THE INTERNET, FREE SPEECH, AND CRIMINAL LAW: IS IT TIME FOR A NEW INTERNATIONAL TREATY ON THE INTERNET?

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The Internet has sparked an unprecedented communications revolution. For most of human history, ordinary people have found it difficult to easily engage in mass communication.[1] In ancient times, almost all communication was through oral or handwritten methods, and it was extraordinarily difficult for ordinary individuals to communicate their ideas broadly.[2] In modern times, even though speech technologies have improved dramatically, the most effective mass communication technologies (e.g., newspapers, radio, and television) have been controlled by governmental officials or private individuals who served as "gatekeepers" for those technologies.[3] Because there might be only one (or a few) media outlets in a given area, a small number of people were able to exercise disproportionate influence over speech communications.[4] While these gatekeepers might have chosen to give ordinary individuals access

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1. *See* RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY 3 (forthcoming 2012).

2. *See id.*; Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57, 60 (2005-2006).

3. *See* WEAVER, *supra* note 1, at 19-44.

4. *See id.* at 19.

to the communications technologies (e.g., by allowing them to publish or air an op-ed piece), they retained broad authority to deny access.[5]

The Internet, coupled with the development of personal computers (PCs) and other handheld devices, has dramatically altered the communications possibilities of ordinary individuals.[6] Compared to prior speech technologies, the Internet suffers from far fewer barriers to access and use. An individual can purchase a simple computer and Internet access for a relatively small amount of money (hundreds of dollars), and a handheld device costs far less. Those who cannot afford a computer can gain free access through libraries or elsewhere. Many businesses (e.g., bookstores, restaurants, and coffee shops) now offer free Wi-Fi access as a way to attract customers. With these new technologies, the communications possibilities of ordinary individuals have expanded dramatically.[7] Using PCs, individuals can easily create high quality documents for dissemination. Indeed, through the mere click of a computer mouse, they can transmit these documents to hundreds (potentially thousands or millions) of people around the world. As the Internet has led to the creation of new forms of communication (e.g., Twitter, blogs, and Facebook), and new communications technologies (e.g., handheld devices), communication has expanded dramatically.

Expanded communication possibilities have transformed the political process as well as democratic systems. Because individuals are no longer forced to persuade traditional gatekeepers to communicate their ideas, they can directly attempt to influence the political process. In the United States, groups such as MoveOn.org and the Tea Party have aggressively used the Internet to do just that.[8] Outside the United States, the Internet has been used equally aggressively. WikiLeaks, an Internet-based organization that fights against governmental secrecy, has used the Internet to expose secret documents.[9] It astounded the world with its claim to have obtained (and its plans to publish) some quarter-of-a-million classified U.S. government documents and its immediate release of 2,000 of those documents.[10] Many of these documents contained sensitive information and their release caused a major embarrassment

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5. *See id.* at 31-33.

6. *See id.* at 45-52.

7. *See id.* at 48-52.

8. *See* Howard Kurtz, *Reading the Tea Leaves*, WASH. POST (Jan. 6, 2010, 9:46 AM), www.washingtonpost.com/wp-dyn/content/article/2010/01/06/AR2010010600986.html; Robert Smith, *Tax Day Tea Parties*, NAT'L PUB. RADIO (April 15, 2009), http://www.npr.org/templates/story/story.php?StoryId=103143657; Linton Weeks, *Ten Years Later, MoveOn Is 4.2 Million Strong*, NAT'L PUB. RADIO (Sept. 22, 2008), http://www.npr.org/templates/story/story.php?storyId=94882173.

9. *See* Ravi Somaiya & Alan Cowell, *WikiLeaks Founder Said to Fear 'Illegal Rendition' to U.S.*, N.Y. TIMES, Jan. 12, 2011, at A6; Dina Temple-Raston, *WikiLeaks Release Reveals Messier Side of Diplomacy*, NAT'L PUB. RADIO (Nov. 28, 2010), http://www.npr.org/2010/11/28/131648175/wikileaks-releases-huge-cache-of-u-s-diplomatic-cables. *See generally* WIKILEAKS, www.wikileaks.org (last visited Sept. 22, 2011) (stating that the organization is committed "to bringing important news and information to the public").

10. *See* sources cited *supra* note 9.

for U.S. governmental officials.[11] The Internet, combined with the WikiLeaks disclosures, has also played a significant role in political movements outside the United States, such as its role in bringing about the downfall of governments in Tunisia and Egypt.[12]

Expanded communications potential has also come with costs. The Internet has provided criminals with a high-tech method to achieve mischief, and criminals have embraced its potential in an array of contexts. For example, the Internet has been used to distribute child pornography,[13] to engage in sexual predation and child abuse,[14] and to perpetuate fraudulent schemes.[15] The Internet has also been used by extremist groups to propagate hate speech and Holocaust denial[16] and by Internet gambling businesses (which, while perhaps legal, can produce significant adverse social consequences).[17] The Internet has also provided a forum for terrorists to connect with each other and organize concerted action. For example, a Colorado woman (nicknamed "Jihad Jane") was indicted for using the Internet to plot terrorism,[18] a self-proclaimed pedophile created a website where he advocated on behalf of pedophilia,[19] and a white supremacist posted a poem describing the murder of a black President.[20]

Given the international nature of modern communications, the only effective way to attack criminal activity on the Internet is through concerted

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11. *See* Temple-Raston, *supra* note 9.

12. *See* David D. Kirkpatrick & Mona El-Naggar, *Protest's Old Guard Falls in Behind the Young*, N.Y. TIMES, Jan. 31, 2011, at A1, *available at* 2011 WLNR 1913878; Eleanor Beardsley, *Social Media Gets Credit for Tunisian Overthrow*, NAT'L PUB. RADIO (Jan. 16, 2011), http://www.npr.org/2011/01/16/132975274/Social-Media-Gets-Credit-For-Tunisian-Overthrow ("Two days ago, Tunisia's president fled the country - many reasons are being cited for his overthrow. But many credit the Internet and young, educated bloggers, tweeters and Facebook users for bringing down the regime.").

13. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 249-50 (2002) (striking down portions of the Child Pornography Prevention Act of 1996 that prohibited "virtual" child pornography); New York v. Ferber, 458 U.S. 747, 756-66 (1982) (upholding a New York criminal statute that prohibited individuals from knowingly promoting sexual performances by children under the age of sixteen years old).

14. *See* Trymaine Lee, *Keeping Predators Away from "Spacebook,"* N.Y. TIMES (Jan. 29, 2008, 5:27 PM), http://cityroom.blogs.nytimes.com/2008/01/29/keeping-predators-away-from-spacebook/.

15. *See infra* Part II.C.

