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A REGULATORY WEB: FREE SPEECH AND THE GLOBAL INFORMATION INFRASTRUCTURE

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National restrictions of freedom of speech on the nascent global information infrastructure are commonplace not only in the United States, but also around the globe.[1] Individual nations, each intent upon preserving what they perceive to be within the perimeters of their national interests, seek to regulate certain forms of speech because of content that is considered reprehensible or offensive to national well-being or civic virtue.[2] The fact that this offending speech is technologically dispersed instantaneously to millions of potential recipients strengthens the impetus to regulate.

At the same time, outspoken free speech advocates vigorously assert an absolutist position of non-regulation, in what appears to be an unrelenting struggle for every inch of unregulated information infrastructure

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1. C.T. Mien. "Steps Taken in Other Countries to Regulate the Internet," *The Straits Times (Singapore)*, March 9, 1996, p. 35. In Austria, a broad study on the subject of regulating the information infrastructure was commissioned by the Federal government. Ursula Maier-Rabler, Viktor Mayer-Schönberger, Gabriele Schmölzer, Georg Nening-Schöfbänker. *Net Without Qualities*. 1995, http://www.komdat.sbg.ac.at/nikt. For the restricting effect on speech through a European Union Directive on Data Protection, see Stewart Baker. "The Net Escape? Ha!," *Wired*, Sept., 1995, p. 125. In the United States, the Communication Decency Act of 1996, outlaws distribution over the internet of material from child pornography to profanity. 47 U.S.C. ' 609 *et seq.* (1996).

2. *See* THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE (1988); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 59–65, 147–74 (1982); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

territory.[3] This information infrastructure is a communicative device of such broad scope and accessibility that it is of paramount importance to free speech absolutists, who characterize it as a tool for democratizing speech on a global basis and insist that it remain insulated from any regulatory mandates.

Activists at both ends of the spectrum disregard an integral aspect of the global composition of the Net. Those who advocate unfettered Net communication and those who espouse some form of national Net regulation are similarly constrained in the pursuit of their objectives by the very structure of the information infrastructure. It is the global aspect of the information infrastructure that shapes the debate on freedom of speech and limits absolutists and regulators at the same time.

The nature of this conflict and its potential resolution will be outlined in this Article.[4] Therefore, assuming that national policy makers will not want to cede their authority to regulate the information infrastructure, we will suggest a mechanism by which those who elect to regulate speech can begin to deliberate about this objective in a structured, principled, and internationally acceptable manner.

I. INTERNATIONAL CONSTRAINTS ON NATIONAL INFORMATION INFRASTRUCTURES

The international nature of the information infrastructure places substantial constraints upon both the free speech absolutists and those who would regulate speech.

A. *Restraint by Nations on Domestic Speech*

Advocates of an unobstructed flow of speech conceive of the Net as (1) an anarchic communicative medium that is an inappropriate area for governmental regulatory intrusion, and (2) a medium capable of advancing freedom on a global scale by razing barriers to accessing information, even in closed societies.[5] In the United States, these free

3. Howard Rheingold. "Why Censoring Cyberspace Is Futile," *Computer Underground Digest* 6.40 (1995).

4. The debate concerning the prudence and legitimacy of content-based speech regulation is beyond the scope of this paper. For an analysis of the contention that some forms of speech are so horrifying and potentially destructive that they can be regulated, and a proposal for the nature and structure of that regulation, see Viktor Mayer-Schönberger and Teree E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law*, 18 B.C. INT'L & COMP. L. REV. 59 (1995).

5. Donald E. Lively, *The Information Superhighway: A First Amendment Roadmap*, 35 B.C.L. Rev. 1067 (1994); Note, *The Message Is the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994).

speech advocates rely on the words of the First Amendment, which is framed in absolute terms, and on the Supreme Court, which has occasionally endorsed an absolutist interpretation of the Amendment's dictates.[6]

But speech is not—and never has been—inviolate, neither in the United States nor in any other country. In fact, restrictions abound.

Communicative acts on the Net are within national speech restrictions, as the Net is not extraterritorial and its users are not otherwise exempted from existing national speech regulations. In fact, many nations have begun the process of constricting the content of speech on the Net. The following discussion samples the regulatory rules currently in force around the world.

Libel. Most nations deal severely with speech that denigrates another's reputation. Many national libel laws apply directly to Net communication.[7]

Pornography. In England, the Obscene Publications Act defines "obscene" as material that "tends to deprave and corrupt persons," making such material subject to regulation. *Penthouse* magazine's World Wide Web site lists 25 countries that outlaw its so-called "adult material," among which are Egypt, India, Japan, Korea, Mexico, Saudi Arabia, Spain and the United Kingdom.[8] The government of Singapore has recently implemented a licensing scheme for all local Internet operators and content providers that is designed to constrain all forms of sexual excesses in cyberspace.[9] And discussions of sex—as well as religion and politics—are banned in Saudi Arabia and Iran.[10]

In Germany, a group of laws designed to protect children was enforced recently in a now-infamous case involving CompuServe. In November 1995, a Bavarian State Attorney ordered a search of the

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6. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Texas v. Johnson, 491 U.S. 397 (1989); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Yates v. United States, 354 U.S. 298 (1957).

