

# THAT SHOULD NOT BE PROTECTED: RETHINKING THE UNITED STATES POSITION ON HATE SPEECH IN LIGHT OF THE INTERPOL REPOSITORY

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## I. INTRODUCTION

Nearly 1,094 bias-related incidents or attacks occurred in the United States of America in the month following President Donald J. Trump’s election.<sup>1</sup> These incidents included race-biased demonstrations, swastikas or other drawn and graffitied imagery expressing messages of “hate and

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1. Hatewatch, *Update: 1,094 Bias-Related Incidents in the Month Following the Election*, S. POVERTY L. CTR. (Dec. 16, 2016), <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election>.

intolerance,” as well as physical attacks and other hate-inspired crimes.<sup>2</sup> Such overt expressions of intolerance and hate have since diminished to a degree, but the underlying sentiments and behaviors persist.<sup>3</sup> Further, the hate speech President Trump supplied during the election continues to unleash accompanying overt acts of violence and harassment both in the United States and abroad.<sup>4</sup> Although the federal government and a majority of state governments protect individuals from hate crimes,<sup>5</sup> the U.S. offers broad constitutional protections for hate speech and the promotion of hateful ideas.<sup>6</sup>

American history is riddled with problems regarding how both the government and its citizens have treated minority racial and religious groups. Stemming from the institution of slavery, racism has been pervasive among citizens and the government in the U.S.<sup>7</sup> After the Civil War, attempts to

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2. *Ten Days After: Harassment and Intimidation in the Aftermath of the Election*, S. POVERTY L. CTR. (Nov. 29, 2016), <https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidation-aftermath-election>.

3. The U.S. Federal Bureau of Investigation documented that hate crime offenses increased from 6,885 offenses in 2015, to 8,437 offenses in 2017. UNIFORM CRIME REPORT: 2015 HATE CRIME STATISTICS, U.S. DEP'T JUST. (2015) (reporting 5,850 hate crime incidents involving 6,885 offenses in 2015), [https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses\\_final.pdf](https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf); UNIFORM CRIME REPORT: 2016 HATE CRIME STATISTICS, U.S. DEP'T JUST. (2016) (reporting 6,121 hate crime incidents involving 7,321 offenses), <https://ucr.fbi.gov/hate-crime/2016/topic-pages/incidentsandoffenses.pdf>; UNIFORM CRIME REPORT: 2017 HATE CRIME STATISTICS, U.S. DEP'T JUST. (2017) (reporting 7,175 hate crime incidents involving 8,437 offenses), <https://ucr.fbi.gov/hate-crime/2017/topic-pages/incidents-and-offenses.pdf>. See generally *Hate in America*, SLATE (Aug. 14, 2017, 6:05 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/12/hate\\_in\\_america\\_a\\_list\\_of\\_racism\\_bigotry\\_and\\_abuse\\_since\\_the\\_election.html](http://www.slate.com/articles/news_and_politics/politics/2016/12/hate_in_america_a_list_of_racism_bigotry_and_abuse_since_the_election.html).

4. Ayal Feinberg et al., *Counties that Hosted a 2016 Trump Rally Saw a 226 Percent Increase in Hate Crimes*, WASH. POST (Mar. 22, 2019), <https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/?noredirect=on#click=https://t.co/bYXsN60xzH>; John Sides & Michael Tesler, *Donald Trump is a Symbol of White Identity Politics in Europe, Too*, WASH. POST (June 21, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/21/donald-trump-is-a-symbol-of-white-identity-politics-in-europe-too/?utm\\_term=.cb735dd1690d](https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/21/donald-trump-is-a-symbol-of-white-identity-politics-in-europe-too/?utm_term=.cb735dd1690d).

5. See *Hate Crime Laws*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/hate-crime-laws> (last updated Dec. 20, 2017) (detailing specific federal statutes that protect against hate crimes); *Hate Crimes: Laws and Policies*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/hatecrimes/laws-and-policies> (last visited Dec. 20, 2017) (indicating that only five U.S. states – Arkansas, Georgia, Indiana, South Carolina, and Wyoming – do not have hate crimes laws).

6. To clarify, hate speech is considered to be merely words targeting another group of people based on their ethnicity, religion, etc., whereas hate crimes can be any number of ordinary crimes which were committed with “hateful” intent or animus towards a particular group of individuals. See Hate Crimes Act, 18 U.S.C. § 249 (2012) (taking already existing crimes and enhancing them due to intent involving actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability).

7. See Glenn C. Loury, *An American Tragedy: The Legacy of Slavery Lingers in our Cities' Ghettos*, BROOKINGS (Mar. 1, 1998) (describing the effect of institutional slavery on future



amount which has nearly doubled since 1999.<sup>12</sup> These hate groups engage in numerous activities to attract a wider following, such as publishing hate material in the form of articles, music and other internet publications, as well as conducting marches and rallies to promote their racist agenda.<sup>13</sup>

The critical issue for this paper is that the non-violent activities of these hate groups are a form of hate speech that adversely affect the groups they target. The effects of hate speech fall into two categories. The first category is the constitutive harms directly caused by hate speech, such as psychological or self-esteem damage.<sup>14</sup> Restrictions to freedom of movement and association can also directly result from hate speech by (1) direct messages or actions causing victims to leave a situation; or (2) the general presence of hate speech causing victims to be more cautious with their decisions.<sup>15</sup>

The second type is the consequential harms occurring through indirect effects of hate speech. These effects include (1) persuading others to believe false discriminatory information, which causes them to engage in other harmful conduct; (2) conditioning listeners to be more receptive to negative stereotypes in general; and (3) conditioning the environment to make such speech and behavior normal.<sup>16</sup> These indirect issues can cause a multitude of harms to the targeted groups, such as creating feelings of inferiority, silencing targets, harming the target's dignity, and maintaining power

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12. *Hate Map*, S. POVERTY L. CTR., <https://www.splcenter.org/hate-map> (last visited Dec. 20, 2017).

13. ANTI-DEFAMATION LEAGUE, *THE SOUNDS OF HATE: THE WHITE POWER MUSIC SCENE IN THE UNITED STATES IN 2012* (2012), <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/Sounds-of-Hate-White-Power-Music-Scene-2012.pdf> (“[W]hite power music can play an indirect role in making violence—especially certain types of violence, such as hate crimes—more likely because it helps make it more acceptable within the movement . . . . Even leaving aside the issue of violence, the role that white power music can have in spreading hate within a community is also a genuine issue of concern—it is perhaps the most frequently expressed concern about hate music, usually described as ‘recruitment.’”); Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), [https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm\\_term=.c2552c55d018](https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.c2552c55d018) (describing a rally of white nationalists and white supremacists at the University of Virginia in 2017); John Herrman, *How Hate Groups Forced Online Platforms to Reveal Their True Nature*, N.Y. TIMES (Aug. 21, 2017), <https://www.nytimes.com/2017/08/21/magazine/how-hate-groups-forced-online-platforms-to-reveal-their-true-nature.html> (describing how online platforms are used to organize hate groups, like the “Unite the Right” Facebook page that helped to organize a white supremacist rally in Charlottesville, and the steps internet service providers take to remove such content).

14. Katharine Gelber & Luke J. McNamara, *Evidencing the Harms of Hate Speech*, 22 SOC. IDENTITIES 324, 325-26 (2016); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (discussing how hate speech can prevent the freedom of movement or association).

15. Gelber & McNamara, *supra* note 14, at 325.

16. *Id.*

imbalances through racial hierarchies.<sup>17</sup> It is important to note that children are highly susceptible to both of these types of harms and also can quickly learn to copy and question these behaviors if not on the receiving end.<sup>18</sup>

One serious problem is the fact that discriminatory views have expanded into, and are legitimately entertained within, U.S. courts, government and politics. As stated above, there have been multiple political parties in which politicians have promoted racism and white nationalism in America,<sup>19</sup> not to mention the discriminatory views that the major political parties held early on in U.S. history.<sup>20</sup>

More recently, various white supremacist groups utilize the internet to connect with others who agree with their views to promote white nationalist and racist ideologies and policies.<sup>21</sup> Hate groups, old and new, also utilize charisma, leading to the open discussion of their ideas and concerns as politically legitimate. When members of the U.S. government and coalitions of alt-right organizations present racist values to the public, it no longer matters that these ideologies are falsely held.<sup>22</sup> The presentation of an idea with good rhetoric does not make it any more truthful, but it does make an idea more believable, and thus spreads the follower-base. Various politicians and representatives have also promoted xenophobic or homophobic values,<sup>23</sup> and President Trump has fanned the flames on issues of hate speech and racism by protecting racist views and spreading them himself.<sup>24</sup>

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17. *Id.*

18. See *How Hate Speech Affects Children*, EQUAL JUST. SOC., <http://talktokids.net/how-hate-speech-affects-children> (last visited Dec. 20, 2017) (“Young children internalize this behavior and learn very quickly who ‘belongs’ and who doesn’t. We must remember that young children, and even teenagers, still have very impressionable brains.”).

19. See generally Alan Greenblatt, *As Hate Speech Pervades Politics, Many Politicians Escape Consequence*, GOVERNING (Mar. 13, 2019, 4:00 AM), <https://www.governing.com/topics/politics/gov-racist-homophobic-statements-state-politicians.html> (detailing instances of state and federal politicians engaging in hate speech and the consequences, or lack thereof, for such speech); Ryan Lenz & Booth Gunter, *One Hundred Days in Trump’s America*, S. POVERTY L. CTR. (Apr. 27, 2017), [https://www.splcenter.org/sites/default/files/com\\_trump\\_100\\_days\\_report\\_final\\_web.pdf](https://www.splcenter.org/sites/default/files/com_trump_100_days_report_final_web.pdf) (giving examples of hate speech by members of the Trump administration).

20. See *supra* texts accompanying notes 7-9.

21. See *Alt-Right*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/alt-right> (last visited Dec. 20, 2017).

22. See Nicole Hemmer, “*Scientific Racism*” is on the Rise on the Right. But it’s Been Lurking There for Years, VOX (Mar. 28, 2017, 10:01 AM), <https://www.vox.com/the-big-idea/2017/3/28/15078400/scientific-racism-murray-alt-right-black-muslim-culture-trump>.