16. *See* Russell L. Weaver, Nicolas Delpierre & Laurence Boissier, *Holocaust Denial and Governmentally Declared "Truth": French and American Perspectives*, 41 TEX. TECH. L. REV. 495, 496 (2009); Richard E. Harwood, *Did Six Million Really Die?*, INST. FOR HISTORICAL REVIEW, http://www.ihr.org/books/harwood/dsmrd01.html (last visited Nov. 11, 2011); *see also* Raffi Berg, *The Fight Against Holocaust Denial*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/europe/4436275.stm (last updated Apr. 14, 2005) (discussing the growing tendency for people to deny the historical existence of the Holocaust).

17. *See* William R. Eadington, *The Future of Online Gambling in the United States and Elsewhere*, 23(2) J. PUB. POL'Y & MKTG. 214, 215-16 (2004), *available at* http://www.jstor.org/stable/30000762.

18. *See* Dina Temple-Raston, *"Jihad Jane" Creates a Calamity for Authorities*, NAT'L PUB. RADIO (Mar. 10, 2010), http://www.npr.org/templates/story/story.php?storyId=124539554.

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

20. *See* Lauren Streib, *Poetic Justice: Kentucky Man Arrested for Threatening President with 16-Line Poem*, BUS. INSIDER (Feb. 20, 2010), http://articles.businessinsider.com/2010-02-20/law_review/29977646_1_social-networking-supremacists-pazienza.

international action. Criminals exist all over the world and can use the Internet to communicate with potential victims everywhere, making it impossible for any one nation to deal with the problem by itself. At present, there is a Convention on Cybercrime created by the Council of Europe, and a number of non-European nations have signed on to that convention.[21] That convention is sound as far as it goes, in that it deals with issues such as fraud, forgery, child pornography, copyright infringement, aiding and abetting, and corporate liability, but the scope of the Convention is relatively limited.[22] More to the point, the Convention does not deal with many important issues.[23]

Omissions from the Convention regarding the Internet are perhaps understandable. In some contexts, regulatory attempts will necessarily raise difficult tensions between the governmental interest in prohibiting crime and the societal interest in protecting other fundamental rights, particularly freedom of expression. On these issues, societies can disagree about whether to place a higher value on freedom of expression or a higher value on some other interest (e.g., human dignity). These disagreements can make it difficult to produce an international approach that is satisfactory to all. This short Article discusses the possibility of a revised international treaty governing the Internet, describes some of the difficulties that are likely to be encountered, and gives some ideas regarding the possible contours of such an agreement.

I. FUNDAMENTAL DISAGREEMENTS

Complicating the possibility of an international treaty on the Internet are fundamental differences between nations regarding the role of speech in society and especially regarding the circumstances under which speech may be circumscribed in pursuit of other interests.[24] No country regards freedom of expression as an absolute right.[25] Even the United States, which tends to treat freedom of expression as a preferred right and to provide much greater protection for freedom of expression than is provided in other countries, balances the need for free expression against other competing interests.[26] As a result, in the U.S., the government is free to limit or prohibit certain types of speech, including child pornography and obscenity.[27]

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21. Council of Europe: Convention on Cybercrime, pmbl. (Nov. 23, 2001) E.T.S. No. 185 [hereinafter Convention on Cybercrime].

22. *See id.* at arts. 7-12.

23. *See infra* Part I.

24. *See* Weaver et al., *supra* note 16, at 506-09.

25. *See generally 2010 Human Rights Report*, U.S. DEP'T OF STATE, http://www.Humanrights.gov/reports (last visited Nov. 11, 2011) (providing detailed reports on the rights and freedoms enjoyed by the citizens of various countries in the world).

26. *See* RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 7-18 (3d ed. 2009).

27. *See* New York v. Ferber, 458 U.S. 747, 756-66 (1982). However, the United States Supreme Court draws a distinction between "child pornography" and "virtual child pornography" (computer-created depictions of children engaged in sex) and has held that the latter is entitled to constitutional protection. *See*

The problem is that many other countries cut the balance between expression and other competing interests quite differently. For example, France places a high value on the need to protect individuals and groups against degradation of human dignity.[28] As a result, in its Gayssot law, France makes it a crime to deny that the Holocaust occurred (or, for that matter, for individuals to dispute the official findings of the Nuremberg War Crimes Tribunal).[29] Although France values free expression, it regards that right as sometimes subservient to other interests.[30] Unlike the United States, where it is doubtful that the Gayssot law would be constitutional,[31] France cuts the balance regarding free expression quite differently.[32]

Because nations value the right to free expression differently, diplomats may find it difficult or impossible to develop an international treaty that will satisfy the needs and interests of all countries.[33] For the United States, at least regarding some of the issues that might arise during treaty negotiations, there may not be significant leeway for compromise. Under United States law, the Constitution is regarded as the supreme law of the land, and any statute that conflicts with the Constitution is invalid.[34] A treaty is regarded as having the same status as a statute, and a treaty that conflicts with the Constitution is necessarily invalid.[35] In other words, while U.S. negotiators may compromise and cooperate with other nations on various issues relating to the definition and prosecution of Internet crime, there will be definite limits that cannot be transcended.

Ashcroft v. Free Speech Coal., 535 U.S. 234, 250-56 (2002); Miller v. California, 413 U.S. 15, 23-26 (1973); Roth v. United States, 354 U.S. 476, 481-91 (1957).

28. *See* Weaver et al., *supra* note 16, at 508.

29. *See* Law No. 90-615 of July 13, 1990, art. 9, Journal Officiel de la Republique Française [J.O.] [Official Gazette of France], July 14, 1990, p. 8333; Weaver et al., *supra* note 16, at 496.

30. *See* Weaver et al., *supra* note 16, at 486.

31. *See id.* at 512-16.

32. *See id.* at 496-97.

33. *See id.*

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

35. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing."); Reid v. Covert, 354 U.S. 1, 16-17 (1957) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V." (footnote omitted)).

II. POSSIBLE AREAS OF AGREEMENT

At this point, it is worthwhile to consider areas of possible agreement regarding the terms of a treaty on the Internet. Given the brevity of this Article, the list of items set forth below is not intended to be exhaustive, but it should give the reader some sense of the possibilities and complexities involved in crafting an international agreement.

A. Child Pornography

Child pornography is one area where there is likely to be considerable agreement between the treaty delegates, but it is already covered in the existing Convention.[36] As the United States Supreme Court recognized in *New York v. Ferber*, society has a compelling interest in protecting children, and it has the right to prohibit child pornography in pursuit of that interest.[37] Most countries condemn the production and distribution of child pornography.[38] As a result, a prohibition against child pornography is one area where U.S. negotiators are likely to find common ground with the negotiators from other countries. Because the United States government has the right to prohibit child pornography, it is free to enter into a treaty prohibiting the production and distribution of child pornography.

