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HATE SPEECH IN CYBERSPACE: BITTERNESS WITHOUT BOUNDARIES

LaShel Shaw*

INTRODUCTION

If the pen is mightier than the sword, today's computer keyboards may be mightier than tanks and machine guns—and just as destructive. The Internet offers a cloak of anonymity which often leads people to type things they would never say to someone's face. Even in its infancy, the Internet became a powerful vehicle for hate. In 1996, an anonymous email user sent racist messages to over sixty Asian students at the University of California, Irvine, blaming them for various problems on campus and threatening to hunt them down one by one to kill them.1 Several students changed their class schedules, and some even left the school.2

As Internet use has become more widespread, the frequency and impact of such hurtful behavior has only increased. Some examples are very dramatic, such as Lori Drew's use of a MySpace account to impersonate a teenage boy to tell her daughter's thirteen-year-old friend that "the world would be a better place without her in it," which led the girl to commit suicide.3 Just as harmful are the routine comments left on websites visited by mil-

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2. Id.
lions of people every day, demeaning women, minorities, even (or perhaps especially) the overweight.4

In fact, making hateful and extremist statements on the Internet in order to get a reaction has become a popular form of recreation among some people. These people are disparagingly known in the online community as “trolls.”5 Some individuals even hold numerous accounts, so they can post hateful statements under one user name and then use their other accounts to add a chorus of agreement, leading other users to believe the troll has widespread support for their inflammatory remarks.6 Just as the ugly creature who tried to devour the Billy Goats Gruff monopolized the fairytale bridge,7 modern day trolls terrorize those trying to use the Internet and undermine its utility as a result.8

Not only is hate speech more likely to happen on the Internet, where anonymity is easily obtained and speakers are psychologically distant from their audience, but its online nature also gives it a far-reaching and determinative impact. Today’s public consciousness is shaped not in the streets or the parks, but in online editorials and web forums.9 All too often, these pages fill up with insults and racist swill.

Under this deluge of hate and bullying, one scholar has commented that “the free flow of information on the Internet

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4. For instance, one woman shared a story about being self conscious while exercising on the popular website fmylife.com, and was greeted with a chorus of comments such as “I’ve seen you whales waddling around and dont [sic] know how I managed to hold myself from vomiting . . . [D]ont [sic] leave the house till youve [sic] done a couple of pushups dumbo.” Dzin, Comment to Posting by Fat Runner, F My Life, http://www.fmylife.com/health/6163418 (Nov. 12, 2009, 1:30 EST).


7. George Webb Daset, Popular Tales from the Norse 264 (2d ed. 1912).

8. It is worth noting, however, that the designation of “troll” is a reference to fishing, because the individuals troll forums for a response like boat crews troll for fish, and did not originate in reference to the mythological creature. Smith, supra note 6.

can make us less free." Anti-social Internet behaviors, including hate speech and cyber bullying, have negatively impacted the lives of people all over the world. It is no surprise that the Secretary General of the United Nations has said that the use of the Internet to spread hate speech is one of the most important challenges to human rights to have arisen from modern technological development.

This Note will explore the problem of hate speech on the Internet, advocating for measures that incorporate transparency and user-driven discussion. First, this Note will explore how harmful hate speech can be and contrast this with the danger of over-restricting free speech. Because of the difficulty in balancing these important human rights interests, including constitutional concerns, hate speech is best regulated on a local level. At the same time, however, the global nature of the Internet makes local regulation by individual national governments impractical, both because of technological constraints and legitimacy concerns. This leaves regulation in the hands of corporations, many of which have approached the problem by employing moderators to police content. This is not a preferable solution because the lack of transparency makes it difficult for users to defend their human rights. Instead, a system where content is discussed publically before the moderator makes a transparent determination concerning its fate offers a solution that potentially increases awareness of and sensitivity to the problem, while allowing the online community of users to better define hate speech according to their own "local" understandings.

**Human Rights Issues**

Hate speech presents serious human rights issues. As Alexander Tsesis has observed, "Prejudicial speech initiates, perpetuates, and aggravates socially accepted misrepresentation about

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13. See infra notes 19–45 and accompanying text.
14. See infra notes 46–60 and accompanying text.
15. See infra notes 61–100 and accompanying text.
16. See infra notes 101–16 and accompanying text.
17. See infra notes 101–29 and accompanying text.
18. See infra notes 130–37 and accompanying text.
The greater the barrage of misethnic and subordinating stereotypes, the more likely it is that persons with intense hatreds will release their pent-up frustration and angers on vulnerable minorities.\textsuperscript{19} The relationship between hate speech and violence is vividly acted out in history.\textsuperscript{20} Hate speech played a major role in exacerbating the violence in Bosnia,\textsuperscript{21} in justifying slavery in Colonial and pre-Civil War America,\textsuperscript{22} and in the rise of the Third Reich.\textsuperscript{23} Indeed, the very purpose of hate speech is often to deny the victim's humanity and "make them objects of ridicule and humiliation such that acts of aggression against them are perceived less seriously."\textsuperscript{24} Like shouting "fire" in a crowded movie theater, hate speech can cause a violent and potentially deadly stampede.\textsuperscript{25}

Hateful words, even those that do not rise to the level of incitement to violence, can cause very real psychological harm to the victims even while reinforcing potentially dangerous beliefs in the minds of the audience.\textsuperscript{26} The racist messages that hate speech often encapsulates, for instance, have been shown to have significant negative impact on parenting practices, and have even been linked to mental illnesses and psychosomatic disease.\textsuperscript{27} Allowing hate speech may even adversely affect the speaker, who


\textsuperscript{21} \textit{Id.}

\textsuperscript{22} Tsesis, \textit{supra} note 19, at 28-48.

\textsuperscript{23} \textit{Id.} at 11-27. Tsesis also ties the Rwandan genocide directly to a pattern of hate speech and prejudice. \textit{Id.} at 66; see also Susan Benesch, \textit{Vile Crime or Inalienable Right: Defining Incitement to Genocide}, 48 \textit{Va. J. Int'l. L.} 485, 501 (2008) (explaining that deliberate and "systemic campaigns of hate speech" is the root of genocide).


\textsuperscript{26} See Tsesis, \textit{supra} note 19. See also Samuel P. Nelson, \textit{Beyond the First Amendment: The Politics of Free Speech and Pluralism} 111 (2005) (stating "one implication of freedom of speech is the social mutability of the individual. Speech acts and the relationships they create change the people who are involved."); Knechtle, \textit{supra} note 20, at 557 (explaining that law in the United States does not address the harms of speech to the same extent as other countries).

