination, including racial, ethnic, religious and sexual, remain prevalent and painful today.¹⁷ Hate speech requires special attention because its

13 U.N. CHARTER art. 55(c).

14 See ICCPR, *supra* note 1, art. 2, reprinted in BOSSUYT, at 49. See generally Oscar M. Garibaldi, *Obligations Arising from the International Covenant on Civil and Political Rights and the Optional Protocol*, in U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 54 (Hurst Hannum & Dana D. Fischer eds., 1993) [hereinafter U.S. RATIFICATION].

The "underlying precepts" of the ICCPR include anti-discrimination, equality, and human dignity. See *infra* Part IV.A (describing these principles in more detail).

15 ICCPR, *supra* note 1, pmb., reprinted in BOSSUYT, at 1. See generally BOSSUYT, *supra* note 1 (presenting the debates and notes of the U.N. Commission on Human Rights from the drafting of the ICCPR). These ideals are reiterated throughout the ICCPR. For example, Article 19(3)(a) speaks of "respect for the rights or reputations of others."

16 See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 515 (3rd ed. 1992). This, of course, depends on the existence of the listener's rights, and the recognition of the validity and worth of those rights. See *infra* Parts III.D. and IV (demonstrating that listener's rights do have validity and worth that demand full recognition). This contrasts with the current United States view that only the rights of the speaker need be considered in depth. See *infra* Parts III.A-C. (discussing United States approach, especially in light of R.A.V.).

17 See, e.g., BELL, *supra* note 16, at 519 nn.9-11. See also, Matsuda, *supra* note 6, at

effects are deep and destructive on both individual¹⁸ and societal levels.¹⁹ As Justice Robert H. Jackson wrote: "These epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed They are always, and in every context, insults which do not spring from reason and can be answered by none."²⁰ Hate speech directed at minorities carries with it past degradations and deprivations to such an extent that it cannot but conjure up those images again. The enforced "inferiority" of the past is brought into the present and made to live again.²¹ A noose hung over the desk of a black worker accompanied by "KKK" references vividly demonstrates this effect.²²

In hate speech situations, the weight of majority power often

2320 (providing hate speech examples and further support for the fact that racism is still common today).

18 Professor Matsuda describes the destructive and inevitable effects of hate speech and racism:

[A]t some level, no matter how much both victims and well-meaning dominant group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth. The idea is improbable and abhorrent, but it is there before us, because it is presented repeatedly We stifle it, reject it as wrong, but it is there, interfering with our perception and interaction with the person next to us. For the victim, similarly, the angry rejection of the message of inferiority is coupled with absorption of the message From the victim's perspective racist hate messages cause real damage.

See Matsuda, *supra* note 6, at 2320, 2339-40 (footnotes omitted).

In addition, hate propaganda has a causal effect on hate-related violence against target groups. As the most horrific example of this causal connection, Hitler "murdered six million Jews in the culmination of a campaign that had as a major theme the idea of racial superiority. . . . [T]he knowledge that anti-Semitic hate propaganda and the rise of Nazism were clearly connected guided development of the emerging international law on incitement to racial hatred." *Id.* at 2342. See also Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985) [hereinafter MacKinnon, *Pornography*] (describing a similar causal link between pornography and sexual violence). My argument throughout this Note as to the need to refocus our approach to hate speech closely parallels much of Professor MacKinnon's ideas on harm-based analysis, connections between propaganda and societal problems, and equalitarian and dignitarian concepts, as developed in that article. See also CATHARINE A. MACKINNON, *ONLY WORDS* (1993) [hereinafter MACKINNON, *ONLY WORDS*] (developing these concepts and, especially, the equalitarian approach to speech).

19 See *infra* Part III.D.1. See generally, BELL, *supra* note 16, at 514-28; Delgado, *supra* note 12, at 292-94; Charles R. Lawrence, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 791-95, 800-04 (1992).

20 Kunz v. New York, 340 U.S. 290, 299 (1951) (Jackson, J., dissenting). Hate speech, as used in this Note, refers to broader expression than just epithets. Justice Jackson's statement rings true for much of this broader hate speech as well.

21 See Lawrence, *supra* note 19, at 792-94, 800.

22 See Matsuda, *supra* note 6, at 2327 (providing various discrimination examples, including this race-based hate expression).

seems to rest on only a politically weak few; the physical and psychological power of being in the majority plays on the inferior feelings of the excluded target group.²³ Additionally, there is rarely any reply to the hate speaker. "[R]acist invectives are one-sided; they neither invite nor permit response Hate speech silences its victim and mars his or her response as presumptively unequal."²⁴ Thus, by its psychosocial weight and the impossibility of effective response, hate speech in a racial context can function as a means of "maintaining established systems of caste and subordination."²⁵ Limiting hate speech and its effects on society is one step towards healing the historical wounds of racism and closing the rifts between races today.²⁶

However, this step is not an easy one under current First Amendment jurisprudence. In *R.A.V. v. St. Paul*, the Supreme Court found that free speech protection includes the burning of a cross on the lawn of a black family in the middle of the night.²⁷ The ICCPR also recognizes the importance of free speech: "Everyone shall have the right to freedom of expression."²⁸ However, in its approach to hate speech, the ICCPR considers the victim's perspective, including the view that protection of hate-based activities such as crossburning is misplaced.²⁹ Without such consideration, how can members of a targeted minority group be fully enfranchised citizens—with the mutual respect of the majority and the laws—under decisions such as *R.A.V.*?

A minority group can only feel left out, their feelings and right to equal treatment and protection of the laws and the courts of this country ignored.³⁰ In light of Congress' recent ratification

23 As Professor Bell states: "Protection of racism and its expression in racial invectives has favored the powerful against the powerless." BELL, *supra* note 16, at 525-26.

24 *Id.* at 526. Again, racist hate speech functions as a model for ethnic, religious, and sexual discrimination. The silencing and subordination of the victims has a similar dynamic in each case.

25 Lawrence, *supra* note 19, at 792; see also Bell, *supra* note 16, at 522-23.

26 As Professor Bell writes: "To provide redress for persons of color and other excluded groups is not to open the floodgates of censorship but to identify a specific group uniquely vulnerable to majoritarian oppression in need of government intervention simply to balance the scales." BELL, *supra* note 16, at 526.

27 112 S. Ct. 2538, 2540-41, 2550 (1992). See *infra* Part III.C. for a full discussion of *R.A.V.* For more examples of hate-speech confrontations and situations, see Matsuda, *supra* note 6, at 2320, 2326-31, 2361-72.

28 ICCPR, *supra* note 1, art. 19(2), reprinted in BOSSUYT, at 381.

29 See generally Matsuda, *supra* note 6 (describing hate speech from the victim-listeners' point of view).

30 See BELL, *supra* note 16, at 522-23.

of the ICCPR, hope for a better balancing of speakers' and listeners' rights lies in the international approach's inclusion of the victim-listener in its analysis of free expression.³¹ The Supreme Court's conflicting opinions in hate speech cases, and the apparent distaste expressed by the individual Justices in protecting hate speakers, may provide the window through which a new approach can be brought to the light. The Supreme Court needs a workable alternative, which can only be developed by critically examining current First Amendment speech jurisprudence.

III. THE UNITED STATES APPROACH

A. *Historical Background*

The Supreme Court considers freedom of speech, as provided in the First Amendment,³² to be one of our most sacred rights as citizens. According to Justice Cardozo, free speech is "the matrix, the indispensable condition of nearly every other form of freedom."³³ However, the First Amendment's brevity has presented many jurisprudential problems of interpretation, giving rise to many free speech controversies.³⁴ Justice Holmes noted why free speech disagreements are often controversial: "[I]t is . . . not free thought for those who agree with us, but freedom for the thought that we hate,"³⁵ which provides the most enduring value of free speech theory.

Interpretation of the scope of freedom of speech has been complicated by the lack of legislative history and the absence of any clear statement of the Framers' intent in writing the First Amendment.³⁶ The several theories advanced for justifying free speech protection³⁷ include: public enlightenment through open

31 Does not ratification of the ICCPR at least marginally evidence an intent on the part of the United States to change its approach to hate speech to reflect more of the ratified document? See *infra* Part IV. Even with the reservations and limits placed on the ICCPR by the United States, the international approach should influence our system, at least doctrinally. For a full discussion of what constitutes a "listeners' right," see *infra* Part III.D.

32 "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

33 *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

34 See NOWAK & ROTUNDA, *supra* note 8, at 937-38. See also *infra* Part III.B.

35 *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

36 See NOWAK & ROTUNDA, *supra* note 8, at 937.

37 The First Amendment does not prohibit the abridging of speech, but rather *freedom of speech*. "Therefore, the values perceived in a system of free expression will be determinative of whether there exists an inhibition upon that freedom." NOWAK & RO-

debate;³⁸ truth-searching by espousing ideas in the open "marketplace" of competing ideas;³⁹ participation in self-government;⁴⁰ individual self-fulfillment;⁴¹ provision of a safety valve for citizen outbursts;⁴² and checking the abuses of the government.⁴³ These theories provide the impetus and justification for the "absolutist approach to rights and preoccupation with individual rights,"⁴⁴ including freedom of speech.

However, freedom of speech has been limited for certain theoretical and practical reasons. From the beginning, "[c]olonial America was an open society dotted with closed enclaves, and one

TUNDA, *supra* note 8, at 939-40.

38 This theory was most notably propounded by John Milton and John Stuart Mill. Milton wrote: "[T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; whoever knew truth put to the worse in a free and open encounter?" JOHN MILTON, *AREOPAGITICA, A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND* (1644).

Mill added recognition of public enlightenment as a positive good resulting from the free exchange of ideas. JOHN STUART MILL, *ON LIBERTY* ch. II (1859).

39 Closely related to the previous theory, this "marketplace of ideas" theory was advanced by Justice Oliver Wendell Holmes, and is arguably the most prominent of the free-speech theories. Justice Holmes wrote: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market" *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

40 See THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 8-11 (1966). Emerson states: "[T]he right of all members of society to form their own beliefs and communicate them freely to others must be regarded as an essential principle of a democratically organized society." *Id.* at 9.

41 See *id.* at 4-7. Emerson writes:

[Man] has powers to reason and to feel in ways that are unique in degree if not in kind It is through development of these powers that man finds his meaning and his place in the world Every man is influenced by the his fellows . . . , but his mind is his own and its functioning is necessarily an individual affair From this it follows that every man . . . has the right to form his own beliefs and opinions. And it also follows that he has the right to express these beliefs and opinions.

Id. at 4-5.

42 Justice Brandeis espoused this theory in *Whitney v. California*, 274 U.S. 357 (1927), when he stated "that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies" *Id.* at 375-76 (Brandeis, J., dissenting).

43 "[O]nce we allow the government any power to restrict the freedom of speech, we may have taken a one-way path that is a slippery slope." NOWAK & ROTUNDA, *supra* note 8, at 940-41.

