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The Creation of Transnational Administrative Structures Governing Internet Communication

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I. INTRODUCTION

As the world becomes more economically integrated, increasing numbers of problems arise that are best handled through international treaties and transnational regulatory structures.[4] For example, there have been concerns regarding the safety of products shipped from developing countries. These concerns have involved manufactured products, but have been particularly evident with food.[5] Numerous examples can be found. The Japanese "discovered high levels of pesticides in imported spinach,"[6] and U.S. "pets died from eating [imported] pet food contaminated with toxic chemicals."[7] In France, pesticides were discovered in fish imported from Africa, prompting the French government to suspend the importation of all fishes from Uganda, Kenya and Tanzania. This suspension was upheld by the French Council of State which held that it was impossible to trace the origin of imported fishes, and therefore that it was permissible to forbid the importation of all fishes from the affected countries.[8] Between the U.S. and the European Union,

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4. *See* Keith Schneider, Democrats on Senate Panel Attack the Free Trade Pact, N.Y. Times, Sept. 17, 1992, at D2.

5. *See* Russell L. Weaver & Francois Lichere, Protecting Consumers in an Era of World Trade, 61 Admin. L. Rev. 105, 106-07 (2009).

6. *Id*.

7. *Id*.

8. CE, Dec. 29, 1999, Rec. Lebon 206945, available at http://www.legifrance.com/affichJuriAdmin.do?oldAction=rechExpJuriAdmin&idTexte=CETATEXT000007996586&fastReqId=376098222&fastPos=7. This decision may be considered the first one to refer to traceability at a time where no legislation had imposed it to public authorities.

there have been disputes regarding U.S. beef laced with natural and synthetic hormones.[9]

In the modern era, not only does trade flow across international boundaries, so does information. As traditional media sources (*e.g.*, newspapers, radio and television) have been supplemented by the Internet, personal computers (PCs) and various types of handheld devices, more and more people are able to freely communicate with others all over the world.[10] These increased communication flows have led to numerous problems that might be susceptible to transnational administrative regulation and enforcement. For example, Internet communications sometimes contain information that violates copyright laws,[11] or that is simply illegal, including the distribution of child pornography[12] and propagation of fraudulent schemes.[13] The Internet has also been used by Internet gambling businesses (which, while perhaps legal, can produce significant adverse social consequences), and has provided a forum for terrorists to connect with each other and organize concerted ac-

9. *See* Marc Christopher Kramb, Die Entscheidungen des Dispute Settlement – Verfahrens der WTO in Hormonstreit zwischen der EU und den USA – Implikationen fur zukunftigen Umgang mit dem SPS – Abkomment, 2001); Barbara Eggers, Die Entscheidung des WTO Appellate Body in Hormonfall, 9 EuZW 147 (1998); Christine Godt, Der Bericht des Appellate Body der WTO zum EG-Einfuhrverbot von Hormonfleisch, 9 Regulierung im Weltmarket 2002 (1998); Olivier Brin, La Politique Sanitaire de la Communauté Européenne à l'Épreuve des Règles de l'Organisation Mondiale du Commerce:Le Contentieux des Hormones, Revue Trimestrielle de Droit Européen, 1999, at 43.

10. *See* Russell L. Weaver, From Gutenberg to the Internet: Free Speech, Advancing Technology and the Implications for Democracy (2013).

11. *See*, *e.g.*, Copyrights and Internet Piracy (SOPA and PIPA Legislation), N.Y. Times, http://topics.nytimes.com/top/reference/timestopics/subjects/c/copyrights/index.html (last visited Apr. 12, 2013).

12. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (striking down portions of the Child Pornography Prevention Act of 1996 that prohibited "virtual" child pornography); New York v. Ferber, 458 U.S. 747 (1982) (upholding a New York criminal statute that prohibited individuals from knowingly promoting sexual performances by children under the age of sixteen).

13. *See* Katie Hafner, With Internet Fraud Up Sharply, EBay Attracts Vigilantes, N.Y. Times (Mar. 20, 2004), http://www.nytimes.com/2004/03/20/business/with-internet-fraud-up-sharply-ebay-attracts-vigilantes,html?pagewanted=all&src=pm.

tion,[14] as well as for the propagation of hate speech[15] and pedophilia advocacy.[16]

In an attempt to deal with these problems, past president Nicolas Sarkozy of France has called for more international regulation of the Internet,[17] as has German Chancellor Angela Merkel.[18] However, effective transnational regulation requires the participation of all of the major players, not just two countries. If a major nation or group of nations opts out of a transnational regulatory scheme, the chances for effective regulation are significantly reduced. Given that Internet communications can so easily cross international borders, significant gaps in participation may undercut the effectiveness of regulatory schemes.

Even though transnational structures may be needed to address problems related to the transnational flow of goods and information, nations differ significantly in terms of their cultures, legal traditions and constitutional restrictions. These differences can make it difficult to develop transnational agreements and regulatory structures. In this short Article, we discuss free speech obstacles to an effective transnational structure regulating the Internet.

II. THE STATUS OF INTERNATIONAL TREATIES UNDER U.S., FRENCH AND ENGLISH LAW

Regarding Internet regulation, the differing attitudes of countries towards treaties constitutes a major obstacle to effective regulation. In this section, we examine the effect and impact of international treaties under U.S., British and French law.

14. *See* Dina Temple-Raston, "Jihad Jane" Creates a Calamity for Authorities, Nat'l Pub. Radio (Mar. 10, 2010), http://www.npr.org/templates/story/story.php ?storyId=124539554.

15. *See* Lauren Streib, Poetic Justice: Kentucky Man Arrested for Threatening President with 16-Line Poem, Bus. Insider (Feb. 20, 2010), http://www.businessinsider.com/poetic-justice-kentucky-man-arrested-for-threatening-president-with-16-line-poem-2010-2.

16. *See* Mothers Fight Back Against Pedophile's Web Site, ABC News (July 30, 2007), http://abcnews.go.com/GMA/story?id=3426796&page=1 (noting that "McClellan has operated detailed [websites] rating the best public places to watch young children at play and posting photos he's taken at events. He even rated locations based on how many little girls, or LGs as he call them, are there.").

17. *See* Eric Pfanner, G-8 Leaders to Call for Tighter Internet Regulation, N.Y. Times (May 24, 2011), http://www.nytimes.com/2011/05/25/technology/25tech.html.

18. *See* Eric Pfanner, Germany Trying to Cut Publishers In on Web Profits, N.Y. Times (Mar. 11, 2012), www.nytimes.com/2012/03/12/business/global/germany-trying-to-cut-publishers-in-on-web-profits.html?pagewanted=print.

A. The U.S. Attitude Towards Treaties

The United States is frequently criticized for its failure to enter into, or comply with, international treaties.[19] However, it is important to realize that the U.S. regards international treaties much differently than do most other nations in the world. Under the United States Constitution, the Constitution itself is the supreme law of the land, and any statute or treaty that conflicts with the Constitution is invalid.[20] Indeed, under U.S. domestic law, a treaty is regarded as having only the same status as a statute[21] and cannot stand if it is not consistent with the U.S. Constitution.[22]

The U.S. position on treaties does not preclude all treaties or all international regulation. In fact, in many areas, international cooperation is quite possible. For example, in *Missouri v. Holland*,[23] the Court held that the U.S. government could constitutionally enter into a treaty on migratory birds. In *De Geofrey v. Riggs*,[24] the Court upheld a treaty regarding the intestate succession of real property owned by foreign citizens. Indeed, there are many areas where the U.S. can validly enter into international treaties.