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is more likely to become entrenched in his or her hateful beliefs if given the legitimacy of a global audience. 28

Nevertheless, the over-regulation of hateful speech also creates serious concerns. Some scholars have even argued that government regulation of hate speech threatens to destroy democracy. Robert Post, for instance, advocates that public discourse is so critical to the development of a democratic collective will that "racist speech is and ought to be immune from regulation." 29 Although there is an alternative view, strongly defended by scholars such as Alexander Tsesis, 30 a robust protection of freedom of speech has clearly won out in American jurisprudence. 31

Limits on freedom of speech may not only endanger democracy, but can also have a negative impact on the individual being prohibited from speaking. Freedom of speech is an individual

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28. See Raphael Cohen-Almagor, Countering Hate on the Internet: A Rejoinder, 22 Amsterdam L. F. 2010, available at http://ojs.ubvu.vu.nl/alf/article/view/138/264 (explaining "[S]ocial science evidence indicates that permitting someone to say or do hurtful things to another person increases, rather than decreases, the chance that he or she will do so again."). Cohen-Almagor goes on to discuss the correlation between hate speech and negative social behavior, stating "[O]bservers may do likewise, creating a climate in which the targets are at an even greater risk. Once the speaker forms the category of the victim who deserves what she gets, that behavior is apt to continue and even escalate to include material discrimination and physical bullying." Id.


30. TSESIS, supra note 19, at 499–501 (explaining that hate speech can actually harm the democratic process because it "can delegitimize the opinions of disfavored groups" and reduces political participation by minorities, stymieing policy and legislative debates). See, e.g., Dawn C. Nunziato, The Death of the Public Forum in Cyberspace, 20 Berekley TECH. L.J. 1115, 1144 (2005) (according to the affirmative theory of the First Amendment, ensuring each citizen can express themselves meaningfully may require government involvement in the market to protect free speech). See also TSESIS, supra note 19, at 179 ("Hate speech does not further political discourse; instead, it escalates the threat to law and order.").

31. See Robert A. Sedler, An Essay on Freedom of Speech: The United States Versus the Rest of the World, 2006 Mich. St. L. REV. 377, 378. Despite the Supreme Court's statement in Gitlow v. New York that "[I]t cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration," Gitlow v. New York, 268 U.S. 652, 669 (1925), recently the Court has treated hate speech in the tradition of Justice Black, instituting "a near-blanket prohibition against regulation regulating speech based on its misethnic content," see TSESIS, supra note 19, at 126.
liberty and essential to personal autonomy.\textsuperscript{32} Potential victims can be harmed by over-regulation of speech, too; complete bans on hateful speech can reinforce the paternalistic idea that the marginalized need government protection and can turn racists into revered martyrs of libertarianism and anti-federalism.\textsuperscript{33} Furthermore, with the "musk of the taboo," hate speech bans can lead to the lionization of racist thugs and make hateful ideologies more appealing to impressionable youth.\textsuperscript{34}

The tension between these different demands of human rights reflects the dualistic nature of human dignity. From one perspective, human dignity demands autonomy. A government that does not respect people's choices and beliefs may violate their dignity. It is crucially important that people be allowed to shape their own identities, as the Hungarian Constitutional Court explained in discussing laws restricting legal names.\textsuperscript{35} There, the court held that dignity includes an inalienable right to bear a name reflecting one's self-identity.\textsuperscript{36} This is not a uniquely Hungarian view—in a case before the European Court of Human Rights concerning the right of transsexuals to present themselves to society as they choose, the relationship between dignity and self-determination was similarly stressed.\textsuperscript{37} The court observed that "society may be reasonably expected to tolerate a

\textsuperscript{32} Solove, supra note 10, at 129–32. But see Cass Sunstein, Republic. com 49–50 (2001) ("[W]e are likely to think that freedom consists in the satisfaction of private preferences—in an absence of restrictions on individual choices. This is a widely held view about freedom [but] it is badly misconceived. Freedom consists not simply in preference satisfaction but also in the chance to have preferences and beliefs formed under decent conditions . . . ").


\textsuperscript{34} See Ronald J. Krotoszynski, Jr., A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany, 78 Tul. L. Rev. 1549, 1598–99 (2004) (describing what Krotoszynski sees as the failure of Germany's attempts to protect dignity). See also Judith Butler, Excitable Speech: A Politics of the Performative 131 (1997) (arguing that censorship, by forbidding certain words and ideas, reinforces them and "the effort to constrain the term culminates in its very proliferation").


\textsuperscript{36} Id.

certain inconvenience to enable individuals to live in dignity and
worth in accordance with the sexual identity chosen by them at
great personal cost." While free speech might not always touch
on the same core aspects of self as personal names and sexual
identity, similar implications arise whenever people are prohib-
ited from full self-expression.39

In contrast to this conception of dignity, which embodies
people's ability to make free choices, dignity also plays a role in
empowering government to limit the freedom of their citizens.
The most famous example of this case was decided by a French
court over a decade ago when it determined that the sport of
dwarf throwing was an affront to human dignity, even when it was
done with the full consent of all the parties involved.40 Though
this case is older, the sentiment it expresses is not outmoded—a
recent French journal article urged that minimum weight
requirements and physical inspections be imposed on all fashion
models, in order to ensure that fashion shows do not remain
spectacles exploiting those suffering from anorexia.41 Particu-
larly in Europe, this more paternalistic view of dignity has been
used to limit Nazi speech42 and even prohibit the display of polit-
ically critical artwork.43

In many situations, the two conceptions of dignity are argua-
bly at odds with each other.44 Dignity-as-liberty demands that

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38. Id. at para. 71.

39. See Patricia Loughlan, Copyright Law, Free Speech and Self-Fulfillment, 24
SYDNEY L. REV. 427, 431 (2002) ("The individual, cognitive self is developed and
constituted through expressive, communicative activity and, accordingly, to
interfere with that activity is to interfere with the development and realisation
of the self and the manifestation of a unique personality.").

40. Conseil D’Etat [CE] [Highest Administrative Court], Oct. 27, 1995,
Commune de Morsang-sur-Orge (Fr.), available in French at http://www.rajf.
org/article.php3?id_article=245.

41. Marc le Roy, Le Maire, le mannequin, et la protection de la dignité de la
personne humaine, 2008 ACTUALITÉ JURIDIQUE ÉDITION DROIT ADMINISTRATIF 80,
available in French at http://www.psyhanalyse-en-mouvement.net/anorexie:
voix.off/index.php.

42. See Alkotmánybíróság (AB) [Constitutional Court] May 9, 2000, 14/
2000 (V. 12) (Hung.), translated in CONSTITUTIONAL COURT OF HUNGARY, supra
note 35, at 189.

hudoc-en (search "68354/01" in the "Application Number" field).

