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Spreading Angst or Promoting Free Expression? Regulating Hate Speech on the Internet

Joshua Spector

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The regulation of speech on the Internet is purportedly commonplace throughout the world.[1] Even if the United States takes no immediate interest in regulating speech over the Internet, foreign pressure is mounting for the United States to respect the laws of other States that restrict hate speech by assisting in preventing the distribution of hate speech to an international forum through the Internet. The U.S. interest in maintaining First Amendment liberties is set against tension resulting in part from the export of Neo-Nazi propaganda from the United States to states where such speech is prohibited.[2] This tension will soon prompt countries such as France and Germany to pressure the United States to restrict Internet speech, thereby adopting an international standard for the prohibition of hate speech on the Internet. In the absence of an applicable international treaty, jurisdictional problems will blister litigation in the United States and abroad. In order to preserve the liberty of free speech in the United States, Internet speech must continue to benefit from the protection of the First Amendment, and other states must look for solutions within their sovereign authority.

This note first contrasts the constitutional jurisprudence of free speech of Germany against the United States. The contrasting practices and doctrines are framed by a survey of international agreements on speech and a brief discussion of hate speech in the United States. The discussion then complicates the problems of speech by projecting it onto the Internet.

In the United States the value of free speech is held in such high regard that the United States Supreme Court will not allow itself to

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* (J.D.) University of Miami School of Law, 2002.

[1] Leonard R. Sussman, *Censor Dot Gov: The Internet and Press Foundation 2000*, (May15,2001), *at* http://www.freedomhouse.org/pfs2000/sussman.html.

[2] Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, Working Paper Series No. 41 at 5, Social Science Research Network Electronic Paper Collection (April 2001), *at* http://papers.ssrn.com/paper.taf?abstract_id=265939 (This article notes that web sites in California have been accessed by Neo-Nazi groups in Canada, Germany, or elsewhere).

subject the content of speech to a balancing test. Balancing the value of speech is inherently subjective. Entrusting un-elected judges to make value judgments, even in the form of so-called balancing tests, guts liberty, depriving a people of the free exchange of ideas essential to the proper functioning of a democracy. While Germany's efforts to curtail "hate speech" are to be commended, the tests implemented by the German Constitutional Court ("FCC") are inconsistent with U.S. constitutional jurisprudence. Germany's treatment of hate speech would not be constitutional if applied in the United States—even if the United States or state governments wished to placate or cooperate with Germany and other concerned states, our highest court would strike down anti-hate speech regulations based on content, save for those that would be consistent with the tests of the U.S. Supreme Court discussed below.

The Basic Law set forth by the German Constitution describes constitutional principles that are similar to U.S. constitutional rights. When the text of these enumerated rights is assembled into a societal structure and context, the respective differences between German and U.S. jurisprudence assume the character of two different dialects of the same language. This assertion is not to say that the language is identical or that identical results should have been met. In fact, Germany's fourth constitution reflects the lessons of World War II, incorporating more explicit limitations on freedoms, particularly freedom of speech. Simply stated, Germany prohibits "hate speech." Conversely, no government in the United States may prohibit hate speech.

I. Prohibiting Hate Speech in Germany

In Germany, Article 1 of the Basic Law protects human dignity. "[I]nviolability of human dignity is the highest of all the constitutional principles, dominating all the other provisions of the Basic Law."[3] The notion of "human dignity" effectively trumps the freedom of speech, allowing Germany to regulate hate speech. Article 1[4] of the Basic Law reads:

(1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.

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[3] SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW 97 (1999), (citing *Life Imprisonment Case*, BverfGE 45, 187 (1977)).

[4] THE DEMOCRATIC TRADITION: FOUR GERMAN CONSTITUTIONS 194 (Elmar M. Hucko ed., 1987).

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly as enforceable law.

The FCC has stated, "the legislature must respect the inviolability of human dignity. . . which is the highest constitutional principle."[5] The FCC has defined the concept of human dignity, in part, through a negative definition.[6]

Article 5 of the Basic Law provides Germans the guarantee of freedom of speech. Article 5 reads, in pertinent part:

(1) Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.
(2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honor.
(3) Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the constitution.

The FCC has stated that freedom of expression is "absolutely fundamental for a liberal-democratic constitutional order because it alone makes possible the constant intellectual debate and the contest of opinions that is its elixir of life. In a certain way, it is the basis of any freedom, 'matrix, the indispensable condition of nearly every other form of freedom.' [citation omitted]"[7] Despite the indispensable condition of freedom of expression, it is curtailed in the interest of regulating hate speech. The regulation of hate speech is based on the tension between Art. 5(1), laying out the freedom of expression, and the contradictory limits of expression imposed by "personal honor" in Art. 5(2) and the inviolability of human dignity, Art. 1(1).

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[5] MICHALOWSKI, *supra* note 3, at 97.
[6] *Id.* at 99, (citing *Horror Film Decision*, BverfGE 87, 209 (1992)) ("The FCC sees [human dignity] as fundamental principle within the system of the basic rights.").
[7] *Id., citing Lüth Decision*, BverfGE 7, 199 (1958).