7. Ulrich Sieber. "Strafrechtliche Verantwortlichkeit fhr den Datenverkehr in Internationalen Computernetzen," *Juristenzeitung* 1996:429–42; Sunday Times v. United Kingdom, 2 E.H.R.R. 245 (1979). More recently in England, a physics lecturer and a nuclear physicist brought separate actions against former colleagues, each alleging that defamatory remarks about his professional competence had been disseminated on Usenet. "Electronic War of Words in Cyberspace Is Heading for Very Real Confrontation in a UK Courtroom," *The Financial Times*, August 13, 1994, at 24.

8. Mitch Betts & Gary H. Anthes, *On-Line Boundaries Unclear: Internet Tramples Legal Jurisdictions*, COMPUTERWORLD, June 5, 1995, at 1, 16.

9. "Lee Kuan Says Yes to Internet, No to Sex and Violence on TV," *Agence France Presse*, Oct. 6, 1995. C.T. Mien, 1996, p. 35.

10. Faiza S. Ambah, *An Intruder in the Kingdom*, BUS. WEEK, Aug. 21, 1995, at 40; Carole Bogert, *Chat Rooms and Chadors*, NEWSWEEK, Aug. 21, 1995, at 36.

Munich office of CompuServe for evidence of a breach of German child pornography laws, and material was seized by police. The prosecutor pressed CompuServe to prevent all users from accessing through its Internet gateway certain Unsenet newsgroups allegedly disseminating child pornography. In December, CompuServe complied and prevented its users from accessing 200 sites, including all those prefixed with "alt.sex." CompuServe later lifted this ban in the wake of substantial world wide protest.[11] By then, CompuServe had developed a software solution to block certain Internet information resources.

Subversive Information. Computer equipment of anarchist groups that advocate anti-government violence through utilization of online sources has been seized by the governments of Italy, England, and Scotland. Vietnam, concerned that increasing links with noncommunist nations could undermine the ruling regime, is seeking to control Internet access on the country's two independent computer networks.[12]

Hate Speech. As might be anticipated, the most virulent laws criminalizing hate speech are found in those countries scarred by the Holocaust. In Germany, a number of provisions of the criminal code are directed at expression that is inconsistent with the "dignity of the human personality developing freely within the social community,"[13] the fundamental right preserved in the German Constitution.[14] For example, Section 130 of the Criminal Code condemns attacks on human dignity that incite hatred. Section 131 of that same Code proscribes the production or dissemination of hate speech in written form.[15] Section 194 permits prosecution for the denial of the existence of the Holocaust where the disavowal is stated to a person who is a member of a group

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11. "Censorship Issues on the Internet Continue to Confuse Governments," *New Media Age*, January 12, 1996, p. 5; "Sex on the Internet," *The Economist*, January 6, 1996, p. 18, where the author inquires, "[w]hen Bavaria wrinkles its nose, must the whole world catch a cold?" See generally Ulrich Sieber, Strafrechtliche Verantwortlichkeit fuer den Datenverkehr in internationalen Computernetzen, JZ 429 (1996), <http://www.jura.uniwuerzburg.de/lst/sieber/stvipdt/svi01/htm>.

12. "Scotland and Italy Crack Down on Anarchy Files," <http://www.eff.org/pub/Legal/Cases/ BITS-A-t-E_Spunk/eff-raids.article>. Adrian Levy and Ian Burrell. "Anarchists Use Computer Highway for Subversion," *British Sunday Times*, March 5, 1995 (England and Scotland); <http://www.eff.org/pub/Legal Cases/BITS-A-t-E_Spunk/bits_seizure.article (Italy)>; "Cyber Notes," *The Christian Science Monitor*, Sept. 21, 1995, p. 11.

13. The Lüth Case, Judgment of Jan. 15, 1958, Federal Constitutional Court, 7 BVerfGE 198, translated in Donald P. Kommers. *The Constitutional Jurisprudence of the Federal Republic of Germany*. (Durham, N.C.: Duke University Press), 1989, p. 370.

14. Grundgesetz {German Basic Law} Article 1.

15. Outlawed are writings that "incite to race hatred or which describe cruel or other inhuman acts of violence against human beings in a manner expressing glorification or intentional minimization of such acts of violence or demonstrating the cruel or inhuman acts in a manner injuring human dignity . . . ." Strafgesetzbuch {German Penal Code} {StGB} 130, 131.

persecuted by the Nazi regime. Section 86 forbids the distribution of propaganda that promotes (1) the precepts of the Nazi regime, (2) unconstitutional parties, or (3) prohibited associations. And Section 86(a) censures the use of insignia—including flags, uniforms, badges and salutes—of these same proscribed organizations.[16]

The means of enforcing these laws outlawing hate speech and Nazi propaganda are currently the subject of vigorous debate in Germany. German prosecutors in Mannheim are investigating CompuServe, the T-Online network of Deutsche Telekom, and America Online for aiding the Internet distribution of neo-Nazi material that questions whether the Holocaust occurred.[17]

