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Racial Hate Speech: A Comparative Analysis of the Impact of International Human Rights Law Upon the Law of the United Kingdom and the United States

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RACIAL HATE SPEECH: A COMPARATIVE ANALYSIS OF THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW UPON THE LAW OF THE UNITED KINGDOM AND THE UNITED STATES

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Hate speech poses a unique problem in the realm of rights protection. Principles of freedom of expression promote its protection, whereas principles of equality favor its restriction. International human rights law, the constitutional law of the United States, and the domestic and constitutional law of Great Britain present different and frequently contradictory doctrines on the resolution of this issue, in spite of their shared common law history and theory of rights protection. The United States Supreme Court's opposition to absorption of international standards has been strong and exceptionally so when confronted with international rules proscribing hate speech. This experience contrasts with that of Great Britain, which in recent times has been receptive to international human rights standards pronounced by the European Union. However, these standards, in relation to hate speech, are substantially in line with the United Kingdom's (U.K.) own willingness to allow restrictions of hate speech. Furthermore, the U.K.'s adoption of the Human Rights Act of 1998 brings its domestic law even more in line with the international human rights law of the European Union. However, as this study explores, the practical policy effect of British law may not be so different from that of the United States law. This Article will comparatively analyze these two examples of domestic absorption and examine the impact of international human rights law on each.

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I. INTRODUCTION

Conventional wisdom is that British and United States (U.S.) laws on hate speech are diametrically different: Hate speech is constitutionally protected in the U.S., while it can be freely prohibited in the U.K.[1] This Article's close examination of this proposition suggests that the differences are nuanced and that the approaches of these two nations are moving closer together. The U.S. Supreme Court is beginning to show some cracks in its formerly absolute doctrine,[2] and the U.K. is beginning to demonstrate heresy of practical living. That is, in practice, the U.K.'s fixed doctrine is not often applied in a manner that effectively prohibits hate speech.[3]

In both countries the influence of international human rights law upon domestic law has raised serious issues. In the United States the controversy has been over the extent to which comparative and international human rights law should influence Supreme Court interpretation of the constitutionally protected individual rights.[4]

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1. *See* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis,* 24 CARDOZO L. REV. 1523 *passim* (2003); *see also* Peter J. Breckheimer II, *A Haven for Hate: The Foreign and Domestic Implications of Protecting Internet Hate Speech under the First Amendment*, 75 S. CAL. L. REV. 1493, 1493 (2002) (asserting that the U.S. "stands alone in its support of . . . Internet hate speech"); Nathan Courtney, Note, *British and United States Hate Speech Legislation: A Comparison*, 19 BROOK. J. INT'L L. 727, 728 (1993). This fact could also be gleaned from a cursory reading of United States Supreme Court decisions and British Statutes. *See generally* Public Order Act, 1986, c. 64 (Eng.); Race Relations Act, 1965, c. 73 (Eng.); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

2. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 362–36 (2003) (Thomas, J., concurring in part and dissenting in part); Virginia v. Black, 538 U.S. 343, 367 (2003); *R.A.V.,* 505 U.S. 377, 383.

3. *See infra* Part II.B.

4. For a more complete treatment of this debate, see generally Stanley A. Halpin,

Among the Justices, out-of-court debates have raged, with Justices Ginsburg, Breyer, Blackmun, and O'Connor lining up in favor of allowing the influence of international human rights law and foreign law, while Chief Justice Roberts and Justices Alito and Scalia have opposed it.[5] In the U.K., the issue has been over the impact of the U.K.'s membership in the European Union, the impact of the European Convention on Human Rights, and ultimately over the proper interpretation of the U.K.'s Human Rights Act of 1998 (HRA),[6] particularly in relation to its traditional Dicean parliamentary sovereignty.[7]

This Article will compare the protection of racial hate speech in each country, while evaluating the impact international human rights law has had on their recent development. As a tool of analysis, this Article will suggest a loose continuum of hate speech prohibitions from the most restrictive to the most permissive to help identify and trace the movement of hate speech protections in the United States, the United Kingdom, and under international human rights law. This Article will examine all laws that would have the effect of restricting any type of hate speech—except those laws of general applicability, which coincidentally may limit hate speech under certain circumstances. For example, a law forbidding fires within city limits that restricts a Ku Klux Klan cross burning is not included in the analysis. The continuum spans from permissible prohibition of all hate speech on one extreme to the absence of any restrictions on hate speech at the other extreme. Levels of prohibition between these two extremes include prohibitions against: (1) hate speech that equals an assault, (2) hate speech that motivates a crime (consider an enhanced penalty), (3) hate speech that threatens future violence against a specific person, (4) hate speech that promotes violence, (5) hate speech that sparks violence (i.e., *Brandenburg v. Ohio*[8]), (6) hate speech that threatens unspecified future violence on society or on a general category of persons (i.e., terrorist hate speech), (7) hate speech that promotes discrimination (i.e., racial), and (8) hate speech that amounts to an insult (i.e., racial).

This Article makes no pretense to be definitive, but only seeks to

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Looking Over a Crowd and Picking Your Friends: Civil Rights and the Debate Over the Influence of Foreign and International Human Rights Law on the Interpretation of the U.S. Constitution, 30 HASTINGS INT'L & COMP. L. REV. 1 (2006).

5. *See id.* at 12–22.

6. Human Rights Act, 1998, c. 42 (Eng).

7. *See* Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329, 347 (2002).

8. 395 U.S. 444 (1969).

raise questions by its exploration. Limiting the comparison to two national systems will facilitate this objective. Difficulty is posed, however, by comparing two very different constitutional systems with different substantive results in the hate speech area. The U.S. has a single written Constitution[9] with a Bill of Rights and a well-established system of judicial review; whereas, the U.K. has an "unwritten"[10] constitution and a long tradition of parliamentary supremacy.[11] The U.S. has strong constitutional protections of hate speech; whereas, the U.K. allows hate speech to be well regulated—or so the conventional wisdom teaches.[12]

This study will also focus on international human rights law to the extent that it influences domestic hate speech law in both the U.S. and the U.K. Scholarly literature has given increased attention to the impact of international human rights law on U.S. constitutional interpretation, where the effects are in their infancy, as well as on other countries of the world.[13] While the approaches and results of the U.S. and the U.K. are also disparate in this regard, their comparison can lead to a better understanding of the process.

One benefit of comparative constitutional studies is to encourage the borrowing of better and more elegant analyses from other jurisdictions. However, the studies also have the goal and often the result of broadening knowledge and understanding—sort of a liberal education for lawyers and law professors. This study hopes to contribute to both.

II. THE BRITISH EXPERIENCE WITH HATE SPEECH LAWS

A. Early History of British Hate Speech Laws

The British Constitution's characterization as unwritten emphasizes both its unique character and its enormous dissimilarity from the U.S. Constitution.[14] Further, because the British Constitution adheres to parliamentary supremacy, some acts of Parliament take on constitutional status but are not subject to judicial review, as compared

9. *See generally* U.S. CONST.

10. More accurately, some parts of the British Constitution are written, such as the Magna Carta, the Bill of Rights of 1689, and the Act of Settlement of 1701; whereas significant elements are found only in tradition. As a result there is considerable debate as to which traditions and acts of Parliament rise to constitutional status.

11. *See* Vick, *supra* note 7, at 333–40.

12. Rosenfeld, *supra* note 1, at 1523.

13. *See* Halpin, *supra* note 4, at 12–22; Vick, *supra* note 7, at 344–72.

14. Vick, *supra* note 7, at 333–40.

to government created laws in the U.S.[15]

With this said, we dive into the comparison. Historically, Britain has not uniformly condemned hate speech by prosecuting suspected offenders.[16] Britain's early sedition laws indeed prohibited not only sedition against the crown but also promotion of "feelings of ill-will and hostility between different classes of His Majesty's subjects."[17] This language proscribes speech that falls short of incitement to violence.[18]

Early prosecutions for hate speech are ably recounted by Kenneth Lasson.[19] Two early prosecutions, while not clearly defining the offense prohibited by the law, involved apparent incitement to violence.[20]

In the 1732 case of *R v. Osborne*, a London newspaper alleged that some Jewish immigrants had brutally killed a woman and her child because the child had been fathered by a Christian.[21] Some of the Jews named in the story were then beaten by a mob.[22] In *R v. Burns*, the defendant's speech to unemployed workers in Trafalgar Square resulted in a crowd following him through St. James Street and Picadilly, smashing windows.[23] While there was some language in these cases suggesting that incitement to less than violence would be adequate for a violation, both cases in fact promoted violence, and that violence in fact occurred.[24] Subsequent hate speech cases confirmed that the speech must promote—and be intended to promote—actual violence.[25]

In 1909, the seditious libel law was interpreted to require that the speech be "calculated . . . to promote public disorder or physical force or violence."[26] The issue did not arise again until 1947, in the case of James Caunt.[27] Responding to British mobs trashing Jewish shops in reaction to the murder of two British soldiers by a Jewish gang in Palestine,

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15. *Id.* at 338.