23. See Tatyana Lewis, *The Most Anti-Gay U.S. Politicians*, RANKER, <https://www.ranker.com/list/the-most-anti-gay-us-politicians/ballerina-tatyana> (last visited Dec. 20, 2017).

24. See, e.g., Charles M. Blow, *Is Trump a White Supremacist?*, N.Y. TIMES (Sept. 18, 2017), <https://www.nytimes.com/2017/09/18/opinion/trump-white-supremacist.html>; Paige Lavender & Daniel Marans, *Donald Trump Blames ‘Many Sides’ for White Supremacist Clashes in Charlottesville*, HUFFPOST (Aug. 12, 2017, 1:21 PM), <https://www.huffingtonpost.com/entry/dona>

The effectiveness of hate groups and politicians in spreading white supremacist ideology is clearly seen in numerous statistics. The Anti-Defamation League has recorded a major increase in anti-Semitic activities in recent years, with an increase in racist speech and attacks by about thirty percent between 2015 and 2016, with an increase of eighty-six percent between 2016 and 2017.<sup>25</sup> As stated above, many news outlets reported upon numerous racist remarks and attacks just after the most recent presidential election.<sup>26</sup> Racial and ethnic attacks, as well as attacks provoked by homophobia and Islamophobia,<sup>27</sup> indicate the trend that permeating hate speech can cause.

The connection between hate speech and hate crimes is clear, but the efforts in stopping such problems have been slow. The U.S. protections against hate speech apply in limited circumstances, and, in general, hate speech regulations are subject to the constitutional scrutiny afforded to protected expressions. When looking internationally, however, laws being implemented by European nations, among others, state that hate speech is against public safety, order, and morals.<sup>28</sup> Under this premise, it is necessary in a democratic society to have hate speech and other discriminatory views be unprotected.<sup>29</sup>

The approach this author recommends, however, is to follow the International Criminal Police Organization's ("Interpol") Repository of Practice in light of Article 3 of its Constitution.<sup>30</sup> The Repository lays out a

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ld-trump-charlottesville\_us\_598f29c2e4b0909642973a6c; Michelangelo Signorile, *Trump's Cabinet: A Who's Who of Homophobia*, BOS. GLOBE (Dec. 15, 2016), <https://www.bostonglobe.com/opinion/2016/12/15/trump-cabinet-who-who-homophobia/9UDr8MnXIQAxjO369qzT0J/story.html>.

25. *U.S. Anti-Semitic Incidents Spike Eighty-Six Percent So Far in 2017 After Surging Last Year, ADL Finds*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/news/press-releases/us-anti-semitic-incidents-spike-86-percent-so-far-in-2017> (last visited Dec. 20, 2017); *ADL Data Shows Anti-Semitic Incidents Continue Surge in 2017 Compared to 2016*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/news/press-releases/adl-data-shows-anti-semitic-incidents-continue-surge-in-2017-compared-to-2016> (last visited Dec. 20, 2017).

26. See Alia E. Dastagir, *The State of Hate in America*, USA TODAY (July 9, 2017, 3:24 PM), <https://www.usatoday.com/story/news/2017/07/09/kkk-racist-rants-religious-vandalism-us-vs-them-mentality-escalates-leaving-dark-corners-interne/418100001/>; *Hate in America*, SLATE (Aug. 14, 2017, 6:05 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/12/hate\\_in\\_america\\_a\\_list\\_of\\_racism\\_bigotry\\_and\\_abuse\\_since\\_the\\_election.html](http://www.slate.com/articles/news_and_politics/politics/2016/12/hate_in_america_a_list_of_racism_bigotry_and_abuse_since_the_election.html).

27. See GHANEABASSIRI, *supra* note 10.

28. See *infra* Part III.

29. *Id.*

30. INTERPOL, REPOSITORY OF PRACTICE: APPLICATION OF ARTICLE 3 OF INTERPOL'S CONSTITUTION IN THE CONTEXT OF THE PROCESSING OF INFORMATION VIA INTERPOL'S CHANNELS (2d ed. 2013) [hereinafter REPOSITORY OF PRACTICE]. Although this repository is specifically geared toward data gathering, the principles can be applied to enforcement action as well.

balancing test of both the law a nation uses to prohibit speech and the targeted speech itself. If the established law does not fall within Interpol's limitations stated in Article 3 of its Constitution, and the speech is not protected by any rights established by the United Nations' Universal Declaration of Human Rights, then the speech is properly targetable. The reason for looking toward Interpol's approach is threefold: First, a change in U.S. law is required if the rising trend of hate speech is to be effectively countered; second, Interpol's predominant test for determining what speech is targetable is highly flexible and effective, as well as in adherence with international views; and third, the U.S. already has a policy of harmonizing with international law, and the law regarding hate speech should be consistent as well since the U.S. is involved in international organizations working against discrimination.

## II. THE HISTORY AND NARROWING OF HATE SPEECH LAW IN THE UNITED STATES: *BEAUHARN AIS*, *BRANDENBURG* AND *R.A.V.*

Hate speech is protected speech in the U.S. and the Supreme Court has consistently prevented states and municipalities from prohibiting it.<sup>31</sup> In *Beauharnais v. Illinois*, however, the Supreme Court's outlier ruling allowed Illinois to prohibit hate speech as a form of group libel (i.e., hate speech).<sup>32</sup> In *Beauharnais*, the appellant violated a state libel statute prohibiting advertising, selling, publishing, or exhibiting material "which . . . portray[ed] depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion."<sup>33</sup> *Beauharnais*, President of the White Circle League of America, violated the law when he distributed leaflets stating that people must act to "prevent the white race from becoming mongrelized by the negro," specifically stating "the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro."<sup>34</sup>

The Court first determined that the law was neither overly broad nor vague, and then analyzed the law under the rational basis standard because, according to the majority, "group libel" was not protected by the First

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31. *See, e.g., infra* note 72.

32. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

33. *Beauharnais*, 343 U.S. at 251. *Beauharnais* challenged his conviction under an Illinois statute that criminalized the manufacture, sale, or public presentation of any material portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which . . . expose[d] the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which [was] productive of breach of the peace or riots[.]" The Supreme Court upheld the conviction and the validity of the statute because libelous statements were not protected by the First Amendment. *Id.*

34. *Beauharnais*, 343 U.S. at 252.

Amendment. The Court determined that, under this standard, the government sufficiently demonstrated a rational basis for the law.

Chicago had a longstanding history of “willful purveyors of falsehood concerning racial and religious groups [who would] promote strife and . . . obstruct . . . free, ordered life in a metropolitan, polyglot community.”<sup>35</sup> Also, the law was passed sometime after a number of race riots, one just a month before the legislation was enacted, in which the “utterances of the character here in question . . . played a significant part.”<sup>36</sup> Furthermore, the Court noted that the “job . . . , educational opportunities and the dignity accorded” to individuals can be tied to the reputation of the group one belongs to.<sup>37</sup> The law aimed to prevent such violence, which is a legitimate state interest, and the law was rationally related to achieving this aim because of the recent history of racial tension and violence due in part to speech like *Beauharnais*.<sup>38</sup> Given the history of hate crimes and race riots in Chicago at the time, it makes sense that the Court was willing to allow the state to protect its citizens especially under the low rational basis standard.

Roughly ten years after *Beauharnais*, the Court cut back on the ability of the states to prohibit speech that had only a tendency to cause a breach of the peace. Traditionally, criminal libel statutes were established for “punishing . . . ‘tendencies’ to cause breach of the peace.”<sup>39</sup> The Court made clear in *Brandenburg v. Ohio*, however, that more than a mere tendency to incite violence was necessary for the speech to lose its First Amendment protection. In *Brandenburg*, a television broadcast of a Ku Klux Klan rally aired in which participants targeted blacks and Jews, and the appellant stated, “there might have to be some revengeance [sic] taken” against the government if it “continues to suppress the white . . . race.”<sup>40</sup>

Unlike in *Beauharnais*, in *Brandenburg* the Court held that hate speech could not be prohibited by the government “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>41</sup> Since there was no evidence of the speech inciting imminent action or lawless action, the government could not prohibit the speech.<sup>42</sup> Thus, the *Brandenburg* decision narrowed the category of speech removed from First Amendment protections to actual incitement of a

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35. *Id.* at 259.

36. *Id.* at 259-60.

37. *Id.* at 263.

38. *Id.* at 261.

39. *Id.* at 254 (citing *People v. Spielman*, 149 N.E. 466, 469 (Ill. 1925)).

40. *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969) (per curiam).

41. *Id.* at 447.

42. *Id.* at 448-49.



breach of peace, rather than *Beauharnais*'s tendency to cause a breach of peace standard, effectively eliminating group libel as a justification for suppressing speech.<sup>43</sup>

The limitations that *Brandenburg* imposed upon hate speech prevention by states were further emphasized by the Court in *R.A.V. v. City of St. Paul*.<sup>44</sup> In *R.A.V.*, the petitioner and several others burned a cross on a black family's lawn.<sup>45</sup> The City chose to prosecute under the Bias-Motivated Crime Ordinance, which stated:

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.<sup>46</sup>

The Court found the ordinance unconstitutional because it prohibited speech that was merely discomfoting, but otherwise permitted.<sup>47</sup>

Although some speech, such as obscenity or intimidation, may be prohibited for being ““of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,””<sup>48</sup> the Court required a narrow approach towards how the government could limit such unprotected speech. First, the Court stated that proscriptions against the unprotected categories of speech are allowed since they go against certain speech that, when in any context, are always unprotected.<sup>49</sup> In other words, speech can only be prevented by the government if it had no aspect of presenting any ideas of value.<sup>50</sup> Second, the Court repeated its precedent's holding that expressions could be prohibited via time, place, and manner restrictions, even if the content of the speech itself was protected.<sup>51</sup> The Court explained this point by providing that a law prohibiting flag burning to protest laws for honoring the flag was not allowed, while prohibiting flag burning in the form of a fire safety law was constitutionally sound.<sup>52</sup>

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43. See *Collin v. Smith*, 578 F.2d 1197, 1204-05 (7th Cir. 1978).

44. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

45. *Id.* at 379.

46. *Id.* at 380.

47. *Id.* at 381.

48. *Id.* at 383 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

49. *Id.* at 383-84.

50. *Id.* at 385.

51. *Id.* at 385-86.