In Austria, the Austrian Prohibition Act similarly prohibits actions on behalf of the Nazi Party, as well as advocacy of its objectives or dissemination of its propaganda. Targeting groups of persons for ignominy or advocating their genocide is likewise forbidden.[18] A special investigation of the Austrian Police into terrorist activities has focused in recent months on the Internet and a Nazi computer network information exchange, known as Thule-Net.[19]

In Canada, separate provisions of the Criminal Code criminalize the willful promotion of hatred[20] and the communication of telephone messages likely to expose people to hatred or contempt because of, among other things, their race, national or ethnic origin, color, or religion.[21]

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16. In December, 1992, the German government banned the sale and distribution of neo-Nazi rock music advocating violence and death to foreigners to youths under the age of eighteen. By this measure the German government sought to staunch the precipitous rise of right-wing violence. Strafgesetzbuch {Penal Code} {StGB} 194, 86, 86a. "Recent Developments," *Harvard International Law Journal* 34:563 (1993).

17. German Research and Technology Minister Juergen Ruettgers stated affirmed that Bonn respected free speech, but declared that the German government must do more to regulate the Internet. He stated that "[w]e cannot tolerate a situation in which anything goes" and suggested that the Group of Seven leading industrial countries take up the issue. "America Online Faces Probe over Alleged Nazi Material on Internet," *The Jerusalem Post*, Feb. 4, 1996, p. 2; "CompuServe Still Blocks Access to Internet," *The Reuter European Community Report*, Feb. 16, 1996. W. Boston, "Germans' Internet Crackdown A Sign of the Future," *Reuters*, Feb.4, 1996. Sieber, 1966, p. 429–42.

18. Verbotsgesetz {Austrian Prohibition Act} ' 3.

19. Burkhard Schröder. *Neonazis und Computernetze*. (Reinbek: Rowohlt), 1995, p. 41.

20. Criminal Code, R.S.C. 1985, ch. C46 ' 319(2). See R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.), wherein the statute was upheld in a case involving a teacher charged with willful promotion of hatred against an identifiable group for promoting anti-Semitism to his students and penalizing the grades of those who did not respond favorably to his ranting. *See also* R. v. Andrews, [1990] 3 S.C.R. 870 (Can.).*See generally*, Michel Racicot, Mark S. Hayes, Alec R. Szibbo, Pierre Trudel, The Cyberspace is Not a 'No Law Land', Industry Canada (1997).

21. S.C. 1976–77, ch. 33, ' 13(1). This statute was upheld in Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892 Can.). It is not yet clear whether these provisions apply to electronic communications.

Privacy Protection. Recently, the European Union decided to regulate the flow of information about individuals, ostensibly to prevent corporate intrusion upon individual privacy. The member nations have agreed to obstruct the export of personal data to nations that do not establish "adequate" privacy protection.[22]

These are just a few examples of the many national regulations of Net speech in place throughout the world. Even liberal and democratic Western countries seem to consistently restrict freedom of expression. The Net is not an anarchic, unregulated dominion above and beyond individual state control, but rather a terrain policed by varied, numerous, and often contradictory national laws that create a variety of regulatory fiefdoms. Yet, the internationality of the Net, as well as the conglomeration of national regulations and their effects on the flow of information on the Net, invariably shapes all communicative activity on it as a whole. Thus, the international aspect of the Net does not remove discussions on the Net from national regulations, but instead subjects them to panoply of varying and contradictory regulations that breed uncertainty. The consequence is that speech, subjected to a patchwork of constraints, might be restricted more than is intended or necessary.[23] In this respect, the global dimension of the Net could develop into more of a liability than a speech-protecting asset, for this state of affairs generates subtle silencing and chilling of speech, rather than clear-cut regulations.

Speech is, of course, also regulated in the United States. The United States Supreme Court has identified varieties of vulnerable expression, or "low value speech,"—forms of expression that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[24] Low value speech includes

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22. *See generally* A. Michael Froomkin, *Anonymity and Its Enmities*, 1995 J. ONLINE L., <http://www.wm.edu/law/publications/jol/froomkin.html>. An issue concomitant to privacy concerns is the right to maintain anonymous communication on the Net. Whether a right to anonymous speech does—or should—exist is beyond the scope of this paper. For conflicting views, compare Tom W. Bell. "Anonymous Speech," *Wired*, Oct., 1995, p. 80 with Richard P. Klaus and Erik J. Heels. "Online," *Student Lawyer*, Sept., 1995, p. 33–36.

23. See Rohan Samarajiva, Cybercontent Regulation: From Proximate-Community Standards to Virtual-Community Standards?, The Virtual Institute of Information, (last visited April 14, 1997) <http://www.ctr.columbia.edu/vi/papers/citirs.htm>.

24. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983).

intentional incitement,[25] obscenity,[26] child pornography,[27] defamation,[28] fighting words,[29] and commercial speech.[30] The Court has enunciated a series of quite different standards for each of these varieties of speech to determine, first, whether a particular communication is protected or falls

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25. *See* Dennis v. United States, 341 U.S. 494, 544–46 (1951)(Frankfurter, J., concurring). *See also* Brandenburg, 395 U.S. at 447–48 (1969)

26. *See* Miller v. California, 413 U.S. 15, 20–35 (1973).

27. *See* New York v. Ferber, 458 U.S. 747, 754–64 (1982).

28. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). *Cf.* Henry v. Collins, 380 U.S. 356 (1965) and New York Times, 376 U.S. at 265 (both holding that defamatory content is not sufficient to remove First Amendment protection). *See generally*, Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Melville B. Nimmer, *The Right to Speak From* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968); Harry Kalven, Jr., *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191 (1964);.

29. Fighting words are not inherently menacing in a constitutional sense, but become so only when such words "by their very utterance inflict injury or tend to incite a breach of the peace." Chaplinsky, 315 U.S. at 572. *See also* R.A.V., 505 U.S. at 382–85. *Chaplinsky* and its fighting words doctrine, similar to obscenity and defamation, seems to raise many more questions than it answers. For example, Chaplinsky addressed his epithets "God damned racketeer" and "Fascist" to a city marshall who had interrupted Chaplinsky's soap box speech. Chaplinsky, 314 U.S. at 569. Why should this outburst not be construed as a cry of frustration at the overweening power of government, and therefore as protected political or civic speech? Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 626 (1982). What of the emotive content of protected First Amendment speech? *See* Cohen, 403 U.S. at 18 (finding that state lacks power to censure underlying content of a "fighting words" message). Could Chaplinsky be convicted for uttering fighting words had he written the same phrases on a poster that he carried while walking the public streets? It has been suggested that the fighting words doctrine's distinction between suppressible rough language and protected provocative words—both of which might stir a listener to anger—operates more to repress "low value" speakers than "low value" speech. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 33–34.

It is interesting that since *Chaplinsky*, no conviction for uttering fighting words has been sustained by the Court. *See, e.g.*, Plummer v. City of Columbus, 414 U.S. 2 (1973); Brown v. Oklahoma, 408 U.S. 914 (1972); Lewis v. New Orleans, 408 U.S. 913 (1972); Gooding v. Wilson, 405 U.S. 518 (1972). Yet, the fighting words doctrine retains technical validity. *See* R.A.V., 505 U.S. 377. A number of commentators have criticized the continuing constitutional validity of *Chaplinsky*, and called for its modification or elimination. *See* Toni M. Massaro. *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129 (1993).

30. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 728 (1976). Commercial speech was once utterly vulnerable to regulation. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942). However, the Burger Court, and now the Rehnquist Court, have enhanced the respectability afforded to speech that proposes a commercial transaction. Unlike the aforelisted categories of vulnerable speech, the validity of commercial speech is assessed by means of a balancing test not unlike that used by the Court to evaluate incidental regulations on otherwise protected communication. Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

into a vulnerable category; and second, if vulnerable, whether any First Amendment protection is merited.

Obscenity and Related Areas. Obscenity, perhaps the quintessential example of valueless expression, is considered bereft of communicative value, and thus subject to broad controls. The Court's latest formulation for distinguishing obscenity from speech that is merely distasteful, rough, evocative, or erotic—and therefore protected to some extent—requires a finding that the communication is patently offensive, appeals to prurient interests, and is bereft of serious scientific, artistic, literary, or political value.[31] Integral to these defining principles is the notion that individual communities retain the authority to set their own statutory standards for the definition of pornography, or communications that are "patently offensive" and appeal to "prurient interests."[32]

However, traditional notions of "community" quickly become confounded in the context of a medium such as the Internet, the characteristics of which obliterate any notions of state or national boundaries. For example, a California couple was convicted in 1994 for dispatching over computer bulletin board materials found to be obscene when viewed in Memphis.[33] The materials at issue in this case were arguably obscene by any community standard.[34] But this case and others like it raise the question of whether using the Internet to transmit

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31. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973). In *Roth v. United States*, 354 U.S. 476, 484 (1957), Justice Brennan opined:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people .... But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

Another justification for categorizing obscene speech as taboo is offered by Professor Schauer—that obscenity is specifically designed to evoke a entirely physical effect, and thus is a physical, and not a mental, stimulus. "[A] pornographic item is in a real sense a sexual surrogate." Fred C. Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GA. L. REV. 899, 922–23, 926 (1979).

32. Child pornography is a special case. Materials depicting children in sexual poses or activities can be criminalized, even if the same materials depicting adults would pass First Amendment muster. New York v. Ferber, 458 U.S. 747, 756, 773 (1982). Moreover, mere possession of child pornography, even in the privacy of one's own home, can be criminalized, despite the contrary holding of *Stanley v. Georgia*, 394 U.S. 557 (1969), concerning possession of adult pornography. Osborne v. Ohio, 495 U.S. 103 (1990). *But see* Jacobson v. United States, 503 U.S. 540 (1992)(conviction for receiving child pornography in the mail overturned where defendant, the target of a government "sting" operation, was entrapped into the purchase).

33. United States v. Thomas, 74 F.3d 701 (6th Cir. 1996). Mark L. Gordon & Diana J.P. McKenzie, *A Lawyer's Roadmap of the Information Superhighway*, 2 J. MARSHALL J. COMPUTER & INFO. L 177, 203 (1995).