44 Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57, 62 (1992).

could generally settle with his co-believers in safety and comfort and exercise the right of oppression."⁴⁵ Living in community, then as now, defines the norm of human existence and requires a certain consensus to follow the community's rules for the mutual benefit of all of its members.⁴⁶ Government use of such consent to justify controlling actions and speech divergent from that which the ruling authority values prompted the Framers of the Bill of Rights to subject "individual autonomy only to limited government for limited purposes."⁴⁷ Thus, the First Amendment advances freedom of speech by restricting the government's ability to abuse individual rights.⁴⁸

B. *The General Rule and the Exceptions*

First Amendment freedom of speech generally enjoys a "preferred position"⁴⁹ in the constellation of constitutional rights. In any context where the laws or actions of the government infringe upon the freedom of speech of its citizens, this preferential treatment draws its power from the application of the various tools of judicial review. For instance, "the Court has applied a narrowed presumption of constitutionality, strictly construed statutes to avoid limiting first amendment freedoms, restricted prior restraint and subsequent punishment, relaxed general requirements of standing to sue and generally set higher standards of procedural due process"⁵⁰ The courts conscientiously protect freedom of speech by requiring that speech regulations not be overly broad, too vague, or discriminatory towards content or viewpoint.⁵¹

45 JOHN P. ROCHE, *American Liberty: An Examination of the "Tradition" of Freedom*, in SHADOW AND SUBSTANCE: ESSAYS ON THE THEORY AND STRUCTURE OF POLITICS 11 (1964).

46 See, e.g., EMERSON, *supra* note 40, at 78.

47 Defeis, *supra* note 44, at 62; see also LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1010 (2d ed. 1988) (describing consent theory and effects in government and law).

48 See Defeis, *supra* note 44, at 62.

49 *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (delineating preferred position and importance of free speech protection).

50 NOWAK & ROTUNDA, *supra* note 8, at 838.

51 See generally *id.* § 16. This general exposition of free speech protection in the courts demonstrates the level of preference for free speech and the narrow limits within which speech regulation, at least in the "public forum," will be allowed. The Court will not tolerate speech limitations that are based on the subjects or viewpoints expressed, especially when it is political expression. See MACKINNON, ONLY WORDS, *supra* note 18, at 38-40, 83 (describing and criticizing arguments for absolutist protection of political speech). This Note generally is concerned with limitations on speech in the public forum, where speech is most highly protected, and where most hate speech occurs. In the "nonpublic forum," content regulation is allowed and hate speech can be more easily

The preference for freedom of speech, however, does not rise to the level of an absolute standard. "Even the absolutist approach to the First Amendment has been tempered by the recognition of certain categories of speech of lesser societal value which the state can regulate."⁵² Speech such as libel and slander,⁵³ obscenity,⁵⁴ incitement to criminal action,⁵⁵ and "fighting words"⁵⁶ has been found to be "lesser value" speech, or not to be speech at all, such that limiting it—even based on content—does not conflict with First Amendment free speech.⁵⁷ The Court has employed a lesser standard of protection for commercial speech⁵⁸ and, additionally, has allowed narrowly tailored speech regulations where the state has a compelling interest in regulating the speech.⁵⁹ Thus, there

regulated, as long as the regulation is viewpoint-neutral. See *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); NOWAK & ROTUNDA, *supra* note 8, at 1082-92.

52 Defeis, *supra* note 44, at 63.

53 See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (protecting private individuals from libel by requiring only negligence in the publication of libelous material); *New York Times Co. v. Sullivan*, 376 U.S. 255 (1964) (protecting the press to some extent through the "actual malice" standard, but still presenting libel of public officials as less protected speech); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (holding libel to be "unprotected" speech).

54 See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) (defining proscribable obscenity as that which the "average person" would find to appeal to the "prurient interest" in offensively depicting sexual conduct without "literary, artistic, political, or scientific value").

55 See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (stating that advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" constitutes less protected speech subject to proscription) (footnote omitted); see also *Hess v. Indiana*, 414 U.S. 105 (1973) (applying strictly the *Brandenburg* test for advocacy of violence or lawlessness).

56 See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (finding no communicative value in "epithets likely to provoke the average person to retaliation, and thereby causing a breach of the peace").

57 "There are certain well-defined and narrowly limited classes of speech[, including obscenity, libel, fighting words, and incitement to violence], the prevention and punishment of which have never been thought to raise any Constitutional problem [S]uch utterances are no essential part of any exposition of ideas, and . . . any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 571-72.

Of course, the majority in *R.A.V.* held that content discrimination is improper even in the case of "unprotected speech." See *infra* Part III.C (appraising *R.A.V.*'s effect on free speech jurisprudence).

58 See, e.g., *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505 (1993) (adding the "reasonable fit" standard of defining the relationship between the legitimate government interest in commercial speech regulation and the means chosen); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (giving "lesser protection" to commercial speech).

59 See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[T]he govern-

are some limits on the preference for and protection of free speech.

Is the need for restricting commercial speech greater or more valid than that for restricting hate speech? Is hate speech not as objectionable, valueless, and unworthy of protection as obscenity or slander?

C. *Hate Speech Regulation in the United States*

1. Current Atmosphere

Recently, communities throughout the United States have attempted to regulate and limit hate speech.⁶⁰ Although this has taken various forms,⁶¹ statutory attempts at hate speech regulation fall into two general categories.⁶² First, the Supreme Court has held those statutes which enhance the penalty for bias-motivated offenses to be constitutional.⁶³ Second, some statutes seek to explicitly create an independent crime for hate-related speech and conduct.⁶⁴ The constitutional validity of this second category of hate speech regulation has not been clearly settled. All of the challenges to speech regulation and the judicial review procedures which make free speech a "preferred right"⁶⁵ have been brought to bear on this type of direct hate speech regulation. This is best demonstrated in *R.A.V. v. St. Paul*,⁶⁶ the Court's seminal hate speech case.

ment may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information'") (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); see also NOWAK & ROTUNDA, *supra* note 8, at 1087.

60 See Daniel D. Munster, Comment, *R.A.V. v. St. Paul: The Future of Hate Speech Regulation*, 70 U. DET. L. REV. 347, 361 (1993); see also Delgado, *supra* note 12, at 284 (describing several college campus hate speech regulations); Schneider, *supra* note 12, at 269, 270-71 & n.10 (specifying various states and communities that have attempted hate speech legislation).

61 See Schneider, *supra* note 12, at 270-71 (listing attempted hate speech regulations).

62 See Munster, *supra* note 60, at 361.

63 See *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (holding that increasing penalty for racially motivated attack does not violate First Amendment because it is conduct regulation and judges traditionally have considered motive as a factor in sentencing).

64 See Munster, *supra* note 60, at 363; see Schneider, *supra* note 12, at 270-71.

65 See *supra* Part III.B (discussing preferred position and importance of free speech).

66 112 S. Ct. 2538 (1992). The majority in *R.A.V.* ultimately departs, however, from the traditional categorical analysis of free speech protection. See *infra* Part III.C.2 (describing majority's "underinclusiveness" doctrine which alters previous free speech analysis).

2. *R.A.V. v. St. Paul*

In 1990, St. Paul, Minnesota enacted an ordinance creating a separate criminal misdemeanor for hate speech, or at least for symbolic conduct of a hateful nature.⁶⁷ The St. Paul Bias-Motivated Crime Ordinance 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.⁶⁸

In *R.A.V. v. St. Paul*, R.A.V. was charged under this ordinance for burning a cross in the middle of the night on the lawn of a black family,⁶⁹ a seemingly clear example of the type of hate expression that St. Paul was trying to combat. The Minnesota Supreme Court found the ordinance applicable and constitutional.⁷⁰

R.A.V. did not contest the application of the St. Paul Bias-Motivated Crime Ordinance to his actions, but rather challenged its constitutionality. He argued that "the St. Paul bias-motivated disorderly conduct ordinance potentially censors so many constitutionally protected activities on its face that it must be completely invalidated."⁷¹ The Minnesota Supreme Court rejected this challenge, stating:

Although the St. Paul ordinance should have been more carefully drafted, it can be interpreted so as to reach only those expressions of hatred and resorts to bias-motivated personal abuse that the first amendment does not protect. So interpreted, the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order, and therefore is not prohibited by the first amendment.⁷²

The Supreme Court applied the doctrinal exception to free

67 St. Paul, Minn. Leg. Code § 292.02 (1990).

68 *Id.*

69 112 S. Ct. at 2540.

70 See *In re R.A.V.*, 464 N.W.2d 507, 509, 511 (Minn. 1991).

71 *Id.* at 509.

72 *Id.* at 511.

speech established in *Chaplinsky v. New Hampshire*⁷³ to narrow the scope of the St. Paul ordinance to cover only unprotected "fighting words."⁷⁴ Following prior decisions such as *Chaplinsky*, "unprotected speech" was viewed as regulable speech not fully protected by the First Amendment.⁷⁵

The United States Supreme Court, while accepting the Minnesota Supreme Court's narrow interpretation of the St. Paul ordinance, viewed differently the meaning of "unprotected." Justice Scalia, writing for the majority, found that while unprotected speech—such as fighting words—could be regulated because of its "constitutionally proscribable content," that does not mean that the categories are "entirely invisible to the Constitution," such that government can "regulate them based on hostility, or favoritism, towards a nonproscribable message they contain."⁷⁶ The Court focused on the content-based distinctions that the St. Paul ordinance drew between different types of speech within the "fighting words" category.⁷⁷ As Justice White described it, the majority "invented" an "underinclusiveness" test,⁷⁸ whereby hate speech regulations based on the proscribable nature of fighting words cannot be addressed only to certain prejudices and epithets, as that would be impermissible content and viewpoint discrimination.⁷⁹ In evaluating the ordinance, the Court employed a less-

73 315 U.S. 568 (1942). The Minnesota Supreme Court also relied on *Brandenburg's* incitement to illegal activity exception in narrowing the St. Paul ordinance to the regulation of only "unprotected speech." The court stated: "St. Paul's bias-motivated disorderly conduct ordinance is also constitutional to the extent it prohibits conduct that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" 464 N.W.2d at 510 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

74 464 N.W.2d at 509-10. *Chaplinsky* upheld a narrowly drawn state statute banning face-to-face words "having a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." 315 U.S. at 568. The test is whether a man of "common intelligence" would view the words as "likely to cause an average addressee to fight." *Id.* at 573. Since *Chaplinsky*, the Court has drawn back from a broad application of the "fighting words" doctrine. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971); *Terminiello v. Chicago*, 337 U.S. 1 (1949). The Court's focus now centers on the likelihood that the words will promote *imminent* violence. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

75 464 N.W.2d at 509-11. The Minnesota Supreme Court was following the traditional interpretation of "unprotected speech."

76 *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2543 (1992). Justice Scalia was reinterpreting "unprotected speech" to mean something contrary to its traditional meaning.

77 *Id.* at 2547-48.

78 *Id.* at 2553 (White, J., concurring).

79 *Id.* at 2547-48. Justice Scalia illustrates the impermissible content-based speech discrimination by stating: "Displays containing abusive invective, no matter how vicious or

than-strict scrutiny test that included a special emphasis on the narrowness of the speech category being regulated.⁸⁰

Four concurring justices, while finding the St. Paul ordinance unconstitutional, would have found it constitutional had the circumstances been different. In three separate concurring opinions, Justices White, Blackmun, and Stevens based their decisions on the overbreadth doctrine as the ordinance criminalized constitutionally protected, as well as unprotected, speech.⁸¹ The concurrences roundly attacked Justice Scalia's opinion as inconsistent, unprecedented, and unwarranted in its effect on First Amendment jurisprudence—both in its protection of hate speech and in its likely weakening of speech protection in general.⁸² Specifically, Justice White strongly disagreed with the majority's creation and application of the "underinclusiveness" doctrine. He observed:

[T]he Court's new "underbreadth" creation serves no desirable function. Instead, it permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms Indeed, by characterizing fighting words as a form of "debate," . . . the majority legitimates

severe, are permissible unless they are addressed to one of the specified disfavored topics. . . . The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 2547. Justice Scalia depicts what he views as impermissible viewpoint discrimination when he states:

"[F]ighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion."