52. *Id.* at 385.

However, the Court re-emphasized its reluctance to allow content-based restrictions on speech.<sup>53</sup> The reason for this reluctance, according to the Court, is to ensure that the government was not a ““specter that . . . may effectively drive certain ideas or viewpoints from the marketplace.””<sup>54</sup> Therefore, speech suppressed on the basis or content of its message, no matter how offensive the message may be, is subject to strict scrutiny – that is, the government bears the burden of showing that a content-based restriction is necessary to achieving a compelling government interest – unless the speech in question is unprotected speech.<sup>55</sup> Since, in *R.A.V.*, the City’s restriction was clearly content-based – that is, it prohibited speech ““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”” regardless of when or where it occurred – rather than a restriction based on the time, manner, or place of the speech, the ordinance was unconstitutional for directly targeting protected speech purely on its political content without a sufficient compelling government interest as required under strict scrutiny.<sup>56</sup>

Another example of the extent of hate speech protection is seen in *Snyder v. Phelps*, in which the Court found that the father of a deceased service member was not able to recover for the damages caused by a group choosing to protest against homosexuals outside the service member’s funeral because the speech was to be protected as ““public concern.””<sup>57</sup> This opinion, combined with the *Brandenburg* analysis and the Court’s condemnation of context distinctions in *R.A.V.*, leaves many types of hate speech constitutionally protected.

Although the problem of hate speech and its direct and indirect harms have been identified, the strong protections of such speech under U.S. law acts like a catalyst for hateful action. In *Beauharnais*, the Supreme Court upheld a state law prohibiting hate speech. *Beauharnais* is, however, an outlier, and the validity of its holding is subject to debate. Since *Beauharnais*, the Court has further limited a state’s ability to prohibit hate speech in cases like *Brandenburg* and *R.A.V.* Ultimately, speech that would not be protected under *Beauharnais* for the mere tendency to bring about violence is unprotected under *Brandenburg* unless it raises to the level of incitement to imminent violence. Further, according to the Court in *R.A.V.*,

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53. *Id.* at 386-88.

54. *Id.* at 387 (quoting *Simon & Schuster, Inc. v. Members of N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

55. *Id.*

56. *Id.* at 391-92, 395-96.

57. *Snyder v. Phelps*, 562 U.S. 443, 448-49, 453-59 (2011).

laws which target hate speech for its hateful content is subject to strict scrutiny as a content-based. Thus, a state regulation of hate speech likely will not stand under Supreme Court review despite the *Beauharnais* decision.

### III. THE STRENGTHS OF INTERPOL'S REPOSITORY AND ITS CONSISTENCY WITH INTERNATIONAL LAW

It is time for the U.S. to consider alternative legal standards, and Interpol's standard based upon its Repository on Article 3 of its Constitution offers an attractive model. This standard comports with international law and follows the policies the Supreme Court emphasized in *Beauharnais*.

#### *A. How the Repository Would Assess Hate Speech Incidents*

Interpol was created as an independent organization where nations came together to fight ordinary crime. Over time, Interpol included other issues of human rights, terrorism, organized crime, human trafficking, and international financial crimes.<sup>58</sup> To maintain its international legitimacy, Interpol utilizes enforcement standards that adhere to international law.<sup>59</sup> But what sets Interpol apart as a politically independent organization is Article 3 of Interpol's Constitution, which states that "[i]t is strictly forbidden . . . to undertake any intervention or activities of a political, military, religious or racial character."<sup>60</sup>

With the purposes of ensuring "a) the Organisation's independence and neutrality . . . , b) to reflect international extradition law, and c) to protect individuals from persecution,"<sup>61</sup> Article 3 strictly defines Interpol's authority and jurisdiction. While Interpol's initial roots as an ordinary crime-fighting organization made adhering to Article 3 relatively easy, the evolution of Interpol's reach into multiple human rights issues rendered Article 3 difficult to apply.<sup>62</sup> Due to Interpol's expansion and Article 3's limitations, Interpol's member states tasked Secretary General with creating guidelines for future operations.<sup>63</sup>

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58. *Crime Areas*, INTERPOL, <https://www.interpol.int/Crime-areas> (last visited Feb. 1, 2019).

59. REPOSITORY OF PRACTICE, *supra* note 30, at 6-7.

60. Int'l Criminal Police Org.-INTERPOL [INTERPOL] Constitution art. 3 ICPO-INTERPOL Doc. I/CONS/GA/195 (2017) (June 13, 1956) [hereinafter ICPO-INTERPOL Constitution].

61. *Neutrality (Article 3 of the Constitution)*, INTERPOL, <https://www.interpol.int/About-INTERPOL/Legal-materials/Neutrality-Article-3-of-the-Constitution> (last visited Feb. 1, 2019) [hereinafter *Neutrality*].

62. *Id.*

63. REPOSITORY OF PRACTICE, *supra* note 30, at 3.

The Repository of Practice is based upon a 1951 resolution that required the application of Interpol's practice at the time to be analyzed under a predominance test, whereby the nature of an offense (among other factors) is reviewed to see if Interpol targeting said offense goes against its principles laid out in Article 3.<sup>64</sup> Although not directly mentioned in Article 3, this predominance test has not been challenged.<sup>65</sup> Therefore, when interpreting the Constitution under the Vienna Convention on the Law of Treaties, as required by the Repository, this rule is carried into Constitutional analysis.<sup>66</sup>

The Repository states that offenses can fall under one of two categories: (1) pure offenses, which are only offensive in a political, military, racial, or religious manner, and thus not applicable to Interpol's jurisdiction; or (2) relative offenses, which contain ordinary-law elements and are thus analyzed under the predominance test.<sup>67</sup> If a law criminalizes a clearly pure offense, then the analysis into the issue stops at that point since Interpol is barred from acting upon that nation's crime. For example, if a law made it illegal to criticize a president, then violations of said law would be a pure offense due to its political nature, preventing Interpol from acting. If the crime instead appears to hold ordinary-law elements, meaning that it pertains to the regular and expected goals of crime prevention and legal prohibition, then a case-by-case analysis of the facts at hand is conducted to determine if the crime in question has any political, military, racial, or religious issues which predominate the ordinary-law aspects.<sup>68</sup> Interpol cannot act if the pure offense aspects predominate, but Interpol can act if the ordinary-law elements predominate.<sup>69</sup> During a case analysis, seven factors are assessed to determine if it is the ordinary-law aspects or the pure offense aspects which predominate:

- (a) the nature of the offence, namely the charges and the underlying facts;
- (b) the status of the persons concerned; (c) the identity of the source of the

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64. *Id.* at 5.

65. *Id.*

66. *Id.* at 7 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose.”) (quoting Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)).

67. *Id.* Given that it would be difficult to update any exhaustive list, these two definitions are tested on a case-by-case basis where the facts and context must always be analyzed. *Id.* at 7 n.17.

68. To clarify, Interpol looks to see if a nation's laws hold a military or political purpose, or if the laws make being a certain race or religion illegal or of a lower class. Laws targeting hate group activities can have political, religious, or racial issues at their core, but may not fall under the Article 3 prohibition because the laws targeting hate groups and hate speech is for the protection of others and of public morals rather than promoting any political, racial, or religious bias. *Neutrality*, *supra* note 61.

69. REPOSITORY OF PRACTICE, *supra* note 30, at 7.

data; (d) the position expressed by another National Central Bureau or another international entity; (e) the obligations under international law; (f) the implications for the neutrality of the Organization; and (g) the general context of the case.<sup>70</sup>

After laying out the test, the Repository then gives thirteen categories with various hypotheticals to see when action may be considered.<sup>71</sup> Of these, there are three categories which are primarily applicable to this paper: (1) issues involving free expression; (2) issues involving free association or assembly; and (3) issues involving current or former politicians. It is important to note that for all of the categories mentioned, the application of Article 3 is dependent upon a nation's capabilities and willingness to target the speech. This ensures that Interpol remains as an independent organization that will not interfere with the laws or politics of its member nations. Therefore, Interpol can only target hate speech if the speech was prohibited in the nation to begin with. This aspect is particularly attractive for the U.S. since it protects a state's right to choose which issues it deems should be targeted without being overly burdened by the federal government.<sup>72</sup>

For freedom of speech, the Repository calls for consideration of Article 2 of the Interpol Constitution, which requires looking to "the spirit of the 'Universal Declaration of Human Rights.'"<sup>73</sup> The Repository also points to Article 19 of the International Covenant on Civil and Political Rights,<sup>74</sup> which provides for the freedom of expression unless it disrupts the rights or reputation of others, or if such expression interferes with "the protection of

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70. *Id.* at 8.

71. *Id.*

72. To see how the Supreme Court case law overly restricts the ability of a state to legislate against certain speech, compare *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."), and *R.A.V. v. City of St. Paul*, 505 U.S. 377, 427-28 (1992) (Stevens, J., concurring) ("While we once declared that 'libelous utterances [are] not . . . within the area of constitutionally protected speech,' our rulings in, have substantially qualified this broad claim. Similarly, we have consistently construed the 'fighting words' exception set forth in *Chaplinsky* narrowly.") (first citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952), and then citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)), with *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding a state's ability to enact criminal libel laws).

73. ICPO-INTERPOL Constitution art. 2, *supra* note 60; REPOSITORY OF PRACTICE, *supra* note 30, at 17.

74. REPOSITORY OF PRACTICE, *supra* note 30, at 14.

national security or of public order . . . , or of public health or morals.”<sup>75</sup> This guidance allows Interpol to target hate speech or discriminatory propaganda, even if the speaker wishes to claim it as mere political speech, since the protection of public safety, order, and morals are allowed by ordinary-law elements.

The Repository states that one of the key factors for free speech issues is who or what is the object of the targeted speech.<sup>76</sup> If the targeted speech is directed towards a state, a governmental official, or a body of government, then generally Article 3 grants protection and blocks extradition since laws against political speech would be a pure offense.<sup>77</sup> Yet, if speech targets apolitical entities or individuals, then Interpol can act since laws preventing such speech would typically fall under ordinary-law (e.g., defamation).<sup>78</sup> Of course, this is just one factor, and the predominance test could still prevent speech targeting a government official if the facts and other factors show that the speech falls under more of an ordinary-law issue.