34. The materials "depicted images of bestiality, oral sex, incest, sado-masochistic abuse, and sex scenes involving urination." *Thomas*, 74 F.3d at 705.

arguably obscene materials portends that the applicable community standards will be those espoused by the most priggish among us.[35]

Another recent case demonstrates the power of the Internet to subject individuals to criminal prosecution.[36] A University of Michigan student, Baker, communicating with an unidentified person through e-mail, expressed an escalating sexual interest in violence against women and girls. Baker was charged under federal law with transmitting threats to injure or kidnap another, but the court granted his motion to quash the indictment on the grounds that these private e-mail communications did not constitute statutory threats.[37]

Above and beyond existing judicial decisions and state laws, Congress has decided to criminalize Internet dissemination of not only obscene material, but all sexually explicit text or images. The Communications Decency Act of 1996 regulates the carriage and transmission of "indecent" materials on the Internet to persons under the age of eighteen. In this Act, designed to protect minors, Congress defines as indecent "any comment, request, suggestion, proposal, image or other communication that describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[38]

The Communications Decency Act has provoked reaction both swift and strong. America Online threatened to terminate its bulletin boards and chat rooms, opining that only through such severe measures could AOL assure compliance with the Act.[39] The Citizens Empowerment Coalition filed suit challenging the constitutionality of the Act, as did the American Civil Liberties Union. Both groups alleged that the Internet is a unique communications medium that merits unique First Amendment protection at least as broad as that afforded to print media. The challengers argued that parents are the best judges of material that

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35. *See also* Samarajiva, Cybercontent Regulation, *supra* note 24.

36. United States v. Baker, 890 F. Supp. 1375 (E.D.Mich. 1995).

37. Baker also posted to an Internet newsgroup, alt.sex.stories, a story that graphically described the torture, rape and murder of a woman, who was designated by the name of one of Baker's classmates at Michigan. This story was the basis for a superseded indictment, but was not mentioned by the Government in the later indictment that was the subject of this case. Id. The court declared:

> While new technology such as the Internet may complicate analysis and may sometimes require new or modified laws, it does not in this instance qualitatively change the analysis under the statute or under the First Amendment. Whatever Baker's faults, and he is to be faulted, he did not violate 18 U.S.C. § 875(c).

Id. at 1390–91.

38. 47 U.S.C.A. § 609 *et seq* (1996).

39. Leslie Miller, *New Law May Silence On-Line Chat, AOL Says*, USA TODAY, Apr. 2, 1996, Life, at 6D.

is appropriate for themselves and their children. A federal judge granted a preliminary injunction against enforcement of the Act, and a three-judge federal court agreed that the portions of the Act that attempt to regulate non-obscene communications do not pass constitutional muster.[40] The case is currently before the Supreme Court of the United States of America and a decision should come down sometime in 1997.

Subversive Advocacy. Intentional incitement, or subversive advocacy, is a special case that illustrates the Court's approach to appraising the validity of content-based regulations. The Court permits regulation of expression that qualifies as incitement only if, as a consequence of the utterance, there exists a genuine likelihood of imminent unlawful conduct, and if the speaker intends this result.[41] *Brandenburg v. Ohio*[42] declares a general First Amendment tenet that advocacy of even the most alarming notions is absolutely protected against direct criminal prohibition, regardless of dangerousness and intent. Interdiction of ideas or perspectives deemed intrinsically dangerous—and perhaps justifiably so—by government is forbidden.

B. *National Enforcement and International Structures*

As we have established, the Internet, even if global in scope, is not an absolutist free speech domain, but is instead subject to innumerable national restrictions. At the same time, the very structure of the Net substantially diminishes the chances for enforcement of national regulations.[43]

National speech restrictions can be enforced directly only within the territory to which they apply.[44] But the Net is global, and so is the flow of information. People who disseminate information through the Net that is illegal in one country can easily transfer their operations to a

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40. American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. June 11, 1996). See *Shakespeare, Bible Restricted?*, COMMUNICATIONS DAILY, March 25, 1996, at 4; *America Online Says Censors in Some Cases*, Reuters Financial Service, Apr. 1, 1996; Matt Godbey, *Internet "Smut" Law Challenged*, PENNSYLVANIA LAW WEEKLY, Apr. 1, 1996, State Court Rulings, at 12; Richard Gehr et. al., *Best of the Net*, THE VILLAGE VOICE, Apr. 2, 1996, Cyber, at 21.

41. Brandenburg v. Ohio, 395 U.S. 444 (1969).

42. *Id.*

43. "The on-line world's lack of respect for state and national borders is making a mockery of outdated laws." Attempts to erect national barriers against subversive or culturally-polluting information are readily circumvented. *On-Line Boundaries Unclear: Internet Tramples Legal Jurisdictions*, COMPUTERWORLD, June 5, 1995, News, at 1.

44. However, the United States has occasionally, and with some degree of success, extended its territorial reach. For example, in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), the Supreme Court upheld the United States' assertion of jurisdiction over a Mexican national who had been forcibly kidnapped and brought to the United States to stand trial for the murder of a Drug Enforcement Agent in Mexico.

country with no similar prohibitions and effectively reorganize their disseminating action in matters of hours.