Id. at 2547-48.

80 *Id.* at 2550. Justice White views this approach as a general departure, or even renunciation, of the strict scrutiny review which is usually applied in First Amendment analysis. *Id.* at 2554 (White, J., concurring).

81 *Id.* (White, J. concurring). "[W]ere the ordinance not overbroad, I would vote to uphold it." *Id.* at 2571 (Stevens, J., concurring).

82 *See id.* at 2552-53 (White, J., concurring) (describing lack of precedent and absence of need for majority decision). Justice White also draws attention to the majority opinion's broader effects on free speech jurisprudence, when he states: "By placing fighting words, which the Court has long held to be valueless, on at least equal constitutional footing with political discourse and other forms of speech that we have deemed to have the greatest social value, the majority devalues the latter category." *Id.* at 2554. Justice Blackmun states that "the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws. . . . [T]his weakens the traditional protection of speech. If all expressive activity must be accorded the same protection, that protection will be scant." *Id.* at 2560 (Blackmun, J., concurring).

hate speech as a form of public discussion.⁸³

But for the overbreadth of the St. Paul Bias-Motivated Crime Ordinance, Justice White and the three⁸⁴ other concurring Justices would have upheld the ordinance.

The broad language and applicability of the majority opinion in *R.A.V.* would seem to sound the death knell for hate speech regulation, especially for statutes criminalizing hate speech. However, the dissension within the Court, evidenced by the concurring Justices' biting attacks on the majority, shows a ray of hope for the future of hate speech regulation.⁸⁵ In addition, all of the Justices expressed their reprehension for burning crosses and similar expressions of hate, as well as their belief that the government has a compelling interest in limiting discrimination.⁸⁶ One can understand why an average citizen, unschooled in constitutional nuances, would have difficulty comprehending how the United States Constitution could protect such hateful activity, or as the dissenters mused, why the United States Supreme Court would go searching for a theory to justify such protection.⁸⁷ With the shortcomings of *R.A.V.* in mind, this Note suggests a workable alternative to bring the Court's free speech jurisprudence in line with the modern citizen's conscience and intuition, and to allow more comprehensive and effective hate speech regulation.

83 *Id.* at 2553-54 (White, J., concurring). Justice White also wrote: "[A] ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace." *Id.* at 2553.

84 In addition to Justices Stevens' and Blackmun's separate concurrences, Justice O'Connor joined Justice White's concurring opinion.

85 See Defeis, *supra* note 44, at 66. In addition to the availability of a better approach to hate-speech regulation, whether this "ray of hope" expands to its full brilliance in the future may depend on, among other things, the dynamics of the Court as justices come and go.

86 See 112 S. Ct. at 2449-50 (Scalia, J.) (stating his belief that governmental interest is compelling and that "burning a cross in someone's front yard is reprehensible"); *id.* at 2556 (White, J., concurring) (stating similar beliefs).

87 See Matsuda, *supra* note 6, at 2348 (describing foreign lawyers' lack of comprehension of United States approach to hate speech). This is especially hard to fathom in light of our past history of racism, the enactment of the Civil War Amendments (the 13th, 14th, and 15th), and the subsequent federal and state civil rights statutes and case law protecting the rights of minorities.

For a discussion of Justice Scalia's "invention" of the majority's analysis in *R.A.V.*, see 112 S. Ct. at 2553-56 (White, J., concurring).

D. A Reevaluation

1. R.A.V. Falls Short

R.A.V. falls short of the optimum protection of *all* citizen's rights because, in finding the hate speech ordinance unconstitutional, the decision focuses only on the speaker's rights. What about the other side of hate speech confrontations, namely, the victim-listener's rights?

In R.A.V., the majority opinion focused on the alleged injury to the crossburners' First Amendment rights.⁸⁸ In so doing, the Court ignored the injuries and rights of hate speech victims, such as the black family which was confronted with a burning cross on their front lawn, as well as the history and hatred for which such symbols stand.⁸⁹ As stated by Professor Lawrence, "the Court was not concerned with how this attack might impede the exercise of the Joneses' constitutional right to be full and valued participants in the political community"⁹⁰

The R.A.V. majority opinion fails in more than just its lack of consideration for the victims' rights and injuries; it ignores the broader danger of hate speech, especially racist hate speech. In addition to being disconcerting, painful, and degrading,⁹¹ hate speech is intimidating.⁹² Because of such intimidation, "[h]ate speech frequently silences its victims, who more often than not, are those who are already heard from least."⁹³ The Court needs to consider the "historical reality that some members of our community are less powerful than others and that those persons con-

88 112 S. Ct. 2538, 2540 (1992); see Lawrence, *supra* note 19, at 789.

89 Professor Matsuda writes: "Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide." Matsuda, *supra* note 6, at 2336 (footnote omitted); see also *In re R.A.V.*, 464 N.W.2d 507, 508 (1991) (describing harms of hate activities such as crossburning and the obligation of the community to combat them). See generally BELL, *supra* note 16, at 519-26; Matsuda, *supra* note 6, at 2335-41 (citing specific negative effects of racist hate messages); Munster, *supra* note 60, at 350-51 (describing various physical and mental injuries to victims of racist hate speech).

The definition of "victims' rights"—equality, free speech, protection from verbal and physical assault, and human dignity, for example—is developed in Part III.D.

90 Lawrence, *supra* note 19, at 789.

91 See *supra* note 89 (defining hate speech injuries).

92 See Lawrence, *supra* note 19, at 799-804 (describing the silencing and intimidation of hate-speech victims).

93 *Id.* at 792.

tinue to be systematically silenced by those who are more powerful."⁹⁴ Hate speech which attacks an immutable characteristic, such as race or ethnicity, "contributes to the victim's sense of helplessness" and frustration, as one's race or ethnicity cannot be changed to mitigate the hatred.⁹⁵ The *R.A.V.* majority has ignored the broader subordination effect of racist hate speech, which, by the injurious content of the speech and the intimidation that must result therefrom, effectively kills any response to the racist attack.⁹⁶

The individual victim, though, is not the only silenced individual. Hate speech impugns the rights and worth of the entire target race, and thereby chills discourse on a broader scale.⁹⁷ The enforced silence resulting from racist hate speech runs counter to intrinsic and instrumental values of speech.⁹⁸ "For African-Ameri-

94 *Id.* at 804.

95 Munster, *supra* note 60, at 349.

96 See Lawrence, *supra* note 19, at 787 (describing anti-subordination theory); see also BELL, *supra* note 16, at 523-26 (depicting oppressive speech as a "badge of servitude" on the same level as segregation); Delgado, *supra* note 12, at 292-94 (defining the class subordination effects of hate speech and racism).

R.A.V. creates a very difficult situation for communities wishing to regulate hate speech because its "underbreadth" doctrine, coupled with the overbreadth doctrine, limits the scope of any definition of a proscribable class of speech, such as fighting words. In other words, a community can only prohibit a speech class that fits between these two doctrines—broad enough to satisfy "underbreadth," but narrow enough not to violate overbreadth and vagueness. *R.A.V.* "reduc[es] protection across the board" by providing that "a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads)." 112 S. Ct. at 2560 (Blackmun, J., concurring). It is difficult to imagine a hate speech regulation that prohibits such a broad class of speech, but does not also violate overbreadth and vagueness.

The effect of Justice Scalia's opinion in *R.A.V.*—ultimately protecting the free speech rights of criminals in their hate speech assaults—is ironic in light of his conservative tendency to decide issues against criminal defendants. See CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT 85 (1993) [hereinafter SMITH, CONSERVATIVE MOMENT] (describing Justice Scalia's support of conservative outcomes in nonunanimous criminal justice cases); Christopher E. Smith, *Justice Antonin Scalia and Criminal Justice Cases*, 81 KY. L.J. 187, 193, 200 (1993) (demonstrating that Justice Scalia, second only to Chief Justice Rehnquist, decides 86% of criminal justice cases against criminal defendants in nonunanimous cases). Justice Scalia's textualist approach to constitutional interpretation, coupled with his focus in *R.A.V.* on the speech aspects over the criminal aspects, may explain this seeming inconsistency. See SMITH, CONSERVATIVE MOMENT, *supra*, at 29-36 (describing Justice Scalia's textualist approach).

97 Lawrence, *supra* note 19, at 792 & nn.25-26; see also Matsuda, *supra* note 6, at 2338-40 (describing not only the victim's injuries, but also the restrictive effect on "non-target-group members," such as whites, as a result of an "atmosphere rife with racial hatred").

98 See *supra* Part III.A. (defining the historic and intrinsic values of freedom of speech).

cans, the intrinsic value of speech as self-expression and self-definition has been particularly important. The absence of a 'black voice' was central to the ideology of European-American racism, an ideology that denied Africans their humanity and thereby justified their enslavement."⁹⁹ The protection of hate speech breathes new life and currency into this discriminatory ideology.

Hate speech silences the target individual or group,¹⁰⁰ minimizing their contribution to public discourse and effectively destroying the free trade of ideas in the supposedly equally-accessible marketplace.¹⁰¹ Thus, the Supreme Court's approach in *R.A.V.* doesn't just fall short in a negligible way. It falls short in a dangerously far-reaching way; a way that may have broad negative effects on our ability to combat racism in our society.

2. New Considerations

In addition to the Court's failure to consider the rights of the victim in *R.A.V.*, new theories and approaches have recently developed in this area of the law. These new theories demonstrate the current concern and dissatisfaction with the Court's present attitude toward hate speech regulation. The search continues for some approach that will better protect the rights and dignity of the hate speech victim, while maintaining conscientious protection of freedom of speech.

First, some advocate focusing more strictly on the "values" that underlie our protection of free speech. They would have the scope of free speech protection "be determined by the broadest range of purposes or values that can coherently be thought to

99 Lawrence, *supra* note 19, at 800.

100 See Delgado, *supra* note 12, at 292-94 (describing the process by which a race or class is subordinated and stigmatized as inferior); Lawrence, *supra* note 19, at 792, 796-97, 800-04 (defining antisubordination theory).

101 See *supra* note 39 (defining the "marketplace of ideas" theory); BELL, *supra* note 16, at 525-26; LAWRENCE, *supra* note 19, at 800 (explaining the infringement of the free speech values of hate speech victims as a result of the silence imposed on them by the hate-speaker). As Professor Bell states:

The marketplace theory . . . of free speech rests upon a naive or convenient assumption that in our democratic society all speakers occupy a level playing field in which all speech is presumptively equal Yet, like all social goods, speech is not equally and freely accessible to all The marketplace analogy also presumes that the discourse of all speech is in fact a dialogue. But racist invectives are one-sided; they neither invite, nor permit response.

BELL, *supra* note 16, at 525-26. In other words, hate speech is antithetical to the marketplace theory—the arguably prevailing theory of free speech protection.

underlie the free speech clause."¹⁰² These "values" would be limited to such ideals as the "search for truth" and individual self-fulfillment, which arguably would not include hate speech.¹⁰³ Similarly, excluding the protection of speech that does not communicate some sort of social idea,¹⁰⁴ but rather is simply abusive, would also limit hate speech.

Hate speech regulations function as more than just protective measures. They also serve a declaratory function by providing at least a threshold nondiscriminatory standard of speech and conduct for the entire community.¹⁰⁵ In other words, laws influence attitudes and culture. Antidiscrimination legislation helps shape the collective mind of the populace in a less biased mold.¹⁰⁶ The search for better protection of the rights of hate speech victims defines each of these new theories and observations.