The more difficult question is whether the treaty can include a provision prohibiting so-called virtual depictions of child sex. In other words, can it prohibit depictions of child pornography that involve only computer-generated images and not actual children? In some countries, there has been a movement to ban such virtual images.[39] For example, in Japan there have been efforts to

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36. *See* Convention on Cybercrime, *supra* note 21, at art. 9.

37. *See* New York v. Ferber, 458 U.S. 747, 756-57 (1982) ("It is evident . . . that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. . . . In *Ginsberg v. New York*, . . . we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the 'well-being of its youth' justified special treatment of indecent broadcasting received by adults as well as children. The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." (citations omitted) (internal quotation marks omitted)); *id.* at 759 ("The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." (footnote omitted)).

38. *See, e.g.*, Convention on Cybercrime, *supra* note 21, at art. 9 (detailing "offences related to child pornography"); United Nations, Convention on the Rights of the Child, art. 34, Sept. 2, 1990, E.T.S. (detailing measures to prevent child pornography).

39. *See, e.g.*, Hiroko Tabuchi, *Japan Wrestles with Popular Depictions of Girls: Child Advocates Seek Limits on Explicit Images, But Publishers Fight Back*, INT'L HERALD TRIB., Feb. 10, 2011, *available at* 2011 WLNR 2579862.

ban depictions of sexual activities of young girls, including even depictions of child sexual activity in such forms as comic strips.[40] In some of these comics, there are no pictures of actual children, or even depictions of actual sex, but rather only suggestions of sexual fantasies (e.g., one comic described an elementary school teacher who purportedly married one of his students and had sex with her).[41] In the United States, to the extent that the comic book could be regarded as "obscene," the government could prohibit it.[42]

If the comic strip is not regarded as obscene, however, it is not clear that U.S. authorities could agree to prohibit the publication. In *Ashcroft v. Free Speech Coalition*, the Court held that "virtual child pornography" (depictions of children engaged in sex that had been created through computer technology without the use of real children) is constitutionally protected under the First Amendment.[43] The focus of the U.S. precedent is on protecting actual children against sexual abuse by drying up the market for such works.[44] Moreover, in *Ashcroft*, the Court held that the government could not ban the mere idea of minors engaging in sex, a theme which had been common throughout history in prominent films and famous books (e.g., Romeo & Juliet), without running afoul of the First Amendment.[45] As a result, a U.S. negotiator might not be free to agree to treaty provisions banning all depictions of child sexual activities.[46] The treaty should focus on banning depictions of actual children engaged in sex.

Even if U.S. negotiators cannot agree to prohibit virtual child pornography, an effective treaty prohibiting the depiction of child pornography (defined as involving depictions of actual children) might have real value for the international community. Like many forms of criminal activity, child

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40. *See id.*

41. *See id.*

42. *See* Miller v. California, 413 U.S. 15, 36-37 (1973); Roth v. United States, 354 U.S. 476, 481-87 (1957).

43. Ashcroft v. Free Speech Coal., 535 U.S. 234, 241, 258 (2002).

44. *See id.* at 245-46.

45. *Id.* at 246-48 ("[T]he CPPA is much more than a supplement to the existing federal prohibition on obscenity. . . . The CPPA [extends] to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements. The materials need not appeal to the prurient interest. Any depiction of sexually explicit activity, no matter how it is presented, is proscribed. The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. It is not necessary, moreover, that the image be patently offensive. Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards. . . . The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations. . . . It is, of course, undeniable that some youths engage in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse." (citations omitted)).

46. *See id.*

pornography has gone both high-tech and international.[47] Because of the Internet, it is quite easy to transmit child pornography across international borders, and it is quite difficult for a single nation, acting alone, to effectively control and attack problems relating to the production and dissemination of child pornography.[48] Through concerted action, nations are much more likely to be able to have an impact on the dissemination of such materials.[49]

B. Obscenity

Another area of possible agreement relates to "obscene" materials. United States Supreme Court decisions have consistently held that obscene speech is not protected under the First Amendment to the United States Constitution.[50] In its landmark decision in *Chaplinsky v. New Hampshire*, the Court recognized that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."[51] *Chaplinsky* included within these classes of speech "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[52] So, obscenity is another type of speech that U.S. negotiators could agree to limit or restrict.[53]

If treaty negotiators wish to prohibit obscenity, however, they may encounter a significant problem reaching agreement regarding how to define the term "obscenity." In most areas of free expression, the U.S. is more permissive than other countries.[54] In regard to sexual speech, however, it is not clear that the U.S. position is as permissive as one might encounter in France or the Scandinavian countries.[55] As a result, U.S. negotiators may seek language that is more restrictive and less protective of sexual speech than some other countries are willing to accept.[56] At the same time, there may be other countries that are significantly more prudish regarding sexual speech and that will want to ban even more sexual speech than U.S. negotiators can agree to

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47. *See generally* George Ivezaj, *Child Pornography on the Internet: An Examination of the International Communities Proposed Solutions for a Global Problem*, 8 M.S.U. - D.C.L. J. INT'L L. 819, 819-20 (1999) (discussing the global impact that the Internet has had on spreading child pornography).

48. *See id.* at 823-47 (discussing how the international community needs to come together to regulate child pornography on the Internet).

49. *See id.*

50. *See* Miller v. California, 413 U.S. 15, 36-37 (1973); Memoirs v. Massachusetts, 383 U.S. 413, 420 (1966); Roth v. United States, 354 U.S. 476, 493 (1957).

51. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

52. *Id.* at 572.

53. *See id.* at 571-72.

54. *See* Weaver et al., *supra* note 16, at 514.

55. *See generally* Ivezaj, *supra* note 47, at 827-29, 846 (stating that U.S. laws define child pornography broadly as to punish all pedophiles, while Norwegian laws apply only to the possession or introduction of child pornography, and French laws apply only to the distribution of such material).

56. *See id.*

ban.[57] Under the United States Supreme Court's landmark decision in *Miller v. California*, governments cannot prohibit all sexual speech but rather only speech that runs afoul of the three-part *Miller* test (as modified by subsequent decisions).[58]

As a result, while it is possible for U.S. negotiators to agree to ban obscenity and to commit the U.S. to work to apprehend and prosecute those involved in creating and distributing obscenity, treaty negotiators will be forced to work hard to find common ground regarding the types of materials that can and should be prohibited. The difficulty for U.S. negotiators will be to develop standards that are sufficiently precise to pass constitutional muster, that protect sexual speech entitled to protection, and that satisfy foreign negotiators.