For the recipients of such information, redeployment is hardly noticeable in an environment dominated by the World Wide Web where information is accessed and retrieved by simply clicking on information links. Because distance from or location of information sources within the World Wide Web is irrelevant to the recipient, access to the relocated information sources is easy and straightforward. Already there exist numerous examples of exiled political groups taking advantage of information infrastructure networks located in countries with regulatory environments more sympathetic to their cause to widely disseminate political information to countries with more restrictive speech and information regulations. Chinese human rights activists use the World Wide Web to advocate for their cause,[45] and Tibetan women in exile castigate the Chinese government for its treatment of their sisters still in Tibet.[46] CAPA, an organization that supports Cubans fleeing their country and delivers accounts on their rescue and survival can be found on the Web, as well as solidarity pages for the Tupac Amaru hostage takers in Peru[47], while German Nazis use American and Canadian Web sites to discuss fascism and to issue denials of the Holocaust, a crime under the German Penal Code.[48]

Information sources need not necessarily be redeployed for information to be disseminated across porous national borders. Other tools are available on the global Net to channel information in order to obscure its source and place of origin. Anonymous remailers allow electronic

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45. *Support Democracy in China* <http://christusrex.org/wwwl/sdc/ sdchome.html>.

46. *Statement of the Tibetan Women's Delegation Fourth World Conference on Women, NGO Forum 95 Huairou, China—September 2, 1995* <http:// www.grannyg.bc.ca/tibet/ tibetpr3.html>.

47 See, e.g., The official Tupac Amaru Homepage can be found at <http://www.cybercity.dk/users/ccc17427>, for an US Tupac Amaru Solidarity Page, see <http://burn.ucsd.edu/~ats/ mrta.htm>. For an Italian one see <http://vivaldi.nexus.it/ commerce/tmcrew/news/mrtal.htm>.

48. The Institute for Historical Review, an organization denying the Holocaust, is present on the WWW through a server in the United States. Its internet offerings include "Auschwitz myths and facts" and "What is a Holocaust denial?" and include outrageous quotes presented in a quasi-scientific context. The Stormfront magazine is a fascist publication operating servers in the United States and Canada. It maintains the White Nationalist Resource Page and contains explicit references to notorious Nazi Gary Lauck. Lauck has used electronic and conventional mail to massively disseminate Nazi propaganda in Germany. He was arrested in Denmark while on a lecture tour and later extradited to Germany, where he is currently awaiting trial for violation of the German Penal Code prohibiting national socialist propaganda. Other web sites include The White Nationalist Page and the Counter-Revolutionary Resource Page. Electronic mailing lists are available a well. For extensive information, see Schröder, *supra* note 20, at 41 and see also Maier-Rabler, *supra* note 1, at 72.

information to be stripped off all it identifying bits and sent without attribution to any recipient.[49] Together with widely available tools of public key encryption,[50] remailers allow worldwide electronic communication on a totally anonymous level, thus circumventing any national attempts at speech regulation.

Continued information redeployment will eventually shape and reshape the global information infrastructure. Nations with little speech regulation or inefficient enforcement structures will attract vast quantities of data and information illegal in other countries. The global infrastructure will experience sustained economic pressures similar to those experienced on the high seas by the "flags of convenience" phenomenon. By redeploying their fleets under "flags of convenience," shipping companies essentially forced countries to deregulate.[51] A similar phenomenon could materialize on the Net. Some countries might evolve into booming "data havens", while others might face a choice between economic hardship and relinquishing their speech constraints, thus compromising their national or civic values.

II. CONSEQUENCES

In the world of a global information infrastructure, an escalating national de jure regulation of speech meets a similarly pervasive de facto futility of enforcement. Herein, indeed, lies a strange paradox: the international dimension of the information infrastructure both strengthens and weakens speech regulation and free speech protection simultaneously.

Given this paradox, national legislatures might continue to enact regulations, but their regulatory endeavors are unlikely to be as effectively enforceable as they desire. To circumvent the limitations of national regulatory attempts, one might advocate for an international regulatory measure to restrict the content of Internet communications. In principle, of course, a global phenomenon like the Internet should

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49. The most well-known anonymous remailer is operated without charge by Johan Helsingius in Finland. His remailer can be reached at anon.penet.fi. A Usenet discussion group on remailers can be found at alt.privacy.anon-server; *see* Andre Bacard, *Anonymous Remailer FAQ* <http://www.well.com/ user/abacard/remail.html>.

50. David Chaum, *Achieving Electronic Privacy*, SCI. AM., Aug. 1992, at 96–101.

51. "Flags of convenience" defines a situation where registration of foreign-owned and foreign-controlled vessels is permitted by certain countries under conditions that are convenient and opportune for the registrant. Flags of convenience have been variously referred to as "flags of necessity," "cheap flags," and "free flags." R. Tali Epstein, *Should the Fair Labor Standards Act Enjoy Extraterritorial Application? A Look At the Unique Case of Flags of Convenience*, 13 U. PA. J. INT'L BUS. L. 653, 655 (1993).

propel nations to achieve international regulatory cooperation and partnership.