In Germany, the freedom of expression is limited to the expression of one's *opinion*. So long as the statement is an opinion, it is constitutionally protected.[8] In the *Soldiers are Murderers Decision* ("*Soldiers*"),[9] the FCC held "[o]pinions. . . contain a judgment about facts, ideas or persons. . . The guarantee exists, therefore, whether or not the statement is rational, emotional, well-founded or unjustified, and whether or not others think that it is useful or prejudicial, of great value or without value."[10] *Soldiers* involved three complainants challenging the constitutionality of their respective criminal convictions for libel.[11] One complainant was a teacher who, during the Gulf War, affixed a sticker to his car with a quotation by the writer Tucholsky "Soldiers are murderers."[12] In the *Offensive Letters Case*, the FCC stated:

> A differentiation according to the moral quality of opinions would constitute a far-reaching restriction of the comprehensive protection [of freedom of expression]. Apart from the fact that the distinction between valuable and valueless opinions is difficult and, in fact, often impossible to make, in a pluralistic society that is based on the concept of a free democracy every opinion, even one that deviates from the dominant view, deserves protection. This is why Art. 5(1)(1) BL even protects degrading judgments about other persons or certain events or conditions unless the limitations laid down in Art. 5(2) BL apply.[13]

The distinction between opinion and fact therefore becomes essential to the expression and dissemination of unpopular ideas. The language of the FCC in the *Offensive Letters Case* does not, by itself, knock out the expression of "hate speech." In the *Holocaust Denial Case*[14] the FCC has stated that the subject of Art. 5(1)(1) BL are opinions, which cannot be proved either right or wrong.[15]

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[8] *Id.* at 200.
[9] BverfGE 93, 266 (1995).
[10] MICHALOWSKI, *supra* note 3, *citing Soldiers* at 200.
[11] *Id.* at 201.
[12] *Id.*
[13] *Id.* at 200, *citing Offensive Letters Case*, BverfGE 33, 1 (1972) at 15.
[14] BverfGE 90, 241 (1994).
[15] MICHALOWSKI, *supra* note 3, at 202, *citing Offensive Letters Case*, BverfGE 90, 241 (1994) at 247.

The Criminal Code of Germany goes past the Basic Law, further restricting the freedom of speech.[16] Article 130 "imposes a sanction of a fine or imprisonment of up to five years against any person who incites hatred or invites violence or arbitrary acts against parts of the population, or insults, maliciously degrades, or defames parts of the population, in a manner likely to disturb the public peace."[17] This provision has not been challenged on a constitutional basis, and there has been little academic discussion, "presumably because there is a shared perception that 'acts by private persons likely to incite racial hatred are not protected by the right to freedom of speech'".[18] The case law of Germany demonstrates that hate speech or speech that is offensive to the dignity of "groups within German society" is simply not protected by the guarantee of free speech in the Basic Law.[19]

II. Hate Speech in the United States

The roots of free speech in the United States may be traced to four main philosophical justifications.[20] John Stuart Mill's utilitarian philosophy is considered the source of the justification from the pursuit of truth.[21] Mill's philosophy proposed the pursuit of truth is a struggle of trial and error that will lead to the truth after uninhibited discussion.[22] Justice Oliver Wendell Holmes imported this concept to American constitutional jurisprudence[23] in his dissenting opinion in *Abrams v. United States*.[24] This justification is the dominant justification for free

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[16] Laura R. Palmer, *A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo*, 26 Yale J. Int'l L. 179, 201 (Winter 2001).

[17] *Id.*

[18] *Id.* at 203.

[19] *Id.* at 203-05.

[20] For a brief discussion of the four justifications, *see* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, Working Paper Series No. 41 at 5, Social Science Research Network Electronic Paper Collection: (April, 2001) <http://papers.ssrn.com/paper.taf?abstract_id=265939>. For an extensive discussion, Rosenfeld cites FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).

[21] Rosenfeld, *supra* note 20, at 17.

[22] *Id.*

[23] *Id.*

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

speech in the United States today, and is referred to as the "free marketplace of ideas."[25]

Freedom of speech in the United States has not been a static barrier to the pressures of the time and political mood. Shortly after the adoption of the Bill of Rights, the Alien and Sedition Acts were passed, sharply curtailing the freedom of speech; during World War I (when the initial freedom of speech cases were tried) convictions were upheld for political speech; the fear of communism following World War II lessened the protection of the First Amendment from the famous "clear and present danger test" devised by Justice Oliver Wendell Holmes to a test based on assessing the gravity of the evil, discounted by its probability.[26] The tests employed in assessing the constitutional protection afforded to domestic speech have evolved over the years, and neither of the above tests remains more controlling or influential.

The extent to which racist speech is protected has changed along with the tests. In *Beauharnais v. Illinois,*[27] the U.S. Supreme Court upheld a conviction for "group libel" against the writer/publisher of a white supremacist periodical who distributed a petition containing many inflammatory statements about African-Americans. The Court further held that the statements were "fighting words," a category of speech unprotected by the First Amendment.[28]

World War II and the Holocaust sparked interested in group libel laws in the United States, just as they influenced the fourth constitution of Germany.[29] Sociologist and law professor David Riesman wrote in support of restricting offensive racial and religious speech in a three-part series for the *Columbia Law Review*, arguing that Fascism undermined democracy by "exploiting its commitment to tolerance and free speech; and that democracies had both a right and duty to curb this threat."[30] New Jersey's state supreme court overruled a race hate law, New York considered one, the governor of Rhode Island vetoed its bill in 1944, Indiana passed a law in 1947, and West Virginia and Connecticut passed marginally effective laws.[31] In 1943 Massachusetts passed a group libel law with strict fines and/or prison terms for "publishing 'any false,