As a result, while the U.S. may have some freedom to compromise and cooperate with other nations on various issues relating to the development of transnational regulatory structures governing the Internet, U.S. negotiators will need to make sure that they do not run afoul of the Constitution. Otherwise, any international treaty or regulatory structure may be unconstitutional and unenforceable in the United States.

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19. *See* Heather M. Heath, Non-Compliance with the Vienna Convention on Consular Relations and Its Effect on Reciprocity for United States Citizens Abroad, 17 N.Y. Int'l L. Rev. 1, 2 (2004).

20. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

21. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing.").

22. *See* Reid v. Covert, 354 U.S. 1, 16-17 (1957) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution . . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights – let alone alien to our entire constitutional history and tradition – to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.").

23. 252 U.S. 416, 435 (1920).

24. 133 U.S. 258, 272-73 (1890).

B. The Status of Treaties within the UK

The status of treaties in the United Kingdom is somewhat different. The UK is a dualist system, and thus the power to conclude international treaties remains within the exercise of the royal prerogative by the Crown's Ministers. Since the Crown cannot change the law of the land by virtue of the royal prerogative, then a direct corollary is the idea that treaties do not constitute a direct source of law in the United Kingdom.[25] Therefore, treaties binding on the United Kingdom do not themselves have the force of law in English courts, and if treaty commitments require changes to UK laws, then legislation must be enacted to that effect so as to incorporate the treaty into national law or otherwise modify national law.[26]

Unlike unincorporated treaties, customary international law is a source of English law which may be applied by the English courts.[27] Treaties may nonetheless be an indirect source of law, such as when legislation is passed to give effect to their terms. English courts will increasingly take account of the norms of international law, and "the principles of statutory interpretation [now] include a presumption that Parliament intends to comply with the [UK's international] obligations," and therefore "any ambiguity in the statutory language is resolved" in favor of a "meaning that is consistent with treaty obligations."[28]

C. The Status of Treaties in France

France cannot be classified as a dualist system regarding the status of international law.[29] Certain aspects of the French system suggest that it has a dualist system, but other aspects suggest that it is a monist system that gives priority to internal sources of law. Quite often, the case law of the Council of State, the supreme administrative Court in France, makes reference to the idea that, "in the internal order", the Constitution must prevail over any other source of law, including international treaties. On the other hand, the French constitutions, since 1946,[30] provide that treaties and international agreements

25. *See* Blackburn v. Attorney General [1971] 1 WLR 1037, 1040-41 (U.K.).

26. The legislation should be enacted by virtue of an Act of Parliament or, in certain circumstances, delegated legislation. *See id*. at 1041.

27. *See* generally Vaughan Lowe, Rules of International Law in English Courts, in Tom Bingham and the Transformation of the Law: A Liber Amicorum 451 (Mads Andenas & Duncan Fairgrieve eds., 2001).

28. J. Beatson et al., Human Rights: Judicial Protection in the United Kingdom, ¶ 1.47 (2d ed. 2008).

29. Denys Simon, L'Arrêt "Sarran": Dualisme Incompressible ou Monisme Inversé ?, Europe, Mar. 1999, at 4.

30. The Constitution of the Fourth Republic gave this possibility which was implemented for the first time by the Conseil d'État in 1952. See CE Ass., May 30,

should have direct effect in French courts, and gives those documents precedence over statutes if certain conditions are met, including regular ratification, regular publicity and the reciprocity principle. Article 55 of the Constitution provides that "[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party."[31] Indeed, the most important treaties must be "ratified" by the President of the Republic, which implies a prior authorization by the parliament. The case law additionally provides that the international treaty must be self-executing and that the reciprocity condition is inapplicable to humanitarian treaties and to European Union treaties. Article 54 of the Constitution sets the relationships between treaties and the Constitution in a way which is not clear cut as to which text must have precedence over the other.[32]

The majority of commentators interpret this provision as proof of the superiority of the Constitution since there is no real duty to amend the Constitution when it conflicts with a treaty. These two provisions are compatible with the idea of a monist system with a priority to internal sources. This supreme internal source is quite obvious for article 54 but also for article 55: it is the French Constitution, i.e. an internal source, which gives priority to an international source of law over Acts of Parliament.

The superiority of the Constitution over international treaties is now very relative when it comes to European Union law which is often presented as "integrated" in the French system. The current state of law is an interesting attempt to conciliate the superiority of the Constitution and the principle of the primacy of European Union law developed by the European Court of Justice, although the case law first suggested that the Constitution was superior to EU law.[33] One could argue that this system could be taken as an example for other countries which are not part of such an integrated system.

The Constitutional Court, the French supreme constitutional court, was asked to control the conformation of a statute with the Constitution as provided by an European directive, and an act from European institutions that the member states shall implement in their own legislation. After having decided that it cannot exercise control over laws unless they are contrary to an express

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1952, Rec. Lebon 231 (Fr.). The Constitution of the Fifth Republic, still in force, adopted the same provision. See 1958 Const. 55 (Fr.).

31. 1958 Const. 55, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-October-1958.25742.html #TitleVI (last visited Mar. 11, 2013).

32. *Id*. at art. 54. ("If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution").

33. *See* CE, Dec. 3, 2001, Rec. Lebon 624 (Fr.).

provision of the Constitution,[34] it changed the formulation to allow itself to exercise control over directives that are contrary to the "French constitutional identity".[35] As a commentator put it, the Constitutional Court switched from an ambiguous formula to an obscure formula.[36]

Fortunately, the Council of State ("Conseil d'Etat"), the French supreme administrative Court, decided to adopt the same conciliatory spirit but with a formula that seems to be more consistent with a practical approach. The most famous ruling was handed down on February 8, 2007.[37] The appellant, the company Arcelor Atlantique et Lorraine, was seeking annulment of a decree transposing Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse-gas emission-allowance trading within the European Union.[38] It claimed that the decree had failed to respect various constitutional principles, specifically the principle of equal treatment.[39] The Council of State was faced with a conflict between the supremacy of the Constitution under the French legal system and the obligations on France arising from its membership of the European Union and the European Union, this membership being included in the French Constitution since 1992.[40]

The Council of State decided that from then on, any conflict between EU law and the French Constitution should be resolved through a dual process.[41] First, the court resolving the dispute must establish whether a national constitutional principle has an equivalent principle within the European Union legal system by taking account the European treaties but also the way they are interpreted by the European Court of Justice.[42] Where such an equivalent principle is present, it is the responsibility of the administrative court either to set aside the argument cited if not relevant or, in the case of a serious difficulty, to submit a reference for a preliminary ruling to the European Court of Justice as to its validity.[43] Second, if the national court cannot establish within the European Union law a general principle equivalent to the

34. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2004-496DC, June 10, 2004, Rec. 7 (Fr.).

35. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2006-540DC, July 27, 2006, Rec. 19 (Fr.).

36. Denys Simon, L'Obscure Clarté de la Jurisprudence du Conseil Constitutionnel Relative à la Transposition des Directives Communautaires, Europe, Oct. 2006, at 2-3.

37. CE Ass., Feb. 8, 2007, Rec. Lebon 55 (Fr.) (English translation available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CJ0127:EN:HTML).

38. *Id*.

39. *Id*.

40. *Id*.

41. *Id*.

42. *Id*.

43. *Id*.

constitutional principle cited, national courts have to investigate directly the constitutionality of the disputed provisions.[44] In the case, the Council of State found that the principles of freedom of enterprises ("Liberté d'entreprendre") and of equal treatment had equivalents in EU law.[45] Regarding the first principle, it stated that the decree was not in breach of the principle but the Council of State had some doubts about the principle of equal treatment since the decree excluded from the system some industries that were probably not polluting less than others subject to the regulation transposing the European Directive.[46] Eventually, the Court of Justice ruled that there was justification for this breach of equal treatment.[47]

Although this ruling could be seen as a loss of sovereignty, it is only partially so. There is a loss sovereignty when an administrative court considers that there is a risk of breach, but the administrative court remains competent to assess that there is no such risk. For example, one argument of the claimant was that the decree should have discriminated between two different economic sectors (namely steel industries and other industries subject to the

44. *Id*.

45. *Id*.

46. Notably Aluminium and Plastic industries where excluded when Steel industries were not. *Id*.

47. *Id*. § 63-65 ("It should be observed here that, while the legislature could lawfully make use of such a step-by-step approach for the introduction of the allowance trading scheme, it is obliged, in particular in view of the objectives of Directive 2003/87 and of Community policy in the field of the environment, to review the measures adopted, inter alia as regards the sectors covered by Directive 2003/87, at reasonable intervals, as is moreover provided for in Article 30 of the directive. However, as the Advocate General notes inter alia in point 48 of his Opinion, the Community legislature's discretion as regards a step-by-step approach could not, in the light of the principle of equal treatment, dispense it from having recourse, for determining the sectors it thought suitable for inclusion in the scope of Directive 2003/87 from the outset, to objective criteria based on the technical and scientific information available at the time of adoption of the directive. As regards, first, the chemical sector, it may be seen from the history of Directive 2003/87 that that sector has an especially large number of installations, of the order of 34 000, not only in terms of the emissions they produce but also in relation to the number of installations currently included in the scope of the directive, which is of the order of 10 000. The inclusion of that sector in the scope of Directive 2003/87 would therefore have made the management of the allowance trading scheme more difficult and increased the administrative burden, so that the possibility that the functioning of the scheme would have been disturbed at the time of its implementation as a result of that inclusion cannot be excluded. Moreover, the Community legislature was able to take the view that the advantages of excluding the whole sector at the start of the implementation of the allowance trading scheme outweighed the advantages of including it for attaining the objective of Directive 2003/87. It follows that the Community legislature has shown to the requisite legal standard that it made use of objective criteria to exclude the entire chemical sector from the scope of Directive 2003/87 in the first stage of implementation of the allowance trading scheme.").

same quotas rules) but the Council of State ruled that if the principle of equal treatment implies to treat equally firms which are in the same situation and allows public authorities to treat differently firms which are in "objectively different situations", it does not impose such a different treatment in the latter case.[48] This is a classic position in French public law[49] but not in European Union law where the case law of the ECJ leads to an obligation to treat differently firms (or citizens) that are in different situations from each other,[50] not to mention that the appraisal of what is an "objectively different situation" is…subjective.[51] The non application of this EU rule (anyone puts in a different situation must be treated differently by any administrative body) clearly demonstrates that the French supreme administrative court controls the content of its constitutional principles in that case.

III. DIVERGENT APPROACHES: THE EXAMPLE OF FREE SPEECH

The Internet is one of those areas where it may be difficult to create an effective transnational administrative structure. For the United States (U.S.), governmental regulation of the Internet is complicated by the fact that the First Amendment protection for freedom of expression is directly implicated, and the U.S. regards free expression differently than many other countries,[52] including France, England and Wales.

The relationship between the Internet and free expression is undeniable. In its landmark decision in *Reno v. American Civil Liberties Union*,[53] the United States Supreme Court characterized the Internet as "a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers."[54] The Court's conclusions have been more than confirmed by subsequent developments. From the revolutions in the Middle East during the Arab Spring, to the assistance of political movements in the U.S. and elsewhere, the Internet has produced profound societal consequences.[55] In Europe, for example, the Pirate Party has used the Internet to organize and to capture seats in some European parliaments.[56] Similar results are evident worldwide.[57]

48. *Id*.

49. *See* CE, Mar. 28, 1997, Rec. Lebon 114 (Fr.).

50. *See* Case C-394/96, Brown v. Rentokil Ltd., 1998 E.C.R. I-04185.

51. The ECJ uses the expression "comparable situations" rather than "objectively different situations." Case C-366/99, Griesmar v. Ministre de l'Economie, des Finances et de l'Industrie, 2001 E.C.R. I-09383.

52. *See* U.S. Const. amend. I.

53. 521 U.S. 844 (1997).

54. *Id*. at 853 (O'Connor, J., concurring in part and dissenting in part).

55. *See* Weaver, supra note 7.

56. *See* Juergen Baetz, Pirate Party Makes a Raid on German Politics, Yahoo! News (Apr. 28, 2012), http://news.yahoo.com/pirate-party-makes-raid-german-

The relationship between the Internet and free expression creates enormous difficulties for transnational regulation. In the area of free speech, the U.S. law approach differs significantly from the approach of other nations, particularly France and the EU. As a result, even if U.S. officials wanted to heed past President Sarkozy's call for greater regulation of the Internet, it might be difficult for them to find common ground, and difficult to create a constitutionally permissible structure.

A. The U.S. Approach to Free Expression

In the United States, the right to free speech has always been treated as a "preferred" right[58] in the sense that the right to free expression often trumps other competing interests.[59] Even though some justices have argued that freedom of speech is "absolute,"[60] and should not be "balanced" against other rights and interests,[61] the United State Supreme Court has consistently rejected the idea of "free speech absolutism." Balancing the right to free expression against other societal interests, the Court has held that the government may prohibit child pornography,[62] as well as obscenity,[63] and can also restrict the sale of pornography to minors.[64]

Even though the right to free expression is not regarded as "absolute" in the United States, the U.S. cuts the balance between speech and other societal interests in favor of free expression, and other nations cut the balance quite differently.

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politics-121746168.html ("[P]olls show [the Pirate Party] as the country's third-strongest political force, leapfrogging over more established parties.").

57. *See* Weaver, supra note 7.

58. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

59. *See*, *e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (holding that freedom of expression trumps the plaintiff's claim that he suffered mental distress from protests at his son's funeral); R.A.V., 505 U.S. at 396 (holding that freedom of expression precludes criminal conviction for hate-type speech); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (holding that freedom of expression trumps the plaintiff's claim that he suffered intentional infliction of mental and emotional distress).

60. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."); id. at 720 (Douglas, J., concurring) ("[T]he First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' That leaves, in my view, no room for governmental restraint on the press." (alteration in original)).

61. *Id*. at 723-24 (Douglas, J., concurring).

62. *See* New York v. Ferber, 458 U.S. 747, 773-74 (1982).

63. *See* Miller v. California, 413 U.S. 15, 36-37 (1973).

64. *See* Ginsberg v. New York, 390 U.S. 629, 642 (1968).

B. The French Approach to Free Expression

France provides an interesting contrast to the United States. Under the 1789 French Declaration of the Rights of Man and of the Citizen, France explicitly recognizes that people have "natural rights" that give them freedom of action,[65] and requires tolerance of others who exercise those rights,[66] but the Declaration allows French society to restrict the exercise of rights when the individual's exercise of those rights intrudes upon the rights of others to enjoy their rights.[67] French law explicitly recognizes that people have "natural rights" that require governmental tolerance of individual freedom,[68] but French law allows society to restrict the exercise of rights when there is an intrusion on the right of others to enjoy their rights.[69] Although French law explicitly recognizes the right to freedom of expression, it also provides that free speech is subject to restriction in order to prevent "abuse."[70]

France has also adopted the European Convention of Human Rights (ECHR), and the ECHR has had a pro-free speech effect on French law. For example, even though the Council of State upheld a 1977 law that prohibited public opinion polls one week prior to political elections,[71] the Cour de cassation, the supreme civil and criminal Court in France, reached the opposite result in 2001when it dismissed a criminal prosecution against a journalist who violated the law during the 1997 legislative elections. The Cour concluded that the law was contrary to the ECHR article on freedom of expression.[72] More recently, the French Constitutional Council struck down a recently-enacted law that permitted prosecution of those who denied the existence of genocides recognized by law.[73] The ruling, focused on free expression as enshrined in the 1789 declaration of human rights (which is part of the

65. French Declaration of the Rights of Man and of the Citizen, art. IV ("Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights. These borders can be determined only by the law.").

66. *Id*.

67. *See id*.

68. *Id*.

69. *See id*.

70. *Id*. at art. XI ("Any man being presumed innocent until he is declared culpable, if it is judged indispensable to arrest him, any rigor which would not be necessary for the securing of his person must be severely reprimanded by the law.").

71. CE, June 2, 1999, Rec. Lebon p. 161

72. Cour de cassation [Cass.] [supreme court for judicial matters] Sept. 4, 2001, No. 00-85239 (Fr.).

73. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-647DC, Feb. 28, 2012, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959 2012/2012-647-dc/decision-n-2012-647-dc-du-28-fevrier-2012.104949.html.

French Constitution), as well as on the idea that a legislator is incompetent to declare that a genocide has been committed such as the Armenian genocide of 1915.[74]

Despite the moderating impact of the ECHR, the U.S. and Europe would probably reach different results on speech that adversely affects national security interests. Article 10, Section 2, of the European Convention on Human Rights (ECHR), provides for an array of restrictions on freedom of expression. However, the ECHR also provides protection for freedom of expression, but places significant restrictions on that right. The ECHR states that the right is

> subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[75]

In other words, both France and the ECHR seem to permit significant restrictions on freedom of expression.

C. English Free Speech Law

In the English common law, free speech, or in European terminology, freedom of expression, is a long-established right in the English common law.[76] Whilst civil liberties have traditionally been vulnerable to the intervention of legislation enacted by a Parliament, which comes imbued with Parliamentary sovereignty, commentators have nevertheless asserted that freedom

74. This law led to diplomatic issues between Turkey and France before the ruling of the Constitutional council as the law of January 29, 2001 declared that Turkey had committed a genocide towards Armenians in 1915. Turkey PM Says French Bill on Genocide Denial "Racist", BBC News (Jan. 24, 2012), http://www .bbc.co.uk/news/world-europe-16695133.

75. European Convention on Human Rights, art. X ("The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.").

76. J. Beatson et al., supra note 25, ¶ 1.09.

of expression has a "special status."[77] Some examples of the common law protection of this right may be offered. In developing the law of defamation in the case of *Derbyshire CC v Times Newspaper Ltd*,[78] the House of Lords referred to the fundamental right to freedom of expression in the common law and held that a local authority should not as such be able to sue for libel.

However, in the later case of *Wainwright v Home Office*, Lord Hoffmann described *Derbyshire CC* as merely recognizing "freedom of speech" as an "underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel."[79] He went on to argue that "no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works."[80]

Given the inherent weaknesses of the common law approach, the incorporation of the ECHR by means of the HRA 1998 was thus a significant act from the perspective of the protection of the freedom of expression. Strasbourg has frequently emphasized the importance of these foundational rights: Freedom of expression is "one of the essential foundations of a democratic society and one of the basic conditions for its progress."[81] The direct application of Article 10 ECHR enshrining of the freedom of expression into English law is therefore important, providing for a concrete and defined right, and allowing inter alia for a framework for evaluating purported restrictions on the freedom of expression. The right is thus not absolute, and exceptions are countenanced, but limitations may only occur if they are (a) are prescribed by law; (b) pursue a legitimate aim; and (c) are "necessary in a democratic society."

IV. THE PROSPECTS FOR TRANSNATIONAL AGREEMENT AND REGULATION OF THE INTERNET

In an Article of this length, it is difficult to discuss all of the areas where transnational regulation of the Internet might be sought, or all of the potential complications. However, in the remaining pages, some of the potential areas for regulation will be discussed.

77. David Feldman, English Public Law ¶ 9.07 (2d ed. 2009).

78. Derbyshire County Council v. Times Newspapers Ltd., [1993] A.C. 534 (H.L.) 6.

79. Wainwright v. Home Office, [2003] UKHL 53 (H.L.), ¶ 31.

80. *Id*.

81. Handyside v. United Kingdom, 1 Eur. Ct. H.R. 737, 754 (1976).

A. Regulation of Commercial Speech.

The beginning of this Article focused on the growing level of commerce between nations. As the Internet has grown in significance, there have been major increases in the quantity of products advertised over the Internet. This is one area of the law where there is significant potential for regulation and substantial room for the creation of transnational regulatory structures. For example, a transnational regulatory regime could regulate and prosecute fraudulent and deceptive commercial speech.

However, even with commercial speech, there are potential constitutional conflicts. The United States Supreme Court has broadly interpreted the First Amendment as protecting, not only political speech, but also commercial speech.[82] Despite this protection, the U.S. government may prohibit speech that is illegal or fraudulent.[83] However, there are definite limits on the government's ability to control the non-fraudulent sale of legal products, including prescription drugs,[84] lawyer services,[85] tobacco,[86] and alcohol.[87] Because many of the problems requiring transnational attention relate to commerce and the sale of goods, this obstacle is a potentially significant one which will undoubtedly limit the ability of treaty negotiators to craft an expansive treaty and ultimately limit the scope of authority that a transnational administrative structure can exercise.