Although national legislatures differ dramatically in the kind of content they prefer to regulate, any attempt to regulate the global information infrastructure must be acceptable to the vast majority of nations in order to become enforceable. Hence, any method or tool to devise a framework for an internationally acceptable and enforceable content-based speech restriction must conform to a rigorous set of requirements. Cognizant of the specific structural qualities of global information infrastructures, we posit several such essential requirements.[52]

The Net is a global phenomenon, thus any feasible regulatory attempt should be based on an internationally acceptable, or already accepted, principle. While speech has never enjoyed—and will never enjoy—absolute protection, the principle of freedom of speech has become part of a minimum standard of freedoms among a majority of nations. Therefore, a method should be devised for defining certain categories of speech that will be subject to regulation, while at the same time staunchly protecting all speech not within these categories. Essentially, regulatory lines should be drawn circumspectly, so that only speech that is encompassed within certain specified and narrow confines can be regulated on the basis of its content. All speech outside these narrow boundaries should be assiduously sheltered from content-based regulation.

Even more important, the method for selecting categories of speech subject to regulation should ensure results that will be accepted by the community of nations. The method should thus include a mechanism for reaching a broad international consensus. This consensus should be multinational in its reach, and hence avoid vulnerability to chauvinistic national interests or sentiments. Shifting attitudes in one nation should not alter the overall definitional landscape of what is offensive or outrageous.

The mechanism should also be multi-cultural in scope, in order to circumvent any charges of cultural imperialism, and to stimulate cross-cultural exchanges of ideas. Moreover, this consensus, broad and

52. Consuelo Lauda Kertz & Lisa Boardman Burnette, *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy*, 43 SYRACUSE L. REV. 1029, 1053–55 (1992). To be effective, any regulation of speech—on the net, as well as In conventional communicative forums—must focus on the party who disseminates the communicative act. Attempts to focus on the party that delivers or receives the message have proven to be ineffective, cumbersome or plain wrong in the past, and no necessity dictates a resurrection of such plans. For example, a telephone carrier is not culpable for a fraudulent 900-service transmitted, and media are not responsible for the accuracy or good faith of advertisements carried unless the publisher undertakes to guarantee the soundness of the advertisement or the product it describes. Pittman v. Dow Jones & Co., Inc., 662 F. Supp. 921, 922 (E.D. La. 1987).

inclusive in concept, should be behavioral in character. Nations should deem themselves bound by the dictates of this consensus, and should adhere their conduct to it. Only if such a consensus is already experienced throughout the world by the vast majority of nations, can we expect the world to accept it in the telecommunications domain as well.

Creating a general principle and agreeing on it internationally will prove to be difficult, if not outright impossible. Thus, we suggest use of an already-existing international legal principle as a basis for a methodology on which to structure a regulatory mechanism.

The international law concept of *jus cogens* might provide such a potential basis for regulating speech content on the Net. *Jus cogens* is linked to the conception of International Law envisioned by its founding father, the well-known Dutch jurist Huig de Grotius, in 1625.[53] Grotius theorized that nations were not conducting their affairs in chaos, devoid of any underlying universal principles. Grotius was convinced that without binding rules of international conduct—a common law among nations that binds them—interactions between nations would be impossible. Grotius traced these norms to natural law principles, and envisioned these principles functioning as a set of mutual links tying nations together.[54]

Since Grotius, many jurists and writers have accepted and reaffirmed the principle of such binding international law norms.[55] Almost 60 years ago, Verdross was the first to advance a coherent view of the relationship between *jus cogens* and other sources of International law.[56] Verdross suggested that the concept of *jus cogens* would be consistent with other international law norms only if international treaties violating *jus cogens* norms would be void. Thus, Verdross' conception of *jus cogens* creates in essence yet another layer of international law above and beyond treaty law and customary international law. International law violating such peremptory norms is void, similar to national laws that violate the national constitution.[57]

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53. Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT'L L. 477 (1982).

54. *Id.* at 480.

55. *See* Mayer-Schönberger & Foster, *supra* note 5, at 90–96 (extensive discussion of the *jus cogens* doctrine).

56. Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937).

57. In 1945, the concept of *jus cogens* was applied and extended in the Nuremberg trial of major war criminals. Steven Fogelson, Note, *The Nuremberg Legacy: An Unfilled Promise*, 63 S. CAL. L. REV. 833 (1990). The Allied court not only concluded that Germany had violated peremptory norms of International Law, but also extended the concept of *jus cogens* from the realm of states to the level of the individual. Louis B. Sohn, *The New International*

In 1969, the precept of *jus cogens* was incorporated into the Vienna Convention on the Law of Treaties.[58] According to leading experts of vastly disparate legal, political, and cultural backgrounds, the issue of whether *jus cogens* is accepted is now settled.[59]

The Vienna Convention defines *jus cogens* as follows:

> [A] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general International law having the same character.[60]

Thus, *jus cogens*, gleaned from verifiable behavior across the community of nations, structurally fulfills the methodological requisites we posit, and offers the potential for achieving the necessary substantive consensus in the global telecommunications arena. As a "peremptory norm of international law,"[61] *jus cogens* represents a corpus of international law rules that are binding upon every nation and every people. It comprises by definition the multicultural and multinational consensus that we assert is essential. *Jus cogens* norms mandate that certain forms of behavior are unequivocally intolerable.

This global consensus commends *jus cogens* norms as the touchstone for identifying types of speech that are amenable to an internationally acceptable content-based regulation. However, we suggest here that—especially given the scope and power of the Net—a

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Law: Protection of the Rights of Individuals Rather than States, 32 AM. U. L. REV. 1 (1982). *See Charter of the International Military Tribunal* in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (Andronicus Pub. Co. 1946) 11.