44. This explains, for instance, why cases on both sides of the abortion
debate have invoked dignity. Compare Bundesverfassungsgericht [BVerfG]
[Federal Constitutional Court] 39, 1 (Ger.) as discussed in Marc Chase McAl-
clist, Human Dignity and Individual Liberty in Germany and the United States as
Examined Through Each Country’s Leading Abortion Cases, 11 TULSA J. COMP. &
people be free to express themselves, but dignity-as-constraint suggests that unfettered hateful or racist speech should not be permitted because it demeans the victims and undermines the social health of the community. An overzealous censor poses as much a threat to human dignity as a hateful propagandist.\(^{45}\)

**National Differences**

While achieving a balance between these two important values of human rights is difficult enough on a local setting, it becomes nearly impossible in the global, anonymous context of the Internet. Each nation has taken a different approach to balancing dignity and free speech. For instance, in the United States, hate speech is only prohibited when it creates a threat of immediate violence,\(^ {46}\) while in many European countries defending the Holocaust or collecting Nazi memorabilia is criminally prohibited.\(^ {47}\) Predictably, "with the expansion of the Internet, new regulatory challenges more frequently arise because of the global reach of hate propaganda transmitted from the United States, where it is legal, and streamed into countries, like France, where such communications are criminal offenses."\(^ {48}\)

Much of this variety stems from the difficulty in achieving a balance without ignoring the important human rights concerns on both sides. In the United States, freedom of speech, the first right guaranteed by the Bill of Rights, is widely cast in near-absolute terms.\(^ {49}\) It is an approach that has been characterized as

833, 916 (1992). For another particularly interesting example of the dignity divide see *Indiana v. Edwards*, 554 U.S. 164, 176–77, 186 (2007) (featuring a heated debate between the majority and the dissent on whether the real affront to human dignity was to deny a mentally challenged defendant the right to be "master of one's fate" and represent himself in court, or to allow him to embarrass himself and the legal system by giving him the opportunity).

45. See Wright, *supra* note 33, at 564–66.

46. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (forbidding state laws to regulate hate speech unless there was the threat of imminent lawless action).

47. See, e.g., *Constitutional Court of Hungary, supra* note 42; *La Ligue Contre le Racisme et l'Antisémitisme v. Yahoo!, Inc., Cour Superieure de Paris [Superior Court of Paris], May 22, 2000, as translated and reprinted in Bellia et al., Cyberlaw: Problems of Policy and Jurisprudence in the Information Age* 94–95 (3d ed. 2007).

48. Tsesis, *supra* note 25, at 497. This is not a merely hypothetical situation, as *La Ligue Contre le Racisme* (Fr.), makes evident.

49. See Mary Ann Glendon, *Rights Talk: The Impeachment of Political Discourse* 41–43 (1991). See also Knechtle, *supra* note 20, at 546–49 (arguing that the United States overprotects free speech when compared to other countries, even considering constitutional differences).
“pure speech jurisprudence.” In contrast, the German approach is drastically different. Under the German Constitution, dignity is the foremost value, and it has been interpreted by the German Constitutional Court as sometimes superseding freedom of speech and expression. Most western nations have adopted an approach similar to Germany's, balancing freedom of expression with other considerations, rather than taking the more robustly absolutist approach to speech from the American model.

Even if all countries agreed on the same basic approach to preventing hate speech and protecting freedom of expression, a global solution to hate speech that would be workable in the online context would still be difficult to achieve, because social and historical context plays such an important role in determining which words are hateful. As one scholar has described, "human dignity is... an expression of a sense of being that is simultaneously personified and imbedded in the relationship between individuals and their community." The most destructive messages are those that rely on historically established hatreds and symbolism in order to awaken dormant cultural prejudices. This is the reason why some scholars have urged the need for a different approach to legislation in the area of hate speech, in order to more appropriately account for historical and sociological factors. Even within the United States, the Supreme Court has suggested that the state legislatures are in a better position to define hate speech, because they are more familiar with local history and practice than federal legislators. The importance of local variation in animating hate speech

50. Tsesis, supra note 19, at 192.

51. See Krotoszynski, Jr., supra note 34.

52. Id. at 1598.


55. Tsesis, supra note 25, at 503–04.

56. See Knechtle, supra note 20, at 552; Molly Beutz Land, Protecting Rights Online, 34 Yale J. Int’l L. 1, 31 (2009).

becomes especially problematic in the Internet context—someone in the United States may post something potentially derogatory about Jews or Gypsies that would be only mildly offensive in their home state, but dangerous in the context of the social and historical circumstances of an Italian reader. It can be hard to regulate hate speech when the person speaking is not aware that their words may have a very real and negative impact elsewhere in the world.58

Complicating things even further are cultural differences in how hurtful messages are typically interpreted, which means the impact of hate speech, as well as its definition, can vary from place to place. The importance of words varies by culture.59 As Amnon Reichman has observed, being thick skinned is only considered a positive attribute in some cultures.60 In places where traditional notions of honor are culturally important, the psychological harm of hate speech and its likelihood to cause violence are both potentially magnified.

GOVERNMENT REGULATION

The disagreements among nations as to what constitutes hate speech and how much hate speech is acceptable exacerbate the issues of jurisdiction that accompany most legal problems in the Internet context.61 As David Johnson and David Post have commented, "A Web site physically located in Brazil . . . has no more of an effect on individuals in Brazil than does a Web site physically located in Belgium or Belize that is accessible in Brazil. . . . [Online conversations] exist, in effect, everywhere, nowhere in particular, and only on the Net."62 Internet users have concrete physical locations as they surf the web, but these are tracked through IP addresses, a system which particularly motivated or tech-savvy individuals can manipulate, making it appear as though they are accessing the Internet from another

58. See STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING TOO 106 (1994) ("And if you ask what words are likely to be provocative to those nonaverage groups, what are likely to be their fighting words, the answer is anything and everything . . . , every idea is an incitement to somebody . . . ").


60. Id. at 126.

61. See David R. Johnson & David Post, LAW AND BORDERS—THE RISE OF LAW IN CYBERSPACE, 48 STAN. L. REV. 1367, 1370–76 (1996). Though the Internet was still emerging at the time, Johnson and Post foresaw this legal tangle that cyberspace has caused.

62. Id. at 1375.
machine or even another country. Because the Internet is not contained by national boundaries, those national boundaries (and the laws contained within them) are not easily applied in the online context.