One area of "commerce" that has grown significantly in recent years is Internet gambling. Not only is online gambling big business, but it frequently crosses international boundaries.[88] To the extent that Internet gambling is illegal,[89] it can be severely regulated. However, legislative support for a ban is waning light of the budget crisis and the search for additional revenues.[90]

82. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-54 (2001); Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976).

83. *See* Va. State Bd. of Pharmacy, 425 U.S. at 771-72.

84. *Id*. at 773.

85. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995); Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 479 (1988).

86. *See* Lorillard Tobacco Co., 533 U.S. at 553-54.

87. *See* 44 Liquormart Inc. v. Rhode Island, 517 U.S. 484, 504 (1996).

88. *See* Eric Pfanner, Is Party Over for Internet Gambling? – Technology – International Herald Tribune, N.Y. Times (July 2, 2006), http://www.nytimes.com /2006/07/02/technology/02iht-gamble03.2100660.html?pagewanted=all.

89. *See* Sewell Chan, Congress Rethinks its Ban on Internet Gambling, N.Y. Times (July 28, 2010), http://www.nytimes.com.com/2010/07/29/us/politics /29gamble.html.

90. *Id*.

States are also seeking additional revenues.[91] As a result, this is an area where transnational structures might be of great use as a way to regulate the industry and to make sure that it operates fairly. If Internet gambling is legalized, treaty negotiators may face some limitations on their ability to create transnational structures, but should be able to create effective transnational regulation.

B. Regulating Child Pornography.

Another area where transnational regulation is possible is with regard to child pornography. Because the U.S. Constitution allows the government to prohibit "child pornography," it would be possible to create an administrative structure to regulate and control the transmission of such pornography over the Internet.[92] In addition, this is an area of the law where transnational regulation would be quite beneficial since the Web helps pornographers send child pornography across international borders.[93]

The only complication is that there is a curious little wrinkle in U.S. law that allows the government to regulate "actual" child pornography, but not "virtual" child pornography.[94] In other words, child pornography can only be banned when it depicts actual children involved in sexual activities, but not when it involves only computer depictions of children involved in such activities.[95] As a result, U.S. treaty negotiators will be forced to recognize and acknowledge this distinction in consenting to U.S. participation in a transnational regulatory structure.

C. Regulating Obscenity.

Transnational regulation might also be permissible with regard to obscenity. U.S. law also permits restrictions on obscenity, and obscenity generates very substantial amounts of international commerce.[96]

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91. *See* Michael Cooper, As States Weigh Online Gambling, Profit May Be Small, N.Y. Times (Jan. 17, 2012), http://www.nytimes.com/2012/01/18/us/more-states-look-to-legalize-online-gambling.html.

92. *See* New York v. Ferber, 458 U.S. 747, 773-74 (1982).

93. *See* Gretchen Ruethling, 27 Charged in International Child Pornography Ring, N.Y. Times (Mar. 16, 2006), http://www.nytimes.com/2006/03/16/national/16porn.html.

94. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002) (explaining that "virtual child pornography" is defined as pictures of children involved in sexual activities that involve solely computer generated images, and that do not involve actual children).

95. *Id*.

96. *See* Brad Stone, An E-Commerce Empire, From Porn to Puppies, N.Y. Times (May 18, 2008), http://www.nytimes.com/2008/05/18/technology/18gordo.html?pagewanted=all.

The only major difficulty is that the U.S. draws a clear line of demarcation between obscenity, which derives no constitutional protection, and other sexual images which may be protected.[97] However, the U.S. has had trouble defining the term "obscenity."[98] As a result, if international negotiators can agree on a suitable definition of "obscenity," this is an area where transnational regulation is possible. The major difficulty is that U.S. law may be a bit prudish regarding sexual images, at least compared to the attitudes of many Western European countries, and this cultural difference might cause the United States to seek greater restrictions than Europeans might find acceptable. Nevertheless, U.S. law would not be an impediment to an agreement as long as all that is prohibited is material that is deemed obscene under U.S. law.

D. Regulation of Speech Related to Holocaust Denial and Degradation of Human Dignity.[99]

There might be substantial impediments if the transnational regulatory structure were to have authority over speech involving Holocaust denial or degradation of human dignity. In this area, there is a major divide between the U.S. and some European countries. France has enacted the Gayssot law which makes it a crime to deny the existence of the Holocaust and also makes it a crime to challenge the findings of the Nuremberg War Crimes Tribunal.[100] Also, many European countries permit restrictions on hate speech, usually with an eye towards protecting human dignity and promoting other values such as equality.[101] For reasons that will be explained below, this will be an area in which there will be limited leeway for the U.S. to agree to international regulation.

The French Holocaust denial law is regarded as a necessary limit on freedom of speech for several reasons. First, the law protects Holocaust victims' and their families' fundamental right to human dignity, and provides for

97. *See* Miller v. California, 413 U.S. 15, 36-37 (1973).

98. *Id*. at 22.

99. This section was largely modeled after Russell L. Weaver, Nicolas Delpierre & Laurence Boissier, Holocaust Denial and Governmentally Declared "Truth": French and American Perspectives, 41 Tex. Tech L. Rev. 495, 499-504, 508-09, 512-15 (2009).

100. *See* Law 90-615 of July 13, 1990, art. 9, Journal Officiel de la République Franaise [J.O.] [Official Gazette of France], July 14, 1990, p. 8333.

101. The right to human dignity receives explicit protection under French law. See Loi 2000-916 29 juillet 1881 [Law 2000-916 of July 29, 1881], Journal Officiel de la République Francaise [J.O.] [Official Gazette of France], July 29, 1881, art. 35. It is also protected under European treaty. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 1(a), Dec. 13, 2007 O.J. (C 306) 1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF.

a 15,000 Euro fine for publication of a document that causes serious damage to a victim's dignity that is published without the victim's approval.[102] Although the human dignity law does not specifically prohibit statements denying the Holocaust, the law's reasoning suggests that freedom of speech may be limited when it conflicts with a crime victim's right to dignity. One can argue that the Gayssot law protects the dignity of Holocaust victims and their families by prohibiting statements contesting, denigrating, even denying the existence of "crimes against humanity." Second, the Gayssot law is regarded as necessary to maintain public order given disturbances that have resulted when the circumstances of the Holocaust have been called into question, and given the tensions that such attitudes can spark between ethnic communities.[103] Third, the Gayssot law is regarded as justified given that the Nazis deported Jews from France during the Occupation, and there is a fear that France will forget the events of World War II as survivors grow old or died.

The Gayssot Law has been interpreted and applied in a very repressive way. For example, Bruno Gollnisch, a member of the European Parliament and the then number three official in the National Front, was criminally prosecuted and convicted for making a variety of statements in the wake of a commission's finding that there were Holocaust deniers at the University of Lyon.[104] It was initially alleged that Gollnisch had publicly contested the neutrality of the findings in a press conference at the National Front's Lyon headquarters.[105] *Le Figaro* reported that Gollnisch made the following statements at the press conference: "Henry Rousso [the Chairman of the Commission] is a committed historian, he is a Jewish person, someone highly respectable, but there is no assurance of his being neutral."[106]

In various interviews, Gollnisch acknowledged that his own specialty was Japanese history and Asian-Pacific matters during World War II rather

102. Loi 2000-916 29 juillet 1881 [Law 2000-916 of July 29, 1881], Journal Officiel de la République Francaise [J.O.] [Official Gazette of France], July 29, 1881, art. 35.