C. Combating Fraudulent Schemes

Another area where an international agreement might have value is in terms of prohibiting fraud and bringing international pressure to bear on fraudfeasors. While this is a topic covered by the current Convention, it is also one where there is significant need for action.[59] Virtually anyone who has an e-mail account has received fraudulent e-mails. Many have received one of the infamous Nigerian e-mails, which refer to an individual who recently died, leaving a lot of money behind, and seeking the e-mail recipient's help in transferring the money out of the country in exchange for a multi-million-dollar fee.[60] Of course, the scheme is ultimately designed to steal the recipient's money rather than to enrich him (the sender usually asks the recipient to deposit a check and then to forward money from the account).[61] The money is sometimes forwarded before the recipient can realize or determine that the deposited check is no good.[62] There are also scams whereby an individual receives an e-mail urgently demanding that he update his account information.[63]

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57. *See generally id.* at 846 (stating that Austria's laws regulating child pornography criminalize not only the possession and acquisition of child pornography but also the production and distribution of such materials).

58. *See* Miller v. California, 413 U.S. 15, 24 (1973). In *Miller*, the Court articulated the following test for determining whether speech is obscene within the meaning of the First Amendment:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (citation omitted); *see* WEAVER & LIVELY, *supra* note 26, at 56-59.

59. *See* Convention on Cybercrime, *supra* note 21, at art. 8.

60. *See* Sally Peck, *£8M of Papers Seized in Nigerian Fraud Haul*, THE TELEGRAPH (Oct. 4, 2007), http://www.telegraph.co.uk/news/worldnews/1565118/8m-of-papers-seized-in-Nigerian-fraud-haul.html.

61. *See id.*

62. *See id.*

63. *See* Tom Zeller, Jr., *You've Been Scammed Again? Maybe the Problem Isn't Your Computer*, N.Y. TIMES (June 6, 2005), http://www.nytimes.com/2005/06/06/technology/06link.html.

If he does, he unwittingly provides the thieves with the information needed to loot the account.[64]

An international agreement could prove to be an effective vehicle for dealing with such scams.[65] Fraud is a serious crime in most countries, but it is difficult to work across borders in order to investigate, apprehend, and prosecute the fraudfeasor.[66] Through international agreements, governments might be able to take collective action to catch such criminals and bring them to justice.[67] Because many of these fraudulent schemes do not raise significant First Amendment difficulties, U.S. negotiators could readily agree to some treaty provisions.

That is not to say that there would be no constitutional problems for U.S. negotiators to consider. In some countries, governments are free not to recognize and even to ban certain religions. For example, in France and Germany, Scientology is not a recognized religion.[68] In the United States, it would be much more difficult to ban a religion as fraudulent or to refuse to recognize a religion as legitimate. The holding in *United States v. Ballard* illustrates the problem.[69] In that case, federal officials tried to prosecute an individual for raising money on behalf of his religion.[70] The individual represented himself as a "divine messenger," used various aliases (e.g., Jesus Christ, St. Germain, and George Washington), and claimed that he could cure incurable diseases.[71] In rejecting the indictment, the United States Supreme Court stated that:

> Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.[72]

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64. *See id.*

65. *See* Convention on Cybercrime, *supra* note 21, at pmbl.

66. *See id.*

67. *See id.*

68. *See* Achim Seifert, *Religious Expression in the Workplace: The Case of the Federal Republic of Germany*, 30 COMP. LAB. L. & POL'Y J. 529, 536 (2009) ("[I]n the case of the Scientology Church, the Federal Labour Court has refused to recognize this group as a religious society under article 137 of the Constitution of Weimar: The main argument was that Scientology is a business organization and not a religious society."); Karla W. Simon, *International Non-Governmental Organizations and Non-Profit Organizations*, 44 INT'L LAW. 399, 410 (2010) ("A French court convicted the French branch of the Church of Scientology of fraud and fined the organization almost US $900,000. But the court stopped short of granting the prosecution's demand to ban the church entirely." (footnote omitted)).

69. United States v. Ballard, 322 U.S. 78, 79-84 (1944).

70. *See id.* at 79-81.

71. *See id.* at 79-80.

72. *Id.* at 86-87.

Thus, while U.S. negotiators may be able to agree to treaty provisions that prohibit and help root out fraud, there may be constitutional limits to the scope of an international treaty that attacks fraud.[73]

III. DIFFICULTIES FINDING COMMON GROUND

As the topics discussed in the prior section reveal, U.S. negotiators may be able to find common ground with foreign negotiators on a variety of topics (e.g., child pornography, obscenity, and fraud) but may encounter significant difficulties in some parts of the negotiations. As for other topics, it will be virtually impossible for U.S. and foreign negotiators to find common ground.[74] Indeed, in some areas of the law, other nations may consider an activity "criminal" that the United States may regard as protected speech.[75] The list set forth below is intended to be illustrative rather than exhaustive.

A. Holocaust Denial and Nazi Symbols

As noted, one area where it would be difficult to reach agreement relates to the issue of Holocaust denial.[76] In Germany, there is a ban on Holocaust denial as well as on the display of Nazi symbols.[77] Similarly, in France, there is a ban on Holocaust denial.[78] It is hard to believe that any of these restrictions could survive First Amendment scrutiny in the United States.[79] Indeed, within the United States, there is even case law suggesting that members of a right-wing political party may dress up in Nazi uniforms, swastikas, etc. and march through a village where survivors of the Holocaust lived.[80]

If foreign negotiators push for a ban on Holocaust denial, U.S. negotiators will have no choice but to refuse their demands.[81] Even though the German

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73. *See id.* at 79-84.

74. *See* Weaver et al., *supra* note 16, at 512-16.

75. *See, e.g.*, *id.* at 498-506.

76. *See supra* note 16 and accompanying text.

77. *See* Zachary Pall, *Light Shining Darkly: Comparing Post-Conflict Constitutional Structures Concerning Speech and Association in Germany and Rwanda*, 42 COLUM. HUM. RTS. L. REV. 5, 53-54 (2010).

78. *See* Weaver et al., *supra* note 16, at 496.

79. *See id.* at 512-16.

80. *See* Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 26 (Ill. 1978). In *Village of Skokie v. National Socialist Party of America*, the National Socialist Party of America, wearing Nazi uniforms and swastikas, sought to march through Skokie, Illinois, a predominantly Jewish village with a significant number of Holocaust survivors. *Id.* at 21-22. Jewish groups threatened a violent response to the march. *Id.* at 22. The Illinois Supreme Court held that the Nazis had a right to march, concluding that "the heavy presumption against the constitutional validity of a prior restraint" could not be overcome. *Id.* at 24. The court cited precedent for the idea that "a hostile audience is not a basis for restraining otherwise legal First Amendment activity[,]" and it noted that "courts have consistently refused to ban speech because of the possibility of unlawful conduct by those opposed to the speaker's philosophy." *Id.* at 25. Despite the favorable ruling, the group decided to hold the march elsewhere. *See* Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 630 (1985).