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[25] Rosenfeld, *supra* note 20, at 17.
[26] Palmer, *supra* note 16, at 207.
[27] Beauharnais v. Illinois, 343 U.S. 250 (1952).
[28] *Id.*
[29] SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 79 (1994).
[30] *Id.*
[31] *Id.* at 82.

written or printed material with the intent to maliciously promote hatred of any group of persons in the commonwealth because of race, color or religion.'"[32] There were no prosecutions under the Massachusetts law.[33] Congress failed to pass bills such as 1944's H.R. 2328, backed by the American Jewish Congress, to ban hate speech literature from the mail.[34] The American Civil Liberties Union ("ACLU") opposed the bill, and attorney Max Ernst recommended instead a federal disclosure law, revealing financing and officers of the group sponsoring the mailer.[35]

Restriction of hate speech peaked with *Beauharnais*; one of the strongest supporters of the group libel law, the American Jewish Congress, later repudiated the law, and the state of Illinois repealed the 1917 law eight years after *Beauharnais*.[36] One commentator notes that some civil rights groups were opposed to group libel legislation because it posed a dangerous exception to the "seamless fabric of individual rights" being advanced in other Supreme Court cases.[37] Subsequent decisions by the U.S. Supreme Court suggest that if *Beauharnais* came before the Court today, the result would be different.

The Court overturned a criminal syndicalism statute in *Brandenburg v. Ohio*,[38] thereby protecting the speech of a Ku Klux Klan leader in a rally stating "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible there might have to be some vengeance taken." The holding set forth a new standard for "fighting words" and for free speech in general. "[A] State [cannot] 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."[39] This test only denies protection to racist speech where there is an *imminent* threat of violence.

American Neo-Nazis gained a great deal of media exposure but little momentum from the Skokie Cases, which included the Illinois District Court decision *Collin v. Smith*[40] ("Collin"). In *Collin* the district court held unconstitutional ordinances in a predominately Jewish

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[32] *Id.*
[33] *Id.*
[34] *Id.* at 83.
[35] *Id.* at 85-6.
[36] *Id.* at 77.
[37] *Id.* at 78.
[38] 395 U.S. 444 (1969).
[39] *Id.* at 447.
[40] 447 F. Supp. 676 (N.D. Ill. 1978).

neighborhood enacted to prevent neo-Nazis from marching.[41] The district court stated that "it is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear."[42] One scholar identifies the U.S. Supreme Court's decision *R.A.V. v. City of St. Paul*[43] as the apotheosis of the above comment.[44]

In *R.A.V.* an African-American family moved into a predominately white neighborhood of St. Paul. Following various other offensive incidents by various perpetrators, a white teenager placed a burning cross on the lawn of the family. The Minnesota Supreme Court convicted the white teenager of a misdemeanor for placing a symbol that "arouses anger, alarm or resentment...on the basis of race, color, creed, religion or gender."[45] The Court held that the regulation was unconstitutional for it discriminated on the basis of content within an area of speech that was not protected by the First Amendment. In other words, a regulation may not favor one form of unprotected speech over others.

There is no *per se* absolute protection of speech in the United States. Two U.S. Supreme Court Justices who purported to be "absolutists" simply set the limits of permissible speech at speech that was protected by the First Amendment.[46] Professor John Hart Ely suggests that such an approach is not sufficiently predictable.[47] In *United States v. O'Brien*, Chief Justice Warren's opinion for the majority held that the act of burning a military draft card was not protected against a necessary ordinance requiring possession of the card; the decision set a three-part test for the incidental regulations of speech and regulations

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[41] *Id.* at 702.

[42] *Id.* The author agrees with these remarks and adds that the only significant popular legacy of the Skokie Cases is in found in mainstream cinema. To wit: in THE BLUES BROTHERS the two protagonists find their vehicle halted in order to allow a group of neo-Nazis to exercise their court-won right to march. The protagonists may indeed interpret the march as "fighting words" for they react by placing their vehicle in low gear and running the demonstrators off a bridge and into water, much to the delight of on-lookers and the duty-bound police.

[43] 505 U.S. 377 (1992).

[44] Palmer, *supra* note 16, at 211.

[45] 505 U.S. 377 at 393.

[46] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 109 (Harvard Univ. Press 1980).

[47] *Id.*

that did not concern content of speech.[48] In another approach to assessing speech, the Court in *Cohen v. California* identified the unprotected categories of speech and narrowed their definitions.[49] Ely identifies the two different decisions as indicative of the two dominant modes of assessing the protection of freedom of speech, referring to content-specific regulations as specific harm tests and the remaining areas of speech as unprotected speech.[50]

It is the not the identification of the two modes of assessment that is noteworthy, but rather it is Ely's argument that the two modes may be articulated as complementary tests.[51] For example, the standard for the Court to review the constitutionality of a regulation remains the test set forth in *O'Brien*.[52] The first prong asks whether the government may enact the regulation, the second part questions whether the regulation fulfills an important government interest, and the third prong questions whether the regulation is unrelated to the suppression of free speech.[53] If the regulation is unrelated, the fourth part of the test asks whether the suppression is no greater than is essential to advance the government's interest.[54] The fourth part of the test will apply a standard of "no gratuitous inhibition" if the speech is non-traditional, such as flag-burning, etc.[55] The standard for the fourth part of the test will be a "serious balancing" test if the form of speech is traditional.[56] Notice that unlike the German system, this is the only instance where the Court will conduct a balancing of any sort. Should the regulation fail the third prong of the test for it *is* related to the suppression of free speech (it is content-based) and the test shifts to the scheme of *Cohen*, where the Court should determine whether the speech in question is part of a well-defined category of unprotected speech.[57]