As with free expression, Article 2 is also considered for offenses concerning the freedom of assembly or association.<sup>79</sup> For Interpol to act against either right, a *prima facie* case must be made showing that national law limits the freedom, or if limitation is “necessary in a democratic society” by looking again to the International Covenant on Civil and Political Rights (“ICCPR”).<sup>80</sup> Assembly is a temporary gathering to express an idea, and the main factor considers whether the assembly is violent or peaceful.<sup>81</sup> Analysis of assembly is taken together with freedom of expression since an assembly is meant to express an idea.<sup>82</sup> Association, on the other hand, is when individuals join together to pursue a common interest.<sup>83</sup> For a nation to limit or prohibit the right of assembly or association, the law must be “consistent with the principles of democracy,” and any limitations “should be reasonable and proportional.”<sup>84</sup>

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75. International Covenant on Civil and Political Rights (ICCPR) art. 19, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

76. REPOSITORY OF PRACTICE, *supra* note 30, at 14.

77. *Id.* at 14-15.

78. *Id.* See *Beauharnais v. Illinois*, 343 U.S. 250, 254 (1952) (citing *People v. Spielman*, 149 N.E. 466, 469 (Ill. 1925)), in which the Supreme Court discussed the ordinary-law element in the context of criminal libel laws and the purpose of preventing breaches of the peace.

79. REPOSITORY OF PRACTICE, *supra* note 30, at 17.

80. *Id.* at 17 n.35 (relating to the idea that Interpol can only act if national law is the first to restrict); *see also id.* at 13.

81. *Id.* at 17-18.

82. *Id.* at 18.

83. *Id.*

84. *Id.* at 17.

Applying Article 3 to issues of assembly and association creates an avenue by which Interpol can counteract hate group activity. Laws can be enacted to protect public safety, order, and morals by preventing groups of people from assembling or creating a formal association to promote discriminatory or hateful views. The analysis for an assembly to promote racist ideas generally shows a predominance toward ordinary law, since any lack of peacefulness or an expectation of violence associated with a message would weigh in the government's favor in deciding to stop said speech. For an association, however, there may be a problem with imposing limitations that are "reasonable and proportional."<sup>85</sup> For example, when a U.S. group has a primary goal to promote state's rights with minor undertones of discrimination in its purpose, it may be allowed to associate for the state's rights purpose with limitations in place for the discriminatory aspects of the association. An association like the Ku Klux Klan or Aryan Brotherhood, however, could be prohibited without a violation on the reasonable and proportional aspects given these groups' history of violence towards others.<sup>86</sup>

Finally, the Repository calls for evaluating the prosecution of current or former politicians according to whether the politician's unlawful act is predominantly a pure offense or a violation of ordinary law.<sup>87</sup> For the sake of analysis then, it must be asked, who counts as a politician? The Oxford English Dictionary defines a politician as "[o]ne who engages in party politics, or in political strife, or who makes politics his profession or business."<sup>88</sup> Interpol's Repository does not define a "politician," but the examples it presents fall in line with the dictionary's definition by mentioning presidents and the heads of various executive departments.<sup>89</sup> Most of Interpol's examples involve people of heightened national importance, indicating that the Interpol standard is narrowly tailored.<sup>90</sup> At the same time, Interpol provides the example of the wife of a nation's president who was also a founder and president of a political party, which indicates that "politician" is interpreted more broadly.<sup>91</sup> Given this lack of

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85. It should be noted that Interpol mentions hate groups or political parties as potential targets since they go against the principles of democracy by attempting to violate the rights of others. *Id.* at 18 ("Accordingly, banning a party that promotes racial supremacy, for example, would probably be a permissible limitation to the freedom of association.").

86. *See* S. POVERTY L. CTR., *KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE* (Richard Baudouin ed., 6th ed. 2011).

87. REPOSITORY OF PRACTICE, *supra* note 30, at 11 (citing ICPO-Interpol G.A. Res. AGN/63/RES/9 (Sept. 28, 1994)).

88. *Politician*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

89. REPOSITORY OF PRACTICE, *supra* note 30, at 12.

90. *Id.*

91. *Id.*

definitiveness, this article will adhere to the dictionary's definition, as allowed under Article 31(1) of the Vienna Convention on the Law of Treaties.<sup>92</sup>

Once a person is determined to be a politician, there are specific policy considerations aside from the predominance test that arise if the politician is wanted in either his or her own country or another country.<sup>93</sup> If wanted in one's own country, Interpol must know if: (1) the politician is granted legal immunity from prosecution; (2) the politician's acts were conducted as an exercise of a political mandate which followed proper administrative procedures; and (3) the general context of the case indicates underlying political agendas.<sup>94</sup> If a politician is wanted by another nation, then the factors that matter are: (1) the position of the politician (where higher-up officials generally have international immunity); (2) if the politician is currently in office; (3) the source of information regarding the politician's activity; and (4) if the nation the politician works in objects to Interpol's involvement.<sup>95</sup>

The political legitimacy granted to hate group ideology by political figures means that the targeting of such figures would undergo Interpol's politician analysis.<sup>96</sup> Clearly, the mere fact that the hate group is using its political position to advocate for its beliefs is not a targetable offense. Thus, the necessary component for targeting politicians is their advocacy for one of Interpol's targetable prohibitions, such as the misuse of the freedom of expression, assembly, or association.

In comparing the Repository with the U.S. cases mentioned in Part II, the Repository follows a similar approach to the *Beauharnais* Court. In *Beauharnais*, the Court decided that the hate speech (i.e., "group libel") was rightly prohibited because it targeted the reputation of others and interfered with public order.<sup>97</sup> The Repository analysis would have found the same, first stating that the law in question did not itself create a pure offense.<sup>98</sup> Looking to the object of the targeted speech, or the black community and

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92. *Id.* at 7 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose.") (quoting Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331).

93. *Id.* at 11-12. Generally, these factors would not mean much in the U.S. But the distinction between whether a U.S. state targets its own politician or that of another state may come into play, and Interpol's policy considerations for such an issue may influence how the U.S. should accordingly act.

94. *Id.* at 11.

95. *Id.* at 12.

96. *See supra* notes 18-22 and accompanying text.

97. *Beauharnais v. Illinois*, 343 U.S. 250, 259-63 (1952).

98. *See id.* at 253-56 (describing the origins and modern purposes of the criminal libel law).



black individuals in Chicago,<sup>99</sup> speech which targets apolitical individuals generally falls in the ordinary-crime definition. With this factor against the appellant's favor, as well as the international obligations of protecting public order and morals,<sup>100</sup> and the context of the case regarding the history of violence and riots in the region,<sup>101</sup> the predominant purpose of the law and the prohibition of this speech meets an ordinary-crime objective. Therefore, Interpol's Repository allows for targeting the appellant's speech.

Not only would the *Beauharnais* appellant's speech have been targetable, but the Repository would allow Interpol to target the White Circle League, of which the appellant was president.<sup>102</sup> This organization would seek protection under the freedom of association, so Interpol's analysis must see if the organization is "consistent with the principles of democracy," where any limitations to associating "should be reasonable and proportional."<sup>103</sup> Although the facts in *Beauharnais* do not directly state that the White Circle League is a hate group, it can be implied through the leaflet activity by the appellant and his members.<sup>104</sup> If given the opportunity to respond, the organization might argue that it adheres to the principles of democracy, since its goals include "[t]o adhere to Constitutional Government as established by our pioneer forefathers" and "[t]o preserve States' Rights."<sup>105</sup> However, the predominant purpose of prohibiting the group would be to protect the rights of others, since The White Circle League was an association that targeted other races,<sup>106</sup> and, considering the historical

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99. *Id.* at 252-53.

100. This factor, although mentioned in the Repository, probably has little to no weight in the context of a strictly U.S. case. However, it is possible to have this factor suit U.S. requirements with mentioning's the state's need to use the police power to promote the general welfare. *See* *Printz v. United States*, 521 U.S. 898 (1997); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Kennedy, J., concurring); *Texas v. White*, 74 U.S. 700 (1869); *McCulloch v. Maryland*, 17 U.S. 316 (1819).

101. *Beauharnais*, 343 U.S. at 258-61.

102. *See id.* at 252.

103. REPOSITORY OF PRACTICE, *supra* note 30, at 18.

104. *Beauharnais*, 343 U.S. at 252-53; *see* Informational Leaflet from Joseph Beauharnais, Founder, The White Circle League of America (Trumbull Park), ELEC. ENCYCLOPEDIA OF CHI. (photo. reprint 2005) (c. 1955), <http://www.encyclopedia.chicagohistory.org/pages/10721.html> (outlining the principles and goals of The White Circle League of America).

105. *Beauharnais* Informational Leaflet from Joseph Beauharnais, *supra* note 104.

106. The leaflet provided that the main purposes of The White Circle League of America included, among others,

1. To oust the Reds from America[;]
2. To preserve white neighborhoods for white people, and to bring about complete separation of the black and white races[;]
7. To support [a U.S. Senator's bill] to ship the Negro back to his Fatherland, Africa, with government aid[;]
10. To expose and resist the race-mixing evil growing up in our Churches[; and]

context of Chicago's race riots,<sup>107</sup> the prohibition of the association would be allowed in order to protect public order, safety, and morals.

Although the *Brandenburg* Court protected the free speech rights of the appellant and the free assembly and association rights of the Ku Klux Klan, Interpol's standard would have allowed for the appellant, the Ku Klux Klan, and those assembling with the appellant, to be targeted. For speech, the law itself is of an ordinary-crime basis as its purpose is to prevent the "advocat[ing] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."<sup>108</sup> The case-by-case analysis would also find the speech targetable since it promotes the active targeting of another group and violates the rights of others.<sup>109</sup> With the predominant purpose of silencing the speech not being of a nature prohibited by Article 3, it follows that arresting the appellant would have been acceptable.

The Ku Klux Klan, as an association assembling to promote the Ku Klux Klan's views, would also be targetable under the Repository standard since it actively promotes hate towards other U.S. citizens based on ethnicity.<sup>110</sup> The law is of an ordinary-law aspect since it is meant to protect the public by criminalizing the "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."<sup>111</sup> An assembly to promote a march on the capital can be seen as political speech, which would be protected by the Repository. Since the assembly mostly calls for acts of violence to promote racism and white supremacy,<sup>112</sup> the predominant ordinary-law elements of public safety would allow the assembly to be prohibited. The same can be said for the Ku Klux Klan as an association, which is predominantly an association that promotes violence against non-White races.<sup>113</sup>

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13. To stop giving money to the Red Cross until it stops its horrible policy of mixing negro and white blood.