Fourteenth Amendment equal protection has also been advanced as a limiting ideal in the area of hate speech.¹⁰⁷ It is argued that "[t]he Fourteenth Amendment reflects our choice not to permit absolute freedom at the expense of equality and equal personhood."¹⁰⁸ This argument relies to some extent on

102 R. GEORGE WRIGHT, *THE FUTURE OF FREE SPEECH LAW* 1 (1990).

103 *Id.* at 2-6; see also EMERSON, *supra* note 40, at 1-15; *supra* Part III.A. (describing the basic theories of freedom of speech in the United States). As Professor Hartman writes:

Hate speech does not merit full constitutional protection because it disserves the values underlying the First Amendment. These values include preparing citizens to make the decisions required of a self-governing society, advancing the universal search for truth, and promoting self-expression in order to foster personal development.

Rhonda G. Hartman, *Hateful Expression and First Amendment Values: Toward a Theory of Constitutional Constraint on Hate Speech at Colleges and Universities After R.A.V. v. St. Paul*, 19 J.C. & U.L. 343, 363 (1993) (footnotes omitted).

104 See WRIGHT, *supra* note 102, at 69-70. Social value is tied to speech that puts forth an argument that can be explained or responded to by other arguments before any action is taken. As noted above, hate-speech does not allow for any meaningful responsive expression, and therefore, under this definition, hate speech can have no "social value." See *supra* notes 100-01 and accompanying text (describing the silencing effects of hate speech on the victim-listener).

105 Michael Banton, *The Declaratory Value of Laws Against Racial Incitement*, in STRIKING A BALANCE, *supra* note 6, at 349, 357. Banton writes: "While ideas can influence behaviour, behaviour can influence ideas just as strongly. The prohibition, by law or custom, of certain forms of behaviour can influence the way people think about possible behaviour" *Id.* at 350.

106 *Id.*

107 "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. See BELL, *supra* note 16, at 522-23; Delgado, *supra* note 12, at 291-94; Defeis, *supra* note 44, at 68-74.

108 BELL, *supra* note 16, at 526. As Professor Delgado states: "[Regulation of] the

reinterpreting Fourteenth Amendment equal protection—from a strict and formal reading to a general and substantive interpretation.¹⁰⁹ Under this interpretation, the equality principle would be affirmative in nature. In other words, the government would not just be prohibited from treating its citizens unequally, but would be required to promote equality throughout society.¹¹⁰ Hate speech regulations would be one equal protection tool that the government could use to promote equality between the various groups in our society.¹¹¹

speech by which society 'constructs' a stigma picture of minorities . . . may be necessary for full effectuation of the values of equal personhood we hold equally dear." Delgado, *supra* note 12, at 292.

109 See MACKINNON, ONLY WORDS, *supra* note 18, at 71 (describing need to inform free speech jurisprudence with Fourteenth Amendment principles, but referring to to "equality," rather than equal protection, in terms of "the problem of social inequality or the mandate of substantive legal equality."). See generally Lawrence, *supra* note 19, at 788 n.14, 792 (discussing equality concepts in speech contexts); MACKINNON, ONLY WORDS, *supra* note 18, at 71-110 (discussing equality and speech).

110 As Professor MacKinnon states:

When equality is recognized as a constitutional value and mandate, the idea that some people are inferior to others on the basis of group membership is authoritatively rejected as the basis of public policy. This does not mean that ideas to the contrary cannot be debated or expressed. It should mean, however, that social inferiority cannot be imposed through any means, including expressive ones.

MACKINNON, ONLY WORDS, *supra* note 18, at 106. Under this model of equality of speech, "[t]he state will have as great a role in providing relief from injury to equality through speech and in giving equal access to speech as it now has in disciplining its power to intervene in that speech that manages to get expressed." *Id.* at 109. This system is exemplified in Canada's affirmative equality approach to hate speech. See generally *id.* at 97-110 (demonstrating application and positive effects of equality principles as found in Canada's free speech and equality jurisprudence).

111 Of course, the state action requirement hampers the hate speech applications of the equal protection clause, especially in situations where the speech is between individuals with absolutely no tie to government action—private discrimination cases. However, the state action requirement may be overcome by the police power of the states or by section 5 of the Fourteenth Amendment, which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." U.S. CONST. amend. XIV, § 5. Professor MacKinnon draws attention to the possible application of § 5 and state powers in stating that "federal equality statutes have not been seen to arise under the Fourteenth Amendment, although it expressly authorizes them, and action by states against social inequalities needs no constitutional authority" MACKINNON, ONLY WORDS, *supra* note 18, at 73-74 (footnote omitted). Although there are perhaps more arguments for overcoming current Fourteenth Amendment restrictions, a full exposition of these issues and arguments is beyond the scope of this Note. See generally NOWAK & ROTUNDA, *supra* note 8, ch. 12 (State Action); *id.* ch. 14 (Equal Protection); *id.* ch. 15 (Congressional Enforcement of Civil Rights).

This argument serves as another example of new considerations and approaches to hate speech that the Supreme Court has failed to consider in its hate speech jurispru-

Under current Fourteenth Amendment jurisprudence, the equality argument requires acknowledging the rights of the victim-listener as being worthy of protection on par with those of the speaker. The quasi-absolutist protection of the hate speaker, allowing him to subordinate and shout down the listener,¹¹² is an impermissible limiting of the listener's fundamental rights under an "affirmative" equal protection analysis.¹¹³ In other words, if the speakers' and listeners' speech rights are equal in validity and indistinguishable in character, then any disparity in the treatment of speakers' rights over listeners' rights would be based on an arbitrary and indefensible classification.¹¹⁴ In *R.A.V.*, for example, the free speech rights of the victim-listener are infringed by the Court's failure to uphold the ordinance that protects them from the silencing effects of the hate-speaker.

In short, our First Amendment jurisprudence falls short and remains unclear.¹¹⁵ However, Fourteenth Amendment equal protection analysis doesn't provide absolute clarity either.¹¹⁶ These two amendments approach the hate speech dilemma from opposite directions—one from freedom and one from equality—and in fact they often conflict directly with each other in any given case.¹¹⁷

The problem is that the Constitution lacks a "general construction clause to prohibit the exercise of rights specified in the Constitution to infringe or destroy other rights guaranteed in the

dence. Additionally, the argument for equality of recognition and protection of freedom of speech—for both speaker and listener—relates closely to the international approach. See *supra* IV.A-B.; see also Defeis, *supra* note 44, at 69, 71-73 (demonstrating the international ideals of equality and nondiscrimination through United Nations documents, including the ICCPR, and the German and Canadian courts).

112 See *supra* note 101 and accompanying text (depicting the silencing of hate-speech victims). In describing the negative effects of failing to apply equalitarian values to free speech, Professor MacKinnon writes: "[T]he less speech you have, the more the speech of those who have it keeps you unequal; the more the speech of the dominant is protected, the more dominant they become and the less the subordinated are heard from" MACKINNON, ONLY WORDS, *supra* note 18, at 72-73.

113 "Whenever fundamental rights are limited, the laws will have to promote an overriding or compelling interest of government in order to be valid" NOWAK & ROTUNDA, *supra* note 8, at 569.

114 "The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government." *Id.* at 570.

115 See *supra* Parts II.B. and III.D.1. (depicting the short-comings of the United States approach in terms of its failure to protect the rights of the victim-listener).

116 See Delgado, *supra* note 12, at 291.

117 See, e.g., Defeis, *supra* note 44, at 74; Delgado, *supra* note 12, at 292.

Constitution.”¹¹⁸ In other words, the Constitution provides little guidance for circumstances in which the freedom right of one citizen, such as freedom to express hatred, conflicts directly with the equality right of another, such as the right to be equally heard. Consequently, without some definition of the interrelation of free speech and equal protection, the preference for First Amendment freedom of speech wins out almost exclusively.¹¹⁹ In general, *R.A.V.* exemplifies this problem, as the Court, without some mandate to consider other rights, such as listeners’ rights, focused solely on the infringement of the crossburner’s freedom of speech, even though the speech was hateful, racist, and intimidating.¹²⁰ This single-right approach narrows the Court’s perspective too much. It allows for the one-sided protection of the speaker’s freedom of speech by treating the victim-listener’s freedom of speech as “less equal” and less valid.

Therefore, a new approach is necessary to overcome the short-comings of the Supreme Court’s decision in *R.A.V.* The conflicting opinions in the *R.A.V.* decision and the new theories of free speech limitation demonstrate the continuing uncertainty in this area of the law and, perhaps, an openness to new solutions.¹²¹ The United States ratification of the ICCPR in June, 1992,¹²² the same month the Court decided *R.A.V.*, demonstrates the continuing uncertainty and possible openness to change within the hate speech arena.

IV. THE ALTERNATIVE—THE INTERNATIONAL APPROACH

A. *Principles of International Human Rights*

Human rights and civil rights are a major focus of international law and recent international treaties.¹²³ Since medieval

118 Defeis, *supra* note 44, at 62.

119 *Id.* at 74. See generally MACKINNON, ONLY WORDS, *supra* note 18, at 72-77 (describing preeminent position of free speech relative to equal protection “at the equality-speech interface”).

120 112 S. Ct. 2358, 2540 (1992). See also Lawrence, *supra* note 19, at 791 (“Justice Scalia’s words betray his inability to see the Joneses [the victims in *R.A.V.*] or hear their voices.”).

121 See *supra* Parts III.C.2. and III.D.2 (depicting Court’s uncertainty and openness to change).

122 SENATE COMMITTEE ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, reprinted in 31 INT’L LEGAL MATERIALS 645 (1992).

123 See THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL

times, countries have shown concern for individuals in other countries.¹²⁴ This concern has increased dramatically since World War II as a result of the atrocious disregard for basic human rights during and after the War.¹²⁵ In fact, the purpose of the United Nations (UN) is, to a large extent, insuring and protecting the rights of all people.¹²⁶ To that end, the international community and the UN rely on international treaties and covenants to delineate specific rights. The obligation of signatory states to protect the civil rights of their citizens under these treaties provides the mechanism for their implementation.¹²⁷

International human and civil rights agreements are uniformly grounded on several basic principles. These basic principles explicitly include: the value of human dignity,¹²⁸ nondiscrimination and equality,¹²⁹ and a balanced view of the interrelation of com-

RIGHTS 1-4 (Louis Henkin ed., 1981) [hereinafter *THE INTERNATIONAL BILL OF RIGHTS*].

124 *Id.*

125 *Id.* at 5. See also Hurst Hannum & Dana D. Fischer, *The Political Framework*, in U.S. RATIFICATION, *supra* note 14, at 1, 7.

126 Defeis, *supra* note 44, at 74-75. The U.N. Charter is based on "faith in the fundamental human rights, . . . in the dignity of the human person," and in the "equal rights of men and women." *Id.* at 75 (quoting U.N. CHARTER preamble). "Among the purposes of the United Nations is international cooperation 'in promoting and encouraging respect for human rights and fundamental freedom for all without distinction as to race, sex, language, or religion.'" *Id.* (quoting U.N. CHARTER art. 1(3), 5).

127 See Defeis, *supra* note 44, at 75 & n.96; *THE INTERNATIONAL BILL OF RIGHTS*, *supra* note 123, at 8-11 (speaking generally of efforts to implement the ideals of the U.N. Charter up to and including the adoption of the ICCPR).