103. The Conseil d'Etat has held that an individual's "dignity is one of the many components of public order." CE, Oct. 27, 1995, Rec. Lebon 372 (holding that dwarves right to dignity precluded them from choosing whether to allow themselves to be "launched" into the air).

104. Olivier Bertrand, Pour les Juges, Gollnisch est Negationniste, Liberation (Jan. 19, 2007), http://www.liberation.fr/societe/010191474-pour-les-juges-gollnisch-est-negationniste; Bruno Gollnisch (FN) Condamne pour ses 'Insinuations' sur les Chambres a Gaz, Le Monde, Jan. 20, 2007, at 11.

105. *See* Aisha Labi, French Professor Faces Suspension for Comments About the Holocaust, Chron. Higher Educ., Oct. 29, 2004, http://chronicle.com/article/French-Professor-Faces/25749/.

106. Olivier Pognon, Négationnisme: Gollnisch Relance la Polémique, Le Figaro, Oct. 11, 2004, cited in Gilles Karmasyn, Les Déclarations de Bruno Gollnisch Sont Implicitement, mais sans Ambiguïté, Négationnistes, Pratique de l'Histoire et Dévoiements Négationnistes, http://www.phdn.org/negation/gollnisch2004.html.

than European history.[107] Moreover, although Gollnisch made it clear that "he did not contest the drama of the concentration camps," he did claim that he was "entitled to discuss the issue freely" and to "discuss the actual number of people killed."[108] Gollnisch said, "I want things to be clear, as far as I am concerned, I do not deny the existence of homicidal gas chambers," and "I'll not question the existence of concentration camps, but on the issue of the number of people killed, historians should be left free to discuss it. As for the existence of gas chambers, it is up to historians to decide."[109] Many of Gollnisch's comments on the Holocaust seemed to focus on the importance of academic freedom and the ability of historians to discuss such matters. In the days after the press conference, Gollnisch made similar statements. For example, when asked in an interview whether he contested the existence of gas chambers, Gollnisch declared that "this is a matter for historians to discuss" and flatly stated "that historians do not agree."[110]

The court found Gollnisch guilty of the offense of "orally contesting the existence of crimes against humanity,"[111] and imposed a three-month suspended prison sentence, a 5,000 euro fine, ordered him to pay for the court decision to be published in newspapers, and ordered that he pay 55,000 euros in damages to nine different plaintiffs.[112] In addition, he was suspended from his professorial post at the University of Lyons for five years.[113] The court held that Gollnisch resorted to "disguising devices, insinuating doubts, contrary to other negationists such as Robert Faurisson or Roger Garaudy who expressed themselves openly."[114] On February 28, 2008, the Lyon Court of

107. *See* France Mulls Ways To Sanction Holocaust Doubter, Radio Islam (Oct. 15, 2004), http://www.radioislam.org/gollnisch/eng.htm.

108. Christophe Forcari, Dix-Sept Ans Aprés son Leader, le Numero 2 du FN Met en Doute leur Existence, Liberation, Oct. 12, 2004, at 12; see Sophia Landrin, Bruno Gollnisch (FN) Emet des Doutes sur L'Existence des Chambres a Gaz et Relativise L'Ampleur de la Shoah, Le Monde (Oct. 13, 2004), www.lemonde.fr/cgi-bin/ACHATS/acheter.cgi?offre =ARCHIVES&type_item=ART_ARCH_ 30J&objet _id=871971; Honor Mahony, French Far-Right MEP Fined for Holocaust Remarks, EU Observer (Jan. 19, 2007), http://euobserver.com/9/23301/?rk=1; French Minister Orders Probe Into Politician's Holocaust Remarks (Radio France Internationale radio broadcast Nov. 29, 2004) [hereinafter Radio France Internationale].

109. *See* sources cited supra note 93.

110. Bruno Gollnisch Maintient ses Propos Juges Negationnistes, Le Nouvel Observateur, Oct. 12, 2004.

111. Bertrand, supra note 89; Bruno Gollnisch (FN) Condamne pour ses 'Insinuations' sur les Chambres a Gaz, supra note 89.

112. Bertrand, supra note 89; Bruno Gollnisch (FN) Condamne pour ses 'Insinuations' sur les Chambres a Gaz, supra note 89.

113. *See* French Far-Right Leader To Appeal, BBC News (Jan. 19, 2007), http://news.bbc.co.uk/2/hi/europe/6277983.stm.

114. Bertrand, supra note 89; Bruno Gollnisch (FN) Condamne pour ses 'Insinuations' sur les Chambres a Gaz, supra note 89..

Appeal confirmed the decision.[115] However, the Cour de cassation overturned the ruling, holding that there was no evidence of such a denial.[116]

It is difficult to believe that Gollnisch could have been successfully prosecuted in the United States for making similar statements had a similar law existed in the United States. Gollnisch's comments about the chairman of the commission would likely have been regarded as nothing more than political comment in the United States, and therefore they would have been regarded as protected political expression. Moreover, most of his statements about the Holocaust fell short of an outright denial that the Holocaust occurred. With minor exceptions, U.S. law does not permit the government to declare "truth" or to demand that everyone accept officially declared truths.[117]

The United States' aversion to governmental censorship is summed up by one American commentator who noted that, "an unregulated marketplace of ideas is preferable to government restrictions on freedom of expression, not because the marketplace of ideas is efficient and always leads to benign results, but because the alternative of government regulation is far worse."[118] As a general rule, governmental officials are precluded from requiring that everyone adhere to certain beliefs or ideals.[119] As the United States Supreme Court recognized in *West Virginia State Board of Education v. Barnette*,[120] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word

115. La Condamnation de Bruno Gollnisch Confirmee en Appel, Le Figaro (Feb. 28, 2008), available at http://www.lefigaro.fr/politique/2008/02/28/01002-20080228ARTFIG00480-la-condamnation-de-bruno-gollnisch-confirmee-en-appel.php.

116. Cass. Crim. 23 June 2009, n° 08-82521 http://legifrance.gouv.fr/affich Juri-Judi.do?idTexte=JURITEXT000020821426

117. *See* Weaver, Delpierre & Boissier, supra note 12, at 512-15.

118. David E. Bernstein, Defending the First Amendment from Antidiscrimination Laws, 82 N.C. L. Rev. 223, 223 (2003).

119. *See*, *e.g.*, W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640-41 (1943) ("Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men . . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.").