81. *See* Weaver et al., *supra* note 16, at 512-16.

and French laws prohibiting Holocaust denial have been upheld in those countries, it is doubtful that they could withstand constitutional scrutiny in the United States.[82] U.S. courts have been particularly reluctant to allow governments to declare "truth" or to decree that certain facts are true.[83] As the United States Supreme Court stated in *West Virginia State Board of Education v. Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[84]

B. Article 10 of the European Convention on Human Rights: Framework

It is not inconceivable that European delegates to an international treaty convention on the Internet and free expression might seek limits on freedom of expression consistent with those contained in Article 10 of the European Convention on Human Rights (ECHR).[85] That section provides as follows:

> 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[86]

After all, European delegates might argue, because the ECHR language has worked well in Europe, it should serve as a model for the world in its regulation of Internet speech.[87]

There are a host of reasons why U.S. negotiators might regard the ECHR language as an inadequate basis for the treaty's language. In a later section, we will examine the language of the ECHR allowing the government to provide

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82. *See id.*

83. *See id.*; *see, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (dissenting from the holding that negative speech regarding World War I was not protected by the First Amendment because such speech was not threatening or dangerous).

84. *Barnette*, 319 U.S. at 642.

85. *See, e.g.*, Weaver et al., *supra* note 16, at 498-506.

86. Council of Europe, European Convention on Human Rights art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention on Human Rights].

87. *See generally* Janelle L. Cornwall, Comment, *It Was the First Strike of Bloggers Ever: An Examination of Article 10 of the European Convention on Human Rights as Italian Bloggers Take a Stand Against the Alfano Decree*, 25 EMORY INT'L L. REV. 499, 509-19 (2011) (discussing how Article 10 will affect a recent Italian law restricting Internet speech in light of how the ECHR has effectively protected freedom of speech in cases from Romania, the United Kingdom, Switzerland, Austria, Ukraine, Turkey, Moldova, and France).

"protection of the reputation or the rights of others."[88] Even if that language is disregarded, the ECHR language would still be questionable under the U.S. Constitution. For one thing, the ECHR uses broad and general language that would seem to make it quite easy for a government to selectively restrict speech.[89] For example, it is unclear what the ECHR means when it provides that states may impose "such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society," or what it means by language that suggests that governments can restrict speech insofar as necessary to "the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, [or] for the protection of health or morals."[90] All of these terms seem to be broad and general enough to permit significant restrictions on freedom of expression and would undoubtedly raise vagueness and overbreadth concerns in the United States.[91]

In every country, there are dissidents who want to alter the prevailing governmental system or to challenge political orthodoxy. Throughout history, governments have taken steps to control or restrict the rights of such individuals. Following Johannes Gutenberg's invention of the printing press in the fifteenth century, governments (fearful of criticism as well as of those who might foment dissent) sought to restrict the use of the printing press in various ways.[92] For example, governments imposed limits on the total number of printing presses that could exist in a given country and also imposed licensing schemes designed to control the content of what was published.[93] The British scheme required printers to submit copies of proposed publications for governmental review, and permitted the censor to refuse a license for any publication that contained material that the censor deemed objectionable.[94] In the decision of the Star Chamber, England also imposed the crime of seditious

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88. Convention on Human Rights, *supra* note 86, at art. 10; *infra* Part III.C.

89. *See* Convention on Human Rights, *supra* note 86, at art. 10.

90. *Id.*

91. *See generally* City of Hous. v. Hill, 482 U.S. 451, 466-67 (1987) (holding that a municipal ordinance making it unlawful to interrupt a police officer in performance of his duties was unconstitutionally overbroad under the First Amendment); Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 574-75 (1987) (holding that a resolution preventing religious group from distributing literature at Los Angeles International Airport was unconstitutionally overbroad); Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (holding that Jacksonville's vagrancy ordinance was unconstitutionally vague).

92. *See* DAVID CROWLEY & PAUL HEYER, COMMUNICATION IN HISTORY: TECHNOLOGY, CULTURE, SOCIETY 82 (5th ed. 2007).

93. *See* Thomas v. Chi. Park Dist., 534 U.S. 316, 320 (2002) (quoting William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 248 (1982)).

94. *See id.*; FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL 240 (1952); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988) (discussing risk to free expression inherent in licensing statutes); Lowe v. SEC, 472 U.S. 181, 205 (1985) (noting the Court's reasoning in *Lovell* to support a broad reading of the exclusion for publishers in the Investment Advisers Act); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) (referencing the struggle for freedom of the press as primarily directed against the power of the licensor).

libel in *de Libellis Famosis*.[95] That decision replaced, in part, the crime of constructive treason and made it a crime to criticize the government or governmental officials (and, at one point, the clergy as well).[96] The crime was enforced by "threats of punishment, litigation costs, and stigma" and was justified by the notion that criticism of the government "inculcated a disrespect for public authority."[97] "Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood," and, therefore, this crime was not a defense.[98] Indeed, truthful criticisms were punished more severely because it was assumed that true criticisms were potentially more damaging to the government.[99]

The broad language of the ECHR would seem to allow repressive regimes—whether the regime involves a monarch, an autocrat, a dictator, or some other type of leader—to readily suppress objectionable speech and to do so entirely consistent with the proposed international treaty on the Internet.[100] All the regime need do is point to the language permitting governments to impose speech restrictions that are necessary to public safety or to health and morals.[101] Consider the recent protests in Tunisia and Egypt.[102] In both countries, government sought to portray the protests as upsetting the balance of the social order and creating a dangerous condition.[103] One would guess that nations are quite adept at finding justifications for their repressive actions. Of course, Europeans might argue that the ECHR provision has been interpreted

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95. *de Libellis Famosis*, (1606) 77 Eng. Rep. 250, 256 (Star Chamber); *see also* Law Commission Working Paper No. 72, 41-44 (1977) (discussing the history of seditious libel); Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 816-30 (1984) (discussing the history of seditious libel in England and America); Jeffrey K. Walker, *A Poisen in Ye Commonwealthe: Seditious Libel in Hanoverian London*, 25 ANGLO-AM. L. REV. 341, 341-66 (1996).

96. *de Libellis Famosis*, 77 Eng. Rep. at 250; *see also* William T. Mayton, *Seditious Libel and the Last Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 102-03 (1984) (discussing the impact of *de Libellis Famosis* on the development of seditious libel). Indeed, in *de Libellis Famosis*, the defendants had ridiculed high clergy. *de Libellis Famosis*, 77 Eng. Rep. at 250; *see* Mayton, *supra*, at 102-03.