As Johnson and Post suggested, though located “nowhere,” websites impact people everywhere. While one could make an argument that online content is physically located on the servers where the information is stored, as Johnson and Post observe, “only location within a virtual space consisting of the ‘addresses’ of the machines between which messages and information are routed. The system is indifferent to the physical location of those machines, and there is no necessary connection between an Internet address and a physical jurisdiction” which makes assigning sovereignty according to the location of these machines unsatisfying. There is also an argument that jurisdiction can be extended based on the physical location of the registry, the company responsible for matching content with URL addresses and handing out domain names. This is also an unsatisfactory solution because it gives countries where the more popular registries are located a disproportionate amount of control over the Internet and leaves other countries unable to address harm the Internet might cause within their borders. Another alternative
would be to allow countries to regulate online activity when that activity has an effect within their borders or to their citizens, but this leaves individuals at the mercy of hundreds of nations’ laws whenever they visit a chat room, read a message board, or open a profile on a social networking site.68

Along with these logistical difficulties in deciding which country has jurisdiction, there are also serious questions about the legitimacy of national regulation of the Internet.59 When individuals vacation in another country, or sign a contract with a foreign corporation, they are reasonably on notice that their behavior is subject to regulation by foreign law; such notice is generally lacking in cyberspace.70 Cases in United States’ courts have recognized that state regulation of the Internet can implicate serious dormant commerce clause issues through the unwieldiness of a legal regime that subjects Internet users to diverse overlapping and perhaps even conflicting laws.71 These same issues can play out on the international stage as well.

Id. at 623–24.

68. Even switching from an “effects” test to a more stringent “targeting” test does not solve the problem, as “it makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has ‘targeted’, when in truth he has ‘targeted’ every jurisdiction where his text may be downloaded” and the test, in relying on the subjective intent of the user, would be “liable to manipulation and uncertainty, and much more likely to diminish than enhance the interests of justice.” Lewis v. King, [2004] EWCA (Civ) 1329 [34] (Eng.).

69. See Johnson & Post, supra note 61, at 1370 (commenting that “physical proximity between the responsible authority and those most directly affected by the law will improve the quality of the decision making”). But see Jack L. Goldsmith, Against Cyberanarchy, 65 U. CHI. L. REV. 1199 (1998) (arguing that national regulation of the Internet is no more impossible or illegitimate than the regulation of any other international activity).

70. Johnson & Post, supra note 61, at 1370 (observing online users can easily be subject to restrictions unfairly, without “[p]hysical boundaries” to delineate the world and to provide “notice that the rules change when the boundaries are crossed”).

71. See Am. Libraries Ass’n v. Pataki, 969 F. Supp. 160, 168–69 (S.D.N.Y. 1997) (“The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed.”). The state law at issue not only burdened interstate commerce, but also threatened “inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether.” Id. at 169. But see State v. Heckel, 24 P.3d 404 (Wash. 2001) (upholding a state law prohibiting spam sent to any Washington citizen).
between the laws of different nation states, as was illustrated by the criminal prosecution of Google employees in Italy.\footnote{72} In February 2010, an Italian court convicted three Google executives for violating Italian criminal law after some teenagers uploaded a video onto the Google owned website Google Video, a video sharing service Google ran prior to acquiring YouTube later that year.\footnote{73} The video showed a disabled classmate being bullied, and quickly attracted attention as it climbed to the top of Google Italy’s “most entertaining” video list.\footnote{74} By making this video accessible to viewers, the Italian court held, Google was violating national privacy laws, even though the company took the video down within hours of it being called to its attention.\footnote{75} The employees, legally responsible for the actions of the company they worked for, were given six-month suspended sentences.\footnote{76} In effect, the decision imposes liability on Google for failing to review content before allowing it to be uploaded to the website.\footnote{77}

Within the national boundaries of Italy the decision may be ideologically troubling, but its impact is not particularly problematic. The Internet, however, is not so neatly confined by borders of sovereignty. While reviewing the small percentage of videos posted by Italians might be feasible,\footnote{78} reviewing all the videos accessible to Italian viewers is not.\footnote{79} The problem would be mul-

\footnote{73. Manuela D’Alessandro, Google Executives Convicted for Italy Autism Video, \textit{REUTERS} (Feb. 24, 2010), http://www.reuters.com/article/idUSTRE61N2G520100224.}
\footnote{75. Matt Sucherman, Serious Threat to the Web in Italy, \textit{GOOGLE BLOG} (Feb. 24, 2010, 1:57 AM), http://googleblog.blogspot.com/2010/02/serious-threat-to-web-in-italy.html (discussing the serious threat to the Internet in Italy). But see Jeff Israely, Italy’s Google Verdict Starts Debate on Web Freedom, \textit{TIME.COM} (Feb. 25, 2010), http://www.time.com/time/business/article/0,8599,1968123,00.html?xid=rss-topstories (recounting that, according to the prosecutors, Google knew about the video for months before taking it down).}
\footnote{76. Barry, supra note 74.}
\footnote{77. Id.; Sucherman, supra note 75.}
\footnote{78. According to the Alexa traffic reports for YouTube as of February 8, 2011, only 3.5% of YouTube’s traffic comes from Italian IP addresses, and presumably the content generated by these users is roughly proportionate. \textit{Alexa Traffic Report for YouTube}, ALEXA, http://www.alexa.com/siteinfo/youtube.com# (click on “audience”) (last visited Feb. 8, 2011).}
\footnote{79. The YouTube website says that over twenty-four hours’ worth of content is uploaded to the site every minute. \textit{YouTube Fact Sheet}, YOUTUBE, http://www.youtube.com/t/fact_sheet (last visited Feb. 8, 2011). \textit{See also} Hunter Walk,}
tiplied manifold if other countries began enforcing their own regulations—requiring that Google review every video to ensure compliance with Italian, Russian, American, Japanese, Saudi, Ugandan, Bolivian, and South African law, for instance, would be an unrealistic demand. The result of such liability would drastically affect the feasibility of internet services and applications. In this way, a few countries could inhibit innovation and limit the availability of Internet services and technology to the entire world.

Beyond the proposition that nations simply should not regulate the Internet is the fact that they cannot realistically enforce

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**Oops, Poo, Surprise... 24 Hours of Video all Up in Your Eyes!** "YouTube Blog" (Mar. 17, 2010), [http://youtube-global.blogspot.com/2010/03/oops-pow-surprise24-hours-of-video-all.html](http://youtube-global.blogspot.com/2010/03/oops-pow-surprise24-hours-of-video-all.html) (announcing that a new record had been set as users uploaded 24 hours of video, enough to fill an entire day, in the space of a single minute). As mentioned earlier, because of Internet users' ability to change or mask their IP addresses, some Italian viewers would still be able to see content that had not been approved for Italians, even if Google attempted to put blocking mechanisms in place. Furthermore, the Italian case hinged on the privacy of an Italian citizen being violated, not on Italian users being able to view content. This matters, because it suggests that content violating the privacy of an Italian citizen would be illegal, even if it were only visible to people in other countries, essentially allowing Italy to censor content globally. Things can become even more complicated; consider, for instance, a hypothetical video posted by a Canadian user and filmed in New York City, but which portrays an Italian citizen visiting the United States on vacation. Even if every video, visible anywhere in the world, were reviewed by a team of Google employees, the anonymity of the Internet might make it impossible to comply with such privacy laws.