*Id.*

107. *Beauharnais*, 343 U.S. at 258-61.

108. *Brandenburg v. Ohio*, 395 U.S. 444, 444-45 (1969) (per curiam) (paraphrasing the Ohio Criminal Syndicalism statute at issue as criminalizing "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'").

109. *Id.* at 445-47.

110. See generally *KU KLUX KLAN*, *supra* note 86.

111. *Brandenburg*, 395 U.S. at 444-45.

112. *Id.* at 446-47.

113. *KU KLUX KLAN*, *supra* note 86, at 20 ("[T]he Klan launched a campaign of terrorism in the early and mid-1920s, and many communities found themselves firmly in the grasp of the organization. Lynching, shootings and whippings were the methods employed by the Klan. Blacks, Jews, Catholics, Mexicans and various immigrants were usually the victims.").

Finally, as with *Brandenburg*, the political speech in *R.A.V.* of burning a cross on someone's lawn could be prohibited under the Repository's analysis even though the *R.A.V.* Court determined otherwise. The City of St. Paul prohibited symbolic or written expressions "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."<sup>114</sup> Since the purpose of the ordinance was to protect public order and morals, it did not criminalize a pure offense. It should be noted that the *R.A.V.* Court held the ordinance unconstitutional since it classified an entire aspect of content as prohibited without giving deference to the specific facts of a case.<sup>115</sup> Under the Repository's guidance, however, this would not be at issue since the analysis is done on a case-by-case basis.<sup>116</sup> For this case, the petitioner encroached the private property of black residents and burned a cross on their lawn.<sup>117</sup> The facts show the petitioner's intent to interfere with the public order and the rights of the victims, and therefore, the government's actions would have been acceptable under the Repository.

*B. Analysis Under the Repository is Similar to Other International Standards*

Interpol's Repository is a strong and easily adaptable process for silencing hate speech. In addition, the predominance test is consistent with multiple international law standards, which makes it a strong contender as a template for the U.S.<sup>118</sup> To make this point, two legal standards will be viewed alongside Interpol's standard: (1) the European Convention on Human Rights; and (2) the American Convention on Human Rights. Both documents promote the belief that people have a right to the freedom of ideas and expression.<sup>119</sup> At the same time, both conventions also place limitations

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114. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (quoting MINN., LEGIS. CODE § 292.02 (1990)).

115. *Id.* at 380, 395-96.

116. REPOSITORY OF PRACTICE, *supra* note 30, at 5.

117. *R.A.V.*, 505 U.S. at 379-80.

118. To understand why compliance with international standards is important, *see infra* Part IV(b).

119. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.") [hereinafter European Convention on Human Rights]; American Convention on Human Rights art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123 ("Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.") [hereinafter American Convention on Human Rights].

upon such freedoms for the purpose of protecting the freedoms and rights of others.

In the European Convention on Human Rights, the balance between the right to free expression and the limitations for protecting others appear in two places. First, Article 10 states that the freedom of expression “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,” listing various reasons for what is considered “necessary.”<sup>120</sup> Second, Article 17 states that “[n]othing in this Convention may be interpreted as implying . . . any right to engage in any activity or perform any act aimed at the destruction [or limitation] of any of the rights and freedoms set forth herein.”<sup>121</sup>

The application of these articles in the European Court of Human Rights (“ECHR”) shows that Articles 10 and 17 do not grant hate speech and hateful associations any protection.<sup>122</sup> For example, in *Ivanov v. Russia*, the applicant used his newspaper company to print multiple publications inciting hatred and discrimination against the Jewish population by promoting “the exclusion of Jews from social life . . . , the existence of a causal link between social, economic and political discomfort and the activities of Jews, and . . . the malignancy of the Jewish ethnic group.”<sup>123</sup> The applicant was tried by the Novgorod Town Court and found “guilty of inciting to racial, national and religious hatred,” and banned from “engaging in journalism, publishing and disseminating in the mass-media for a period of three years.”<sup>124</sup> The applicant appealed to the Novgorod Regional Court, which upheld the conviction. He then appealed to the ECHR.

The main complaint that the appellant brought before the ECHR was that the lower court charge of incitement to hatred was unfounded, which the ECHR attributed to a claim for violating his Article 10 rights.<sup>125</sup> The ECHR stated that, although Article 10 does lay out a broad protection for freedom of expression, Article 17 limited that freedom if the expression was to achieve “the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the

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120. European Convention on Human Rights, *supra* note 119, art. 10, § 2 (“The exercise of these freedoms . . . may be subject to such formalities, restrictions or penalties as are prescribed by law and are necessary in a democratic society[.]”).

121. *Id.* art. 17.

122. See *Factsheet: Hate Speech*, EUR. COURT HUM. RTS. (June 2018), [http://www.echr.coe.int/Documents/FS\\_Hate\\_speech\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf).

123. *Ivanov v. Russia*, App. No. 35222/04, 1 Eur. Ct. H.R. 1 (2007), <http://hudoc.echr.coe.int/eng?i=001-79619>.

124. *Id.* at 2.

125. *Id.* at 3.

Convention.”<sup>126</sup> The Court then noted that the appellant’s goals of inciting anti-Semitic activity as well as the anti-Semitic sentiment in the appellant’s belief that the Jews were enemies of Russia.<sup>127</sup> The Court found that Article 17 prevented Article 10 protections from applying since this attack on an entire ethnic group blatantly goes against the Convention’s values.<sup>128</sup>

When analyzing the facts of *Pavel Ivanov* with the Repository’s predominant purpose test, the analysis leads to the same conclusion. The applicant’s expression would be targetable as incitement to hatred or violence, which goes against public order and morals.<sup>129</sup> The crime that the applicant was charged with was not a pure offense under the Repository since it was meant to protect public safety and order by criminalizing “public incitement to ethnic, racial and religious hatred through the use of the mass-media.”<sup>130</sup> With this established, the targeted activity must be predominantly political for it to be protected. Here, the applicant’s speech falls under the hate speech category that the repository clearly allows to be targeted because it advocates for discrimination against a whole ethnic-religious group, which goes against Article 2 of Interpol’s Constitution.<sup>131</sup> Therefore, protection would not be awarded and the charges against the applicant would be upheld.

The ECHR’s use of both articles is comparable to the predominance test that is applied via the Repository, and the more a case’s facts indicate a political rather than ordinary-law concern, the clearer the similarities become. For instance, in *Temel v. Turkey*, the applicant was president of the Peoples’ Democratic Party in Turkey and had given a speech which called against the actions of the U.S. in Iraq.<sup>132</sup> Specifically, he rallied against the imprisonment of the president of the Kurdistan Freedom and Democracy Congress (“KADEK”) for threats of terrorism, as well as Turkey’s involvement in allowing the imprisonment.<sup>133</sup> During his speech, the applicant and those in the audience raised chants of “No to War” and to release the imprisoned.<sup>134</sup>

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126. *Id.* at 4 (quoting European Convention on Human Rights art. 17, *supra* note 119).

127. *Id.*

128. *Id.* at 4, 5.

129. REPOSITORY OF PRACTICE, *supra* note 30, at 14.

130. *Ivanov*, App. No. 35222/04.

131. REPOSITORY OF PRACTICE, *supra* note 30, at 14.

132. *Temel v. Turkey*, App. No. 16853/05, Eur. Ct. H.R. ¶¶ 6-8 (2011).

133. *Id.* ¶ 8. KADEK is a subgroup of the Kurdistan Worker’s Party (“PKK”), which is registered as a terrorist organization. See *Kongra-Gel Kurdistan Freedom and Democracy Congress (KADEK) Kurdistan Workers’ Party (PKK)*, GLOBALSECURITY.ORG, <https://www.globalsecurity.org/military/world/para/pkk.htm> (last visited Dec. 20, 2017) [hereinafter *Kongra-Gel*].

134. *Temel*, App. No. 16853/05, ¶ 8.

Allegedly concerned with the applicant's advocacy for terrorist activities, Turkish authorities arrested and tried him for assisting the terroristic organization PKK-KADEK.<sup>135</sup> While the applicant stated that he was merely speaking against the U.S. war efforts and Turkey's involvement, the prosecutors claimed that he was spreading propaganda for the support of terrorism, which included encouraging youth to take up arms and begin a civil war against Turkey.<sup>136</sup> The Turkish Security Court overhearing the case found the applicant guilty, and the Court of Cassation agreed upon different legal grounds and called for a remand of the case.<sup>137</sup> Although the applicant showed that he never expressly called for any violence and argued that he was speaking on behalf of his party (as a way to divert liability), the Turkey Security Court found the appellant guilty since the propaganda was in support of the president of a terrorist group that led several massacres against civilians.<sup>138</sup>

The ECHR analyzed these facts under Article 10 and found no explicit findings that the applicant's speech went against the values of the freedom of expression in relation to the convention because his speech was over political imprisonment and government action rather than the promotion of propaganda and the views of a violent political party.<sup>139</sup> Therefore, to find an implicit showing of an Article 10 or Article 17 violation, the Court needed to see if the applicant's speech was in violation of a standard "'provided by [Turkish] law', [where the law] applies to one or more of the legitimate purposes referred to in paragraph 2 of Article 10," and to see if the language deserves protection as 'necessary in a democratic society' to achieve these goals" of the convention.<sup>140</sup> Regarding the law itself, the ECHR found that application of Turkey's Act No. 3713 on the fight against terrorism was acceptable,<sup>141</sup> and that Turkey's Act No. 3713 was for legitimate purposes as to the "prevention of crime 'as well as the protection of' national security."<sup>142</sup>

With regard to the applicant's speech being limited as "necessary in a democratic society," the ECHR found in favor of the applicant because the speech was of his political party's views on serious issues concerning Turkish government and international participation.<sup>143</sup> The ECHR also

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135. *Id.* ¶ 14.

136. *Id.* ¶¶ 16-17. This accusation is based upon the fear that Turkey has for an uprising from its Kurdish minority. See *Kongra-Gel*, *supra* note 133.