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[48] *See* ELY, *supra* note 46; JOHN HART ELY, ON CONSTITUTIONAL GROUND 173-187 (Princeton Univ. Press 1996).
[49] *See* ELY, *supra* note 46, at 114.
[50] *See id.* at 105-116.
[51] *Id.* at 111.
[52] *See* JOHN HART ELY, ON CONSTITUTIONAL GROUND 173-187 (Princeton Univ. Press 1996).
[53] *Id.* at 174.
[54] *Id.*
[55] *Id.* at 175.
[56] *See id.* at 175-79.
[57] *Id.*

Scholars have certainly argued that hate speech should constitute a category of unprotected speech.[58] If speech falls into an unprotected area, there is no balancing test or analysis of its content other than to determine whether it is or is not within the category. But there is an inherent test of whether a racial epithet or the like is racist enough to be hate speech. At the risk of being trite, there may be *dislike* speech that does not carry the pretextual and/or harmful dimensions of hate speech. This junction may be considered similar to the FCC's determination of whether some element of speech is a fact or an opinion. Perhaps the fact/opinion test would be the necessary objective criteria for U.S. courts to determine whether speech is dislike or hate speech. Clearly this discussion leads to the unsatisfactory conclusion that there is no easy answer, but if further tests are necessary to divine the protected speech from the unprotected speech, making hate speech an unprotected category of speech promises some radical shifts in the foundation of free speech.

Some scholars have endeavored to identify four stages of speech in the United States, of which we are just now entering the fourth.[59] The fourth stage results from the expansion of the "alternative discourses" (feminist theory, critical race theory, etc.) that assert that mainstream speech is "inherently oppressive" and a white male dominated discourse.[60] To engage and treat this condition of speech, these alternative discourses call for the "pluralization and fragmentation of discourse."[61] In that vein, the protection of free speech shifts to cover the oppressed and marginalized discourses against the pressure brought to bear on them by the hegemonic, dominant discourse.[62] In the third stage, the greatest protection for hate speech would be available, as the protection focused on the rights of the listener.[63] The fourth stage, in contrast, calls for suppression of hate speech, but that perspective has not

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[58] *See* Mari Matsuda, *Public Response to Racist Speech*, WORDS THAT WOUND (Westview Press 1993); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, WORDS THAT WOUND (Westview 1993).

[59] Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, Working Paper Series No. 41 at 13, Social Science Research Network Electronic Paper Collection (April, 2001) *at* http://www.papers.ssrn.com/paper.taf?abstract_id=265939.

[60] *Id.* at 14.

[61] *Id.*

[62] *Id.*

[63] *Id.*

yet been adopted by the U.S. Supreme Court.[64] In between these stages, some scholars have argued that hate speech in the United States should be self-regulated.[65] This solution is likewise as optimistic as a snowball in hell, but the trajectory of the pitch is on point. If end-users of the Internet adopted state-mandated software to filter the content downloaded from the Internet,[66] the immediate pressure on the United States to conform to international positions on Internet hate speech would be lessened.

III. International Agreements Applicable to the United States

Under several international agreements, it may be argued that the United States has an affirmative duty to enact legislation prohibiting hate speech. One such agreement is the Universal Declaration of Human Rights. Article 18 provides for free expression, and Article 19 calls for freedom to express (free from interference, regardless of frontiers). This language opens the door for so-called political hate speech. Article 29(2) enables the exercise of rights limited by law for "morality, public order and the general welfare in a democratic society." Then Article 30 states that one cannot engage in an activity to destroy any rights or freedoms.

Another such agreement is the International Covenant on Civil and Political Rights. Article 20(2) holds forth: "Any advocacy of

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[64] *Id.*

[65] A. Michael Froomkin, *Thirtieth Annual Administrative Law Issue Governance of the Internet: Article Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, n. 686 ("There is a strong sentiment in some quarters that 'industry self-regulation' should be used to ban hate speech on the Internet." citing generally J.M. Balkin, et al., *Filtering the Internet: A Best Practices Model*, 2-10 (Sept. 15, 1999) (arguing that self-regulation is the only effective means of controlling Internet content), http://www.webserver.law.yale.edu/infosociety/Filtering5.rtf (on file with the DUKE LAW JOURNAL); Bertelsmann Foundation, *Self-Regulation of InternetContent, at* <http://www.stiftung.bertelsmann.de/internetcontent/english/download/Memorandum.pdf (1999)> (examining the need for and structure of a self-regulating system for the control of Internet content) (on file with the DUKE LAW JOURNAL)).

[66] *See* J.M. Balkin, et al., *Filtering the Internet: A Best Practices Model*, at 2 (Information Society Project at Yale Law School, Sept. 15, 1999), *available at* <http://webserver.law.yale.edu/infosociety/Filtering5.rtf> (proposing a filtering plan; however it seems likely that hate groups, like child pornographers, would deliberately not conform to whatever means such a plan relied on).

national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." The U.N. Human Rights Committee interpreted this provision to mean "that signatory states were obligated to enact legislation prohibiting hate speech, although such laws did not necessarily have to include criminal penalties."[67] The United States signed with a set of reservations stating that it was not bound by a provision that violated the First Amendment.[68]

Article 4 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination seeks to "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form."[69] Further, signatories were to "adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination."[70]

The reservations of the United States in entering these treaties demonstrate the national commitment to the protection of the First Amendment. These reservations also predict that the United States would not become a party to a treaty that called for the restriction of hate speech over the Internet. The constitutional jurisprudence discussed above has been applied to and has focused on speech over the Internet.