80. For suggestions that the Italian Google decision could have a sinister impact on the Internet, particularly if mirrored by other countries, see Chris Califf, "Google Case in Italy May Alter Web Experience," *Athens Banner-Herald* (Mar. 7, 2010), [http://www.onlineathens.com/stories/030710/bus_571688040.shtml](http://www.onlineathens.com/stories/030710/bus_571688040.shtml) (saying "these limitations [subjecting Internet services like Google and Facebook to liability for failing to monitor user content] could drastically alter the way we experience the Internet"); Ann Woolner, "Italy Risks Internet Stone Age with Trial of Google Executives," *Sydney Morning Herald* (Mar. 1, 2010), [http://www.smh.com.au/opinion/society-and-culture/italy-risks-internet-stone-age-with-trial-of-google-executives-20100228-pb4u.html](http://www.smh.com.au/opinion/society-and-culture/italy-risks-internet-stone-age-with-trial-of-google-executives-20100228-pb4u.html) (quoting Professor Eric Goldman of Santa Clara University as saying cases like the Italian Google decision "absolutely suppress entrepreneurial innovation" and that a similar attitude towards the Internet in the United States would have "killed eBay, YouTube, Facebook and the rest before they got started"). *See also* Sucherman, *supra* note 75 ("[The conviction] attacks the very principles of freedom on which the Internet is built... [If] sites like Blogger, YouTube and indeed every social network and any community bulletin board, are held responsible for vetting every single piece of content that is uploaded to them... then the Web as we know it will cease to exist, and many of the economic, social, political and technological benefits it brings could disappear.").
the regulations they do make.\textsuperscript{81} This was illustrated in a series of cases concerning Yahoo! and the sale of Nazi memorabilia. The Yahoo! website featured auctions, where individual users could offer items for other users to bid on. Some people listed Nazi memorabilia, and French groups sued Yahoo! for violating French Criminal law, which prohibited “the exhibition of Nazi items for sale.”\textsuperscript{82} Although the French Yahoo! website, at www.yahoo.fr, did not contain such material, it linked to the American website, at www.geocities.com, where the memorabilia could be purchased.\textsuperscript{83} The French government asserted jurisdiction because the “damage was suffered in France,”\textsuperscript{84} and ordered Yahoo! to “prevent any access . . . to the auction service . . . .”\textsuperscript{85} Yahoo! partially complied with the order, posting warnings and amending the auction policy, but it did not block French citizens from accessing the auction site and viewing the prohibited items.\textsuperscript{86} In response, the French government threatened to impose a penalty of 100,000 Francs.\textsuperscript{87} A United States federal court refused to enforce the order, despite principles of comity and a desire to avoid “disrespect,”\textsuperscript{88} because it held that enforcing the French decision would violate the First Amendment of the United States Constitution.\textsuperscript{89}

As the Yahoo! cases indicate, enforcing sovereignty online is not as simple as a nation deciding that it has jurisdiction. In order for this jurisdiction to have any meaning, that nation also needs to convince others of the propriety of the jurisdiction.\textsuperscript{90}

\begin{itemize}
  \item \textsuperscript{81} See Johnson & Post, \textit{supra} note 61, 1370–75.
  \item \textsuperscript{82} \textit{Bellia} et al., \textit{supra} note 47, at 94–95.
  \item \textsuperscript{83} \textit{Id.}
  \item \textsuperscript{84} \textit{Id.}
  \item \textsuperscript{85} This decision could have been logistically difficult for Yahoo! to enforce, because companies only have a limited ability to determine the physical location of Internet users, particularly without incurring great expense. See \textit{supra} note 63 and the accompanying text. See also \textit{Bellia} et al., \textit{supra} note 47, at 95 (indicating that Yahoo! made the argument that such filtering was technologically unfeasible).
  \item \textsuperscript{86} Yahoo!, Inc. v. La Ligue Contre le Racisme et l’Antisémitisme, 169 F. Supp. 2d 1181, 1185–86 (N.D. Cal. 2001), \textit{rev’d en banc}, 433 F.3d 1199 (9th Cir. 2006).
  \item \textsuperscript{87} \textit{Id.} at 1185.
  \item \textsuperscript{88} \textit{Id.} at 1187, 1192.
  \item \textsuperscript{89} \textit{Id.} at 1193.
  \item \textsuperscript{90} Exceptions occur when the entity the government is attempting to regulate has a physical presence within the country, such as servers or employees (which can be moved by a corporation who grows weary of the regulation) or when the entity operates a website governed by a registry within the state’s borders. On this last point, see \textit{GlobalSantaFe Corp. v. Globalsantafe.com}, 250 F. Supp. 2d 610 (E.D. Va. 2003).
\end{itemize}
which can be difficult given the resources at stake and the basic disagreement among nations over the proper balance between free speech and human dignity. While mere pronouncements about whether behavior is acceptable might have limited utility, most countries would presumably prefer that these pronouncements be followed. Yet given the borderless nature of the Internet, it can be extremely difficult for nations to effectively prosecute online behavior, even that which has had severe repercussions within its sovereign boundaries.

International coordination and regulation is also a problematic solution. Traditional customs and procedures that govern transnational activities are difficult to translate to the Internet context because of the massive amounts of information that travels online. Specific treaties on the issue are also largely unworkable. Without universal ratification, most Internet companies would move their servers to the countries who were not participating in the agreement, and hate speakers from any country could continue to spread their hateful comments throughout the world. Furthermore, it would be extremely dif-

91. In addition to playing an important role in human rights and becoming increasingly relevant to criminal investigations, the Internet is also worth a lot of money. Internet advertising alone is forecasted to reach $147 billion by 2012, according to Kelsey Group. See Press Release, Kelsey Group, Interactive Advertising Revenues to Reach US$147 Billion Globally by 2012 (Feb. 25, 2008), available at http://www.kelseygroup.com/press/pr080225.asp. This does not include the substantial online sales markets for physical goods (like clothes and plane tickets), information (like Westlaw and LexisNexis), and software (like iPhone applications).

92. See supra notes 19–60 and accompanying text.


94. See, e.g., Johnson & Post, supra note 61, at 1372–73 ("United States Customs officials have generally given up. . . . [A]nd claim no right to force declarations of the value of materials transmitted by modem. . . . [Nations are f]aced with their inability to control the flow of electrons across physical borders.").

95. David G. Post, Against "Against Cyberanarchy," 17 BERKELEY TECH. L.J. 1365, 1378 (2002) ("Scale matters. . . . Rules and principles that may be quite reasonable at one scale may become incoherent and unreasonable at another.").