The ICCPR is enforced at the international level by the Human Rights Committee [hereinafter "the Committee"] established in Article 28. ICCPR, *supra* note 1, art. 28, reprinted in BOSSUYT, at 501. The Committee is responsible for receiving and evaluating the mandatory national reports submitted by signatory nations in regard to their efforts to give domestic effect to the provisions of the ICCPR. ICCPR, *supra* note 1, art. 40, reprinted in BOSSUYT, at 615. Interstate reporting—one state reporting the ICCPR violations of another—is provided for in Articles 41 and 42. ICCPR, *supra* note 1, arts. 41-42, reprinted in BOSSUYT, at 635, 689. There is also an optional individual communications procedure, whereby an individual in a signatory state can report violations which have injured them. See *infra* notes 144-47 and accompanying text (demonstrating Committee's duties as applied to hate speech case in Canada). Annually, the Committee reports to the U.N. General Assembly on the progress and violations of the signatory nations, and the U.N. responds accordingly under its charter. ICCPR, *supra* note 1, art. 40(5), reprinted in BOSSUYT, at 631 (defining Committee's duty to make its General Assembly report). See generally DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 50-51 (describing functions of Human Rights Committee). By signing the ICCPR, the United States has subjected itself to Committee jurisdiction and U.N. sanction for any ICCPR violation.

128 "All human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights, art. 1, G.A. Res. 217A(III), U.N. GAOR, 3d. Sess., at 71, U.N. Doc. A/810 (1948), reprinted in *THE INTERNATIONAL BILL OF RIGHTS*, *supra* note 123, app. at 372.

129 See, e.g., Article 7 of the Universal Declaration of Human Rights: "All are equal

peting rights.¹³⁰ Such principles directly implicate the hate speech issue. They require a balancing of the speaker's right to free speech against the listener's right to have her inherent human dignity protected from hate speech injuries.

Articles 19 and 20 of the ICCPR directly implement these principles by defining the relationship between the opposing rights of freedom of expression and freedom from hate speech. Article 20 requires that signatory nations prohibit hate speech. Thus, this international approach frames the hate speech issue in a manner notably different from that of the United States Supreme Court. While the direct effect of the ICCPR in the United States may be limited,¹³¹ a comparison of the ICCPR and United States approaches provides interpretive principles that can improve our hate speech jurisprudence. This comparison requires an examination of the ICCPR's provisions affecting hate speech—Articles 19 and 20—before its domestic application is considered.

B. *Articles 19 and 20 of the ICCPR*

The ICCPR is fundamentally based on equality, nondiscrimination, and the need to balance the rights of all individuals in order to better protect the rights of each.¹³² In fact, equalitarian,

before the law and are entitled without any discrimination to equal protection of the law." THE INTERNATIONAL BILL OF RIGHTS, *supra* note 123, at 373.

130 Article 29(2) of the Universal Declaration of Human Rights, for example, provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Id. at 377.

131 See *infra* Part IV.D (discussing ICCPR reservations and self-executing doctrine which limit its application in United States).

132 The ICCPR in its preamble demonstrates the equalitarian and the dignitarian arguments in its "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" ICCPR, *supra* note 1, pmbll. reprinted in BOSSUYT, at 1. "All persons are equal before the law and are entitled without any discrimination to equal protection of the law." ICCPR, *supra* note 1, art. 26, reprinted in BOSSUYT, at 479. Equality is provided to "the extent that this principle coincides with the principle of non-discrimination" Garibaldi, *supra* note 14, at 69.

As to nondiscrimination, Article 2, paragraph 1 requires signatory states to "respect and ensure . . . the rights recognized in the [ICCPR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR, *supra* note 1, art. 2(1), reprinted in BOSSUYT, at 49. Many of the ICCPR's various articles contain nondiscrimination language.

dignitarian, and nondiscrimination principles have risen to the level of *jus cogens*, or "peremptory norms binding on all as superior law," in customary international law.¹³³ In the international scheme, generally, an individual's rights are not absolute. Individual rights carry certain obligations to others and to the community.¹³⁴ In other words, exercising an individual right to the detriment of others will not be tolerated. Significantly, this international approach specifically prohibits private discriminations, recognizing the debilitating individual and societal effects of that meritless activity.¹³⁵ Most importantly for hate speech discussion, the ICCPR recognizes the importance of balancing both sides of a conflict between two individual rights.¹³⁶ Here, the opposing rights are freedom of expression and freedom from hate advocacy's discriminatory assaults on individual and community dignity, as embodied in ICCPR Articles 19 and 20, respectively. Article 19, paragraph 2: "Everyone shall have the right to freedom

See generally Garibaldi, *supra* note 14, at 62-69.

The balancing of competing rights is demonstrated in Articles 5 and 19. Article 5, paragraph 1, provides: "Nothing in the [ICCPR] may be interpreted as implying for any State, group or person any right to engage in any activity . . . aimed at the destruction of any of the rights and freedoms recognized herein . . ." ICCPR, *supra* note 1, art. 5(1), reprinted in BOSSUYT, at 103. For pertinent parts of Article 19, see *infra* notes 137, 139 and accompanying text.

133 B. G. Ramcharan, *Equality and Nondiscrimination*, in THE INTERNATIONAL BILL OF RIGHTS, *supra* note 123, at 246, 249. "Customary norms of international law are those that are so widely accepted by the international community that they are binding even on states that have not ratified treaties embodying them." Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 816 (1990). *Jus cogens* cannot be changed by agreement; they are nonderogable. *Id.* at 817. While often it is difficult to show that a principle has reached the level of *jus cogens*, "credible arguments have been made that most, if not all, international human rights standards satisfy this test." *Id.* at 816.

134 See ICCPR, *supra* note 1, art. 5(1), reprinted in BOSSUYT, at 105; *id.* art. 29(2), reprinted in BOSSUYT, at 516; see also Defeis, *supra* note 44, at 71-73 (describing the international ideals of rights limitations and resultant community obligations).

135 Ramcharan, *supra* note 133, at 261-63. The United States courts and Congress have handled private discrimination less clearly than the international prohibition, although even the international approach is clouded by some notion of personal choice. *Id.* at 262. United States courts generally have required state action as an element of discrimination cases, especially in Fourteenth Amendment cases. "Most of the protections for individual rights and liberties contained in the Constitution and its amendments apply only to the actions of governmental entities." NOWAK & ROTUNDA, *supra* note 8, at 452. While the state action requirement has been relaxed to some extent recently, it remains an important part of American case law. *Id.* at 457.

136 Defeis, *supra* note 44, at 126-27; THE INTERNATIONAL BILL OF RIGHTS, *supra* note 123, at 30. Article 5, paragraph 1 of the ICCPR speaks to this balancing specifically. See *supra* note 132 (quoting in part ICCPR art. 5(1)).

of expression"¹³⁷ Article 20, paragraph 2: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."¹³⁸

Article 19, paragraph 2, provides the right to free expression. Article 20 directly limits free speech in its prohibition of national, racial, and religious hate advocacy. These conflicting principles frame the debate over the relative boundaries of free speech protection and hate speech regulation, seemingly presenting an inconsistency within the ICCPR. However, the ICCPR solves, at least facially, its own inconsistency in Article 19, paragraph 3, which provides:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputation of others¹³⁹

Thus, Article 19, paragraph 3, reinforces the Article 20 principle by requiring respect for the rights of others, including listeners. Freedom of expression is public and relational and therefore should be subject to moral and legal restrictions.¹⁴⁰ In Article 19, paragraph 3, the right for which free speech can and should be restricted in order to properly respect the rights of the "others," the listeners, is the right provided in Article 20—the right not to be confronted with hate speech.¹⁴¹ Thus, Articles 19 and 20 dem-

137 ICCPR, *supra* note 1, art. 19(2), reprinted in BOSSUYT, at 381.

138 ICCPR, *supra* note 1, art. 20(2); reprinted in BOSSUYT, at 403.

139 ICCPR, *supra* note 1, art. 19(3), reprinted in BOSSUYT, at 386.

140 See BOSSUYT, *supra* note 1, at 378 (reprinting debate and discussion from the Commission on Human Rights in the 5th Session (1949), 6th Session (1950), and 8th Session (1952)).

141 Such a right, or at least a provision for sanctions against a hate speaker, has been suggested and further defined by the Human Rights Committee of the U.N., which administers the ICCPR and other international human rights agreements, and provides guidance on their meaning and use. See *supra* note 127 (describing Committee's responsibilities and authority). The Committee, for example, decided one case directly on the Article 20 hate speech issue, *J.R.T. and the W.C. Party v. Canada* (see *infra* note 144), thereby providing definition to that Article. See *infra* notes 144-47 and accompanying text; see also Ineke Boerifijn & Joanna Oyediran, *Article 20 of the International Covenant on Civil and Political Rights*, in STRIKING A BALANCE, *supra* note 6, at 29, 31; Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS, *supra* note 123, at 209, 230 ("Article 20 constitutes a further limitation on Article 19").

While the R.A.V. Court recognized the harms of hate speech, the right not to be confronted by it was not recognized. See *supra* Part III.C-D (discussing R.A.V. and its fail-

onstrate a balancing approach to conflicting, interrelated rights by allowing for the limited restriction of one right in order to more fully effectuate another.

Although Article 19 free speech is not absolute, neither is the right to be protected from hate speech as defined in Article 20. In Article 20, "advocacy" consists of more than simply expressing hatred; it must include a certain amount of incitement of others—specifically, incitement, or "strong encouragement," to display "discrimination, violence or hostility," probably within a reasonably short time.¹⁴² Thus, it is doubtful that the mere utterance of racial epithets or rhetoric would be too easily prohibited or punished under Article 20 legislation; racial expressions by themselves would not usually be seen as inciting others to discriminate or become violent.¹⁴³

A fact scenario more deserving, and more exemplary, of hate speech regulation under Article 20 is found in *J.R.T. and the W.G. Party v. Canada*.¹⁴⁴ A Canadian human rights tribunal issued a cease and desist order against the defendants for operating a recorded telephone message service which warned callers that Jews were perverse and lazy, and responsible for world wars, unemployment, inflation, and the spread of communism.¹⁴⁵ The defendants refused to comply, were held in contempt by the Canadian Federal Court, and subsequently applied to the U.N. Human Rights Committee for relief from this alleged infringement of their

ure to recognize the victim-listeners' rights).

142 Partsch, *supra* note 141, at 228. "Incitement to 'discrimination' and 'violence' are legally defined (or definable) concepts. 'Hostility' is an attitude and only a further moral qualification of the incitement." *Id.* Partsch also defines other terms that are relevant to the international approach to hate speech and racism. *Id.* at 228-30.

143 Depending, of course, on the circumstances and reactions caused by the statements, this should be the outcome under the narrowing construction of "advocacy" and "incitement." See *id.* (defining international hate speech terms). This accords with broad speech protection and with the test, as informed by the international balancing approach proposed later in Part V of this Note. See *supra* note 127 (describing Human Rights Committee and its authority to interpret provisions of the ICCPR).

144 See P. R. Gandhi, *The Human Rights Committee and the Right of Individual Communication*, 1986 BRIT. Y.B. INT'L L. 201, 240 (citing *Report of the Human Rights Committee*, U.N. GAOR, 38th Sess., Supp. No. 40, at 234, 236, U.N. Doc. A/38/40 (1983)). See *supra* note 127 (describing duties of Human Rights Committee under the ICCPR).

Although this case is a good application of Article 20, it is probably not the most clear example of hate speech; in the United States it would be heatedly argued, to be sure. However, these cases, even in the international arena, are relatively rare. Under the test formulated in Part V of this Note, a similar result should follow.

145 John Manwaring, *Legal Regulation of Hate Propaganda in Canada*, in STRIKING A BALANCE, *supra* note 6, at 106, 117-18.

right to free expression under ICCPR, Article 19(2).¹⁴⁶ The Committee refused to admit the application for consideration, finding that Article 20(2) of the ICCPR directly prohibited this clear advocacy of racial or religious hatred.¹⁴⁷ Decisions such as these help define Article 20 of the ICCPR and demonstrate its application.