16. *See* Kenneth Lasson, *Racism in Great Britain: Drawing the Line on Free Speech,* 7 B.C. THIRD WORLD L.J. 161, 162 (1987) (explaining that criminal prosecutions of hate speech at common law were limited to actions "likely to disturb the peace").

17. SIR JAMES FITZJAMES STEPHEN, DIGEST OF THE CRIMINAL LAW 65 (MacMillan & Co., London 3d ed. 1883).

18. Lasson, *supra* note 16, at 162.

19. *See id.* at 162–70.

20. *Id.* at 162 (citing R v. Osborne, (1732) 25 Eng. Rep. 584 (Ch.) 584; R v. Burns, (1886) 16 Cox C.C. 355,355.

21. *Id.* (citing *Osborne*, 25 Eng. Rep. at 584).

22. *Id.*

23. *Id.* (citing *Burns*, 16 Cox C.C. at 355).

24. *Id.* at 162.

25. *Id.*

26. *See* R v. Aldred, (1909) 22 Cox C.C. 1, 3.

27. *See* Lasson, *supra* note 16, at 163.

Caunt wrote in his small London newspaper: "There is a growing feeling that Britain is in the grip of the Jews. . . . [V]iolence may be the only way to bring them to a sense of their responsibility to the country in which they live."[28] Caunt admitted that he intended to offend Jews but not to promote violence.[29] He was acquitted by the jury.[30]

The jury was instructed: "[A] man publishes seditious libel if he does so with the intention of promoting violence by stirring up hostility and ill-will between different classes of His Majesty's subjects. . . . It is not enough merely to provoke hostility or ill-will."[31] As late as 1947, it appeared that in Britain hate speech was only prosecutable as seditious libel if it intended to and actually promoted violence.[32] Thus, Britain does not have a long legal history of forbidding hate speech that runs short of promoting violence. While sedition laws on the books might appear to prosecute lesser forms of hate speech, clearly the law in action displays that the courts required the element of intentional promotion of actual violence to be present.[33] With respect to the Sedition Act, one could argue that as late as 1947 the British position on hate speech was not very different from that of the U.S. at the time.

The Public Order Act of 1936 enhanced the government's power to prosecute hate speech.[34] Section five prohibited "threatening, abusive or insulting words or behavior with intent to provoke a breach of the peace or whereby a breach of the peace is likely."[35] The Act was strengthened by court decisions in 1963 and 1964, which held that the term "likely" referred not to a reasonable audience but to a part of an audience prone to violence. Additionally, the courts applied the law to any utterance in public, not necessarily to utterances only before a large audience.[36]

B. Recent British Experience with Hate Speech Laws

In 1965, the United Kingdom enacted the Race Relations Act, which differed from the Public Order Act in several respects.[37] Although its

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28. *Id.* (quoting BARRY COX, CIVIL LIBERTIES IN BRITAIN 231 (1975)).

29. *Id.*

30. *Id.*

31. *Id.* (citing *Seditious Libel Charge, Article on the Jews, An Editor Found "Not Guilty,"* TIMES (London), Nov. 18, 1947, at 3) (emphasis omitted).

32. *See id.* at 163–64.

33. *Id.* at 164.

34. *See id.* at 165 (citing Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, c. 6, § 5 (Eng.)).

35. Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, c. 6, § 5 (Eng.).

36. *See* Lasson, *supra* note 16, at 165–66 (citing Ward v. Holman, [1964] 2 All E.R. 580 (Q.B.) 580; Jordan v. Burgoyne, [1963] 2 All E.R. 744 (Q.B.) 744).

37. *Id.* at 167.

penalties were substantially more severe—two years of imprisonment, a fine of £1,000, or both—the Race Relations Act weakened the prohibition against hate speech and reduced the likelihood of successful prosecutions.[38] First, its prohibitions were limited to written or spoken messages of incitement to racial hatred, not symbols and gestures.[39] Second, proof of violation required both intent and likelihood of causing a breach of the peace.[40] Lastly and most significantly, consent of the Attorney General was required for prosecution.[41] The last requirement appeared to minimize the number of prosecutions, and tended to limit them to offenses against the government and to matters of a serious nature.[42] The second requirement made prosecution more difficult, even if approved by the Attorney General.[43]

The judicial system also appeared reluctant to prosecute hate speech, especially when it was less than likely an incitement to violence would succeed. Few prosecutions were brought under the Race Relations Act and fewer were successful because the courts frequently held in favor of freedom of speech.[44] Only twenty cases were brought between 1965 and 1976 and one-third of these were unsuccessful.[45] The first prosecution under the Act, in 1967, was against a seventeen-year-old who was charged with distributing a racist flyer.[46] His conviction was overturned on the grounds that his method of delivery, the note tied to a bottle cast through an M.P.'s window, did not amount to distribution under Section 6(2) of the Act.[47] This case implies that the statute was not to be enforced against minor hate speech incidents, which had little potential for inciting violence; this case likely sent a message to the Attorney General regarding his discretion under the Act.[48] On the other hand, Neo-Nazis operating in Britain were successfully prosecuted for inciting racial hatred by distributing pamphlets in the traditional manner.[49] Additionally, some Black Power advocates were prosecuted

38. *See id.* at 167–68 & n.45

39. *Id.* at 167–68.

40. *Id.* at 167.

41. *Id.*

42. *See id.*

43. *Id.*

44. *See id.* at 170.

45. *Id.* (citing J. Gewirtz, *The Case for a Group Libel Law in Great Britain*, *in* MINORITIES: COMMUNITY AND IDENTITY 375, 377 (C. Fried ed., 1983)).

46. *Id.* at 168 (citing R v. Britton, [1967] 2 All E.R. 51 (Q.B.) 51).

47. *Id.*

48. *See id.*

49. *Id.* at 168–69 (citing *Colin Jordan Gaoled for 18 Months,* TIMES (London), Jan. 26, 1967, at 9).

under the Act for anti-white rants: in the case of four convicted Hyde Park corner speakers, the penalty of only £270 suggests that the court believed that these were minor offenses that did not initiate violence and were hardly worth the prosecution.[50] The decision that most limited the application of the Act was *R v. Hancock*.[51] In that case, members of the Racial Preservation Society distributed materials not substantially different from the materials of the Neo-Nazis mentioned above.[52] Their call for the return of non-whites from Britain and speculation as to their racial inferiority was couched in more sophisticated language and carefully avoided any incitement to violence.[53] All were acquitted.[54] It appeared that the incitement had to be clear and the language virulent for a jury conviction under the Act.

Other jury acquittals included that of the leader of the openly racist Democratic National Party who referred to "'niggers, wogs and coons' and, in reference to an Asian killed in a race riot, said, 'One down, a million to go.'"[55] Significantly, the judge admonished in his jury instruction: "'Britain was still a free country and people should be able to say what they liked provided they did not incite to violence.'"[56] It now appeared that virulence alone was not enough to be found in violation of the Act unless there was also incitement to violence.[57] Thus, under the Race Relations Act of 1965, the incitement to and the likelihood of resulting violence appeared to be virtually required for an attorney general to decide to prosecute or a court to convict.

In 1976, however, the Race Relations Act was amended to restore some of the provisions of the Public Order Act of1936.[58] Specifically, Parliament removed the intention requirement from the Race Relations

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50. *Id.* at 169 (citing *Card Accused by Police,* TIMES (London), Nov. 23, 1967, at 3). However, another case involving blacks resulted in a greater penalty, twelve months. *See id.* (citing R v. Malik, [1968] 1 All E.R. 582 (A.C.) 585).

51. *Id.* (citing Richard. P. Longaker, *The Race Relations Act of 1965: An Evaluation of the Incitement Provision*, 11 RACE & CLASS 125, 142 (1969)). Lasson reports that this case was poorly reported by the London press; other authors have simply listed this decision as unreported. *See, e.g.*, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 365 n.178 (1991); Lasson, *supra* note 16, at 169 n.62.

52. Lasson, *supra* note 16, at 169.

53. *Id.*

54. *Id.*

55. *Id.* at 170 (quoting Gewirtz, *supra* note 45, at 378).

56. *Id.*

57. It should be observed that this is not very different from the U.S., except that *Brandenburg v. Ohio*, 395 U.S. 444, 452–53 (1969), provides a more narrow definition of incitement. This is just a swing of the pendulum in the long and varied history of the clear and present danger doctrine.