96. After all, as Johnson & Post suggest, the location of servers is irrelevant because "[m]essages can be transmitted from one physical location to any
HATE SPEECH IN CYBERSPACE

It is difficult to draft a treaty to deal with Internet hate speech that was specific enough to be meaningful but that did not conflict with the constitutions of at least some countries.97 Firstly, the United States has taken an anomalous stance on the regulation of hate speech when compared to much of the rest of the world, who do not offer it a constitutionally protected status akin to political dissent.98 Secondly, the United States has a disproportionate control over the Internet because most of the popular registries, including the one that controls all the “.com” websites in the world, are located within its borders.99 This control, combined with the United States’ inability to join a treaty that conflicted with the First Amendment, would likely frustrate any carefully drawn international agreements that take a more moderate stance towards balancing free speech and other human rights.100

Regulation by Third Parties

Corporations are generally not bound by national constitutions; outside of rare exceptions, a company, even an American company that does business only in the United States, can restrict speech arbitrarily without running afoul of the First Amendment.101 As many scholars have observed, this means that corpo-

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97. See supra notes 46–60 and accompanying text.
98. See, e.g., Carmi, supra note 53, at 988.
99. See GlobalSantaFe Corp. v. Globalsantafe.com, 250 F. Supp. 2d 610 (E.D. Va. 2003) (explaining the registry system, commenting on the vast jurisdiction the court has over .com and .net addresses because of the locations of the registries, and holding that an appropriate remedy could include ordering the registry to cancel a website owned by a foreign individual, even against the injunction of a foreign court).
100. See Knechtle, supra note 20, at 542.
101. In Marsh v. Alabama, 326 U.S. 501 (1946), the Supreme Court applied the First Amendment against a corporation who had restricted proselytizing on the sidewalk of a company-owned town. Later decisions such as Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), made it clear that Marsh's applicability was limited. In Lloyd, which allowed a large shopping mall to prohibit the quiet distribution of anti-war materials, the Court largely confined Marsh to its facts, explaining that it "involved an economic anomaly of the past, 'the company town'" and that Marsh only meant that "where private interests were substituting for and performing the customary functions of government, First Amendment freedoms could not be denied where exercised in the customary manner on the town's sidewalks and streets." Id. at 561–63. While there are those who argue that companies like Google, given their place of public trust and importance to modern life, should be held similarly accountable, Supreme Court precedent clearly does not support such a position. See Nicholas P. Dickerson,
rations can "potentially engage in massive regulation of Internet content that would be patently unconstitutional if carried out by Congress . . . ."\textsuperscript{102} Certainly, the corporations that control the Internet are better positioned to regulate it than governments, not only because they are free from legal constitutional restrictions, but also because they can easily reach across most national borders and more directly enforce their decisions.\textsuperscript{103}

Many have championed a free market approach to the Internet\textsuperscript{104} and there is evidence that the United States Congress prefers this model.\textsuperscript{105} Under a free market system, the theory goes, individuals are free to choose which websites they would

\textsuperscript{102} Dickerson, supra note 101, at 79.

\textsuperscript{103} Indeed, for this reason, much national regulation of the Internet has been attempted through prohibiting conduct of corporations, rather than individuals. Consider, for example, the cases discussed in the previous section of this Note—the Italian government imposing criminal liability on Google for hosting offensive material and French citizens suing Yahoo! for allowing access to auctions for prohibited items. See supra notes 72-94 and accompanying text. This is especially marked because both national law enforcement and potential plaintiffs cannot easily ascertain the identity of an Internet user without assistance from the Internet service provider. The United States Congress is well aware of this fact, as reflected in the online music piracy context. See Digital Millennium Copyright Act, 17 U.S.C. § 512(h) (2006) (providing for subpoenas, which copyright holders can request in order to force an Internet service provider to provide identification of the alleged infringer).

\textsuperscript{104} See, e.g., Kyle McSlarrow, President & CEO of Nat’l Cable & Telecomms. Ass’n, Net Neutrality: First Amendment Rhetoric in Search of the Constitution, Remarks Before the Media Institute in Washington, D.C., at para. 14 (Dec. 9, 2009), available at http://www.ncta.com/PublicationType/Speech/Net-Neutrality-First-Amendment-Rhetoric-in-Search-of-the-Constitution.aspx (arguing that network neutrality laws are inappropriate because Internet service providers "have stated repeatedly that they will not block their customers from accessing any lawful content or application on the Internet. Competitive pressures alone ensure this result: we are in the business of maximizing our customers’ choices and experiences on the Internet.").

\textsuperscript{105} See Communications Decency Act, 47 U.S.C. § 230(b)(2) (2006) (stating that "[i]t is the policy of the United States . . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . ."); see also Dickerson, supra note 101, at 63 (maintaining that "perhaps recognizing the blatant unconstitutionality of government-imposed, content-based regulations, Congress . . . granted Internet Service Providers (ISPs) carte blanche to regulate as they see fit.").
like to visit according to their interests and preferences.\footnote{Sunstein, supra note 32, at 13–17.} In the speech context, this means that people who prefer not to encounter hate speech can simply choose to frequent websites with active moderating, while those who would rather encounter the unfiltered views of others can choose Internet sites which have rejected all filtering in order to capture these users' interest.

The problem with the free market approach is that it compares an imperfect legal system with a perfect market system, and the market system is not perfect.\footnote{Julie E. Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management," 97 Mich. L. Rev. 462, 491 (1998) (stating “all real-world institutions, including market-based ones, are imperfect, and . . . it is real-world institutions that must be compared.”); \textit{see also} id. at 481 (pointing out, in the context of the Internet and intellectual property rights, that “[c]ontract, ‘market,’ and ‘property’—the efficient building blocks of the new social order—have talismanic significance, with the result that private-law forms of regulation are advocated absent any proof that they would produce the best regime, or even a good one, for disseminating information and promoting ongoing creative progress.”).} It incentivizes content providers to focus on more profitable groups, such as those who are the most likely to respond to advertising,\footnote{Owen M. Fiss, \textit{Why the State?}, 100 Harv. L. Rev. 781, 787–88 (1987) (replying “[t]here is a great deal of force to those arguments [that a free market of choices should prevail], but they obscure a deeper truth—a market, even one that is working perfectly, is itself a structure of constraint . . . . [It] privileges select groups, by making [the media] especially responsive to their needs and desires . . . those who have the capital to acquire or own [media services] . . . those who control the advertising budgets of various businesses . . . [and] those who are the most able and most likely to respond enthusiastically to advertising.”).} and can lead content providers to manipulate consumers in order to gain their attention.\footnote{Sunstein, supra note 32, at 18–19.} In addition, people may not always want the Internet that their consumer choices might shape;\footnote{Id. at 113–14.} “[t]o be a con-