A layperson might see little distinction between Article 20 and the United States Supreme Court's jurisprudence on "fighting words" and incitement to illegal conduct.¹⁴⁸ As seen in the United States' proposed amendment to Article 19 of the ICCPR¹⁴⁹ and in *Brandenburg v. Ohio*,¹⁵⁰ restrictions on expressions would be allowed to prevent incitement to violence.¹⁵¹ The important difference, and the one most troublesome to the United States in ratifying the ICCPR, lies in Article 20's prohibition of not only incitement to violence but incitement to "discrimination" and "hostility" as well.¹⁵² Hostility and, to a lesser extent, discrimination are rather overbroad and vague to comport with the United States' more absolutist protection of free speech, especially as they implicate content-based restrictions.¹⁵³ By signing the ICCPR, what obligations has the United States incurred?

146 *Id.* See Gandhi, *supra* note 144, at 240.

147 *Id.* The U.N. Human Rights Committee stated:

[N]ot only is the author's 'right' to communicate racist ideas not protected by the [ICCPR], it is in fact incompatible with its provisions . . . [T]he opinions which [the applicant] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit.

Report of the Human Rights Committee, U.N. GAOR, 38th Sess., Supp. No. 40, at 234, 236, U.N. Doc. A/38/40 (1983).

148 See *supra* notes 55-56, 74 (citing *Chaplinsky* and *Brandenburg's* treatment and development of "fighting words" and incitement, respectively).

149 See BOSSUYT, *supra* note 1, at 395. The proposed United States reservation to Article 19 would have limited any restrictions on free speech under paragraph 3 of that Article to those defined by incitement to violence, as defined by such cases as *Brandenburg*, not incitement to hostility or discrimination.

150 395 U.S. 444 (1969).

151 Defeis, *supra* note 44, at 81 & n.122.

152 See David Filvaroff et al., *The Substantive Rights and United States Law*, in U.S. RATIFICATION, *supra* note 14, at 71, 119.

153 See Partsch, *supra* note 141, at 228-29 (defining the various terms employed in Article 20). Partsch states that incitement to "hostility" is really the only problematic definition, as the "difference between 'hatred' and 'hostility' is not certain; perhaps 'hatred' has a strong subjective element while 'hostility' suggests an attitude displayed externally." *Id.* at 228. See also Defeis, *supra* note 44, at 81 (describing the United States opposition to Article 19(3)'s content-based nature).

C. *United States Obligations Under the ICCPR*

Generally, when the United States ratifies a treaty, that treaty becomes the "supreme law of the land," with power equivalent to that of a federal statute, although ultimately subordinate to the Constitution.¹⁵⁴ International treaties create not only international obligations, but may also become part of domestic law, enforced by federal statutes and the President.¹⁵⁵ Article 2 of the ICCPR defines the substantive obligations of signatory states.¹⁵⁶ A signatory nation must "respect and ensure" the individual and community rights provided for in the ICCPR, and it must provide effective remedial, adjudicatory and enforcement procedures for violations of those rights.¹⁵⁷ The obligation to "respect" the rights designated in the ICCPR simply entails the government not violating

154 "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land" U.S. CONST. art. VI, cl. 2. See *infra* note 162 and accompanying text.

As to the constitutional limits on the validity and relative power of treaties, Justice Field stated:

That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States

Geofroy v. Riggs, 133 U.S. 258, 266-67 (1890); see also *Reid v. Covert*, 354 U.S. 1 (1957).

Another major element of a United States treaty that needs to be considered is the executory nature of the treaty. See *infra* Part IV.D.; *infra* notes 158-59; *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); see generally NOWAK & ROTUNDA, *supra* note 8, at 214; Stewart, *supra* note 1, at 78; Anne M. Williams, *United States Treaty Law*, in U.S. RATIFICATION, *supra* note 14, at 35.

155 See Williams, *supra* note 154, at 44-49. Domestic implications of treaties depend on such things as the nature of the treaty, whether it is self-executing, and whether the appropriate branch of government implements it. See *supra* note 154 (describing United States treaty doctrine generally).

156 ICCPR, *supra* note 1, art. 2, reprinted in BOSSUYT, at 52, 64-70. Signatory obligations as to treaty compliance are generally governed by the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. See Massimo Coccia, *Reservations to the Multilateral Treaties on Human Rights*, 15 CAL. W. INT'L L.J. 1, 7 (1985) (describing the Vienna Convention, its application, and its influence on international treaty law). While Article 2 defines the international obligations of signatory nations, it does not necessarily have the same domestic effects. See *infra* Part IV.E (discussing treaty reservations, especially with regard to United States treaty doctrine).

157 *Id.* See also Filvaroff, *supra* note 152, at 83-88 (describing Article 2 and its application in the United States).

those rights.¹⁵⁸ The obligation to “ensure” connotes affirmative action by the state to enable individuals to enjoy and exercise those rights.¹⁵⁹ To “ensure” requires not only limits on the government, but also on private individuals, to some extent, to prohibit them from inhibiting the exercise of the Covenant rights of others.¹⁶⁰

Thus, under the terms of the ICCPR, the United States should be obligated to “respect and ensure” the rights of citizens as defined in the ICCPR—not only freedom of speech, but also freedom from hate speech. As illustrated in Article 20, hate speech restrictions and a process for their adjudication, remedy, and enforcement should be provided by law. However, this is not the case in the United States. How is that possible? The answer, or at least a justification, lies in the reservations, understandings, and declarations that the United States made in ratifying the ICCPR.

D. *United States Reservations*

Even without reservations¹⁶¹ and other treaty limitations, the United States approach to domestic treaty implementation is less straightforward and clear than Article VI of the Constitution suggests: “This Constitution . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land”¹⁶² This language clearly states that upon signing a treaty, its provisions should automatically become the binding “Law of the Land”—binding domestic law. However, “[g]iven the isolationist bent of the American legal system, it is unlikely that international human rights law will generally be deemed to be directly incorporated into U.S. law.”¹⁶³ The government of the United States prefers to have more discretion in implementing

158 Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS*, *supra* note 123, at 72, 77; Garibaldi, *supra* note 14, at 54-57.

159 Buergenthal, *supra* note 158, at 77; Garibaldi, *supra* note 14, at 55.

160 Buergenthal, *supra* note 158, at 77-78.

161 As defined in the Vienna Convention, a “reservation” is a “unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.” Vienna Convention, *supra* note 156, art. 2(d).

162 U.S. CONST. art. VI. See *supra* note 154 and accompanying text (describing the validity and relative power of treaties under the Constitution).

163 Strossen, *supra* note 133, at 805.

international treaties domestically than Article VI of the Constitution facially seems to allow. This preference is advanced by the judicial doctrine of "self-executing treaties,"¹⁶⁴ which often prevents the direct incorporation of such international documents into domestic law. If a treaty is considered to be "non-self-executing,"¹⁶⁵ then congressional legislation is required to give it domestic force.

The United States Senate declared the ICCPR a non-self-executing treaty.¹⁶⁶ The declaration notifies the courts that they cannot use the ICCPR directly until Congress and the Executive Branch pass legislation allowing such action. This effectively removes implementation of the ICCPR from the judiciary and places it in the hands of the Executive and Legislative branches.¹⁶⁷ The decision to make the ICCPR non-self-executing was driven by Congressional fear of excessive litigation of the vague wording of the ICCPR as well as a preference not to use the unicameral treaty power under Article VI of the Constitution to change domestic law.¹⁶⁸ Thus the United States uses a dichotomous approach to the implementation of its international human rights agreements; it accepts its full obligations internationally, but reserves the option to only partially implement them domestically.¹⁶⁹ Thus, even

164 This doctrine has developed from *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), in which Chief Justice John Marshall stated:

Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded . . . as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court.

Id. at 314. See Stewart, *supra* note 1, at 79; Strossen, *supra* note 133, at 812-15.

165 "Non-self-executing" means that the treaty is not "capable of being applied or enforced directly by the courts," especially where the treaty shows an intent not to be effective as domestic law. Williams, *supra* note 154, at 46-47.

166 SENATE COMMITTEE ON FOREIGN RELATIONS REPORT, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. No. 102-23, 102d Cong., 2d Sess. 9 (1992) [hereinafter FOREIGN RELATIONS REPORT] (Declaration 1 defines the non-self-executing nature of United States ratification of the ICCPR), reprinted in 31 INT'L LEGAL MATERIALS 645 (1992).

167 Stewart, *supra* note 1, at 79. However, there is some dispute as to the effect of such declarations, as "[i]t is for the courts and not the Senate to decide whether a multilateral treaty provision is self-executing." David Weissbrodt, *Globalization of Constitutional Law and Civil Rights*, 43 J. LEGAL EDUC. 261, 268 (1993).

168 Weissbrodt, *supra* note 167, at 268.

169 Hurst Hannum & Dana D. Fischer, *Conclusion*, in U.S. RATIFICATION, *supra* note 14, at 281, 286. "Apart from accusations that the United States is guilty of its own dou-

while joining the international community under the ICCPR, the United States provides itself with an escape hatch to maintain its domestic protection of hate speech in violation of the treaty.

Additionally, the United States made direct reservations to Article 20 of the ICCPR in order to preserve its quasi-absolutist protection of free speech, including hate speech.¹⁷⁰ The reservation to Article 20 clearly states that the ICCPR will not be allowed to restrict our freedoms of speech and expression, as we have defined them in such cases as *R.A.V.*¹⁷¹ The reservation generally defines the United States approach, stating that our quasi-absolutist protection of free speech, even hate speech, will not be tainted or limited by international norms, even though we pay lip service to the ICCPR and the cause of international human rights.¹⁷² The reservation eviscerates Article 20, at least as far as implementing any direct domestic legislation.

Generally, international law contains few restrictions on reservations. The major limits on reservations depend on the reactions of other signing nations, and on the compatibility of the reservation with the object and purpose of the treaty and customary international law in general.¹⁷³ Other countries have similarly re-

ble standard when it comes to criticizing the human rights performance of its allies, the United States obviously is open to unanswerable charges of hypocrisy if it accuses others of violating standards it refuses itself to accept." *Id.*

170 "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech . . . protected by the Constitution and laws of the United States." FOREIGN RELATIONS REPORT, *supra* note 166, at 6-7.

No reservation was made to Article 19(3), which also allows for free speech restrictions that would seem to go beyond those allowed in the United States. However, the United States does not have to implement the full allowance of restrictions, and therefore nothing deemed unconstitutional is required in Article 19(3). Filvaroff et al., *supra* note 152, at 118.

171 112 S. Ct. 2538 (1992). For a discussion of *R.A.V.*, see *supra* Part III.C.2.

172 The broad reservations, declarations, and understandings adopted by the United States "essentially declare that U.S. law and practice is perfect and the United States will accept no international norm as an appropriate goal," which does "little credit either to the U.S. concept of rights or to the international community." Hannum & Fischer, *supra* note 169, at 283. See *supra* Part III.A-C (discussing United States "quasi-absolutist" protection of most expression, including hate speech under *R.A.V.*).

173 This is all based on the Vienna Convention on the Law of Treaties, especially Articles 19-21. See Coccia, *supra* note 156, at 7. Although not a party to the Convention, the United States generally recognizes most of its provisions as binding custom in international law. *Id.* at 13. See generally *id.* at 22-34 (describing the application of the compatibility rule to international treaty reservations generally).