IV. Regulation of Internet Speech in the United States

The U.S. Supreme Court has addressed free speech and the Internet in *Reno v. ACLU*.[71] In *Reno*, the U.S. Supreme Court struck down Title V of Telecommunications Act of 1996,[72] known as the Communications Decency Act of 1996 ("CDA"). The CDA sought, *inter alia*, to reduce the exposure of minor children to pornographic materials on the Internet.[73] The Court looked at two key provisions.[74] The first, 47 U.S.C.A. § 223(a), prohibited the knowing transmission of obscene or indecent messages to any recipient under eighteen years of age.[75] The

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[67] WALKER, *supra* note 29, at 89.
[68] *Id.*
[69] *Id.* at 90.
[70] *Id.*
[71] Reno v. ACLU, 521 U.S. 844 (1997).
[72] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.
[73] *Reno*, 521 U.S. at 857-58.
[74] *Id.* at 859.
[75] 47 U.S.C.A. § 223(a) (Supp. 1997) read, in pertinent part:
(a) Whoever--

second provision, § 223(d), prohibited the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age.[76] The Court noted that the statute contained affirmative defenses that tempered the provisions' breadth in § 223(e)(5)(A), covering those who take "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to the prohibited communications.[77] The other defense covered those who restricted access to covered material by demanding certain designated forms for proof of age, such as a verified credit card or an adult identification code.[78]

Immediately after President Clinton signed the bill, on February 8, 1996, twenty plaintiffs filed suit, challenging the constitutionality of §§ 223(a)(1) and 223(d).[79] Following a temporary restraining order

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

[76] Reno, 521 U.S. at 859. The provision, U.S.C.A. 223(d) provided:
(d)Whoever--
(1) in interstate or foreign communications knowingly—
(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

[77] Reno, 521 U.S. at 860.
[78] *Id.* at 861.
[79] *Id.*

against enforcement of one provision of the CDA, a three-judge district court entered a preliminary injunction against enforcement of both of the above-mentioned, challenged provisions.[80] On the panel, Chief Judge Sloviter acknowledged that the U.S. Government had an interest that was "compelling" with respect to some of the material, but that the CDA's use of the terms "patently offensive" and "indecent" were, in the opinion of the court, "inherently vague."[81] Judge Sloviter also determined that the affirmative defenses were not "technologically or economically feasible for most providers," and rejected the contention that providers could defend themselves against liability by "tagging" material in a manner that enabled potential viewers to screen out unwanted transmissions.[82] Similarly, Judge Buckwalter concluded that the word "indecent" in § 223(a)(1)(B) and the terms "patently offensive" and "in context" in § 223(d)(1) were too vague to be adequately enforced with respect to constitutional protections.

The U.S. Government argued that under the Court's decision in *Renton v. Playtime Theatres, Inc.*,[83] the CDA was constitutional as a sort of "cyberzoning" on the Internet.[84] The Court distinguished *Renton*, which upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. The ordinance in that case was aimed at secondary effects associated with the presence of these theaters (crime, deteriorating property values) as opposed to the CDA which "is a content-based blanket restriction on speech, and, as such, cannot be properly analyzed as a form of time, place, and manner regulation."[85] The Court continued by distinguishing a line of cases dealing with regulation of television, noting that many of the factors inherent in broadcast television are not present in cyberspace. "Neither before nor after the enactment of the CDA have the vast democratic foray of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry."[86]

The Court applied several of these factors of key importance to the present discussion, specifically, that of the medium's "invasive" nature. On this matter, the Court stated that "[t]he Internet is not as

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[80] *Id.* at 862.
[81] *Id.*
[82] *Id.*
[83] Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925 (1986).
[84] Reno, 521 U.S. at 867-868.
[85] *Id.* at 868 (citation omitted).
[86] *Id.* at 868-69.

"invasive" as radio or television,"[87] and looked to *Sable Communications of Cal., Inc. v. FCC*,[88] wherein a company that offered pre-recorded, sexually oriented telephone messages challenged the constitutionality of an amendment to the Communications Act that imposed a blanket prohibition on indecent as well as obscene interstate commercial telephone messages. The Court in *Sable* recognized that the "dial-it medium requires the listener to take affirmative steps to receive the communication, i.e., turning on the radio or television and being surprised by an indecent message is different than placing a telephone call" (to solicit one).[89] The newness or difference of the medium is summarized by the Court in its acknowledgment that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[90] The Court concluded:

> The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[91]

Indeed, the opinion by Justice Stevens crescendos on this note of non-interference and respect for democracy; echoes of the marketplace of ideas, now a market breathing with globalization and pulsing at ever faster rates of information exchange. This corpus matures almost in spite of its various heads, like a chimera snapping back and forth, battling for supremacy. Perhaps Justice Stevens and the majority sensed the futility of muzzling the mouths of this thing. The Court was impressed with the ease of access to the base technology and the swelling participation in the exchange of information. Conversely, Justice O'Connor's concurring opinion furthers the majority's observation that in 1996, either the technology did not yet exist to enable gateways and content providers to avail themselves of the affirmative defenses or such devices were not effective enough to prevent the evils targeted by the CDA.