\footnotesize{106. Sunstein, supra note 32, at 13–17.}

\footnotesize{107. Julie E. Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management," 97 Mich. L. Rev. 462, 491 (1998) (stating “all real-world institutions, including market-based ones, are imperfect, and . . . it is real-world institutions that must be compared.”); \textit{see also} id. at 481 (pointing out, in the context of the Internet and intellectual property rights, that “[c]ontract, ‘market,’ and ‘property’—the efficient building blocks of the new social order—have talismanic significance, with the result that private-law forms of regulation are advocated absent any proof that they would produce the best regime, or even a good one, for disseminating information and promoting ongoing creative progress.”).}

\footnotesize{108. Owen M. Fiss, \textit{Why the State?}, 100 Harv. L. Rev. 781, 787–88 (1987) (replying “[t]here is a great deal of force to those arguments [that a free market of choices should prevail], but they obscure a deeper truth—a market, even one that is working perfectly, is itself a structure of constraint . . . . [It] privileges select groups, by making [the media] especially responsive to their needs and desires . . . those who have the capital to acquire or own [media services] . . . those who control the advertising budgets of various businesses . . . [and] those who are the most able and most likely to respond enthusiastically to advertising.”).}

\footnotesize{109. Sunstein, supra note 32, at 18–19.}

\footnotesize{110. Id. at 113–14.} Sunstein has observed that “citizens in a democratic system, aware [of their long-term interests and the need for a civically informed populace], might want to make choices that diverge from those that they make in their capacity as private consumers.” \textit{Id.} at 113. Sunstein offers specific examples of this, noting that “some people support efforts to promote serious coverage of public issues on television, even though their own consumption patterns favor situation comedies; they seek stringent laws protecting the environment or endangered species, even though they do not use the public parks or derive material benefits from protection of such species; they approve of laws calling for social security and welfare even though they do not save or give to the poor; they support antidiscrimination laws even though their own behavior is hardly race- or gender-neutral.” \textit{Id.} at 114.
sumer, even a sovereign one, is not to be a citizen."

Furthermore, the greater the power disparity between content providers and content users, the more likely it is that the market system will be imperfect, and in the Internet context, where millions of users are bound by contracts of adhesion for which they had no opportunity to bargain, free choice in the marketplace may be more fiction than reality.

Even if the markets functioned perfectly within the Internet context and everyone was able to interact in the online environment of their choosing, it might still be unwise to rely on free markets because of the polarizing effect they can have in the speech context. As Cass Sunstein observes in his book Republic.com, strong market pressures can have "potentially destructive effects" on government and society. When users can choose to see only what they want to see, and gravitate to websites which share their point of view, people cease to encounter opposing viewpoints or share common experiences, which are preconditions for any large democracy.

Perhaps even more troubling, as various psychological studies have shown, "[a]fter deliberation, people are likely to move toward a more extreme point in the direction to which the group's members were originally inclined." This means that if popular websites like YouTube overcensor in order to stay non-offensive to the masses, people who wish to engage in mean-spirited speech are more likely to seek out websites sharing hateful viewpoints and, by participating in conversation solely with other racists, become more racist themselves. People who are unilaterally prevented from speaking without a chance to defend themselves are more likely to visit other forums where they hear nothing but continually crescendo-ing echoes of their own viewpoints, causing more extremism and contempt.

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111. Fiss, supra note 108, at 788.
112. See Margaret Jane Radin, Regulation by Contract, Regulation by Machine 144, reprinted in LAW AND SOCIETY: APPROACHES TO CYBERSPACE 265, 267 (Paul Schiff Berman ed. 2007) (exploring the pervasiveness of online contracts, "binding on anyone accessing the site, regardless of whether anyone ever opens the link that reveals them").
113. SUNSTEIN, supra note 32, at 14.
114. Id. at 9.
115. Id. at 65 (emphasis omitted).
116. Id. at 9. See also Richard Delgado & David H. Yun, Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation, 82 CALIF. L. REV. 871, 878 (1994) ("Hate speech may make the speaker feel better, at least temporarily, but it does not make the victim safer. Quite the contrary, the psychological evidence suggests that permitting one person to say or do hateful things to another increases, rather than decreases, the chance that he or
TRANSPARENCY AND DISCUSSION

Both Fiss and Sunstein make compelling arguments, but there is another critical issue with reliance on free markets to deal with concerning Internet hate speech: the frequent lack of transparency. The imperfections of free markets are magnified when the process lacks transparency. It is difficult for users to "shop" for censorship policies they find unpalatable when the process of Internet content regulation by third parties is so often invisible. While it would be fairly easy to determine when a forum's approach to censorship was overly lax by the user's standards, because the user would encounter material which offended him or her, the reverse is not so true. A user who found a website devoid of any controversial remarks might not know whether this was because only mild-mannered content had been posted, or if it was due to a pervasive censorship policy that resulted in content being removed that the user would not find objectionable—even potentially under circumstances when the removal would offend the user, if he or she was aware that it had occurred.

Today, many websites take a markedly opaque approach in regulating content. For instance, consider YouTube, one of the most popular forums for online expression today. After users she will do so again in the future. Moreover, others may believe it is permissible to follow suit.

117. This long-recognized connection has been stressed by the International Monetary Fund, which observed that "[t]here is a strong consensus for making transparency the 'golden rule' of the new international financial system," and "[a] lack of transparency has been found at the origin of each recurring crises in the emerging markets." Michael Camdessus, Managing Dir. of the Int'l Monetary Fund, Stable and Efficient Financial Systems for the 21st Century: A Quest for Transparency and Standards, Address at the XXIVth Annual Conference of the Int'l Org. of Securities Comm'n (May 25, 1999), available at http://imf.org/external/np/speeches/1999/052599.htm.

upload clips to YouTube, watchers who find the content distasteful have the option to flag the video for removal, alleging that the material violates YouTube's community guidelines. A moderator, who is employed by YouTube, later reviews the material and makes a decision whether to comply with the request to take the content down or to leave it up.

This "flag and unilateral-review system" is much like that used in the online context for perceived violations of intellectual property, under the Digital Millennium Copyright Act. Under that regime, websites which allow users to upload content, like YouTube and Facebook, are insulated from liability for containing material which violates copyright law, but only if they follow the statute's notice-and-takedown procedure. A copyright holder, identifying the material as improperly posted, is instructed to send notification to the content provider. The company then needs to notify the original poster of the infringe-
ment and remove the offending material.\textsuperscript{124} This copyright scheme has been subject to considerable criticism because it frequently leads websites, concerned about their own liability, to pull material even when the request for removal is unfounded.\textsuperscript{125} The United States Congress, however, has enacted this process only for copyright infringements, and there is no legal requirement to use the flag-unilateral review system in the hate speech context, where no such legislation governs.