58. Lasson, *supra* note 16, at 170–71.

Act and required only "'threatening, abusive or insulting'" language where "'hatred is likely to be stirred up against any racial group in Great Britain.'"[59] This strengthened language, however, seemed to have little effect upon prosecutions, which were quite infrequent between 1976 and 1982.[60] This has been attributed to the Attorney General's continued reluctance to use his discretionary power and prosecute under the 1976 Act.[61]

The 1986 Public Order Act further strengthened the proscriptions against hate speech by including either likelihood of or intent to "'stir up racial hatred'" and giving constables the authority to "'arrest without warrant anyone they reasonably suspect[ ] is committing an offense under this section.'"[62] However, it still required the Attorney General's consent to prosecute[63]—the most serious impediment to enforcement of hate speech prohibitions.[64] In the past, the Attorney General's discretion was guided by the practical difficulty of obtaining convictions, by the political sensitivity against prosecuting puny speakers who lacked the wherewithal to affect a violent result, and by the uncertainty as to the definitions of the offenses. These restrictions appeared to severely limited prosecutions for hate speech, and this trend appeared likely to continue after the passage of 1986 Act as well.[65]

C. Prosecutions under the 1986 Public Order Act

The 1986 Public Order Act addresses only racial hatred, which it defines in section 17 as being against a "group of persons . . . defined by reference to [color], race, nationality (including citizenship) or ethnic or national origins."[66] It excludes religion, which has led to the much-criticized result of excluding Muslims but not other religions tied to a specific ethnic group.[67] Violation of the statute is specified as "using

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59. *Id.* at 171 (quoting Gewirtz, *supra* note 45, at 379).

60. *Id.* (citing Roger Cotterrell, *Prosecuting Incitement to Racial Hatred*, 1982 PUB. L. 378, 378).

61. *Id.* (citing Geoffrey Bindman, *Incitement to Racial Hatred*, 132 NEW L.J. 299, 301 (1982)).

62. *Id.* at 177 (citing Public Order Act, 1986, c. 64, § 18(3) (Eng.)).

63. *Id.* at 173, 177.

64. *See id.* 172 (citing 89 PARL. DEB., H.C. (6th ser.) (1986) 859).

65. *See id.* at 177–78.

66. Public Order Act, 1986, § 17.

67. *See* Lasson, *supra* note 16, at 177; *see also* Courtney, *supra* note 1, at 727 n.5. Because the Act does not refer to religious hate speech, its prohibition of ethnic hate speech was originally held only to apply to certain religious groups that are synonymous with a religion; but not to Muslims who belong to a number of ethnic groups, this was corrected by the adoption of the racial and religious Hatred Act of 2006. *See* Anthony Jeremy, *Practical*

'threatening, abusive, or insulting words or behavior'" combined with the intention "'to stir up racial hatred'" or the likelihood that racial hatred will be stirred up.[68] Writing in 1987, Lasson concluded that retaining the provision giving the Attorney General discretion to prosecute would result in a continued lack of enforcement of hate speech laws.[69]

A question remains regarding the impact of the HRA on the hate speech prohibitions of section five of the revised Public Order Act.[70] One writer, reviewing three cases from the Divisional Court, has concluded that since at least 2004, these courts have retained the traditional U.K. choice of public order over free speech.[71] The writer states that, as of this date, no case involving a section five interpretation in view of the HRA has reached any court higher than the Divisional Court.[72]

Prior to 1998, the only legal option for reducing hate speech was the 1986 Act, which directly prohibited hate speech but with the limitations discussed above. Then, the U.K. Parliament adopted the Crime and Disorder Act of 1998, which for the first time provided for an enhanced penalty for certain criminal acts motivated by racial hatred.[73] This hate crime statute defined "racial aggravation" and created special offenses such as: "racially-aggravated assault," "criminal damage," and "harassment."[74] Further, section 153 of the Powers of Criminal Courts Act of 2000, as amended by the 2001 Act, required the courts, even without a specific charge under the 1998 Act, to use racial aggravation evidence to increase the sentence.[75] The Powers of Criminal Courts Act

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Implications of the Enactment of the Racial and Religious Hatred Act 2006, 9 ECCLESIASTICAL L.J. 187, 195–96 (2007); *see also* Sejal Parmar, *The Challenge of "Defamation of Religions" to Freedom of Expression and the International Human Rights*, 2009 EUR. HUM. RTS. L. REV. 353, 353–75 n.15.

68. Lasson, supra note 16, at 173, 177 & n.92 (citing Public Order Act, 1986, § 18).

69. *Id.* at 177–78; *see also* W.J. Wolffe, *Values in Conflict: Incitement of Racial Hatred and the Public Order Act 1986*, J. ADMIN. L. 85, 85–93 (1987). Wolffe argues that the Attorney General consent requirement "is intended to ensure that prosecutions do not inhibit legitimate discussion." *Id.* at 93.

70. *See generally* Human Rights Act, 1998, c. 42 (Eng.); Public Order Act, 1986.

71. *See* Andrew Geddis, *Free Speech Martyrs or Unreasonable Threats to Social Peace?—"Insulting" Expression and Section 5 of the Public Order Act 1986*, PUB. L. 853, 859–66 (2004) (citing Hammond v. DPP [2004] EWHC (Admin) 69, 168 J.P. 601 (Q.B.); Norwood v. DPP [2003] EWHC (Admin) 1564; Percy v. DPP [2001] EWHC (Admin) 1125 (Eng.), 166 J.P. 93 (Q.B.)).

72. *Id.* at 872.

73. *See* Crime and Disorder Act, 1998, c. 37, §§ 29–31, 96 (Eng.).

74. *Id.*

75. Powers of Criminal Courts (Sentencing) Act, 2000, c. 6, § 153 (Eng.).

of 2000 is significant because it gave the U.K. Attorney General a tool for acting against hate speech without directly prosecuting pure hate speech standing alone.[76]

Since 1999, the Crown Prosecution Service of the U.K. Attorney General's office has provided annual monitoring reports of hate crime incidents and data on their prosecutions.[77] Hate crime incidents are defined broadly for reporting purposes as "any incident which is perceived to be racist by the victim or any other person."[78] Thus defined, it would include pure hate speech as well as action accompanied by hate speech or other indicia of racial motivation for a criminal act. In the policy section of the report, only a few violations of the 1998 Hate Crime Act are identified as accepted for prosecution.[79] Reasons supplied for dropping charges in the 2006–2007 year include: failure of witnesses to attend (19.8%), refusal of witness to give evidence (11.4%), other insufficient evidence (34.1%), public interest (18.1%), written off or other (12.4%), and bound over without trial (4.2%).[80] The data is not susceptible to a breakdown analysis to determine how many incidents reported did indeed involve only pure hate speech; however, given the high percentages of dropped prosecutions attributed to other factors, it appears that after the 1998 sentence enhancement statute, prosecutions of pure hate speech were rare.

III. IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW UPON BRITAIN

The European Human Rights Convention[81] (EHRC) is less specific than the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) in its exception of hate speech from the usual protections of speech. Article 10(1) of the EHRC provides for freedom of expression, but allows derogation by restrictions. It states:

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76. *Id.*

77. *See, e.g.*, MGMT. INFO. BRANCH, CROWN PROSECUTION SERV., RACIST AND RELIGIOUS INCIDENT MONITORING (2007).

78. *Id.* § 1.6.

79. *Id.* § 1.2. These violations include "racially aggravated assault, criminal damage, public order, and harassment." *Id.*

80. *Id.* § 2.6. Some data from earlier years is provided on page eleven. *Id.* at § 2.8. The number of complaints received and prosecuted shows a steady rise, which may be attributed to a greater familiarity with the 1998 Act in later years. *See id.*

81. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Human Rights Convention].

> The exercise of these freedoms . . . 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 and 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.[82]

Although the list of justifications for speech restrictions is somewhat detailed, the EHRC fails to specifically mention the promotion of discrimination as in the ICCPR and CERD.[83]

The European Commission of Human Rights, however, had little difficulty in finding this to be the clear implication of the EHRC.[84] In the case of *Glimmerveen v. Netherlands*, the complainants were members of the Nederlandse Volks Unie (NVU), a political party that called for ethnic homogeneity for the Netherlands and proposed to, if elected, expel all non-white citizens from the country. [85] Glimmerveen was convicted in the Netherlands courts of possessing, with the intent to distribute, pamphlets promoting racial discrimination.[86] He and Hagenbeek requested to be placed on the ballot as candidates for the Municipal Council of The Hague.[87] Although they did not submit their candidacy in the name of the NVU Party, the Voting Board denied their submission on the ground that it was a subterfuge for the NVU, which had previously been declared a "prohibited association" by the Dutch Courts.[88] Glimmerveen and Hagenbeek claimed that their conviction for possessing hate leaflets and denial of their candidacy violated their rights under Article 10 of the EHRC.[89]

The court denied their claims, stating that although Article 10 protects offensive as well as non-offensive expression, Article 14

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82. *Id.* art. 10(2).

83. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on the Elimination of all Forms of Racial Discrimination, Dec. 21, 1966, 660 U.N.T.S. 195 [hereinafter CERD].

84. *See* Glimerveen v. Netherlands, App. No. 8348/78, 18 Eur. Comm'n H.R. Dec. & Rep. 187 (1979).

85. *Id.* at 188.

86. *Id.*

87. *Id.* at 189.

88. *Id.* at 190.