Since Nuremberg, *jus cogens* prohibits not only states from engaging in certain conduct, but also holds individuals accountable for conduct that violates *jus cogens*. *The Nuremburg Legacy*, 63 S. CAL. L. REV. at 868–870. *See also* Articles 7 & 8, *Charter of the International Military Tribunal* (1946). This acceptance of peremptory norms of International Law is the significant legacy of the Nuremberg trials, and since Nuremburg, *jus cogens* has become a widely accepted mainstream principle. *The Nuremburg Legacy*, 63 S. CAL. L. REV. at 883.

58. *Vienna Convention on the Law of Treaties*, 63 AM. J. INT'L L. 875 (1969), signed and ratified to date by 48 nations. During the drafting process, 43 out of 44 nations commented positively on the proposed *jus cogens* regulation. Comments by Governments, ILC Reports on 2nd part of its 17th Session and on its 18th Session, General Assembly, 21st Session, Official Records, Supp. No. 9 (A/6309/Rev.1), Annex.

59. For the Socialist view, see Geoffrey Hazard, Book Review of Aleksidze, Some Theoretical Problems of International Law: Peremptory Norms: Jus Cogens, 78 Am. J. Int'l L. 248 (1984); for a western view, see W. Paul Gormley, The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens, THE RIGHT TO LIFE IN INTERNATIONAL LAW (B.G. Ramcharan ed., 1985). For a general treatise of jus cogens see LAURI HANNIKAINEN, PEREMPTORY NORMS IN INTERNATIONAL LAW (Finnjish Lawyers Pub. Co. 1988).

60. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969).

61. Mayer-Schönberger and Foster, *supra* note 5, p. 90–96.

paradigm shift is appropriate. Not only can speech that incites behavior condemned by *jus cogens* principles be regulated, but also speech that advocates conduct that *jus cogens* terms depraved can be banned, should a nation desire a broader ban. To be sure, the varieties of speech subject to regulation under a *jus cogens*-based system would be few and narrow: only speech that advocated clearly reprehensible behavior, e.g., piracy, slavery, genocide, apartheid, aggressive warfare, terrorism, and torture, could be constrained.[62]

Because a *jus cogens*-based approach narrows the parameters for restrictions to the common denominator among the community of nations, this approach avoids the constant danger of cultural imperialism. It also averts the impulsive, ultimately devastating reflexes that characterize national majoritarianism. As such, *jus cogens* is uniquely qualified to serve as a methodology for regulating globally connected information infrastructures.

Defining the substantive categories of speech to be regulated is the first step. But no regulation will be effective without a working enforcement strategy. Because the information infrastructure is global, so must be the enforcement. The international instrument that implements the *jus cogens* approach to regulation of speech on the information infrastructure must address the enforcement issue. Reciprocal extension of the principle of territoriality among the state parties and the broadening and strengthening of international criminal law and its procedural aspects can be a first level for addressing the area of enforcement.[63]

But the objectives of an international agreement are even broader in scope. State parties must recognize the importance of speedy national implementation and rigorous enforcement of the internationally agreed regulations. Moreover, state parties need to execute and implement an enforcement mechanism among them to guarantee continued national support for such an agreement.[64]

International consultative organizations with existing substantial factual knowledge of the matters at issue, such as the Organization for Economic Cooperation and Development (OECD), could facilitate discussions and negotiations leading up to such an international agreement.

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62. *Id.* at 97–102.

63. For example, The Genocide Convention of 1948, 78 U.N.T.S. 227, has been ratified by more than 100 nations. Persons charged with genocide, an offense against the community of nations, can be tried by any nation.

64. A possible, albeit dramatic, consequence of continuous, open and systematic non-enforcement of the international agreement by one nation could be the restriction of access for information flows from that country, or by that particular government. For example, these domains could be temporarily disabled in the network domain name files.

III. CONCLUSION

Regulating the content of speech on the Net is still thought of as a national issue. Free speech absolutists and national legislators discuss these matters without considering the international dimension of the information infrastructure, which diminishes the significance of these national debates.

The international aspect of the information infrastructure places unique, albeit unexpected and largely unrecognized, constraints upon both free speech advocates and regulators. The former must come to terms with the fact that the global Net is not an anarchic medium, above and beyond legal restrictions, but on the contrary, is cluttered with numerous—even contradictory—national speech regulations. On the other hand, national regulators must recognize that domestic controls and enforcement are futile regulatory mechanisms for an international structure in which information can be redeployed and disseminated in a matter of seconds.

Only an international perspective can overcome the current shortsightedness of free speech absolutists and regulators alike. Speech restrictions on the Net must be elevated to the international level to be both subjectively acceptable to the world's nations and globally enforceable. An international legal instrument, *jus cogens*, which by definition embodies this global consensus and positively binds all nations, could provide a useful tool in drafting a possible solution. *Jus cogens*, limiting regulation to specific, defined areas such as advocacy of genocide, slavery, torture, or apartheid, together with creative international enforcement structures might facilitate the creation of speech regulations that are both sensible and feasible.