In the hate speech context, the flag and unilateral-review system can create an over-policing of hate speech that unfairly infringes on users' freedom of expression. This is especially true given the flexibility and room for interpretation inherent in many websites' terms of use.\textsuperscript{126} Viewers can flag material, and moderators can subsequently have it taken down, merely because they disagree with the viewpoint of the speaker, no matter how appropriate others might find the content. This is not mere speculation; YouTube has been accused of viewpoint restriction in the past.\textsuperscript{127}

Conversely, the flag and unilateral-review system can also lead to underpolicing of hate speech. While any user can flag a video as offensive, if the moderator disagrees, then the hateful speech remains in place.\textsuperscript{128} A bias on the part of the moderator can distort the content left online, and his actions need not even be intentional. Because hate speech only functions as hate speech within a specific historical-cultural context,\textsuperscript{129} a moderator's mere unawareness of the background of some of the viewers can allow hateful speech to remain in place.

These issues highlight the problematic nature of the flag and unilateral-review system, and suggest a better alternative—one with increased transparency and communication. Under such a scheme, users who encountered content they found objectionable could raise the issue in a flagging comment, explaining why they thought the content was offensive. This comment

\begin{itemize}
\item \textsuperscript{124} \textit{Id.} § 512(g).
\item \textsuperscript{125} \textsc{Bellia et al.}, \textit{supra} note 47, at 526–27.
\item \textsuperscript{126} \textit{See, e.g.}, \textsc{Facebook}, \textit{supra} note 120; \textsc{YouTube}, \textit{supra} note 119.
\item \textsuperscript{127} \textit{See} Luann Dawkins, \textsc{YouTube Banned Videos: Censorship Gone Too Far?}, \textsc{Stop ACLU} (Jan. 25, 2009), http://www.stoptheaclu.com/2009/01/25/youtube-banned-videos-censorship-gone-too-far/ (suggesting that YouTube moderators took down respectful arguments against gay marriage while leaving videos supporting gay marriage in place. The article features a copy of the video which was taken down, along with video clips that were left up, to highlight the potentially arbitrary or politically biased methods that can prevail when the content regulation decisions are made by a single moderator.).
\item \textsuperscript{128} \textit{See} \textsc{YouTube}, \textit{supra} note 119, for an explanation of the process.
\item \textsuperscript{129} \textit{See supra} notes 54–60 and accompanying text.
\end{itemize}
would be visible to all users, so others could read and comment on it in turn. The original poster of the material would also have the opportunity to publically respond. After a certain period of time had passed, a moderator, considering all of the discussion, would make a final decision, explaining the reasoning behind their determination. The content would then be taken down, though the discussion about the content might be best left up, in order to facilitate continued thought about censorship and make it easier for those visiting the website to judge the particular atmosphere of the site.

In this way, a transparent system of censorship has the advantage of bolstering the free market approach by allowing people to understand what content is being kept from them, enabling them to make better informed decisions about the websites they wish to frequent and support. At the same time, this transparency may ameliorate some of Professor Sunstein’s concerns about the polarization of constant viewpoint reinforcement, because by seeing what content was removed from a website, even users who disagreed with it would encounter the opposing view.

A transparent approach is also a better method for dealing with fundamental human rights issues, like those that free speech and hate speech entail. By increasing the efficacy of the free markets, letting users view the content being targeted for removal puts more autonomy back into the hands of the people. This is particularly true if the system allows not only for transparency, but also for a general discussion of the acceptability of the content. Some complain that regulation of hate speech is patronizing, but it is much less so if it is discussed and imposed by the community, rather than by a moderator acting behind the scenes. People should have a limited ability to make the market accountable—if Sunstein is correct, allowing this input may even encourage people to make better decisions than their behavior suggests they would support.

Encouraging people to publically discuss whether or not content should be taken down would also allow local community influence to play more of a role in defining what is offensive. Because hate speech is defined entirely by the norms of the community, this can be crucial. Transparency keeps the modera-

130. Sunstein, supra note 32, at 9.
132. Sunstein, supra note 32, at 18–19.
133. See supra notes 54–60 and accompanying text.
tor from making content decisions based on personal preference and bias; allowing an open discussion of the targeted material before a decision is made would more fully inform the moderator of the Web browsers’ perceptions of the content.

This is a particularly powerful idea given how the Internet is redefining the importance of geography and community. Part of the reason why national regulation of the Internet has become so problematic is because online communities do not match the boundaries of “real life” communities. As Professor Berman observed, “[B]y analyzing the social meaning of our affiliations across space, we can think about . . . community not as a geographically determined territory circumscribed by fixed boundaries, but as ‘articulated moments in networks of social relations and understandings.’”134 Online communities are becoming increasingly more important,135 and online transnational-cultures are emerging.136 As time goes on and these communities start to share more history, while displacing, or at least complementing, traditional geographic communities, their cultural content may have an important role in shaping and defining hate speech. Giving online communities the ability to express whether or not content offends them, rather than leaving the decision in the hands of a single individual, who may not necessarily share the same background of experience, lends more legitimacy to Internet regulation.

The main drawback to this transparent, user-driven approach is that potentially hateful speech would have to be left up for a period of time to allow discussion. The main arguments that scholars such as Tsesis have raised against hate speech, however, stem from it becoming commonplace and accepted.137 Speech that is branded as potential hate speech and is being scrutinized as such is less likely to impact the viewpoints of people reading it or to cause psychological harm to potential victims.

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136. See, e.g., Theresa McGinnis et al., “Indnprire”: Online Spaces of Transnational Youth as Sites of Creative and Sophisticated Literacy and Identity Work, 18 LINGUISTICS & EDUC. 283, 283 (2007) (stating in the abstract that “technological sites are important and dynamic representational spaces for youth to engage in . . . identity work”).

137. See TSESIS, supra note 19, at 138.
who may come in contact with it. Hate speech, when named for what it is, loses most of its hurtful impact.

**Conclusion**

While the Internet has brought people together by enabling individuals from all over the world to communicate as though they lived next-door, it has also created rifts of distance as it enables people to harm each other in ways that were never before possible. In the context of hate speech, the anonymity of the Internet and the potentially massive audience that one can attract has led to a serious and growing problem.

Policing hate speech is a complex issue with important consequences that implicates serious human rights issues on either side of the debate. Furthermore, because of disagreements over the importance of free expression and the impracticality and illegitimacy of translating national jurisdiction into cyberspace, government regulation is unlikely to produce a solution to the problem. This leaves the determination largely in the hands of corporations and the markets, which means transparency is crucial. Implementing procedures that incorporate transparency and user discussion, rather than leaving censorship decisions entirely in the hands of two invisible individuals, encourages awareness of the problem and allows the specific audience of the speech to determine what is appropriate.