137. *Temel*, App. No. 16853/05, ¶ 21.

138. *Id.* ¶¶ 22, 23.

139. *Id.* ¶¶ 39-43, 44.

140. *Id.* ¶ 43.

141. *Id.* ¶ 49.

142. *Id.* ¶¶ 50-52.

143. *Id.* ¶ 60.

emphasized that the applicant was speaking on behalf of a political party in opposition to the controlling party, a situation that is important to the convention to allow criticism of controlling government officials.<sup>144</sup> Finally, the ECHR found that the legal analysis of the applicant's speech was unacceptable since the prosecution tried him for "a tenth of a sentence" in his speech rather than taking in the applicant's statement as a whole.<sup>145</sup> When looking at the whole statement, there was clearly no encouragement of the use of violence or armed resistance.<sup>146</sup> This, and the heavy sentence upon the applicant for his criticism of government action, meant that the government violated Article 10. The lower court conviction must be reversed, and the applicant must be compensated for the government's wrongful conviction.<sup>147</sup>

Again, if looking at *Temel* under the Repository, the same result would follow. The fact that the law in question dealt with a matter of national security meant that the crime itself was not a "pure offense" which solely targeted political, military, racial, or religious issues. Hence, an analysis into the predominant purpose of the targeted speech was necessary. The facts clearly indicated that even with advocacy for the release of the president of KADEK, the predominant purpose of the speech was political opposition to government action and international action by the U.S. and Turkey. This heavily political nature meant that the speech was protected, and that any interference by Interpol would be unacceptable. It also shows how Interpol's standard comports with the ECHR.

The Repository's comparability with the ECHR does not automatically mean it satisfies other international standards. Therefore, a second comparison of the Repository with the American Convention on Human Rights and the Inter-American Court of Human Rights ("IACHR") is necessary. When comparing the European and American Conventions on Human Rights, it is evident that the American Convention has a tighter grip on what is considered limitable speech. In Article 13, there is a broad allowance for limiting speech against the "respect for the rights or reputations of others; or the protection of national security, public order, or public health or morals."<sup>148</sup> The last clause of Article 13 also states that "any advocacy of national, racial, or religious hatred that constitute incitements to lawless

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144. *Id.* ¶ 63.

145. *Id.* ¶¶ 59, 61-62.

146. *Id.* ¶ 62.

147. *Id.* ¶¶ 63, 64, 91, 94.

148. American Convention on Human Rights art. 13, *supra* note 119.

violence or to any other similar action against any person or group of persons . . . shall be considered as offenses punishable by law.”<sup>149</sup>

Even though the decisions of the IACHR are tailored to the American Convention, there is evidence that the ECHR has significantly influenced the decisions of the IACHR.<sup>150</sup> It therefore makes sense that the IACHR would follow a similar pattern of analysis as the ECHR. The problem, however, is that the IACHR has yet to formally hear a case on hate speech, and the Inter-American Commission on Human Rights has not analyzed or defined the American Convention in this area. That being said, both organizations have been instructed to adhere to the policy of the U.N. or the ECHR on this topic,<sup>151</sup> and that the Commission had made a statement against the Charlottesville protest.<sup>152</sup> This indicates that the IACHR would also adhere to the international standards already looked upon. Since the Repository has been shown to follow to these same international standards, then it can be concluded that the Repository would also find the same results as the IACHR.

#### IV. U.S. LAW SHOULD BE ENFORCED UNIFORMLY ON A DOMESTIC AND AN INTERNATIONAL

The U.S. maintains some of the greatest protections for free speech.<sup>153</sup> At the same time, the U.S. also has a multitude of hate speech problems that comes from this extensive freedom.<sup>154</sup> The U.S. has yet to look at any

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149. *Id.*

150. See Eduardo Andrés Bertoni, *The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards*, 3 EUR. HUM. L.R. 332, 348-51 (2009).

151. Eduardo Bertoni, *Hate Speech Under the American Convention on Human Rights*, 12 ILSA J. INT'L & COMP. L. 569, 571 (2006).

152. Press Release, Org. of Am. States, IACHR Repudiates Hate Speech & Violence in Charlottesville, Virginia, United States (Aug. 18, 2017), [http://www.oas.org/en/iachr/media\\_center/PReleases/2017/124.asp](http://www.oas.org/en/iachr/media_center/PReleases/2017/124.asp).

153. See Richard Wike & Katie Simmons, *Global Support for Principle of Free Expression, but Opposition to Some Forms of Speech*, PEW RES. CTR. (Nov. 18, 2015), <https://www.pewresearch.org/global/2015/11/18/global-support-for-principle-of-free-expression-but-opposition-to-some-forms-of-speech/> (“[I]deas about free expression vary widely across regions and nations. The United States stands out for its especially strong opposition to government censorship[.]”) (cited in Alex Gray, *Freedom of Speech: Which Country has the Most?*, WORLD ECON. F. (Nov. 8, 2016), <https://www.weforum.org/agenda/2016/11/freedom-of-speech-country-comparison/>). But see ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2017: FREE SPEECH UNDER ATTACK 3 (reporting that the U.S. was “demoted from a ‘full democracy’ to a ‘flawed democracy’ in 2016.”), [http://pages.eiu.com/rs/753-RIQ-438/images/Democracy\\_Index\\_2017.pdf](http://pages.eiu.com/rs/753-RIQ-438/images/Democracy_Index_2017.pdf); FREEDOM HOUSE, FREEDOM IN THE WORLD 2019, 3, 18 (2019) (“[T]he United States ranks behind 51 of the 87 other Free countries in Freedom in the World.”), [https://freedomhouse.org/sites/default/files/Feb2019\\_FH\\_FITW\\_2019\\_Report\\_ForWeb-compressed.pdf](https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf).

154. See *supra* Part I.



international standards to update its free speech laws. Since the U.S. has taken to international law to update domestic laws and court rulings for other issues, and since the Repository is so similar to other forms of international law, then it makes sense for the U.S. to use the Repository as a model to remove protections against hate speech.

The Repository's strong likeness to other international standards makes it a suitable model standard to consider. However, just because the repository standard is found as comports with international law does not mean that it is necessary for the U.S. to follow. The U.S.'s use of international law and legal opinions for its own decisions and law, and a showing of U.S. participation in international issues regarding hate speech must be viewed to determine that the Repository's international adherence is of important consideration.

#### *A. U.S. Court and Legislature Have Already Utilized International Law for Guidance and Harmonization*

Like many other nations, U.S. law is founded upon the traditions and practices that have come about in its own society. Yet, in legal areas where the U.S. does not have appropriate knowledge on the subject matter, where U.S. common law is confusing or developed in an inappropriate manner, or where deference to a uniform standard is beneficial, the U.S. has accepted the influence of international law. One example of this can be seen in the U.S. court system regarding capital punishment. The U.S. is an outlier on capital punishment as it remains one of only six industrial nations to still implement it in practice,<sup>155</sup> with only thirty-one U.S. states still implementing its capital punishment laws.<sup>156</sup>

Even though the U.S. has an entirely independent legal standard for capital punishment, the U.S. Supreme Court still found the need to look beyond its own laws in *Roper v. Simmons*.<sup>157</sup> In this case, the respondent committed premeditated murder when he was seventeen years old.<sup>158</sup> Even though he had no prior convictions and was a minor, the jury recommended the sentence of capital punishment, which the trial judge imposed.<sup>159</sup> Among other issues, the respondent appealed on the basis that executing someone

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155. *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries> (last updated Dec. 31, 2017).

156. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated May 31, 2019).

157. *Roper v. Simmons*, 543 U.S. 551 (2005).

158. *Id.* at 556.

159. *Id.* at 558.

who was under eighteen when the crime was committed is unconstitutional under the Eighth and Fourteenth Amendments.<sup>160</sup>

Looking at the respondent's argument, the Court first analyzed how interpretation of the Constitution is conducted, stating the importance of looking to "the evolving standards of decency that mark the progress of a maturing society."<sup>161</sup> The Court noted that the plurality decision in *Stanford v. Kentucky* held that it should not bring judgement on the issue of allowing the capital punishment for those above sixteen years old since twenty-two of the thirty-seven capital punishment States permitted it.<sup>162</sup> Since the Court's opinion changed over time with regard to the execution of the mentally retarded, the Court noted that the same analysis of changing standards had to be viewed in *Roper*.<sup>163</sup> The Court started by looking to U.S. history of executing juveniles, stating that "[i]n the past 10 years, only three [states] have done so."<sup>164</sup> The shift of "reducing . . . juvenile capital punishment, or in taking specific steps to abolish it, has been slower" than those changes towards execution of the mentally retarded.<sup>165</sup> Yet, the Court noted that the general awareness of juveniles having lower culpability than adults existed and no state reversed its repeal of juvenile execution laws.<sup>166</sup>

Even though juvenile culpability is legally lower than average criminals, the Court still needs to show that this lowering is enough to remove juveniles from being "the most deserving of execution."<sup>167</sup> After distinguishing that juveniles are culpably less deserving of capital punishment than ordinary criminals,<sup>168</sup> the Court then looked to international standards for the interpretation of the Eighth Amendment's prohibition of cruel and unusual

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160. *Id.* at 559.

161. *Id.* at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). It had already been determined that "our standards of decency do not permit the execution of any offender under . . . [sixteen] at the time of the crime," a decision based upon the views of professional organizations, other nations "that share our Anglo-American heritage, and by leading members of the Western European community." *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion)).

162. *Id.* at 562 (citing *Stanford v. Kentucky*, 492 U.S. 361, 377-78 (1989) (plurality opinion), *abrogated by id.*).

163. *Id.* at 562, 563 (comparing the decision of *Penry v. Lynaugh*, 492 U.S. 302 (1989), which said that the Eighth Amendment did not exempt the mentally retarded from the capital punishment, with *Atkins v. Virginia*, 536 U.S. 304 (2002), which abrogated the *Penry* opinion; the Court notes the change of public opinion and standards of decency over time).

164. *Id.* at 564.

165. *Id.* at 565.

166. *Id.* at 566, 567.

167. *Id.* at 568 (quoting *Atkins*, 536 U.S. at 319).