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[87] *Id.* at 869.
[88] Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989).
[89] Reno 521 U.S. at 870, *citing* Sable 492 U.S. at 127-28.
[90] *Id.* at 870.
[91] *Id.* at 885.

Just as in *Reno v. ACLU*, the problem of regulating speech over the Internet with technology continues to be a boogey solution today. The idea that content of speech may be regulated up to a standard of usage and exposure that is established by available technology is a boogey. It is an illusion of restraint and an unfixed barricade against the enforcement of Internet speech regulations that, save some purportedly effective and convenient software, would be unconstitutional. To adopt standards of content regulation that are bounded by and set to an evolving technological standard is not a suitable substitute to time, place, and manner regulations such as the identification card that demonstrates age and therefore allow or denies access. Rather, a standard for permissible Internet speech must be the standard for speech generally. Reliance on software and technology can only prove to be uneven, leading to irregular or ambivalent guidelines by which Internet speakers must police their own expression. The technology standard would have a chilling effect on speech, and would splinter the pathways of exchange over the Internet.

The concept of a technology standard is derived from arguments put forth by the U.S. Government in *Reno v. ACLU* and Justice O'Connor's concurring opinion. The technology standard is formed or found in the viewer-side computer unit. The boundary or filter may take the form of a software program that screens particular sites on the World Wide Web, for example, by search terms. Other devices may be set on the content providers' side, such as credit card verification to establish an age of eighteen years or more or a paying subscription to enable access. It may be argued that the U.S. Supreme Court realized that although every new media has a different set of factors that define its usage and relationship to the freedoms of the First Amendment,[92] the court saw the futility in tying those precious freedoms to the shifting silicon of a technology standard.

The comparative latitude of U.S. jurisprudence in regard to speech contributed to the foresight of the Court in *Reno v. ACLU*. Such an outcome and perspective was different from the *Tribunal de Grande Instance* of Paris decision when Yahoo!, Inc. was put on trial in France for allowing Internet users in France to access and conceivably purchase Nazi memorabilia from auctions that were transacted through Yahoo!, Inc.'s U.S. servers.[93] This situation is distinguishable in that in *Reno v. ACLU*, the concern was how to prevent minors from accessing the covered material when others had a right to so speak. Conversely, in the

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[92] *Id.*

[93] *See infra.*

Yahoo! cases, authorities in France (and Germany) were seeking to enforce laws that did strive for blanket enforcement.

A. Regulation of Internet Hate Speech Based in the United States

In *Reno v. ACLU* the U.S. Supreme Court elected not to institute a new test for unprotected speech on the Internet. The Ninth Circuit Court of Appeals has gone one step further in assigning the traditional free speech jurisprudence to speech on the Internet in *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*.[94] In that case, the American Coalition of Life Activists ("ACLA") compiled a series of dossiers on doctors, abortion clinic workers, politicians, judges and abortion rights supporters termed the "Nuremberg Files" to be used in a war crimes style trial once popular opinion turned against abortion rights.[95] One activist received the files and posted the information on a web site.[96] The site listed names of doctors and other persons who provided or supported abortion, and marked the names of those already victimized by anti-abortion terrorists by striking through the names of those murdered and graying-out the names of those wounded.[97] A poster that preceded the web site had information about a particular doctor and offered $500 to the ACLA organization that successfully persuaded the doctor to stop performing abortions.[98]

In response to the web site, a group of doctors sued ACLA and another organization, and twelve activists, alleging, *inter alia*, that the defendants' speech had harmed them.[99] The Ninth Circuit began its analysis with a comparison to the acts of Patriots intimidating the Loyalists, and John Brown and the abolitionists' violent actions to free slaves.[100] The court identified the test as one of whether the speech in question constituted a "true threat." Looking to *Brandenburg v. Ohio*, the court noted that "[p]olitical speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time

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[94] Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001).
[95] Planned Parenthood, at printed page 9.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at printed page 10.

in the future by an unrelated party."[101] Under *Brandenburg*, the requirement is that the speech is capable of "producing imminent lawless action."[102] Applying this analysis to the language of the web site here, the court held that while it no doubt frightened the doctors, the "constitutional question" inquired into the source of the fear.[103] The standard demanded that if the defendants had foreseen that the doctors would have perceived a threat in the speech, it would then be unprotected speech.[104] Speech made in a public context is afforded greater protection than direct speech between persons because where the speech allegedly makes a threat, the public speech is less likely to be an actual threat than hyperbole or the like.[105] Furthermore, there is an interest in not interfering with the normal channels of public speech, of which the Internet is now a major component.[106]

As a standard for comparison, the Ninth Circuit was able to look to the U.S. Supreme Court's decision in *NAACP V. Claiborne Hardware Co.*[107] where the NAACP organized a boycott of white-owned businesses and boycott supporters took the names of black patrons who disregarded the boycott.[108] The names of these people were read at public meetings and published in a newspaper, and sporadic acts of violence against these people followed. Charles Evers, a boycott organizer, stated at one rally, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[109] The U.S. Supreme Court found that Evers' words, despite being an express call for violence, were quintessentially political statements made at a public rally (rather than direct threats to certain persons).[110] Similarly, the Ninth Circuit held that the defendants' speech on the Internet was protected.[111] The aggressive and hateful language of hate groups on the Internet would likewise enjoy the protection of this test.