97. Mayton, *supra* note 96, at 91, 103; *see* LOUIS KRONENBERGER, THE EXTRAORDINARY MR. WILKES 36-37 (1st ed. 1974); Matt J. O'Laughlin, Comment, *Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, 70 UMKC L. REV. 707, 720-21 (2002) (referring to the seditious libel prosecution of John Wilkes during the reign of George III).

98. Mayton, *supra* note 96, at 103; *see* KRONENBERGER, *supra* note 97, at 50; O'Laughlin, *supra* note 97, at 720-21.

99. *See* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 184 n.290 (1998); *see also* William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. ST. B.J. 48, 48 (1996) (discussing the trial of Peter Zenger, who was arrested for printing articles criticizing the Royal Governor, and noting that truth was not a defense to seditious libel).

100. *See* Convention on Human Rights, *supra* note 86, at arts. 8, 10.

101. *See id.* at art. 10.

102. *See, e.g.*, Beardsley, *supra* note 12 (discussing how the Internet impacted the Tunisian protests); *Egypt Protests Draw Mixed Reaction in Region*, CNN (Jan. 29, 2011), http://articles.cnn.com/2011-01-29/world/egypt.middle.east.reaction_1_egyptian-people-egyptian-president-hosni-mubarak-populous-arab-nation?_s=PM:WORLD; *Protester Dies in Tunisia Clash*, ALJAZEERA, http://english.aljazeera.net/news/africa/2010/12/20101224235824708885.html (last modified Dec. 25, 2010).

103. *See supra* note 102 and accompanying text.

more narrowly and in a way that is respectful of freedom of expression. This argument provides little solace to U.S. negotiators (or, more particularly, U.S. courts forced to apply the provision) when the language suffers from such a high degree of overbreadth and vagueness.[104]

It is also not clear that the ECHR provision, even if narrowly construed, would provide the level of protection mandated by the First Amendment. For example, using the ECHR provision, could governments justify the suppression of legitimate news organizations that attempt to publish purloined government documents as the U.S. government tried to do (but was rebuffed) in the *Pentagon Papers Case*?[105] Or, to update the *Pentagon Papers Case* to a modern Internet context, could the government rely on the treaty to justify suppression of WikiLeaks, which has obtained a quarter-of-a-million classified documents and has actually released thousands of documents?[106] If WikiLeaks could be prosecuted, what happens to the various traditional publishers such as the *New York Times*, Germany's *Der Spiegel* magazine, Britain's *Guardian* newspaper, France's *Le Monde* newspaper, and Spain's *El Pais* newspaper, to which WikiLeaks made a coordinated release of the documents?[107] Would the Internet treaty also give governments the power to prosecute the various newspapers that were involved with the WikiLeaks disclosure?

Although the U.S. has evolved over the last century, it is not clear that U.S. law would permit the U.S. government to prosecute WikiLeaks. In a number of early decisions, U.S. courts upheld convictions of individuals who engaged in so-called "subversive advocacy."[108] In *Brandenburg v. Ohio*, however, the United States Supreme Court reversed those earlier decisions and held that subversive advocacy could not be prosecuted absent proof that it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[109] Moreover, in *New York Times Co. v. United States*, the Court held that the government could not prohibit the *New York Times* from publishing classified documents that were turned over to it.[110] In order to obtain such relief, the government would have to meet a "heavy burden" of justification, and the Court concluded that it could not satisfy that burden.[111]

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104. *See supra* notes 90-91 and accompanying text; Convention on Human Rights, *supra* note 86, at art. 10.

105. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

106. *See* Temple-Raston, *supra* note 9; Somaiya & Cowell, *supra* note 9.

107. *See* Temple-Raston, *supra* note 9; Somaiya & Cowell, *supra* note 9; Kim Severson & Robbie Brown, *WikiLeaks Cables Make Appearance in a Tale of Sunken Treasure and Nazi Theft*, N.Y. TIMES, Jan. 7, 2011, at A10, *available at* 2011 WLNR 381340.

108. *See, e.g.*, Frohwerk v. United States, 249 U.S. 204, 209-10 (1919) (upholding the conviction of a newspaper publisher under the Espionage Act); Schenck v. United States, 249 U.S. 47, 48, 52 (1919) (upholding a conviction under the Espionage Act and applying the clear and present danger test even though the danger was not so clear or so present).

109. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

110. *N.Y. Times Co*., 403 U.S. at 714.

111. *Id.*

It is not entirely clear that the U.S. Supreme Court will continue to apply the *Brandenburg* standard in an Internet context. In an earlier article, I analyzed whether *Brandenburg* remains good law in the Internet era.[112] On an initial glance, one might question how an Internet publication could be successfully prosecuted under the *Brandenburg* test.[113] Most Internet communications are unlikely to produce "*imminent* lawless conduct."[114] As we have seen in the recent demonstrations in the Middle East, however, as well as in this country, it is possible to stimulate and coordinate nearly instantaneous actions over the Internet.[115]

The ECHR language could be analyzed in greater depth, and additional inconsistencies with U.S. constitutional law could be revealed. Enough has been said, however, to show that U.S. negotiators would have great difficulty agreeing to include the ECHR language in an international treaty on the Internet.[116] The vague principles articulated in the ECHR are insufficient to satisfy U.S. constitutional standards, and it is unlikely that the language could satisfy the *Brandenburg* test.[117] The bottom line is that there are lots of questions that would have to be resolved before U.S. negotiators could agree to such a provision.

C. Protection of Reputation Against Defamatory Speech

A provision in the ECHR also allows governments to regulate or limit speech in order to protect reputation.[118] Regarding this area of the law, there is another major divide between U.S. attitudes towards reputation and freedom of expression and the attitudes of those in some other countries.

The divide between the U.S. and other countries has constitutional implications as well as both civil and criminal implications.[119] Germany's Basic Law provides explicit protection for personality, which protects both individual worth and dignity.[120] In some countries, it is even possible to

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112. *See* Russell L. Weaver, Brandenburg *and Incitement in a Digital Era*, 80 MISS. L.J. 1263, 1265 (2011).

113. *See id.*

114. *See id.* at 1278.

115. *See id.* at 1279; WEAVER, *supra* note 1, at 67-81.

116. *See supra* notes 85-91 and accompanying text.

117. *Compare* Convention on Human Rights, *supra* note 86, at art. 10 (stating generally the right to freedom of expression), *with* U.S. CONST. amend. I (specifying freedom of speech rights), *and* Weaver, *supra* note 112, at 1265 (referring to the imminent lawless action).

118. *See* Convention on Human Rights, *supra* note 86, at art. 10.

119. *See* Near v. Minnesota, 283 U.S. 697, 718-19 (1931); Lisa J. Laplante & Kelly Phenicie, *Mediating Post-Conflict Dialogue: The Media's Role in Transitional Justice Processes*, 93 MARQ. L. REV. 251, 258 (2009).