Customary norms generally limit treaty derogation and reservations. *Jus cogens*, or peremptory norms, provide an absolute limit much higher than general customary norms. *Id.* at 31-33; see *infra* Part IV.E. (discussing more completely *jus cogens* limitations).

served out of Article 20, and no countries have objected vigorously to the reservations.¹⁷⁴ Objections generally are rare, in fact, and "the compatibility rule does not apply when states accept reservations."¹⁷⁵ In addition, the compatibility rule is unclear and difficult to apply.¹⁷⁶ Thus, it is unlikely that the United States reservation to Article 20 will be challenged or ruled incompatible with the ICCPR; instead, it will remain valid under international law.¹⁷⁷

However, the non-self-executing declaration and the Article 20 reservation do not necessarily foreclose further inquiry into the application of the ICCPR in the United States. Even the Senate has expressed views not quite as hostile and permanent as the reservations and declarations suggest. The Senate Committee on Foreign Relations extolled the virtues of "adhering to internationally recognized standards of human rights," and stated that the approach of the United States government "does not preclude the United States from modifying its obligations under the Covenant in the future if changes in U.S. law allow the United States to come into full compliance."¹⁷⁸ Thus, the door is not fully closed to the ICCPR; the United States could adhere to Article 20 and the ICCPR more fully with genuine benefits both domestically and internationally.¹⁷⁹ Additionally, by fully complying with the ICCPR, especially as to the hate speech prohibitions of Article 20, the United States can rid itself of the hypocrisy of its current dichotomy of domestic and international postures.¹⁸⁰ The United States can better exercise its world leadership role in human rights, and it can learn something from the rest of the world.¹⁸¹

174 Dinah Shelton, *International Law*, in U.S. RATIFICATION, *supra* note 14, at 27, 32-33 (discussing the reservations of various nations to Article 20 of the ICCPR).

175 Coccia, *supra* note 156, at 34.

176 *Id.* at 22-23.

177 "In theory . . . the only limit to the will of States as expressed in international agreements is the doctrine of *jus cogens*; in practice it is doubtful whether such will undergoes any limit at all." *Id.* at 32-33 n.172. See *infra* Part IV.E.

178 FOREIGN RELATIONS REPORT, *supra* note 166, at 4, reprinted in 31 INT'L LEGAL MATERIALS 645 (1992).

179 See Hannum & Fischer, *supra* note 169, at 281; *supra* Parts II.B and III.D.2. (describing the harms of hate speech and the corresponding benefits of hate-speech regulation).

180 See Hannum & Fischer, *supra* note 169, at 286.

181 *Id.* at 288-89.

Where U.S. policies are out of step with the rest of the world—and we may well lag behind other Western democracies in the economic and social spheres—international dialogue should result in more rights for Americans, not

Specifically, the United States can learn to better protect all of its citizens—speakers and listeners alike—by informing its free speech jurisprudence with international considerations. But, how can this be done in light of our treaty doctrine and the reservations to the ICCPR?

E. Continued Relevance of Article 20

Even considering the United States' reservation to Article 20 of the ICCPR and the declaration that the ICCPR is non-self-executing, the international approach to hate speech maintains a certain domestic interpretive value.¹⁸² Considering the confusion and dissatisfaction of the United States courts with the constitutional standards that apply to hate speech restrictions,¹⁸³ the reservation holds less weight than it first might seem. The reservation states only that "Article 20 does not authorize or require legislation or other action that would restrict the right of free speech . . . protected by the Constitution"¹⁸⁴ The reservation does not guarantee any specific free speech principle, and may actually require a "rereading of the first Amendment or at least . . . a reading that is not 'absolutist' free speech."¹⁸⁵ Ad-

fewer The United States can stand by, aloof and proud, or it can exercise the leadership role its 200-year history of democracy justifies, by accepting that human rights norms are truly universal and worthy of support.

Id. See also Weissbrodt, *supra* note 167, at 261 (describing the merits of studying international human rights and constitutional law to benefit the study and application of constitutional law in the United States).

182 See *supra* note 5 and accompanying text (describing the Supreme Court as the ultimate interpreter and arbiter of the Constitution, treaties, and laws of the United States). This notion of the Court as interpreter was recognized by the Senate: "Nothing in [the ICCPR] requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution . . . as interpreted by the United States." FOREIGN RELATIONS REPORT, *supra* note 166, at 24 (emphasis added).

183 See *supra* Part III.D. (discussing the split of opinions in *R.A.V.* and the distaste which the various Justices felt in deciding for the hate-speaker).

184 FOREIGN RELATIONS REPORT, *supra* note 166, at 6-7.

185 Jordan J. Paust, *Rereading the First Amendment in Light of Treaties Proscribing Incitement to Racial Discrimination or Hostility*, 43 RUTGERS L. REV. 565, 567-69 (1991). While Professor Paust refers specifically to a different treaty, the language of the proposed United States reservation to that treaty, substantially similar to the reservation to Article 20 of the ICCPR, states that nothing in the treaty can "require or authorize" any action by the United States government. *Id.* at 566-67. Professor Paust writes:

[T]he language of the reservation does not expressly guarantee the primacy of an "absolutist" free speech principle. In fact, no particular free speech principle, value, or content is necessarily protected by such language [G]iven the normal rule of construction that one should interpret domestic law consistently

ditionally, the right protected by the Constitution, here the right to freedom of speech, including hate speech, remains unclear under the Court's split in *R.A.V.* Thus, it is not so obvious that Article 20 would directly conflict with our rights under the Constitution.

More importantly, by using international norms to interpret domestic rights and laws, the United States courts would not be using Article 20 as "authorization" for a change in its hate speech approach. Instead, the United States courts could use their interpretive powers and international law to incorporate the customary norms defined by Article 20.¹⁸⁶ "As a principle of interpretation, domestic law is construed as fully as possible in conformity with the international law."¹⁸⁷ Generally, treaty provisions evidence customary norms of international law such that they become universally binding on all nations, including non-signing nations.¹⁸⁸ Many have argued that human rights standards, and specifically the standards in the ICCPR, are indeed such customary norms.¹⁸⁹ In fact, many go further, holding such human rights principles to be "peremptory" norms, or *jus cogens*, and therefore non-derogable and unalterable, disallowing any reservation.¹⁹⁰

The United States has demonstrated that it too holds international human rights standards to be overriding in their importance and influence.¹⁹¹ Historically, international norms and treaties were of paramount significance to the Framers of the Constitution, and under their natural law ideals they advocated the incorporation of such fundamental principles into domestic law as binding precedent.¹⁹² While the relative willingness of United States

with our international obligations, one can appreciate that the reservation's language is not merely content-neutral and potentially protective of constitutional requirements that are contrary to those of the treaty, but also presumptively supportive of the obligations set forth in the treaty.

Id. at 567-69 (footnotes omitted).

186 *See supra* note 5 (defining the Court's interpretive power).

187 Shelton, *supra* note 174, at 277.

188 Strossen, *supra* note 133, at 816. Such things as the general usage of nations, judicial decisions, resolutions of international bodies, and national legislation also evidence such customary norms. *See also* Coccia, *supra* note 156, at 30-34.

189 Strossen, *supra* note 133, at 816-17. In fact, the United States government holds the ICCPR to be at least a customary law principle. *Id.* at 818.

190 *Id.* at 816-17. "[T]hese standards cannot be changed by agreement [T]he International Court of Justice has declared that rules concerning the basic human rights are 'obligations *erga omnes*' (owing by each state to all persons)." *Id.*

191 *Id.* at 818.

192 *Id.* at 818-23.

courts to incorporate international norms into domestic law has gone through several cycles, there is little doubt that, in proper situations, such norms may be employed as interpretive tools.¹⁹³ Thus, the use of international norms, such as those evidenced by the ICCPR, as interpretive principles in domestic law would comport with the Framers' intent and with judicial practice and precedent.¹⁹⁴ The ICCPR "can [and should] be used by state and federal courts to interpret or clarify constitutional or legislative standards."¹⁹⁵ In cases where domestic laws are unclear and open to definitional argument, the ICCPR, as a customary norm of international human rights law, should be used to inform the United States courts' determinations of the meaning and application of those laws.

193 See Shelton, *supra* note 174, at 277 & n.14; Strossen, *supra* note 133, at 820-23, 831-36. The United States Supreme Court has regularly employed international norms to interpret the Constitution and our domestic laws. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369 & n.1 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 830 & n.31 (1988) ("We have previously recognized the relevance of the views of the international community . . ."); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982). While these are generally Eighth Amendment death penalty cases, there are cases dealing with other constitutional issues, such as Fourteenth Amendment equal protection. See Strossen, *supra* note 133, at 834.

Most importantly, such cases demonstrate the Court's willingness to incorporate international norms into domestic decisions. In *Stanford*, Justice Brennan actually referred directly to the ICCPR as a source for interpreting a domestic constitutional issue. See 492 U.S. at 390 & n.10 (Brennan, J., dissenting).

The lower federal courts and many state courts have also relied on international norms to help interpret domestic law. Specifically, see *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (demonstrating the incorporationist approach to the use of customary international law domestically), as well as the many recent federal and state cases evincing a similar willingness to use the interpretive approach. See Strossen, *supra* note 133, at 822-23 & nn.79-83.

194 See generally Shelton, *supra* note 174, at 277; Strossen, *supra* note 133, at 827-28, 831-36.

In contrast to U.S. courts' current reluctance to view themselves as bound directly to international human rights principles on substantive issues, they are much more willing to invoke such principles—whether embodied in treaties or in other manifestations of customary international law—to guide the interpretation of domestic legal norms Even apostles of positivism concede that judges should be free to resolve ambiguities, or to fill gaps, in positive law by reference to universally accepted legal principles The resort to international human rights standards for purposes of construing domestic statutes and constitutions is fully consistent with, and justified by: . . . the intent of the framers of the U.S. Constitution; the early practice of U.S. courts and other government officials; . . . and the consistent practice of federal and state courts throughout the U.S.

Id. at 824-25 (footnotes omitted).

195 Shelton, *supra* note 174, at 277.

Thus, the international approach to hate speech can be incorporated as a customary norm into our First Amendment jurisprudence. The international approach to limiting hate speech would not usurp our strong protection of free speech, but rather would supplement our approach with due consideration for the rights of the listener—the unprotected victim under current United States law.¹⁹⁶ It requires a refocusing of the balancing process in the international manner towards antidiscrimination and equality,¹⁹⁷ while maintaining the high stature of free speech.

The First Amendment to the United States Constitution is broad in its language, as is Article 20 of the ICCPR.¹⁹⁸ Thus, even though the new approach, using both free speech protection and hate speech regulation, is applicable and beneficial to our society, a major problem remains—how can such broad principles be implemented in the United States without promoting judicial or government censorship?

V. AN ALTERNATIVE SOLUTION

A solution to the problem of hate speech requires recognition of the importance of freedom of expression, and at the same time condemnation of hate speech as inconsistent with community living and proper respect for human dignity. The conclusion derived from the above comparison of approaches is that the balancing approach, utilizing the positive aspects of both the United States and international systems, must be incorporated into our free speech jurisprudence.¹⁹⁹ It can, and will, better protect the rights of all members of society. Specifically, the rights of the speaker and the listener must be equally recognized and protected.²⁰⁰ Such equal protection can only be realized by closely examining and balancing the actions, reactions, and rights of both sides of the hate speech confrontation.²⁰¹

196 See *supra* Parts II.B and III.D (describing the failure of United States courts to consider victims' rights).

197 See *supra* notes 128-29 (defining the international focus on antidiscrimination and equality).

198 See *supra* notes 2-3 and accompanying text (quoting the First Amendment and ICCPR, art. 20).

199 As shown in Part IV.E., the international balancing approach under the ICCPR can be incorporated into United States courts as an interpretive tool.