89. *Id.* at 193.

protects against racial discrimination, and Article 17 provides that "'[n]othing in this Convention may be interpreted as implying . . . any right to . . . perform any act aimed at the destruction of any of the rights and freedoms set forth herein.'"[90] The commission reasoned that the complainants were trying to use Article 10 to support a right to engage in activities that promote the destruction of rights of Dutch non-whites protected under the charter, and that this use of Article 10 violated the spirit and text of the EHRC.[91] Accordingly, the ruling stated that the Voting Board did not violate the complainants' Article 10 speech rights because the speech promoted discrimination, which was forbidden by Article 14.[92]

The mode of analysis employed by the European Court of Human Rights (ECHR) in Strasbourg differs from that of the U.S. Supreme Court. The specific speech protection language of the EHRC is as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring licensing of broadcasting, television or cinema enterprises.
> 2. 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.[93]

The Strasbourg court balances interests in protecting speech against the protection of individual rights,[94] but unlike the U.S. courts, does not

90. *Id.* at 194.

91. *Id.* at 195.

92. *Id.* at 197.

93. European Human Rights Convention, *supra* note 81, art. 10.

94. For a detailed and accessible description of the European Court of Human Right's methodology see Susannah C. Vance, *The Permissibility of Incitement to Religious Hatred*

explicitly use different levels of scrutiny for different categories of rights. Rather, the court first determines whether the statute challenged is the result of a "'normally functioning, democratic society.'"[95] To determine this, the court decides whether it complies with the "rule of law" in the British sense, which includes not only that the law be properly promulgated, but also that it not be unduly vague and that it serve a legitimate purpose as set out in Article 10(2) above.[96] As a second step, the court applies the "proportionality test," which balances the importance of the end of the speech restriction to democratic society against the degree of tailoring of the restriction to that end.[97] The burden of proof is on the state.[98] While this second step appears close to the United States law's strict scrutiny test (requiring the least restrictive means of achieving a compelling interest),[99] the European court gives an additional "margin of appreciation" to the state to allow for differences in the democratic systems of the European member states.[100] Paul Mahoney, clerk of the European court, contends that the margin of appreciation rule creates tension between the values of "universality" and "subsidiarity."[101] When speech has little value to governance or society, such as racist speech, the court is willing to forgo universal application of the covenant right (e.g., of free speech) and treat it as subsidiarity to the interest of the state.[102]

Nevertheless, the EHRC employs strong language favoring freedom of speech in Articles 10 and 11. In addition, the ECHR has confirmed the high level of protection afforded this freedom and in some cases has allowed it to prevail over hate speech regulation.[103] For example, in 1994 the court held in *Jersild v. Denmark* that a Danish conviction of a television journalist for reporting on and repeating a small group's racist remarks was contrary to the speech protections of Article 10.[104]

Offenses Under European Convention Principles, 14 TRANSNAT'L L. & CONTEMP. PROBS. 201 *passim* (2004).

95. *Id.* at 208 (quoting Paul Mahoney, *Universality Versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments*, 1997 EUR. HUM. RTS. L. REV. 364, 369).

96. Mahoney, *supra* note 95, at 369.

97. Vance, *supra* note 94, at 208.

98. *Id.* at 208–09.

99. The second part of the test has been identified as quite similar to the United States Supreme Court's concept of "strict scrutiny." *See generally* Vance, *supra* note 94.

100. Mahoney, *supra* note 95, at 378–79.

101. Vance, *supra* note 94, at 209.

102. *Id.*

103. *See* Jersild v. Denmark, 19 Eur. Ct. H.R. 1, 24 (1994).

104. *Id.* at 18.

Employing the proportionate doctrine,[105] the court concluded that Denmark failed

> to establish convincingly that the interference thereby occasioned with the enjoyment of his right to freedom of expression was "necessary in a democratic society"; in particular the means employed were disproportionate to the aim of protecting "the reputation or rights of others." Accordingly, the measures gave rise to a breach of Article 10 of the Convention.[106]

Thus, the European court demonstrated its ability, if not proclivity, to choose free speech over hate speech statutes. It appears that the proportionality rule, which is essentially a balancing test without the guidance of designated levels of scrutiny, allows this court substantial leeway in disallowing regulations of hate speech.

The British courts have recognized Article 10's strength in protecting speech in overturning a conviction under the Public Order Act—for defacing and stomping on an American flag—as violative of proportionality principles of the HRA's Article 10.[107]

The domestic impact of international human rights law upon the U.K. has been vast. The EHRC, to which the U.K. is a signatory, not only sets forth a list of protected rights,[108] but also provides for an appeal from domestic courts to the ECHR at Strasbourg.[109] Even before the 1998 enactment of the U.K.'s Human Rights Act, which formally incorporated the ECHR into domestic law, the European covenant and its interpretation by Strasbourg had a significant effect on U.K. courts.[110] These courts were giving significant weight to the ECHR and decisions by the Strasbourg court, were tending to accept the concept of basic human rights, were interpreting the common law to incorporate human rights, and were applying standards quite similar to the proportionality doctrine used by the ECHR in resolving individual rights claims.[111] The polity was also in a mood for constitutional reform after the end of the

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105. Rather than the levels of scrutiny employed by the U.S. Supreme Court.

106. *Jersild*, 19 Eur. Ct. H.R. at 28.

107. Percy v. DPP [2001] EWHC (Admin) 1125 (Eng.), 166 J.P. 93 (Q.B.).

108. *See* European Convention on Human Rights, *supra* note 81, arts. 2–5, 8–14.

109. *See id.* arts. 26, 45.

110. To review the impact of the European covenant on U.K. courts, see the litany of sources cited in Dominic McGoldrick, *The United Kingdom's Human Rights Act 1998 in Theory and Practice*, 50 INT'L & COMP. L.Q. 901, 904 nn.24–30 (2001).

111. *Id.*

Thatcher revolution and with the Labor Party now in power.[112] The devolution to Scotland, Wales, and Northern Ireland had just been confected with the proviso that their power was limited by the ECHR.[113] Although an appeal to the Strasbourg court was expensive, time consuming, and, therefore, infrequent, the prospect of this international court invalidating a law of Parliament no doubt ran shivers up the spine of the British, who were devoted to the concept of Dicean parliamentary sovereignty.[114] Greater domestic control of rights decisions would limit this threat. Unquestionably, the judicial and political stage was set for adoption of the HRA.

On the one hand, the HRA can be seen as acceptance of international norms; but on the other hand, it can be seen as a way of controlling the application and interpretation of those norms by providing a greater degree of domestic control over these matters.[115] Under the HRA, significant domestic court and parliamentary power was preserved.[116] With the HRA, the U.K. incorporated the major part of the ECHR into its domestic law.[117] The Act, however, made clear that it did not establish a U.S.-style bill of rights protected by judicial review.[118] The courts were allowed the power only to make a declaration of "incompatibility."[119] Then the ball is passed to Parliament, which has the last say as to whether to remedy the incompatibility by legislation. However, as one British writer has observed: "A Declaration of Incompatibility will put social, political, and legal pressure on the government to introduce remedial legislation."[120] If the government fails to do so, the party can appeal to the ECHR at Strasbourg, and if successful there, Parliament will be required to legislate or be in violation of the EHRC.[121]

112. *Id.* at 903.
113. *Id.* at 901–02.
114. *Id.* at 924.
115. *Id.* at 906–09 (explaining the "incorporation" of the ECHR into the HRA).
116. *Id.* at 905–06.
117. *Id.* at 906–09.
118. *Id.* at 906.
119. Human Rights Act, 1998, c. 42, art. 4 (Eng.).
120. McGoldrick, *supra* note 110, at 924.
121. *Id.*

IV. THE EXPERIENCE OF THE UNITED STATES WITH HATE SPEECH LAWS

A. Hate Speech in the United States Supreme Court

Although the conventional wisdom is that hate speech is protected by the First Amendment in the United States, few Supreme Court cases address the issue, and those have not been entirely consistent.[122] Furthermore, there have been a number of controversies over hate speech regulations which the Supreme Court has yet to address. These unaddressed topics include regulation of hate speech on school and college campuses and regulation of certain speech in the workplace, which may be viewed as prohibited sexual harassment under Title VII of the Civil Rights Act of 1964.[123] In law review literature, debate rages over the proper constitutional attitude toward hate speech yielding only the conclusion that the current standards are ill-defined.[124]

The principal cases on this issue include the 1952 decision in *Beauharnais v. Illinois*,[125] the 1992 decision in *R.A.V. v. City of St. Paul*,[126] and the 2003 decision in *Virginia v. Black*.[127] *Wisconsin v. Mitchell*, while sometimes not viewed as a hate speech case, had an impact on hate speech (and thought) prevention by enhancing the criminal penalty for hate motivated crimes.[128] Three out of these four cases ruled against protection of hate speech.[129] In *Beauharnais*, a five-to-four Court upheld criminal prohibition of any publication which "'portrays depravity, criminality, unchastity or lack of virtue of a class of citizens of any race, color, creed or religion.'"[130] While this case appears to uphold proscription of hate speech as group libel and has never been overturned, substantial arguments exist that the precedent has been

122. *See generally* Virginia v. Black, 538 U.S. 343 (2003); Wisconsin v. Mitchell, 508 U.S. 476 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Beauharnais v. Illinois, 343 U.S. 250 (1952).