168. *Id.* at 569-75.

punishment, noting that “the United States is the only country in the world that continues to give official sanction to the juvenile capital punishment.”<sup>169</sup>

To make the determination, the Court first looked to the United Nations Convention on the Rights of the Child, ratified by every country except for the U.S. and Somalia, which prohibits the execution of those under eighteen years old.<sup>170</sup> Next, Court reviewed evidence that the only countries to execute juvenile offenders since 1990 were the U.S. and seven other, non-Western European countries, and interpreted this fact as indicative of how out of touch the U.S. was with its contemporaries.<sup>171</sup> Finally, the Court looked to the legal history of the United Kingdom, since both nations are closely tied with regard to legal history and practice, indicating that the U.K. had already abolished capital punishment for those under eighteen years old in 1933.<sup>172</sup> The Court found that the evidence shows that “the opinion of the world community [provides] respected and significant confirmation” for its decision to affirm the lower court’s decision to set aside the capital punishment imposed on the respondent.<sup>173</sup> Although there is still debate on how much weight should be given to international values for domestic jurisprudence,<sup>174</sup> this case shows that international law can act as a guide when U.S. law is unclear or outdated.

It is not just the courts that have relied upon international law for guidance. Other branches of the U.S. government have looked to international law for creating harmonized domestic standards. On a more obvious level, this occurs when the U.S. takes on self-executing treaties, which makes a treaty supersede any conflicting pre-existing federal statutes.<sup>175</sup> If a treaty is not self-executing, then Congress is able to pass statutes, or the President can pass executive orders, to adhere to the treaty’s goals.<sup>176</sup> The harmonization to international standards can also be done without a treaty, with one example being the America Invents Act (“AIA”), where the patent law standard of looking to the invention date changed to the

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169. *Id.* at 575.

170. *Id.* at 576.

171. *Id.* at 577.

172. *Id.*

173. *Id.* at 578, 579.

174. *Id.* at 623-28 (Scalia, J., dissenting).

175. JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 67-70 (2d ed. 2003). It can sometimes be difficult to determine if international law supersedes U.S. law even if it is not explicitly self-executing. *See id.* at 323-24 (introducing how some believe that ratification of the U.N. Charter means that the Ninth Amendment of the Constitution should incorporate international standards of human rights and dignity).

176. *Id.* at 78-79.

internationally accepted filing date standard.<sup>177</sup> Finally, looking to the executive branch, it is generally accepted that the President must adhere to international customary law, as shown by the intent of the framers of the Constitution and the opinions of modern legal scholars and officials.<sup>178</sup> This, on top of the high importance that the presidential office holds with regard to international relations,<sup>179</sup> indicates that international custom is heavily considered when the U.S. president engages in or enacts foreign policy.

*B. The U.S. Domestic and International Approaches to Hate Speech and Discrimination Issues Should be the Same*

Since every branch of the U.S. government is accustomed to looking towards international custom and law to determine, update or clarify certain issues, there should be no problems with doing so for issues of hate speech, meaning that Interpol's standard can be analyzed and implemented by the U.S. However, just because the U.S. can harmonize does not mean that it will, even if it is in the U.S.'s best interest to do so. The U.S. Supreme Court is typically unwilling to overturn legal precedent based on international law but the laws of international authorities are considered instructive in interpreting the Constitution.<sup>180</sup> In *Roper*, the U.S. was already trending toward removing juvenile executions,<sup>181</sup> and the issue of juvenile executions had complicated legal precedent which was still undergoing development.<sup>182</sup> On the other hand, the Supreme Court and lower courts have consistently adhered to the rules regarding hate speech since *Brandenburg*. At the same time, comportment by the legislative and executive branches with international standards is typically seen where harmonization is required.<sup>183</sup>

It is true that the courts are willing to overturn bad precedent as necessary.<sup>184</sup> However, as argued in Justice Scalia's dissent in *Roper*, the

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177. *Summary of the America Invents Act*, AM. INTELL. PROP. L. ASS'N, <https://www.aipla.org/detail/advocacy-article/Summary-of-the-America-Invents-Act> (last visited Feb. 2, 2019).

178. PAUST, *supra* note 175, at 169-92.

179. *See* U.S. CONST. art. II, § 2, cl. 2.

180. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.").

181. *Id.* at 565-67.

182. *Id.* at 561-62.

183. *Id.* at 567.

184. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("Adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.' Nevertheless, when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'") (first quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), and then quoting *Smith v. Allwright*,

personal history and legal development of the U.S. should not be infringed upon or altered by the standards and customs of others.<sup>185</sup> Looking back to the problems of hate speech in the U.S. signifies the domestic need for change and that it is necessary to view other possible analyses or legal standards. So, for international law to be considered, it appears that an influencer outside of U.S. standards and custom must exist. The *Roper* Court presented the change in international practice and the place of the U.S. in comparison to show a necessity in updating the law to conform with those of its peers.<sup>186</sup> A similar argument can be made here since the U.S. appears to be out of touch with the rest of the international community regarding its hate speech standards,<sup>187</sup> but this alone may not be reason enough.

Justice Douglas's dissenting opinion in *Beauharnais*, which mirrors the arguments made *Brandenburg* and *R.A.V.*, succinctly states the U.S. views and interpretation of the First Amendment:

The First Amendment says that freedom of speech, freedom of press, and the free exercise of religion shall not be abridged. That is a negation of power on the part of each and every department of government. Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power[.] The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for retrained speech and thought against the abuses of liberty. They chose liberty. That should be our choice today no matter how distasteful to us the pamphlet of *Beauharnais* may be.<sup>188</sup>

The historic context for the nearly unwavering protection of speech comes from the control of the English kingdom over its subjects and colonies,

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321 U.S. 649, 665 (1944)); *see, e.g.*, *Whitney v. Cal.*, 274 U.S. 357 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (*per curiam*) (*overruling Whitney* insofar as it allowed a state to punish mere advocacy of particular acts); *see also* *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (making clear that the Court disapproved of and would not follow the 1944 *Korematsu* decision) (stating “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”) (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944)) (Jackson, J., dissenting)); *Plessy v. Ferguson*, 163 U.S. 537 (1987), *abrogated by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (*overruling Plessy*'s “separate but equal” principle).

185. *Roper*, 543 U.S. at 624 (Scalia, J., dissenting) (“More fundamentally, however, the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”).

186. *Roper*, 543 U.S. at 575-78.

187. *See* Kevin Boyle, *Hate Speech: The United States Versus the Rest of the World*, 53 ME. L. REV. 487, 493-94, 501 (2001).

188. *Beauharnais v. Illinois*, 343 U.S. 250, 286-87 (1952) (Douglas, J., dissenting).

which the U.S. was trying to break away from.<sup>189</sup> This is vastly different from the context upon which the U.N. and Europe based their declarations and conventions on human rights, especially when considering the rise and fall of Nazi Germany through World War II.<sup>190</sup> To the international community, although free speech is of heightened importance as seen in *Temel*, human dignity and safety and the rights of others can take greater precedent as seen in *Ivanov*.<sup>191</sup> This just is not the case under U.S. law, which looks for an actual incitement to immediate lawless action rather than a tendency to do so.<sup>192</sup> Yet, considering the trying times that we are put under with regard to the growth and spread of hate speech in the U.S., the policies of *Brandenburg* are not adequate. Hate speech in the U.S. has for too long been persistent, and thus special consideration should be carved out for this category with international influence coming into play.<sup>193</sup>

With issues where the U.S. is involved both domestically and internationally, it is necessary to have consistent international law approaches. Looking back to the AIA, a harmonized patent law system was beneficial for developing and protecting intellectual property.<sup>194</sup> In similar respects, it is necessary to determine how hate speech laws can be used both domestically and internationally. As it turns out, there are at least two areas where the U.S. would improve from updating its hate speech laws to an international standard.

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189. Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 547-48 n.1 (1903) (discussing how truth was not a defense to defamation under Roman law and legal systems throughout history that were based on Roman law principles). Under English seditious libel law, criticisms based on truth were more likely to result in liability. See PETER N. AMPONSAH, LIBEL LAW, POLITICAL CRITICISM, AND DEFAMATION OF PUBLIC FIGURES 42 (2004) (“This rule governing the English law of seditious libel gave rise to the maxim ‘The greater the truth, the greater the libel.’”) (internal citations omitted).

190. *What is the European Convention on Human Rights?*, AMNESTY INT’L (UK) (Aug. 21, 2018, 4:47 PM), <https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights>; see Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357 (1993).

191. *Ivanov v. Russia*, App. No. 35222/04, 1 Eur. Ct. H.R. 1 (2007), <http://hudoc.echr.coe.int/eng?i=001-79619>.

192. *Cf. Beauharnais v. Illinois*, 343 U.S. 250, 286-87 (1952), with *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

193. It could also be argued that, although hate speech may not actually incite immediate lawless action, the direct and indirect effects of hate speech in Part I can be enough by which hate speech can be triggered as unprotected. Most likely, however, the courts would be unwilling to change its precedent solely on this point.

194. Michael H. Anderson et al., *Why International Inventors Might Want to Consider Filing Their First Patent Application at the United States Patent Office & the Convergence of Patent Harmonization and Ecommerce*, 30 SANTA CLARA HIGH TECH. L.J. 555, 560 (2014).

The first regards the fight against terrorism. With the U.S. already being involved in this prospect,<sup>195</sup> it makes sense to enact laws toward this goal. One of the bigger problems with fighting ISIS is finding a way to target propagandists and prevent the spread of their ideologies on social media.<sup>196</sup> Though efforts have been made in this regard,<sup>197</sup> it has been proven difficult without the means to actually target a propagandist as a terrorist.<sup>198</sup> This is especially true when dealing with domestic promotion of terrorist or extremist groups by U.S. citizens.<sup>199</sup> If Interpol's standard were adopted, then targeting domestic or international propagandists would no longer pose a problem. Since terrorist and extremist propaganda attacks public safety, order, and morals, laws against such speech would be accepted under the Repository<sup>200</sup> and would bypass many of the difficult questions that are currently raised by the First Amendment.