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[101] *Id.*
[102] Brandenburg, 395 U.S. 444 at 447.
[103] Planned Parenthood, 244 F.3d 1007, at printed page 11.
[104] *Id.* at printed page 11, *citing* United States v. Orozco-Santillan, 903 F.2d 1262, 1265 n.3 (9th Cir. 1990).
[105] Planned Parenthood at 13; *see* McCalden v. California Library Ass'n, 955 F.2d 1214 (9th Cir. 1990).
[106] Particularly the World Wide Web where web sites are posted and viewed. *See* Reno, 521 U.S. 844.
[107] NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).
[108] *See id.*
[109] Claiborne, 458 U.S. at 902.
[110] *Id.* at 928-29.
[111] Planned Parenthood, at printed page 14.

Planned Parenthood answers a question that *Reno v. ACLU* did not need address: whether the protections of the First Amendment, and the corresponding tests that American constitutional jurisprudence has fashioned to outline them, still apply to Internet speech. Neither *Reno v. ACLU* or *Planned Parenthood* directly address issues regarding the international dimension that Internet speech assumes.

B. The Yahoo! Cases

Yahoo, Inc. ("Yahoo") has been involved in litigation in both Europe and the United States for hosting hate speech items on its auction sites. In particular, Yahoo's case demonstrates the straining of traditional doctrines of jurisdiction in the context of Internet commerce between the United States and France. The litigation to this point has been domestic, with the initial prosecution in a Paris court, followed by Yahoo's filing for an injunction in California.

Yahoo had experienced investigations for several acts of hosting the auction of alleged articles of hate speech. In November of 2000, German prosecutors investigated the local Yahoo subsidiary under the belief that the auction service had sold copies of Adolf Hitler's autobiography, *Mein Kampf*, which is restricted in Germany.[112] This investigation followed the order from the Paris court by one week, and a Japanese raid on Yahoo's Tokyo office for the sale of child-pornography videos by one day.[113] In response to the German investigation, Yahoo commented, "[T]he company distances itself from Nazi philosophy... On the German Yahoo website, 90,000 objects are offered. As soon as Yahoo gets information that illegal products are included, it removes them."[114] The Yahoo auction system is one that moves from user to user, the company does not conduct the transaction, and Yahoo forbids auctions of "any item that is illegal to sell under any applicable law, statute, ordinance or regulation."[115] In 1999, large online book vendors Amazon.com, Barnesandnoble.com and Bertelsmann's BOL all removed *Mein Kampf* from their online sales to German customers.[116] Auction sites, however, provide a different and more complex set of problems for administrating services. Yahoo seems to be responsive to the public policy concerns of the consumers' countries. Yet Yahoo, in contrast to

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[112] Barnaby Page, *Germany Investigates Yahoo's Nazi Auctions*, CMP TECHWEB / TECHWIRE, Nov. 28, 2000.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*

the French court, does not believe that it can monitor and then effectively block the sale-by-auction of hate speech articles to a degree that will both satisfy the courts of France and other concerned states sufficient to avoid prosecution in the offended state.

Earlier this year, a German court in Munich made the decision not to prosecute Yahoo's German subsidiary for hosting an online auction of *Mein Kampf* in 2000.[117] One prosecutor noted "We finally decided that Yahoo was only a supplier of internet [sic] services and not responsible for their content."[118] While the decision by the Munich prosecutor was assuredly of great relief to Yahoo, the distinction drawn between a supplier of Internet services and a producer of content is but a tenuous foothold for Yahoo and other Internet portals or auction sites in the face of mounting international litigation.

On or about April 5, 2000, Yahoo received a letter from *La Ligue Contre Le Racisme Et L'Antisemitisme* ("LICRA") stating, "unless you cease presenting Nazi objects for sale [on the U.S. Auction Site] within 8 days, we shall size [sic] the competent jurisdiction to force your company to abide by [French] law."[119] LICRA then utilized the United States Marshal's Office to serve process on Yahoo in California, and filed civil complaints against Yahoo in the *Tribunal de Grande Instance* of Paris (the "Tribunal"), alleging violation of a French criminal statute[120] that bars the public display in France of Nazi-related "uniforms, insignia or emblems" (the "Nazi Symbols Act").[121] The Tribunal issued an order on May 22, 2000 directing Yahoo to "take all necessary measures" to "dissuade and render impossible" any access via "yahoo.com" by Internet users in France to the Yahoo auctions displaying Nazi materials.[122] The Tribunal reaffirmed the May 22 order: [D]irect[ing] Yahoo!, *inter alia*, to 1) re-engineer its content servers in the United States and elsewhere to enable them to recognize French Internet Protocol ("IP") addresses and block access to Nazi material by end-users assigned such IP addresses; 2) require end-users with "ambiguous" IP addresses to provide Yahoo! with a declaration of nationality when they arrive at Yahoo!'s home page or when they initiate

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[117] *Yahoo Not Responsible for 'Mein Kampf' Sales: German Court*, AGENCE FRANCE-PRESSE, March 26, 2001.
[118] *Id.*
[119] Yahoo! Inc. v. La Ligue Contre Le Racisme Et, L'Antisemitisme, 2001 U.S. Dist. LEXIS 7565, 1172 (N.D.Cal. 2001).
[120] *See* Le Nouveau Code Penal Art. R.645-2.
[121] Yahoo, 2001 U.S. Dist. LEXIS 7565, 1172.
[122] *Id.* at 1172, 1173.