123. *See, e.g.*, Aguilar v. Avis Rent A Car System, Inc., 980 P.2d 846, 848 (Cal. 1999), *cert. denied*, 529 U.S. 1138 (2000) (racial epithet); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1490 (M.D. Fla. 1991) (pornographic pin-ups in workplace).

124. *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321 (1989); Martha Minow, *Regulating Hatred; Whose Speech, Whose Crimes, Whose Power?—An Essay For Kenneth Karst*, 47 UCLA L. REV. 1253, 1254 (2000); Nadine Strossen, *Incitement to Hatred: Should There be a Limit?*, 25 S. ILL. U. L.J. 243, 245 (2001).

125. 343 U.S. 250 (1952).

126. 505 U.S. 377 (1992).

127. 538 U.S. 343 (2003).

128. 508 U.S. 476, 479 (1993).

129. *See id.* at 479, 490; *R.A.V.*, 505 U.S. at 396; *Beauharnais*, 343 U.S. at 251, 266–67.

130. *Beauharnais*, 343 U.S. at 251, 266–67.

undermined especially by *New York Times v. Sullivan*.[131] In short, the argument is that Justice Frankfurter's 1952 opinion relied upon the then prevailing—but now rejected—categorical exception of all libel from First Amendment protection.[132] *Beauharnais* was offered as justification for regulations in Skokie, Illinois' against the proposed Neo-Nazi march through this heavily Jewish populated town.[133] The Seventh Circuit struck down the regulations on the ground that *Beauharnais* was no longer good law.[134] The case did not reach the Supreme Court, other than on a motion for a stay that was denied, which included a dissent by Justices Rehnquist and Blackmun that stated "*Beauharnais* has never been overruled."[135] The continued viability of *Beauharnais* is also supported by the Court's cite to it in the next major hate speech case, *R.A.V.*[136] The idea that *Beauharnais* still has a few breaths of life supports the proposition that the U.S. rule is not totally protective of hate speech. Certainly, it shows that the U.S. has not had a continuous or very long-standing history of protection of hate speech.

Wisconsin v. Mitchell came down in favor of discouraging hate speech (and thought) as well in 1993. The decision upheld criminal statutes enhancing the penalty for hate-motivated crimes.[137] The Supreme Court reasoned that the state statute criminalized conduct, not speech, and that the accompanying motivation, which could be proven by the accompanying speech, was merely a mental element that justified enhancement.[138] This mental element was analogized to the penalty-enhancing mental element of specific intent for first degree murder.[139] The justification was that hate-motivated crimes harm society in a special way.[140] Justice Rehnquist wrote, for a unanimous Court, that the state statute "singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm."[141] He stated, in example, that "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their

131. 376 U.S. 254 (1964).
132. *See Beauharnais*, 343 U.S. at 255–57.
133. Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978).
134. *Id.*
135. Smith v. Collin, 436 U.S. 953, 953 (1978).
136. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).
137. Wisconsin v. Mitchell, 508 U.S. 476, 479, 490 (1993).
138. *Id.* at 484–85.
139. *Id.* at 485.
140. *Id.* at 487–88.
141. *Id.*

victims, and incite community unrest."[142] Even if this type of statute prohibits only conduct, not speech, it is clear that the statute deters hate speech and promotes a strong public policy opposing hate speech. Also, the availability of this type of law enables states to pacify citizens calling for hate speech regulation.

Although in *R.A.V.* the incident was hate speech in the form of cross burning in the yard of an African-American, the ordinance under which the defendants were charged was justified under the "fighting words" categorical exception to the First Amendment because the state court had so limited the ordinance.[143] In a significant blow to the categorical approach, Justice Scalia held that the categorical exclusion from constitutional protection was not total and that content-based regulation within the excluded category could still violate the First Amendment.[144] In *R.A.V.*, the ordinance's prohibitions included burning a cross where "'one knows [it] . . . arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'"[145] Thus, the ordinance was view-point as well as content-based because symbols arousing positive feelings were not forbidden. *R.A.V.*'s biggest impact was that it signaled the Court's non-receptivity to regulations of hate speech, although its narrow holding closed the door to only one—probably insignificant—approach to regulating hate speech: prohibiting hate speech that amounted to fighting words.

The next relevant case, *Virginia v. Black*, is significant because, for the first time since *Beauharnais* (unless you count *Wisconsin v. Mitchell*), the Court legitimized hate speech regulation.[146] In *Black*, the Court partially upheld Virginia's anti-cross-burning statute.[147] It approved the first part of the statute, forbidding cross burning "'with the intent of intimidating any person or group of persons.'"[148] The second part of the statute, providing that "any such burning of a cross shall be prima facie evidence of intent to intimidate," was struck down on the theory that cross burning could be intimidation but could also be an expression of ideology.[149] Significantly, the Court accepted jury instructions providing that the state must prove that "'the defendant had

142. *Id.* at 488.

143. *Id.* at 487.

144. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

145. *Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

146. *See* Virginia v. Black, 538 U.S. 343, 347–48 (2003).

147. *Id.*

148. *Id.* at 348 (quoting VA. CODE ANN. § 18.2-423 (2002)).

149. *Id.* at 348, 365–67.

the intent of intimidating any person or group of persons.'"[150] However, the jury instructions did not include a definition of "intimidate."[151] The Supreme Court supplied one: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[152] The Court clarified its understanding of that definition with "the history of cross burning in this country, [which] shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence."[153]

This intimidation standard requiring intentionally placing one in fear of bodily harm is considerably less stringent than the assault standard of intentionally placing one in fear of immediately harmful conduct.[154] It is less stringent than the *Brandenburg* test, which requires "advocacy . . . directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[155] Additionally, the *Black* standard is less stringent than the *Chaplinsky* "fighting words" exception which requires, among other things, face-to-face expression.[156]

In *Black*, the Court seemed to move toward a categorical approach, excluding certain types of hate speech from First Amendment protection—hate speech that is intended to place one in fear of future bodily harm. This intentionally intimidating speech, subject to a categorical exception, could be labeled "terrorist" speech.[157] The Court makes much of the "true threat" exception from First Amendment protection and explains: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an unlawful act of violence to a particular individual or group of individuals."[158] Terrorist speech, on the other hand, requires only the intention of placing one in *fear* of bodily harm.

Perhaps after 9/11, the Supreme Court, as well as the American people, have become sensitized not only to terrorism but to terrorist

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150. *Id.* at 351 (quoting O'Mara v. Commonwealth, 535 S.E.2d 175, 250 (Va. Ct. App. 2000)).

151. *Id.* at 351.

152. *Id.* at 360.

153. *Id.*

154. *See* RESTATEMENT (SECOND) OF TORTS § 21 (1965) (defining "assault" as the "imminent apprehension" of a "harmful or offensive contact").

155. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

156. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942); *see also* Gooding v. Wilson, 405 U.S. 518, 523 (1972); Lewis v. New Orleans, 408 U.S. 902, 913 (1972) (limiting "fighting words").

157. The key to terrorism is the creation of fear.

158. *Black*, 538 U.S. at 359.

speech. At oral argument in *Virginia v. Black*, the usually silent Justice Thomas forcefully asserted that the terrorism felt by blacks as a result of racist hate speech threatened generalized future bodily harm against them.[159] The burning cross, Thomas recalled, was more than mere intimidation but the symbol of the Klan's "reign of terror," which for a century placed a population in terror.[160]

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159. Transcript of Oral Argument at 22–24, *Black*, 538 U.S. 343 (No. 01–1107), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/01-1107.pdf.

160. *Id.* at 23–24.