The second example where an update in hate speech laws is beneficial involves the U.S.'s participation in the Organization for Security and Cooperation in Europe ("OSCE"). The OSCE's main objective is to "ensure respect for human rights . . . and promote tolerance and non-discrimination."<sup>201</sup> To implement the policies promoting tolerance and non-discrimination, one of the main measures that the OSCE promotes is to pass legislation or non-discriminatory policies within national security and governance.<sup>202</sup> As seen in the 2009 Human Dimension Meeting on effective implementation of hate crimes legislation, one of the main recommendations involved enactment of laws "that establish hate crimes as specific offenses" or enhance penalties for violent crimes committed against "the victim's race,

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195. Janice Yu, *Regulation of Social Media Platforms to Curb ISIS Incitement and Recruitment: The Need for an International Framework and its Free Speech Implications*, 4 J. GLOB. JUST. & PUB. POL'Y 1, 2 (2018).

196. See Dan de Luce et al., *Going After the ISIS Propaganda Mastermind*, FP (Aug. 31, 2016, 8:07 PM), <http://foreignpolicy.com/2016/08/31/going-after-the-isis-propaganda-mastermind/> (describing how, even after the U.S.'s targeted killing of ISIS's propaganda mastermind Abu Muhammad al-Adnani, it is difficult to prevent the spread of ISIS's message and influence on social media); Brendan I. Koerner, *Why ISIS is Winning the Social Media War*, WIRED, <https://www.wired.com/2016/03/isis-winning-social-media-war-heres-beat/> (last visited Mar. 21, 2018) (describing the tactics and successes of ISIS in gaining a wide social media audience and support).

197. *Propagandists, Recruiters, and Spokespersons*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/sites/default/files/Propagandists%20Recruiters%20Spokespersons.pdf> (last visited Mar. 21, 2018).

198. Michael J. Lebowitz, *Terrorist Speech: Detained Propagandists and the Issue of Extraterritorial Application of the First Amendment*, 9 FIRST AMEND. L. REV. 573, 600-01 (2011).

199. *Id.* at 579-80.

200. REPOSITORY OF PRACTICE, *supra* note 30.

201. *What We Do*, OSCE, <https://www.osce.org/what-we-do> (last visited Dec. 20, 2017).

202. *Tolerance and Non-Discrimination*, OSCE, <https://www.osce.org/tolerance-and-nondiscrimination> (last visited Dec. 20, 2017).

religion, ethnicity, sexual orientation, gender, gender identity, mental and physical disabilities, or other status.”<sup>203</sup>

Although there were debates about the protections of free speech, the consensus was that the passage and enforcement of such laws was appropriate for ensuring a safe environment.<sup>204</sup> As member of the OSCE,<sup>205</sup> it makes sense for the U.S. to promote this policy as well. While it is true that the U.S. has already implemented the use of hate crime enhancement laws,<sup>206</sup> it has also been shown above how laws which target hate speech are out of the question under the current U.S. standard.<sup>207</sup> The U.S. can only hold this inconsistent stance if it is maintaining partial cooperation with the viewpoints held by the OSCE, such as the necessity of utilizing educational and awareness-raising initiatives.<sup>208</sup>

At the same time, U.S. involvement with the OSCE clearly shows the full commitment of the U.S. to supporting the many goals of the OSCE.<sup>209</sup> The body through which the U.S. cooperates with the OSCE is the U.S.

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203. *Hate Crimes: Effective Implementation of Legislation*, OSCE (Sept. 15, 2009), <https://www.osce.org/odihr/38711?download=true>.

204. *Id.*; see *Preventing and Responding to Hate Crimes*, OSCE (Sept. 15, 2009), <https://www.osce.org/odihr/38711?download=true>.

205. *Participating States*, OSCE, <https://www.osce.org/participating-states> (last visited Dec. 20, 2017).

206. *Hate Crime Laws*, *supra* note 5.

207. See Anne-Marie Beliveau, *Hate Speech Laws in the United States and the Council of Europe: The Fine Balance between Protecting Individual Freedom of Expression Rights and Preventing the Rise of Extremism and Radicalization through Social Media Sites*, 51 SUFFOLK U.L. REV. 565 (2018).

208. Organization for Security and Co-operation in Europe [OSCE], *Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding*, Ministerial Council Dec. 13/06, OSCE Doc. MC.Dec/13/06, at ¶ 5 (Dec. 5, 2006).

209. On the issue of tolerance and non-discrimination, statements made by U.S. representatives on how more can be done by other member states to quell discrimination within their borders, see U.S. Dep’t of State, *Statement on Tolerance and Non-discrimination at HDIM Session 9* (2017), <https://www.osce.org/odihr/344736?download=true>; U.S. Dep’t of State, *US Statement on Tolerance and Non-discrimination at HDIM Session 8* (2017), <https://www.osce.org/odihr/344731?download=true>; U.S. Dep’t of State, *Statement on Tolerance and Non-discrimination at HDIM Session 7* (2017), <https://www.osce.org/odihr/344726?download=true> (“My delegation strongly supports the September 14 OSCE side-event on combating anti-Semitism through education, featuring the ‘Turning Words into Action’ Project initiated under the German OSCE Chairmanship.”); U.S. Dep’t of State, *Tolerance and Non-Discrimination: Responses to and Prevention of Hate Crimes in the OSCE Area* (Oct. 6, 2011), <https://www.osce.org/odihr/83672?download=true> (“We therefore continue to support the various OSCE initiatives that address prejudice, discrimination, and intergroup conflict, ranging from the work of the Office for Democratic Institutions and Human Rights (ODIHR), including its annual hate crimes report and new law enforcement training program, to the work of the Personal Representatives on Tolerance and the High Commissioner on National Minorities.”).



Helsinki Commission.<sup>210</sup> The goals of this commission are to ensure that the member nations of the OSCE are in compliance with the Helsinki Accords, as well as to advance “comprehensive security through promotion of human rights, democracy, and economic, environmental, and military cooperation in the [fifty-seven] nation OSCE region.”<sup>211</sup>

Looking specifically at the tolerance and non-discrimination branch of the OSCE, the Helsinki Commission has incorporated initiatives to collect data on hate speech and hate crimes.<sup>212</sup> In the U.S., the Helsinki Commission advocated for a U.S.-EU Joint Action Plan to combat prejudice and discrimination.<sup>213</sup> When comparing the commission’s goals with current U.S. law, there is a clear frustration of the OSCE’s purpose. The disallowance of laws against hate speech indicates that the commission is unable to do its job of promoting said laws, and thus unable to properly cooperate with the OSCE’s goals. This same issue can be seen regarding the U.S.’s involvement in Interpol, where maintaining the current hate speech standard would prevent the U.S. National Central Bureau from being able to implement Interpol’s hate speech policy, as seen in the Repository.

One possible solution for relieving the frustration is to have U.S. law apply differently for domestic and international issues, where U.S. citizens and domestic speech have greater protection than extraterritorial speech.<sup>214</sup> To do so would cause inconsistent and confusing application of the law, which is especially problematic when dealing with issues of high constitutional importance, as was seen regarding issues of habeas corpus and

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210. *About CSCE: Frequently Asked Questions*, COMM’N SEC. & COOPERATION EUR., <https://www.csce.gov/about-csce/our-structure/frequently-asked-questions> (last visited Mar. 25, 2019) (“The Helsinki Commission monitors and encourages compliance with the Helsinki Final Act and other OSCE commitments by strengthening human rights monitoring, defending those persecuted for acting on their rights and freedoms, and ensuring that compliance with Helsinki provisions are given due consideration in U.S. foreign policy.”).

211. *About the Commission on Security and Cooperation in Europe*, COMM’N SEC. & COOPERATION EUR., <https://www.csce.gov/about-commission-security-and-cooperation-europe> (last visited Dec. 20, 2017).

212. *Tolerance and Non-Discrimination*, *supra* note 202; see *About the Commission on Security and Cooperation in Europe*, *supra* note 211.

213. The U.S.-EU Joint Action Plan was proposed in a 2016 federal bill. The provisions establishing the Joint Action Plan were not incorporated into the enacted legislation. See S. 1635, 114th Cong. § 133 (2016); Act of December 16, 2016, Pub. L. No. 114-323, 130 Stat. 1905 (2016).

214. Timothy Zick, *Territoriality and the First Amendment: Free Speech at - and Beyond - Our Borders*, 85 NOTRE DAME L. REV. 1543, 1549 (2010) (“With regard to citizens, although First Amendment rights have not frequently been enforced extraterritorially the assumption is that the First Amendment formally applies to expressive activities beyond U.S. borders. By contrast, aliens abroad are presumed not to enjoy First Amendment rights. Thus, although they favor exportation of First Amendment norms in general, policymakers have been reluctant to acknowledge that First Amendment limitations apply extraterritorially.”).

the law of war.<sup>215</sup> If instead the U.S. adopted an internationally accepted standard, then the U.S. could better cooperate on this issue abroad while at the same time maintain consistent approaches of legal application. Therefore, the historical argument promoted by Justice Scalia would not apply here since the issue of hate speech is no longer of purely domestic policy, but also of maintaining consistent application on an international level.

## V. CONCLUSION

Interpol's standard is a highly successful and adoptable tool for the U.S. Yet, how much do the above arguments matter if President Trump is unwilling to acknowledge that a problem exists? His constant use of discriminatory rhetoric is a promotional influence for hate speech. If Congressional-majority support for President Trump is also considered, then a unified policy against hate speech will probably not come up soon.

Even with this being the case, positive changes in the law can still come about through precedents. It was shown above that the Court can look to international law and custom for its legal decisions, and how the Court has a tight control over the constitutionality of the First Amendment regarding how hate speech can be controlled.

At the same time, *Brown v. Board of Education* shows how the courts can start the process of creating progressive change in law and policy in the face of animosity by the other sectors of government.<sup>216</sup> Given this, it is clear that the Courts have the power to sway social and political opinion upon this issue if the Interpol standard is adopted. Therefore, the necessary changes can happen sooner if greater consideration is given to the hate speech problem.

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215. *Hamdan v. Rumsfeld*, 548 U.S. 557, 585-89 (2006) (finding that the Court should not refuse habeas corpus relief for Hamdan's military trial because the necessity of military discipline was not founded for a potential terrorist (a non-service member), and the fairness of military proceedings was not founded in this case, where the Constitution seeks to protect the rights of due process even for non-citizens).

216. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 489 (1954); see *History: Brown v. Board of Education Re-enactment*, U.S. CTS, <http://www.uscourts.gov/educational-resources/educational-activities/history-brown-v-board-education-re-enactment> (last visited Dec. 20, 2017).