120. *Id*.

or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."[121]

Likewise, although many European countries permit restrictions on hate speech, usually with an eye towards protecting human dignity and promoting other values such as equality,[122] U.S. decisions have generally been hostile to hate speech restrictions.[123] In *Hustler Magazine, Inc. v. Falwell*,[124] a pornographic magazine printed a parody portraying a religious/political figure as having engaged in an incestuous relationship with his mother in an outhouse.[125] The Court applied First Amendment free speech principles to hold that the plaintiff could not recover for intentional infliction of mental and emotional distress.[126] Likewise, in *Snyder v. Phelps*,[127] members of a fundamentalist religious group picketed at the funeral of a deceased military veteran who was killed in Iraq.[128] At the funeral, protestors held signs with messages such as "God Hates You," "You're Going to Hell," and "Thank God For Dead Soldiers."[129] The Court held that the father could not recover from the protestors for intentional infliction of mental and emotional distress.[130] The Court held that the speech related to matters of public interest and debate, and could not be suppressed simply because the protestor's views were objectionable or distressing to the soldier's father.[131]

By contrast, restrictions have been made in the UK so as to criminalize hate speech. The Public Order Act 1986 makes it an offence for a person to use threatening, abusive or insulting words or behavior that causes, or is likely to cause, another person harassment, alarm or distress.[132] The Racial and Religious Hatred Act in 1996 amended the POA to make it an offence punishable by up to seven years imprisonment to use threatening words or behavior intended to stir up religious hatred,[133] and the Terrorism Act 2006 criminalizes the "encouragement of terrorism' which includes making statements that glorify terrorist acts, and is punishable by up to seven years imprisonment.[134]

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121. *Id*. at 642.

122. *See* supra note 6 and accompanying text.

123. *See* e.g., R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Dawson v. Delaware, 503 U.S. 159 (1992).

124. 485 U.S. 46 (1988).

125. *Id*. at 48.

126. *Id*. at 50-57.

127. 131 S. Ct. 1207 (2011).

128. *Id*. at 1212.

129. *Id*.

130. *Id*. at 1219.

131. *Id*.

132. Public Order Act, 1986, c. 64, § 18 (U.K.).

133. Racial and Religious Hatred Act, 2006, c. 1, § 1, 29B, 29L (U.K.).

134. Terrorism Act, 2006, c. 11, § 1 (U.K.).

E. Regulation of Nazi Symbols.

In theory, transnational regulation could also extend to regulation of prohibited symbols. For example, many European countries make it a crime to display Nazi symbols, or to march in Nazi uniforms. However, if the U.S. were to participate, it is not clear that a transnational administrative structure could be given the power to prohibit such symbols from the Internet. Although the United States Supreme Court has not definitively resolved the issue, its existing case law suggests that the First Amendment prohibits the U.S. government from criminalizing displays of Nazi regalia, advocacy of Nazi ideas, or even Nazi marches.[135]

F. Regulation of Speech Regarding National Symbols.

Another area where Internet regulation would be difficult is regarding governmental attempts to protect national symbols. In reliance on the ECHR, France has exercised the power to restrict free speech in order to maintain public order.[136] Pursuant to that authority, France has enacted a law (Loi pour la Sécurité Intérieure) prohibiting individuals from holding the French national flag or the French national anthem in contempt.[137] In upholding this law, the Conseil Constitutionnel held that lawmakers did not transgress the necessary balance "between the protection of public order and the protection of the freedoms guaranteed by the Constitution"[138]

By contrast, the U.S. First Amendment protects individuals who choose to desecrate the U.S. flag. In *Texas v. Johnson*,[139] the Court struck down a law prohibiting the burning of a U.S. flag while stating that the State's interest in "preserving the flag as a symbol of nationhood and national unity" cannot justify a "criminal conviction for engaging in political expression." [140] Presumably, U.S. treaty negotiators also could not agree to a treaty prohibiting the denigration of French or other nation's symbols to the extent that the action is taken on U.S. soil.

135. *See* Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (per curiam); Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (per curiam); Village of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 25-26 (Ill. 1978) (per curiam).

136. Weaver, Delpierre & Boissier, supra note 12, at 507-08.

137. Code pénal [C. pén.] art. 433-5-1 (Fr.).

138. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2003-467DC, Mar. 13, 2003, J.O. 4789 (Fr.).

139. 491 U.S. 397 (1989).

140. *Id*. at 420.

G. Regulating of Speech Affecting National Security Interests.

There may also be limits on the ability of a transnational administrative structure to regulate or limit speech affecting national security interests. In Europe, there is much broader authority to protect such interests. Article 10, Section 2, of the European Convention on Human Rights (ECHR), provides for an array of restrictions on freedom of expression:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals. . .[141]

The U.S. Constitution has been interpreted as providing the U.S. government with relatively more limited authority to regulate speech affecting national security interests. In *New York Times Co. v. United States*,[142] the government tried to prevent newspapers from publishing stolen classified government documents (referred to as "The Pentagon Papers").[143] The Court treated the lower court injunction as a prior restraint against speech, held that any prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity," and that the government "carries a heavy burden of showing justification for the imposition of such a restraint."[144] The Court held that the government had failed to satisfy that burden even though the government claimed that release of the reports would have had an adverse impact on national security interests.[145]

H. Regulating Speech Advocating Illegal Action.

It may also be difficult to regulate speech that attempts to incite or promote illegal action. In this area of the law, there is tension between the government's desire to intervene against crime early, through crimes such as conspiracy and attempt, and the societal interest in freedom of expression. The United States Supreme Court has also issued other decisions that probably would have been decided differently under French protections against degradation of human dignity, as well as under the ECHR which permits greater regulation of speech in order to protect national security. *Branden-*

141. European Convention on Human Rights, art. 10, § 2.
142. 403 U.S. 713 (1971).
143. *Id*. at 714.
144. *Id*.
145. *Id*.

burg v. Ohio,[146] involved Klu Klux Klan members who held a rally dressed in Klan regalia, burned a large cross at the rally, and talked about taking "revengeance" (sic) on behalf of the Caucasian race.[147] The Court held that the activities were protected against prosecution unless it could be shown that the Klan members intended to incite imminent lawless conduct, and were likely to cause imminent lawless conduct.[148]

I. Regulatory Protection of Privacy Interests.

Privacy is another issue where there may be interest in transnational administrative regulation of the Internet, but it is another area whether there is significant divergence between the U.S. and Europe. Europe, in general, is more protective of privacy than the United States, and is considerably more willing to allow that right to trump the right to freedom of expression. The European Convention on Human Rights has a special provision that guarantees the "right to respect of the private and family life." which contains two subparts:

> 1) Everybody has a right to have his private and family life respected, as well as his place of residence and correspondence.
>
> 2) There can be no interference of a public authority in the exercise of this right, except if this inference is legal and is a measure that, in a democracy, is necessary for the protection of national security, public safety, economic well-being of the State, defense of the public order and prevention of criminal infringements, protection of the health and ethics, or for the protection of the rights and freedom of other people.[149]

Even though Germany's constitution (the Basic Law) provides explicit constitutional protection for personality,[150] the ECHR provision has been construed as being more protective of privacy than the German provision. In a case involving Princess Caroline of Monaco and paparazzi who were taking pictures of her while she was in public places, German courts refused to hold that the paparazzi had violated Caroline's rights. The European Court of Human Rights disagreed, applying ECHR section 8,[151] and holding that Prin-

146. 395 U.S. 444 (1969) (per curiam).