> [Justice Thomas]: Mr. Dreeben, aren't you understating the -- the effects of -- of the burning cross?
> This statute was passed in what year?
>
> Mr. Dreeben: 1952 originally.
>
> [Justice Thomas]: Now, it's my understanding that we had almost 100 years of lynching and activity in the South by the Knights of Camellia and -- and the Ku Klux Klan, and this was a reign of terror and the cross was a symbol of that reign of terror. Was -- isn't that significantly greater than intimidation or a threat?
>
> Mr. Dreeben: Well, I think they're coextensive, Justice Thomas, because it is --
>
> [Justice Thomas]: Well, my fear is, Mr. Dreeben, that you're actually understating the symbolism on -- of and the effect of the cross, the burning cross. I -- I indicated, I think, in the Ohio case that the cross was not a religious symbol and that it has -- it was intended to have a virulent effect. And I -- I think that what you're attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish and, indeed, that it is unlike any symbol in our society.
>
> Mr. Dreeben: Well, I don't mean to understate it, and I entirely agree with Your Honor's description of how the cross has been used as an instrument of intimidation against minorities in this country. That has justified 14 States in treating it as a distinctive --
>
> [Justice Thomas]: Well, it's -- it's actually more than minorities. There's certain groups. And I -- I just -- my fear is that the -- there was no other purpose to the cross. There was no communication of a particular message. It was intended to cause fear --
>
> Mr. Dreeben: It --
>
> [Justice Thomas]: -- and to terrorize a population.
>
> Mr. Dreeben: It absolutely was, and for that reason can be legitimately

The majority in *Virginia v. Black* tried to fit this case into the true threat exception to First Amendment protection, citing the 1969 case of *Watts v. United States*.[161] The intent required to show true threats, said the Court, is only the "intent of placing the victim in fear of bodily harm or death," not the intent of carrying out the threat.[162] Thus, the Court moved from communication of an "intent to commit an act of unlawful violence" to merely the intent to create fear.[163] This is a significant movement from *Watts*, where the federal statute forbade "knowingly and willfully" making a threat against the President.[164] The court of appeal judges in *Watts* argued over whether "willful" meant that a defendant must have "intended to carry out his 'threat'" or meant merely that the "speaker voluntarily uttered the charged words with 'an apparent determination to carry them into execution.'"[165] Under either meaning, the Supreme Court found that that Watts's words did not amount to a true threat.[166]

Accordingly, defendant Black's cross burning in the rented field outside of town, out of view of any black person or other target of the Klan, was treated as communication only to Klan members and was protected.[167] Whereas, the cross burning on the lawn of a black resident, by fellow defendants Elliot and O'Mara, could more easily be interpreted as designed to create fear and would not be protected.[168]

The true threat exception would allow criminalization of Tony Soprano's[169] promise to kill you if you fail to perform a particular act on

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> proscribed without fear that the focusing on a cross -- burning of a cross with the intent to intimidate would chill protected expression.
>
> This is a very different case than the R.A.V. case that was before the Court. There the Court was confronted with a statute that prohibited the use of language based on particular messages of group-based hatred….

Id. at 22–24.

161. *Black*, 538 U.S. at 359 (citing Watts v. United States, 394 U.S. 705, 708 (1969)).

162. *Id.* at 360.

163. *Id.*

164. *Watts*, 394 U.S. at 705.

165. *Id.* at 707 (citing Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918)) (emphasis omitted).

166. *Id.* at 708.

167. *See Black*, 538 U.S. at 348–50, 367.

168. *Id.* at 350–51, 367. This fact relies on the assumption, of course, that the jury could find the requisite intent, within the act of burning the cross and the surrounding facts, without the stricken statutory presumption of intent.

169. Tony Soprano, portrayed by James Gandolfini in HBO's television show "The Sopranos," "heads the most powerful criminal organization in New Jersey." HBO.com, The Sopranos, Cast & Crew, http://www.hbo.com/the-sopranos/index.html (last visited Jan. 20, 2010).

his behalf. He is communicating his specific intention to kill you. The terrorist speech exception is considerably less specific. Terrorist speech only requires the intention to place one in fear of some general unspecified danger at an indefinite time in the future.[170] The Virginia statute, upheld in *Black*, provides a penalty for cross burning with "'an intent to intimidate a person or group of persons.'"[171] While the statute does not define intent to intimidate, the Court clarified its meaning, stating: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[172] Thus, the Court appears to be expanding *Watts* to include the intent of creating fear within the constitutional protection to true threats. Arguably then, the Court in *Black* has moved from merely protecting true threats to protecting the terrorist speech by changing the meaning of the term.

Notably, in *Black*, the Court characterized the exception it had earlier established in *Chaplinsky* as allowing a state to punish words that inherently incite or inflict injury.[173] Although the facts of *Chaplinsky* involved fighting words, it seems that the Court recognized that the underlying rationale of *Chaplinsky* is that any utterance inflicting injury can be constitutionally proscribed. Knowledge of hate speech through, for example, a television newscast of a klan cross burning outside of town, might well inflict fear in a black person of normal sensibilities—even without a true threat to their person.[174] The Court in *Black* pointed to another circumstance in which, quite arguably, hate speech can be prohibited under U.S. law.

Additionally, Justice O'Connor seemed to suggest a low-value or no value categorical approach for hate speech, when she stated that the expression by cross burning was "'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.'"[175]

Furthermore, the Virginia statute's choice of the cross-burning symbol singles out racial and perhaps religious intimidation as prohibited expression. By excluding other expressions of intimidation

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170. "Immediacy" or "great present ability" is generally required for the tort of assault. *See, e.g.*, W. Union Tel. v. Hill, 150 So. 709, 710 (Ala. Ct. App. 1933).

171. *Black*, 538 U.S. at 348 (quoting VA. CODE ANN. § 18.2-423 (2002)).

172. *Id.* at 360.

173. *Id.* at 359 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

174. *See* Matsuda, *supra* note 124.

175. R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (quoting *Chaplinsky*, 315 U.S. at 572).

such as gender or age, the statute would seem to be just as content-based as the statute in *R.A.V.* We should recall that in *R.A.V.*, Justice Scalia's majority opinion found impermissible content-based discrimination where the statute failed to prohibit all fighting words, but instead singled out those based on race, religion, and gender.[176]

This softening of restrictions on hate speech regulation may be attributable to the more permissive view of international human rights law and the domestic law of other countries. However, the substantial scholarly criticism in the United States should also be taken into account.

For example, David Kretzmer argues that racist speech should be restricted because of the harms it causes, namely the spread of racial prejudice and affront to personal dignity.[177] Toni Massaro takes a middle ground between protecting the First Amendment's right to freedom of speech and the regulation of hate speech.[178] She summarizes two approaches to hate speech: the first "allows hate speech in order to maximize opportunities for individual expression and cultural regeneration"; the second advocates for the repression of hate speech to promote equality.[179] Massaro defends a third approach, the "accommodationist" approach, which endorses "tightly worded, cautiously progressive measures that tend to proscribe only targeted vilification of a person on the basis of race, gender, religion, ethnic origin, sexual orientation, or other protected characteristics."[180]

Mari Matsuda takes a stronger position, favoring criminalization of

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176. *Id.* at 391.

177. David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 462 (1987) (asserting that the first harm, the spread of racial prejudice, begins with the basic presumption that speech influences ideas, beliefs, and attitudes). He explains that racist speech, therefore, has the ability to induce non-racists into adopting racist ideas, beliefs, and attitudes. *Id.* Racist speech would also reinforce such beliefs in racists themselves. *Id.* Racist speech then would "increase the incidence of racial prejudice and discrimination in society." *Id.* An increase in the incidence of racial prejudice and discrimination is a harm that should be avoided. *Id.*

The second harm, affront to personal dignity, focuses on two approaches, stipulative and empirical. *Id.* at 465. The empirical approach to affronts on personal dignity is based on the "reaction[s] of persons" to the racist speech. *Id.* The stipulative approach is based on the idea that an interest in dignity should be protected, and any invasion in that "interest must be regarded as harm." *Id.*. Kretzmer reviews the standard arguments for protection of hate speech and concludes that a cost-benefit analysis should be performed rather than an unquestioned protection of hate speech. *See id.* at 512–13.

178. *See generally* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991).

179. *Id.* at 213.

180. *Id.*

hate speech.[181] She argues that racism "comprises the ideology of racial supremacy and the mechanisms for keeping selected victim groups in subordinated positions."[182] Racism, she states, is implemented by: "[v]iolence and genocide; [r]acial hate messages, disparagement, and threats; [o]vert disparate treatment; and [c]overt disparate treatment and sanitized racist comments."[183] Matsuda calls racist speech a form of "violence of the word."[184] Racist speech, she argues, wounds by attacking the self-esteem of the targeted group and diminishing one's sense of personal security.[185] Victims of racist speech often experience psychological symptoms and emotional distress, and are restricted in their own personal freedoms.[186] Matsuda gives real-life examples of victims quitting their jobs, forgoing their education, leaving their homes, avoiding certain public places, curtailing their own exercise of speech rights, and otherwise modifying their behavior and demeanor, all to avoid receiving hate messages.[187]

B. International Human Rights Law of Hate Speech as it Bears on the United States

The United States has signed and ratified two human rights covenants that include hate speech provisions: the ICCPR[188] and the CERD.[189] Both of these conventions not only fail to protect hate speech, but also obligate the state parties to adopt laws against the practice.[190] Article 20 of the ICCPR requires the prohibition of "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[191] CERD is even more emphatic

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181. *See* Matsuda, *supra* note 124, at 2380–81.
182. *Id.* at 2332.
183. *Id.*
184. *Id.*
185. *Id.* at 2337–38.
186. *Id.* at 2336–37.
187. *Id.* at 2337.
188. ICCPR, *supra* note 83.
189. CERD, *supra* note 83.
190. *See, e.g.*, ICCPR, *supra* note 83, art. 2. The ICCPR provides:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Id.