any search using the word "Nazi"; and 3) comply with the Order within three (3) months or face a penalty of 100,000 Francs (approximately U.S. $ 13,300) for each day of non-compliance.[123]

The Tribunal denied LICRA's request for the Tribunal to enforce the order or impose the penalties set against Yahoo against Yahoo! France.[124] LICRA then employed the U.S. Marshal's Office again in order to serve the Tribunal's order on Yahoo in California.[125] Yahoo brought the action in the U.S. District Court for the Northern District of California seeking a declaration that the order of the Tribunal is unenforceable in the United States "because it contravenes the Constitution and laws of the United States."[126] In turn, LICRA and the second defendant, *L'Union Des Etudiants Juifs De France* ("UEJF"), moved for dismissal of Yahoo's action on the ground that district court lacked personal jurisdiction over them.[127]

As a matter of U.S. jurisprudence, it is interesting to note that the District Court in California considered the jurisdictional dimension of whether the case presented a "case or controversy" ripe for adjudication.[128] The court observed "[LICRA and UEJF] have not yet sought to enforce the French Order in the United States, the Court concludes that, as is discussed in more detail below, [Yahoo] nonetheless faces immediate and ongoing consequences because of its refusal to comply with that Order."[129] The court foresaw that Yahoo, without a determination of whether the Tribunal's order was enforceable in the United States, was faced with the choice of either facing the daily accumulation of penalties against it, subject to an unpredictable legal outcome if LICRA and UEJF sought to enforce the order in the United States.[130] The court recognized that the case was indeed ripe for adjudication as "a classic example of a situation in which declaratory relief would clarify the present and ongoing rights and obligations of the parties."[131]

The judgment of the Tribunal called for Yahoo to "dissuade and render impossible" the ability of Internet users in France to access sales

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[123] *Id.* at 1173.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 1168.
[127] *Id.*
[128] *Id.* at 1174 n.2.
[129] *Id.*
[130] *Id.*
[131] *Id.*

of Nazi articles on any auction service that is hosted by Yahoo.[132] The Tribunal, via Judge Jean-Jacques Gomez, declared that because Yahoo allowed Internet users in France to view the Nazi articles, an actionable harm had been suffered in France.[133] On July 24, 2000, representatives for Yahoo told the court that it was technically impossible for the company to block French Internet users from the U.S.-based Yahoo.com auction site.[134]

C. The Future of Internet Speech (From the United States)

Prior to the U.S. Supreme Court's decision in *Reno v. ACLU*, Professor Lessig argued that U.S. courts would be faced with situations where judges may be compelled to act against the will of the legislature, and the lower courts must be prepared to rule against legislation, like the CDA, that has a popular and important thrust, but leans up against or battles the protections of the U.S. Constitution.[135]

Confronting the International Marketplace of Ideas

The U.S. position on free speech would not be fit for a fledgling democracy.[136] In fact, the participation of the United States in the Allies' setting up the restricted post-war German press[137] demonstrates a practice not consistent with constitutional rights enjoyed by the press here. Conversely, the laws of other states, including those of our Western allies, should not be allowed to stifle the freedoms defended in the United States. The Internet presents real and immediate problems, yet it should not usher in a new standard for free speech. The United States has reserved the right to protect free speech above its obligations to international treaties and agreements. For now, the optimistic notion that the truth will defeat falsehood and hate speech continues, gingerly, into the amplified forum of the Internet. Proponents of Internet speech regulation are right to call attention to powers and currents oppressive to

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[132] Carl S. Kaplan, *French Nazi Memorabilia Case Presents Jurisdiction Dilemma*, N.Y. TIMES, Aug. 11, 2000.
[133] *Id.*
[134] *Id.*
[135] *See* Lawrence Lessig, *Reading the Constitution in Cyperspace*, 45 EMORY L.J. 869 (Summer 1996).
[136] *See* Laura R. Palmer, *A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo*, 26 YALE J. INT'L L. 179 (Winter 2001).
[137] *Id.* at 197-201.

truth over the Internet, such as barriers to access, politically-biased filtering, and the simple noise and vast scope of information.

States may still regulate hate speech without waking the myrmidon of international laws and treaties. By putting the onus on end-users of the Internet, rather than private entities in foreign, sovereign states, the jurisdictional problems presented by the Yahoo cases are avoided, and no pressure is brought to bear on states such as the United States, that recognize a greater degree of freedom of speech over the Internet. Three members of the Information Society Project at Yale Law School set forth such a plan in 1999, which stated that a "general international treaty on Internet content is highly unlikely, given the wide cultural diversity of the planet and the need for near universal participation. . . ."[138] Furthermore, the United States, given its reluctance to cede the freedom of speech to any international agreement, would not become a party to any sort of agreement that would accomplish the ends sought by German and French authorities. If so-called "end-user" solutions are not pursued, the problems of the Yahoo cases will be seen more often, straining international trade, international relations, and deterioration of free speech in the United States. The Internet has already become a vital and accessible forum for a speech, an electronic marketplace of ideas. If Internet speech from the United States does not continue to benefit from the same protection under the First Amendment as traditional speech, citizens of the United States will have lost the most important pair of lungs that could breathe life into the freedom of speech in the twenty-first century.

[138] J.M. Balkin, et al., *Filtering the Internet: A Best Practices Model*, at 2 (Information Society Project at Yale Law School, Sept. 15, 1999), *available at* http://www.webserver.law.yale.edu/infosociety /Filtering5 .rtf.