120. *See* Paul M. Schwartz & Karl-Nikolaus Pfeifer, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better Than One Unitary Concept?*, 98 CAL. L. REV. 1925, 1937-47 (2010).

criminally prosecute those who engage in defamatory speech.[121] In England, defamation laws have historically been very pro-plaintiff, and the law made it relatively easy for a defamation plaintiff to recover.[122] Indeed, English law imposed the burden of proof on the plaintiff, and most privileges were difficult to sustain.[123] As a result, British defamation law has historically had a very significant chilling effect on the British media's ability to report on matters of public interest.[124] Most British newspapers and media outlets tended to apply a "legally admissible evidence" standard, which required editors to determine what legally admissible evidence was available to support allegations that they might make and then to make a business decision about whether it was prudent to air particular allegations.[125] As a result, the British media was fairly cautious in its reporting in an attempt to avoid liability.[126] In addition, British news outlets tended to engage in extensive prepublication review designed to minimize the possibility for defamation liability.[127]

Although U.S. defamation law tracked British defamation law for the first couple of centuries,[128] U.S. law diverged dramatically from England in the 1960s.[129] In *Garrison v. Louisiana* for example, the Court made clear that criminal sanctions could not be imposed against defamatory speech.[130] As a result, a U.S. negotiator to a treaty could not agree to a provision that would authorize the imposition of criminal sanctions for libelous speech.[131] Likewise, in contravention to a number of other countries, U.S. negotiators could not agree to treaty provisions that permit courts to enter injunctions against defamatory speech. In *New York Times Co. v. United States*, the Court held that it would apply a strong presumption against the constitutionality of prior

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121. *See* Laplante & Phenicie, *supra* note 119, at 258 ("*New York Times* editor and Pulitzer Prize winner Tina Rosenberg observes: 'In many countries, journalists must also contend with laws that make libel a criminal offense, and use a very broad standard to define libel. Venezuela criminalizes expression deemed disrespectful to public officials even if completely true.'").

122. *See* RUSSELL L. WEAVER, ANDREW T. KENYON, DAVID F. PARTLETT & CLIVE P. WALKER, THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION & FREE SPEECH 17-34 (2006).

123. *See id.* at 25-34.

124. *See id.* at 131-50.

125. *Id.* at 142-43 ("All media organizations indicated that, as a matter of journalistic ethics, they did not want to print or broadcast anything that is untrue. But all stated that they were not able to publish everything that they believed was true. Most focused on whether, if their organization was called on to account for a story, it would have legally admissible evidence with which to defend itself." (footnotes omitted)).

126. *See id.*

127. *Id.* at 141 ("As compared to the American media, the thoroughness of the review process was startling. Most newspapers and broadcasters had teams of lawyers (usually junior barristers from local law offices who act as 'night lawyers') who reviewed each day's paper or program for material that might be defamatory. *The Guardian*, for example, had several lawyers who reviewed each day's paper before it was published. *The Times* had an in-house staff of three solicitors who performed this task, and also employed a barrister who came in during the evening to make spot checks.").

128. *See id.* at 35-39.

129. *Id.* at 39.

130. *See* Garrison v. Louisiana, 379 U.S. 64, 67, 74 (1964).

131. *See id*.

restraints.[132] In the Court's earlier decision in *Near v. Minnesota*, the Court held that the presumption against prior restraints extended to allegedly defamatory statements about public figures made in an allegedly "malicious, scandalous and defamatory newspaper."[133] The Court went on to hold: "Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals."[134]

In regard to the possibility of imposing damages for defamation, again, U.S. law is more restrictive than that of other countries.[135] In *New York Times Co. v. Sullivan*, the Court reaffirmed the national commitment to freedom of expression;[136] expressed concern regarding the possible "chilling effect" of defamation judgments;[137] and held that public officials must prove "actual malice" in order to recover in a defamation action.[138] In other words, the Court shifted the burden of proof from the defendant to the plaintiff and required the plaintiff to prove either that the defendant had "knowledge" that the statements were false or that he acted in "reckless disregard" for truth or falsity.[139] This standard was soon after extended to defamation suits brought by so-called public figures.[140]

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132. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) ("We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled 'History of U.S. Decision-Making Process on Viet Nam Policy.' 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' The District Court for the Southern District of New York in the *New York Times* case, and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the Government had not met that burden. We agree." (citations omitted)).

133. Near v. Minnesota, 283 U.S. 697, 703, 718 (1931) ("The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right.").

134. *Id.* at 718-19.

135. *See* WEAVER ET AL., *supra* note 122, at 47, 249-51.

136. N.Y. Times Co. v. United States, 376 U.S. 254, 270-71 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent." (citations omitted)).

137. *Id.* at 271-72 ("That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive[]'. . . .").

138. *Id.* at 279-80.

139. *Id.* ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

140. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 138-39 (1967) (treating the Athletic Director at the University of Georgia as a public figure and requiring him to satisfy the actual malice standard in order to

The U.S. Supreme Court has suggested that somewhat lower standards might be applied to defamation actions brought by private figures, even private figures involved in matters of public interest,[141] but especially to private individuals involved in matters of purely private interest.[142] Even in these contexts, however, the U.S. standards are different than those applied in foreign countries.

The historic discrepancies between U.S. defamation law and that of foreign countries, particularly plaintiff-friendly jurisdictions like England, have led U.S. courts to refuse to enforce foreign defamation judgments unless they were rendered under standards consistent with the First Amendment to the United States Constitution.[143] Because foreign defamation judgments are never rendered in accordance with U.S. defamation standards, these decisions mean that foreign defamation judgments are essentially unenforceable in the United States.[144] There are sound reasons for the refusal by the U.S. courts.[145] The evidence suggests that, despite the widespread impression that the British media engages in bold and aggressive reporting, the British media has actually been quite chilled in its reporting on matters of public interest by British defamation law.[146] If U.S. courts enforced British defamation judgments, there is a significant risk that British defamation law might begin to govern publications in the United States and that the U.S. media might be chilled in its coverage of the news in the same way that the British media has been historically chilled.[147]

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recover in a defamation action); Associated Press v. Walker, 191 So. 2d 727, 727 (La. Ct. App. 1966), *rev'd*, 389 U.S. 28 (1967) (treating a retired general and former candidate for governor as a public figure and requiring him to satisfy the actual malice standard).

141. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 330-31, 346-47 (1974) (holding that private individuals could recover in a defamation action based on standards lower than the actual malice standard).

142. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 779-81 (1985) (holding that states retained substantial discretion regarding the liability standards to be applied to defamation actions brought by purely private individuals).