191. *Id.* art. 20 (emphasis added). It should be noted that although the United States has

and clear. Article 4 of CERD requires that:

> States Parties *condemn all propaganda* and all organizations which are based on ideas or *theories of superiority of one race* or group of persons of one colour or ethnic origin, or which attempt to *justify or promote racial hatred and discrimination* in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this convention, *inter alia*:
> (a) Shall declare an offence punishable by *law all dissemination of ideas based on racial superiority or hatred,* incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination and shall recognize participation in such organizations or activities as an offence punishable by law;
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.[192]

Article 7 of CERD requires the parties to speak out against discrimination and take other positive steps to end discrimination:

> States Parties undertake to adopt immediate and effective measures, particularly in the fields of *teaching, education, culture and information,* with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and

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ratified this treaty, it has done so with severe reservations in this area. The very first U.S. reservation relates to Article 20: "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." U.S. Reservations, Understandings, and Declarations: International Covenant on Civil and Political Rights, 138 CONG. REC. 8068, 8070 (1992) [hereinafter U.S. Reservations from ICCPR].

192. CERD, *supra* note 83, art. 4 (emphasis added).

> friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.[193]

The United States has attempted to reserve its way out of these obligations.[194] The Reservations of the United States to CERD[195] and to the ICCPR[196] are quite similar, both denying the obligations set out in Articles 4 and 7 listed above.

While the meaning of Article 20 of the ICCPR appears quite clear, a decision of the United Nations (UN) Human Rights Committee, arising out of Canada, reinforces the meaning of the provision. In *J.R.T. and the W.G. Party v. Canada*,[197] Mr. T and the W.G. political party, which he founded, provided telephone dial-in access to a taped message warning of the dangers of "'international Jewry'" leading to "'wars, unemployment and inflation and the collapse of world values and principles.'"[198] A complaint by Jewish groups and individuals led to a decision by the Canadian Human Rights Commission, pursuant to the Canadian Human Rights Act.[199] Section 13(1) of this Act identified as a forbidden discriminatory practice telephonic communication of "any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that the person or those persons are identifiable on the basis of a prohibited ground."[200] Under section 3, prohibited

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193. *Id.* at art. 7 (emphasis added).

194. *See* U.S. Reservations from ICCPR, *supra* note 191, at 8070; U.S. Reservations, Understandings, and Declarations: International Convention on the Elimination of All Forms of Racial Discrimination, 140 CONG. REC. 14,326 (1994) [hereinafter U.S. Reservations from CERD].

195. U.S. Reservations from CERD, *supra* note 194 at 14,326. The concern was:

> (1) [t]hat the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

Id.

196. U.S. Reservations from ICCPR, *supra* note 191, at 8070.

197. J.R.T. v. Canada, U.N. Hum. Rts. Comm., UN Doc. CCPR/C/OP/2 at 25 (Apr. 6, 1983).

198. *Id.* ¶ 2.1.

199. *Id.* ¶ 2.4.

200. *Id.* ¶ 2.2.

grounds included: religion, race, gender, age, and others.[201] Eventually, after some attempts by Mr. T. to modify the message's language but not its meaning,[202] the Canadian Human Rights Committee enforced its ruling through the Trial Division of the Canadian Federal Court, and Mr. T. was declared in contempt of court.[203] He was sentenced to prison and fined; however, both punishments were suspended on the condition that he did not use the telephone to communicate hate messages.[204]

Mr. T. and the party submitted a communication to the UN Human Rights Committee, alleging violations of 19(1) and 19(2) of the ICCPR, which provide for freedom of expression.[205] The UN body observed that the Canadian tribunal held that, "'although some of the messages are somewhat innocuous, the matter for the most part that they have communicated is likely to expose a person or persons to hatred or contempt by reason of . . . race or religion.'"[206] The UN committee found that Canada had not breached articles 19(1) or 19(2) of the ICCPR.[207] Rather, the state party's action simply gives effect to article 20(2) and "not only is the author's 'right' to communicate racist ideas not protected by the Covenant, it is in fact incompatible with its provisions."[208] The Human Rights Committee thus concluded that the messages "clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit."[209] Thus, although these international hate speech norms clearly require some prohibition of hate speech, the United States is clearly posed, by its reservations, to resist any domestic absorption of these norms.

The influence of international human rights law on Supreme Court constitutional interpretations, at least among some Justices, appears to be growing.[210] A changing tide can be observed in the Supreme Court's analysis of some racial discrimination cases, notably in the area of

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201. *Id.* ¶ 2.3.

202. The UN Commission reported that the revised message recited "'we are now denied the right to expose the race and religion of certain people, regardless of their guilt in the destruction of Canada.'" *Id.* ¶ 2.6. Further, the message referred to "'a preponderance of certain racial and religious minorities involved in the corruption of our Christian way of life.'" *Id.*

203. *Id.* ¶ 2.8.

204. *Id.*

205. *Id.* ¶ 1.

206. *Id.* ¶ 2.4.

207. *Id.* ¶ 8(b).

208. *Id.* ¶ 6.2.

209. *Id.* ¶ 8(b).

210. *See supra* note 4 and accompanying text.

affirmative action.[211] In 1989, the Supreme Court found that affirmative action programs had not met the strict scrutiny test because they were not remedial in nature.[212] However, in 2003, the Court found that affirmative action programs met the strict scrutiny test by promoting diversity; the Court did not require the programs to be remedial.[213] Thus, the Court's decision created greater protection of African-Americans. Questions remain, however, as to how much of this trend can be attributed to the influence of international human rights law. With the practice of applying "strict scrutiny lite" to affirmative action cases, the Court appears to be moving toward the international human rights norm.[214] Recognition of the value of international human rights norms in constitutional interpretation has also occurred in other rights areas.[215]

There is movement toward these norms in hate speech doctrines as well, although slight. As discussed above, *Virginia v. Black* arguably recognized for the first time that terrorist speech could be prohibited, and *Wisconsin v. Mitchell* provided a significant weapon in the hands of prosecutors to inhibit hate speech.[216] The argument that this movement

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211. Haplin, *supra* note 4, at 22–31.

212. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498–511 (1989); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223–28 (1995).

213. *See* Grutter v. Bollinger, 539 U.S. 306, 321–22, 343 (2003).

214. *See* Halpin, *supra* note 4, at 33–37.

215. Justice Kennedy for a five-Justice majority in *Lawrence v. Texas* observed:

> [A]lmost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom,* 45 Eur. Ct. H.R. (1981) ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

539 U.S. 558, 573 (2003). The federal courts have also recognized international human rights law when interpreting the Alien Torts Claims Act and Torture Victims Protection Act. Consistently since the 1980 case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), federal courts have allowed a cause of action based upon international customary human rights law proscribing torture. *See also* Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (allowing a cause of action against a de facto governmental official in the former Yugoslavia for systematic rape in violation of customary international human rights law).

216. *See* Virginia v. Black, 538 U.S. 343, 367 (2003); Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993).

is a result of international human rights law, however, is difficult to make. In other affirmative action cases, independent parties filed amicus curiae briefs describing and arguing for the international human rights norm to be adopted.[217] However, in *Black*, the usual international human rights advocates were absent and no amicus curiae mentioned the international standards. [218] Accordingly, one cannot say that the Court was specifically aware of these arguments as compared to other cases in other areas, and no mention of these norms appeared in any of the opinions.

In addition to the existence of human rights norms, some impact upon this movement in U.S. hate speech law can be attributed to the generalized force of globalism on the Court.[219] Globalism, the increasing interdependence of nations of the world, is a strong force for uniformity in rights protections.[220] As Justice Breyer observed:

> [T]he "globalization" of human rights [is] a phrase that refers to the ever-stronger consensus (now nearly worldwide) on the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as national constitutions and international treaties, and the related decision to enlist independent judiciaries as instruments to help make that protection effective in practice.[221]

The United States' basic self-interest dictates that it must be aware that its own record in human rights protection has a strong impact upon the effectiveness of its foreign policy.[222] Not only is uniformity of rights

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217. In the affirmative action area, see Brief for Human Rights Advocates and the University of Minnesota Human Rights Center as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02–241), 2003 WL 399226. In the criminal procedure area (capital punishment of juveniles), see Brief for the Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1628523. *See also* Halpin, *supra* note 4, at 12–22.

218. In *Virginia v. Black*, 538 U.S. 343 (2003), there was no brief from human rights advocates. One can assume that strategic considerations silenced these advocates. In the United States, there is often a conflict between civil libertarians (e.g., the American Civil Liberties Union) advocating free speech and civil rights proponents advocating equality. Perhaps human rights advocates did not want to enter this fray in order to preserve coalition building or funding sources. *See* Halpin, *supra* note 4, at 13 n.68 (listing the amicus curiae in the case).

219. Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003).

220. *Id.*

221. *Id.* at 266.