200 See *supra* Part II.B. and III.D.1 (presenting arguments for recognizing the rights and needs of the listener).

201 Justice Stevens described his dissatisfaction with the overbroad sweep of the Court's "categorical approach" to the First Amendment, as it "fits poorly with the com-

The United States can be seen as an advocate for absolutist protection of almost all speech, and specifically hate speech.²⁰² The ICCPR, while not advocating absolute protection of any one right, can be seen as an advocate for hate speech prohibition.²⁰³ As in the ideal adversarial trial, the opposing advocates present the extremes, and somewhere between them lies the truth, or here, the solution to the hate speech dilemma.

The middle ground, where the balancing approach can best be used, rests in the overlap of the exceptions to the United States absolutist approach—"fighting words" and incitement to illegal conduct—and the "incitement" concept of Article 20 of the ICCPR.²⁰⁴ Both speak to "incitement," whether it be incitement to violence, hostility, or discrimination.²⁰⁵ Incitement to any of these is detrimental to society and public order, and thus each should be uniformly condemned.²⁰⁶ "Fighting words" doctrine

plex reality of expression," and ultimately "sacrifices subtlety for clarity." *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2566 (1992) (Stevens, J., concurring). "I believe our decisions establish a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech." *Id.* at 2567.

202 See *supra* Part III.A-C (describing the United States approach to hate speech).

203 See *supra* Part IV.A-B (recounting the international approach to hate speech as derived from Article 20 of the ICCPR).

204 The "fighting words" doctrine was first articulated in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). It stands for the proposition that face-to-face words that "have a tendency to cause acts of violence by the person to whom, individually, the remark is addressed," where a reasonable man of "common intelligence" is the listener, can be banned constitutionally without infringing on the speaker's right to free speech. *Id.* at 573. "Fighting words" are considered to be unprotected speech. There is some overlap here with *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *Brandenburg* defines another exception to general free-speech protection—incitement to illegal conduct. "[A]dvocacy of the use of force or of law violation" can only be prohibited or limited "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

Article 20 requires prohibition of "advocacy of national, racial or religious hatred that constitutes incitement to hostility, discrimination or violence . . ." ICCPR, *supra* note 1, art. 20(2), *reprinted in* BOSSUYT, at 403.

205 See *supra* notes 140-43 and accompanying text (comparing Article 20's incitement provisions to the United States approach to incitement as defined by *Brandenburg*). *Chaplinsky*, similar to *Brandenburg*, defines the unprotected speech—"fighting words" here—as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . ." 315 U.S. at 572 (emphasis added).

206 "[A]dvocating' violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it." *Brandenburg*, 395 U.S. at 447 (stating the reasoning of *Whitney v. California*, 274 U.S. 357 (1927), as discredited for its overbroad limit on protected speech, but not overruling this statement as the basic reason for creating an exception to free-speech protection).

Justice Murphy stated in dictum that "fighting words" have only "slight social value

looks to the reaction of a listener to a face-to-face attack,²⁰⁷ while Article 20 provides an individual the right not to be confronted with hate speech. The focus is on the reactions of listeners—victims and bystanders. Thus, the listener is explicitly included in the balancing of rights by both approaches. This common ground of considering listener reaction, then, provides the basis for informing the overall protection of free speech with a respect for the rights of hate speech victims. It is here that the international balancing approach can be incorporated into United States jurisprudence as an interpretive tool²⁰⁸ for the definition and evolution of “fighting words.”

By maintaining our general free speech protection, while specifically looking to “fighting words” and Article 20 jurisprudence for guidance on hate speech victim protection, several factors²⁰⁹ may be distilled out of the process. These factors can then be used in a narrow balancing test for defining proscribable hate speech. Once it is shown that hate speech is indeed involved—a showing that speech advocating or inciting hatred, violence or discrimination based on race, nationality, religion, gender, or ethnicity has in fact been uttered²¹⁰—the factors should include:

as a step to truth . . . [which] is clearly outweighed by the social interest in order and morality.” *Chaplinsky*, 315 U.S. at 572.

“There was general agreement that advocacy of national, racial, or religious hatred and war propaganda were evils.” BOSSUYT, *supra* note 1, at 406 (quoting the Commission of Human Rights’ discussion and debate of Article 20 of the ICCPR).

207 The Court described the prohibited speech in *Chaplinsky* as “epithets likely to provoke the average person to retaliation . . .” 315 U.S. at 770. This demonstrates that the focus is on the reaction of at least the “average” listener.

208 See *supra* Part IV.E (defining the interpretive powers of the courts in the incorporation of international law into domestic use).

209 Kent Greenawalt suggests three such factors in his book, namely, “aims of the speaker, damage to the listener, the nature of the language used, or some combination of these three . . .” KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 296-97 (1989). See also Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602-05 (describing factors defining “low-value” speech as suggested by judicial decisions). My factors were partly inspired by Greenawalt’s and Professor Sunstein’s suggestions, but in a much stronger sense, it was the clash between the needs of the victim and a fear of censorship that really defined my thought processes in this endeavor.

210 This threshold “definition” is based on the language of Article 20 of the ICCPR. See *supra* note 4 and accompanying text. Another plausible “definition” is offered by Professor Matsuda: “In order to distinguish the worst, paradigm example of racist hate messages from other forms of racist and nonracist speech, three identifying characteristics are suggested: 1. The message is of racial inferiority; 2. The message is directed against a historically oppressed group; and 3. The message is persecutorial, hateful, and degrading.” Matsuda, *supra* note 6, at 2357. Both “definitions” have something positive to offer. Professor Matsuda is dealing more narrowly with race, but these factors can most likely be extrapolated to cover ethnicity, religion, etc.

- (1) the intent of the speaker;
- (2) how closely the speech was directed at a specific person or group, at the time of its utterance;
- (3) the response actually induced in the listener;
- (4) the government's interest in protecting the speech;²¹¹ and
- (5) whether there is any other reasonable use or purpose of the speech for which it should be protected.²¹²

The balance of these factors will define the outcome. The interests of the listener, the speaker, society, and the state are all balanced on the scale of justice in the context of the hate speech confrontation. The freedom and dignity of *both* listener and speaker must be equally protected.

These factors, whether it be intent or the interests involved, have been developed in various areas of United States jurisprudence.²¹³ They collectively entail a generous respect for the speaker's right to speak, as seen in the consideration of the interests for protection, as well as the listener's right not to be confronted with hate speech. The jurisprudence of other signatory nations to the ICCPR—especially Canada²¹⁴ and Germany²¹⁵—in

I placed the word "definition" in quotes here, because these merely serve as parameters which allow us to know whether we are dealing with a hate speech issue. The real definition of whether a certain act is legally proscribable hate speech is based on the balancing of the factors set out below.

211 "Government interest" is defined, for instance, in First Amendment cases involving content-based regulations on speech in public fora, such as *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and cases following in that line. See generally NOWAK & ROTUNDA, *supra* note 8, at 1090-99 (citing various cases under the *Perry* analysis which demonstrate the case law development of government interests in speech limitation).

212 This factor is formulated in a parallel sense to the third prong of the current obscenity test, which requires consideration of "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15 (1973). "The test is whether a reasonable person (not an ordinary member of any given community) would find value in the material taken as a whole." NOWAK & ROTUNDA, *supra* note 8, at 1144 (citing *Pope v. Illinois*, 481 U.S. 497, 501 & n.3 (1987)). This line of cases, although based on obscenity, should at least provide an analog of how this factor should be developed for hate speech.

213 See *supra* notes 210-12.

214 See, e.g., *The Queen v. Keegstra*, 3 S.C.R. 697 (Can. 1990). *Keegstra* is the seminal Canadian, and possibly international, case on hate speech which demonstrates many, if not all, of the arguments for the international balancing approach, based on listeners' and speakers' rights, and dignitarian, equalitarian principles. It is a good example of how hate speech should be regulated, although its reasoning cannot be directly brought into the United States, as the international principles of the ICCPR are expressed directly in their constitutional documents. See generally Irwin Cotler, *Principles and Perspectives on Hate Speech, Freedom of Expression and Non-discrimination: The Canadian Experience as a Case-Study*

adjudicating Article 20 matters also informs the elements of the test.²¹⁶ The critical element that is added to the current inadequate United States approach to hate speech regulation, as depicted in *R.A.V.*, is *proper consideration for the victim-listener's reaction and rights*.²¹⁷ Respect for the basic dignity and rights of all human beings is the indispensable factor.

The balance of these factors weighed together in good faith, with general free speech protections still in place,²¹⁸ should sufficiently protect our freedom of speech, especially in light of our rightly continued general disdain for limitations on speech. Regardless of the specific test that is developed to deal with the hate speech problem, though, it is of the utmost importance that the United States accept the international balancing of rights as a modification of our unreasonable absolutist approach. Ultimately, this must be the beginning of any solution to the hate speech problem.

VI. CONCLUSION

The belief that "all Men are created equal" is a basic tenet of one of our most cherished and fundamental documents, the Dec-

in *Striking a Balance*, in *STRIKING A BALANCE*, *supra* note 6, at 123; Manwaring, *supra* note 145, at 106.

215 See, e.g., *The Mephisto Case*, 30 BVerfGE 173 (Ger. 1971); *The Luth Case*, 7 BVerfGE 198 (Ger. 1958). These cases exemplify the German approach to speech limitation. These are not hate-speech cases per se, but their principles apply to hate speech, as the balancing approach was demonstrated there with a heavy thrust towards dignitarian ideals and individual honor. See generally Rainer Hofmann, *Incitement to National and Racial Hatred: the Legal Situation in Germany*, in *STRIKING A BALANCE*, *supra* note 6, at 159; DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 366 (1989).

216 See *Part III: Country Experiences*, in *STRIKING A BALANCE*, *supra* note 6, at 75 (describing the laws and experiences of various countries around the world; most importantly, because they have democracies relatively similar to the United States, several articles from Canada, Germany, the United Kingdom, and Australia are included).

217 The response of the listener, under factor (3) of the above test, should be limited in its weight by a threshold "reasonableness" standard. To allow the oversensitive listener to go to court everytime they are unintentionally slighted would chill free speech by placing the rest of the community in fear of mistakenly uttering an "insult." Knowingly attacking a person's sensitivity is different, and should be weighed against the speaker under factor (1)—the intent factor. The balancing of the various factors of the test should filter out the frivolous and oversensitive without turning away those with genuine injuries.

218 The overbreadth and void-for-vagueness doctrines comprise the two main "general free-speech protections." See generally NOWAK & ROTUNDA, *supra* note 8, at 944-52 (defining overbreadth and vagueness).

laration of Independence.²¹⁹ Equality cannot abide weighing the right of one person more heavily than the right of another. The First Amendment must not continue to protect the dangerous and harmful hate speech of racists and bigots at the expense of silencing and subordinating the voices and rights of minorities. The inordinate protection of such worthless speech is a "quixotic tilt at wind mills which belittles great principles of liberty."²²⁰ It is time that the United States recognizes the rights of the speaker *and* the listener. It is time that the United States fully accept its obligations under the International Covenant on Civil and Political Rights—joining the international community in protecting the rights of all by balancing the competing and equal rights of each.

Scott J. Catlin

219 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

220 *Kunz v. New York*, 340 U.S. 290, 295 (1951) (Jackson, J., dissenting).