147. *Id*. at 445-46.

148. *Id*. at 447.

149. European Convention on Human Rights, art. 8.

150. *See* Ellen S. Bass, A Right in Search of a Coherent Rationale – Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights, 42 U.S.F. L. Rev. 799, 830-31 (2008).

151. *See* 1A Lindey on Entertainment, Publ. & the Arts § 3:11.30 (3d ed.).

cess Caroline was entitled to some privacy protections even when she appeared in public.[152]

U.S. privacy law is of relatively recent origin and is traced to a seminal article written by Samuel Warren and Justice Louis D. Brandeis.[153] Under the modern formulation, the tort of privacy has four separate and distinct causes of action: 1) intrusion upon the plaintiff's seclusion or solitude, or into private affairs; 2) public disclosure of embarrassing private facts about the plaintiff; 3) publicity that places the plaintiff in a false light in the public eye; and 4) appropriation of the plaintiff's name or likeness for the defendant's advantage.[154]

In the United States, it is extremely doubtful that a public figure like Princess Caroline could use the tort of privacy to halt the publication of similar photographs. The First Amendment interest in publication of true information, especially of events that occur in public places, is too great. As a result, a media outlet could not be required to pay damages for revealing the name of a rape victim despite a statutory prohibition against disclosure.[155] Even in false light privacy cases, in which plaintiff is portrayed in a "false light" in the public eye, the Court has required plaintiff to show that defendant published with "actual malice" (in the sense that it knew that the publication was false or acted in reckless disregard for truth or falsity).[156]

Despite the divergence between the U.S. and Europe on scenarios like the Princess Caroline case, there are a number of areas where cooperation between the U.S. and other countries should be possible in terms of the treaty negotiations. U.S. courts would probably uphold appropriately drafted restrictions on paparazzi that are designed to halt harassment. Illustrative is the lower court holding in *Galella v. Onassis*[157] in which the paparazzi was enjoined from certain types of behavior (although he was not enjoined from

152. Von Hannover v. Germany, Eur. Ct. H. R. (2004), available at 2004 WL 1808843.

153. *See* generally Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). In their article, Warren and Brandeis forcefully articulated the need to protect "privacy." Id. at 195-96.

154. *See* William L. Prosser, Privacy, 48 Calif. L. Rev. 383, 389 (1960).

155. *See*, *e.g.*, The Florida Star v. B.J.F., 491 U.S. 524 (1989). In this case, a newspaper asked the Court "to hold broadly that truthful publication may never be punished consistently with the First Amendment." *Id*. at 532. The Court declined, saying that "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the [particular] case." *Id*. at 533. The Florida Star case concerned a state statute that made it unlawful to "'print, publish or broadcast . . . in any instrument of mass communication' the name of a victim of a sexual offense." *Id*. at 526.

156. *See* Time, Inc. v. Hill, 385 U.S. 374, 387 (1967).

157. 353 F. Supp. 196 (S.D.N.Y. 1972), aff'd in part, rev'd in part, 487 F.2d 986 (2d Cir. 1973).

photographing Ms. Onassis in public).[158] In the United States, it might also be possible to gain judicial protection for one's name and likeness,[159] to protect against someone who intruded into plaintiff's seclusion, or against someone who tries to appropriate plaintiff's intellectual property.[160]

So, in the final analysis, there is some room for U.S. negotiators to agree to restrictions on Internet speech that affects privacy, but the U.S. ability to enter such agreements may be limited by constitutional concerns.

V. CONCLUSION

Some prominent world leaders have called for international regulation of the Internet. Undoubtedly, these leaders correctly recognize that, if Internet regulation is to be effective, there must be international cooperation. Transnational regulatory structures are also necessary. Internet communications frequently cross international borders, and no single nation is capable of dealing with Internet crime entirely on its own. Child pornography might originate in one part of the world (*e.g.*, Asia), be transmitted to another part of the word (*e.g.*, Europe), and be retransmitted to yet another part of the world (*e.g.*, the Americas).[161] A single country will be unable to investigate such far-flung activities by itself, much less to apprehend the perpetrators and bring them to justice. Moreover, transnational administrative structures could help nations develop regulatory standards and enforcement structures.

Even though international cooperation is need, the First Amendment to the United States Constitution will inevitably restrict the ability of U.S. treaty negotiators to negotiate an international treaty governing the Internet, and their ability to agree to transnational regulatory structures governing the In-

158. *Id*. at 241.

159. *See* Ali v. Playgirl, Inc., 447 F. Supp. 723, 731-32 (S.D.N.Y.1978); Eastwood v. Superior Court, 198 Cal. Rptr. 342 (Cal Ct. App. 1983).

160. *See* Zacchini v. Scripps–Howard Broad. Co., 433 U.S. 562 (1977). In this case, an entertainer who performed a "human cannonball" act in which he was shot from a cannon into a net some 200 yards away performed his act in a fair ground surrounded by grandstands. *Id*. at 563-64. A reporter filmed the act and showed it on the news. *Id*. The entertainer sued for damages claiming that the station unlawfully appropriated his property. *Id*. at 564. The news station claimed that it was immune from suit under the First Amendment. *Id*. at 564-65. The Supreme Court disagreed. *Id*. at 565-66.

161. *See* Nina Bernstein, Inmate Accused of Collecting Internet Child Pornography, N.Y. Times (Mar. 28, 1997), http://www.nytimes.com/1997/03/28/us/inmate-accused-of-collecting-internet-child-pornography.html ("The two-count indictment says that as early as January 1994, while he was a prisoner at the Minnesota Correctional Facility at Lino Lakes, Mr. Chamberlain used a prison computer and the Internet to obtain child pornography, used E-mail through an anonymous remailing service in Finland to discuss with others how to avoid detection, and possessed an optical disk containing 287 visual depictions of minors engaged in sexually explicit conduct.").

ternet. U.S. negotiators should have no difficulty agreeing to certain types of provisions. For example, U.S. negotiators could agree to criminalize child pornography, obscenity (assuming that they can agree on a workable definition of the term "obscenity"), and various types of fraudulent schemes. In addition, U.S. negotiators can commit the U.S. government, including and especially police and prosecutors, to work with other governments to apprehend and punish those who engage in such activities.

U.S. negotiators may be constitutionally prohibited from agreeing to criminalize certain other types of conduct. Despite the possible importance to European nations, U.S. negotiators may not be able to agree to prohibit Internet speech involving Holocaust denial or the display of Nazi insignias or symbols, and they could not accept some of the broad and general speech provisions articulated in the European Convention on Human Rights. Finally, because U.S. defamation law differs so radically from that of other countries, U.S. negotiators could not accept British demands to cut the balance between speech and reputation more decisively in terms of reputation, and (assuming that the lower court decisions hold up over time) could not agree to have U.S. courts enforce foreign (especially British) defamation judgments. U.S. public policy can and should preclude enforcement of such judgments.

Thus, while there are possible avenues for U.S. cooperation in terms of a treaty governing the Internet, U.S. negotiators will need to tread lightly in order to ensure that they do not transgress the boundaries established by the First Amendment to the United States Constitution.