222. In the Civil Rights area, this is a corollary of Derrick Bell's "Convergence Theory"

protections useful for U.S. foreign policy, but perhaps more importantly, this uniformity has often become the reality within which the United States must operate.[223] For example, the World Wide Web has made speech and its regulation international.[224] Recent experience has demonstrated that regulation of speech by one nation can have a worldwide impact.[225] An example of this effect is the Australian Supreme Court's decision in *Dow Jones & Co. v. Gutnick*.[226] The court held that a claim for defamatory expression on the Internet is actionable in Australia.[227] Economic impact of an Australian judgment upon Dow Jones is quite likely to restrict Internet speech by that company.[228] Accordingly, the lowest common denominator becomes the controlling speech regulation. In the area of hate speech, as well as other speech, the more protective United States laws can become irrelevant. An example is France's restriction on hate speech, which forbade offering Nazi paraphernalia for sale over the Internet by Yahoo.[229] Yahoo, having no effective way of keeping the Internet out of France, is faced with the dilemma of preventing these offers or facing a judgment against it in France.[230]

Further, the advent of terrorism in the continental United States is beginning to give hate speech a context or history similar to other nations of the world. Arguably, the history of Nazi terrorism, Irish Republican Army terrorism, and other terrorism in Europe contributed strongly to the development of the current international human rights law position on hate speech.[231] The ICCPR and the CERD, developed under the auspices of the United Nations after World War II, were highly influenced by the mode of rights protection employed by the

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which attributes advances in Civil Rights not to altruism but to a convergence of the interests of the controlling powers with those of the Black community. *See* Derrick Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (asserting that "the interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

223. *See* Rosenfeld, *supra* note 1, at 1524.

224. *See id.*

225. *See generally* Amy Oberdorfer Nyberg, *Is All Speech Local? Balancing Conflicting Free Speech Principles on the Internet*, 92 GEO. L.J. 663 (2004).

226. (2002) 210 C.L.R. 575 (Austl.).

227. *Id.* at 576.

228. For an excellent discussion of this Australian case and its potential impact see generally Nathan W. Garnett, Dow Jones & Co. v. Gutnick: *Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?*, 13 PAC. RIM L. & POL'Y J. 61 (2004).

229. Nyberg, *supra* note 225, at 663 n.5 (citing Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, 145 F.Supp. 2d 1168, 1171 (N.D. Cal. 2001)).

230. *Id.* at 1172 n.2.

231. *See* Rosenfeld, *supra* note 1, at 1541, 1544–57.

United States.[232] The United States was a strong mover in this process, beginning with Eleanor Roosevelt's leadership in adoption of the Universal Declaration of Human Rights by the United Nations Security Council.[233] The lack of hate speech protections in the ICCPR, however, was more reflective of Europe's great fear of the return of Nazism or other totalitarian systems.[234] The United States no doubt shared this fear for Europe, but not so much for itself; thus, when the Convention was ratified, the United States reserved itself out of application of the ICCPR's hate speech rule.[235] Before the convection of these multilateral human rights treaties, European fear of the return of totalitarianism—and particularly the genocidal racism of Nazism—was reflected in the post-World War II domestic rights provisions of many European nations.[236]

After 9/11, the U.S. may feel stronger kinship with Europe and be more willing to move toward its approach to hate speech, which is reflected in human rights norms. It was in this post-9/11 context that the terrorism long felt by African Americans was finally accepted as legitimate in *Virginia v. Black*.[237] Another force upon the decision may well have been a grudging acknowledgement by the Court that African-Americans in the United States have long been subjected to the terrorism of hate speech and that perhaps some softening of hate speech protections was appropriate—especially now, after 9/11, when the rest of the nation got a taste of terrorism. Certainly, an internal alert was sounded to the Court by Justice Thomas at oral argument in *Black*—and

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232. *Compare* U.S. CONST. amends. I–X, XIII–XV, *with* ICCPR, *supra* note 83, *and* CERD, *supra* note 83.

233. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). Although now viewed as customary international law, the Declaration was not a treaty, but was a step in the ultimate convection of both the ICCPR and the Covenant on Economic Social and Cultural Rights. These two rights regimes included in the Declaration (often referred to as first and second Generation Human Rights) were split into two treaties under the belief that the Civil and Political Covenant would be more likely to gain approval. This was true primarily because of the opposition of the U.S. to the Economic, Social, and Cultural Covenant which the U.S. believed did not fit comfortably with its primarily First Generation rights regime. For an excellent detailed consideration of the forces in the drafting of the hate speech articles of the ICCPR and the CERD see Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1, 25–27, 48–62 (1996).

234. Rosenfeld, *supra* note 1, at 1525.

235. *See* U.S. Reservations from ICCPR, *supra* note 191, and accompanying text.

236. Rosenfeld, *supra* note 1, at 1548. For example, Germany's Constitution places a prime value on honor and allows the repression of speech to protect personal honor. *See id.* at 1548–55.

237. 538 U.S. 343, 347–48 (2003).

no doubt repeated in conference.[238] This behavior of the Court, moving toward the international human rights law position, suggests influence by these norms. With respect to hate speech, international human rights law, especially as articulated in the ICCPR and the CERD, has quite clearly treated this type of speech as less protected and indeed, often prohibited by the countervailing norm of equality.[239] While the Supreme Court has not adopted the standard of human rights law, it has moved along the continuum toward that position and concedes that some types of hate speech may be prohibited.[240] That movement, in this writer's view, has extended to the verge of creating a new category of speech excepted from First Amendment protection. That category, here labeled terrorist speech, is defined as speech intended to create fear of some unspecified future harm. Clearly, the doctrinal position of the Court has not reached the level of hate speech condemnation that exists in international human rights law, but there is movement in that direction.

V. CONCLUSION

The United States has only grudgingly moved along the continuum toward permitting hate speech regulation. It indeed has a mixed tradition, with the Supreme Court initially permitting regulation of group libel in the *Beauharnais* case.[241] In more recent years, the Court has chipped away at the rule of total protection of hate speech, allowing enhancement of criminal penalties for hate-motivated crimes in *Wisconsin v. Mitchell* and finally in 2003's *Virginia v. Black*, allowing the proscription of not only true threats, but also arguably of terrorist speech, as defined herein.[242] Although the international human rights standard, specifically enunciated in the ICCPR and CERD, permits and encourages regulation of speech that advocates discrimination or offends dignity, the Court has not specifically allowed regulation of hate speech to go this far. There is some jurisprudential basis for such a rule emanating from the older *Chaplinsky* language allowing the proscription of speech that itself causes injury and *Beauharnais'* approval of the group libel statute. Even though there is definite movement of the Court toward the international standard, it is difficult to attribute the

238. *See supra* notes 159–60, and accompanying text.

239. *See* ICCPR, *supra* note 83; CERD, *supra* note 83.

240. *See generally* Wisconsin v. Mitchell, 508 U.S. 476 (1993); Gooding v. Wilson, 405 U.S. 518 (1972); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

241. *See* Beauharnais v. Illinois, 343 U.S. 250, 251 (1952).

242. *Black*, 538 U.S. 343, 359 (2003); *Mitchell*, 508 U.S. at 484–88.

change solely to the influence of international law. Rather, a number of factors seem to affect the U.S. position, including: globalization, demands of foreign policy, the advent of terrorism in the U.S. following 9/11, scholarly writings, the impact of the World Wide Web in creating a lowest common denominator effect of other nations' hate speech regulations, and a rise in racial sensitivity of the Court sparked by Justice Thomas.[243]

The United Kingdom has, on the other hand, been modulating its traditional rule of prohibiting hate speech through legislation; particularly through its prosecutorial policy. Few instances of hate speech, which offend dignity or are inherently injurious, have been prosecuted in recent years. Further, the prosecutor's office appears to be trying to mollify those calling for hate speech prosecutions by citing ordinary criminal cases with an enhanced penalty for hate motivation as hate speech prosecutions—apparently modeling this technique after the U.S. decision in *Wisconsin v. Mitchell*.[244] It can thus be argued that the U.S. and the U.K. are quite similar; in both, the primary force operating against hate speech is the enhanced penalty for crimes motivated by hate.

The impact of international human rights law in the U.K. is enormous and not yet fully realized. The adoption of the HRA in 1998 incorporated into domestic law the EHRC of the European Union. In the area of hate speech law, however, the impact promises to be slight due to the similarity of the domestic and international law, at least on paper. While this adoption might be viewed as a pull toward greater protection of hate speech, it has no effective way of modifying the U.K.'s prosecutorial policy, which has tended to allow hate speech as long as it offended no more than the dignity of citizens. While the HRA does not install U.S.-style judicial review or upset parliamentary sovereignty, it does enhance the role and the visibility of the U.K. courts with respect to protection of human rights by giving them the authority of making a declaration of the incompatibility of a statute with the HRA, sending the law back to the parliament for a final decision.[245] In the long run, the U.K. courts' power may evolve to a stronger position and their role as protector of human rights, including speech rights, may be awakened.

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243. *See supra* Part IV.B.

244. *See* Human Rights Act, 1998, c. 42, §§ 4, 9 (Eng.); Vick, *supra* note 7, at 355–56 (describing the "incompatability" process).

245. *See* Human Rights Act, 1998, § 4.