143. *See* Telnikoff v. Matusevitch, 702 A.2d 230, 240-44 (Md. 1997); Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 663-65 (N.Y. App. Div. 1992). U.S. courts have also refused to enforce nondefamation foreign free speech judgments. *See, e.g.*, Sarl Louis Feraud Int'l v. Viewfinder, Inc., 406 F. Supp. 2d 274, 278-79 (S.D.N.Y. 2005), *vacated*, 489 F.3d 474 (2d Cir. 2007) (refusing to enforce a default judgment by a French high-fashion clothing designer obtained in France against a U.S. corporation for unauthorized use of intellectual property and unfair competition).

144. *See* WEAVER ET AL., *supra* note 122, at 183-200.

145. *See* Russell L. Weaver, *Free Speech, Democracy and Enforcement of Foreign Defamation Judgments*, *in* RECOGNITION & ENFORCEMENT OF JUDGMENTS 268, 268-317 (Russell Weaver & F. Lichere eds., U. Aix-Marseille Press 2010) (on file with author).

146. *See* WEAVER ET AL., *supra* note 122, at 131-50.

147. *See* Weaver, *supra* note 145, at 298-317. Interestingly, for those familiar with the British tabloid press, one might wonder whether the British press has ever really been "chilled" in its coverage or its reporting. *See* WEAVER ET AL., *supra* note 122, at 215-42. After all, the tabloid press appears to be very aggressive and hard hitting in its approach. *See id.* at 131-32 ("[T]o the casual observer, the pre-*Reynolds* English press and media might have seemed to be remarkably robust and even aggressive. Indeed, as the authors discussed their research with other academicians and laypersons, others frequently pointed out the bold reporting of some English newspapers, particularly what are commonly called 'the tabloids.' This term can no longer be taken literally to refer to format but is taken to mean sensationalized and populist approaches

In recent years, British defamation law has moved closer to U.S. defamation law.[148] The trend began in the Pacific where decisions were rendered by the Australian High Court and the New Zealand High Court extending common law qualified privilege to cover journalistic practices.[149] The British House of Lords followed suit in *Reynolds v. Times Newspapers Ltd.*, and similarly extended common law qualified privilege.[150] Under *Reynolds*, the focus is on whether the defendant's publication relates to a matter of public interest.[151] In deciding whether a publication was protected, the House of Lords suggested that various factors should be considered. It stated:

> Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing.
>
> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a

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to journalism, often veering towards entertainment rather than news reporting or analysis."). Empirical evidence suggests that the British tabloids are not, in fact, hard hitting except when they are able to avail themselves of reporting privileges (e.g., the privilege of reporting on judicial proceedings). *See id.* at 144-50. As a result, "the popular perception of the English media as aggressive and robust was not borne out by interviews conducted for the purpose of this book. In almost all of the early interviews, English journalists and broadcasters frankly admitted that English defamation laws had a significant impact on their coverage." *Id.* at 138 (footnotes omitted).

148. *See* Reynolds v. Times Newspapers, Ltd., [2001] 2 A.C. 127 (EWCA) at 160-78 (Eng.).

149. *See* Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520, 575-76 (Austl.) (extending common law qualified privilege); John Burrows, Lange v. Atkinson *2000: Analysis*, 2000 NEW ZEALAND L. REV. 389, 389-92, 398-99.

150. *See Reynolds*, 2 A.C. at 160-79.

151. *See* WEAVER ET AL., *supra* note 122, at 99-111.

> reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.[152]

Even though *Reynolds* moved England closer to the United States' defamation jurisprudence, the decision did not provide the level of protection to defamation defendants provided by the *Sullivan* decision.[153] The early evidence suggests that *Reynolds* has not had much effect on the practices of British journalists, but there are hopeful signs that *Reynolds* will ultimately have a significant impact on media practices though the impact is far from universal or complete.[154] *Reynolds* was reinforced by the later decision of *Jameel v. Wall Street Journal Europe*, but the impact of that decision is far from clear.[155]

The bottom line is that U.S. negotiators may not have much freedom to adopt the types of defamation-liability provisions that the rest of the world might want.

D. Privacy

Privacy is another area where there is likely to be considerable disagreement between U.S. negotiators and foreign negotiators, but it is also perhaps an area where some common ground can be found.

Europe, in general, is more protective of privacy than the United States and is considerably more willing to allow that right to trump freedom of expression.[156] The ECHR has a special provision that guarantees the "right to respect of the private and family life."[157] This provision contains two subparts:

> 1) Everyone has the right to respect for his private and family life, his home and his correspondence[; and]
>
> 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[158]

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152. *Id.* at 103.
153. *See Reynolds*, 2 A.C. at 178-79; N.Y. Times Co. v. Sullivan, 376 U.S. 254, 304 (1964).
154. *See* WEAVER ET AL., *supra* note 122, at 226-27.
155. Jameel v. Wall St. Journal Europe SPRL, [2005] Q.B. 904 (EWCA) at 908-14 (Eng.).
156. *See* Convention on Human Rights, *supra* note 86, at art. 8.
157. *Id.*
158. *Id.*

Even though Germany's constitution (the Basic Law) provides explicit constitutional protection for personality,[159] the ECHR provision has been construed as being more protective of privacy than the German provision.[160] In a case involving Princess Caroline of Monaco, paparazzi were taking pictures of her while she was in public places; German courts refused to hold that the paparazzi had violated Princess Caroline's rights.[161] The European Court of Human Rights disagreed, applying ECHR § 8 and holding that Princess Caroline was entitled to some privacy protections even when she appeared in public.[162]

U.S. privacy law is of relatively recent origin and is traced to a seminal article written by Samuel Warren and Justice Louis D. Brandeis.[163] Under the modern formulation, the tort of privacy has four separate and distinct causes of action: "1. [i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs[;] 2. [p]ublic disclosure of embarrassing private facts about the plaintiff[;] 3. [p]ublicity which places the plaintiff in a false light in the public eye[; and] 4. [a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness."[164]

In the United States, it is extremely doubtful that a public figure like Princess Caroline could use the tort of privacy to halt the publication of similar photographs. The First Amendment interest in publication of true information, especially of events that occur in public places, is too great.[165] As a result, in one case, the United States Supreme Court held that a media outlet could not be required to pay damages for revealing the name of a rape victim despite a statutory prohibition against disclosure.[166] Even in false-light privacy cases, in which the plaintiff is portrayed in a "false light" in the public eye, the Court has required the plaintiff to show that the defendant published with "actual malice"

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159. *See* Ellen S. Bass, Comment, *A Right in Search of a Coherent Rationale—Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights*, 42 U.S.F. L. REV. 799, 828 (2008).

160. *See* Von Hannover v. Germany (59320/00), [2004] E.M.L.R. 21, 2004 WL 1808843 (Eur. Ct. H.R. 2004).

161. *See id.*

162. *See id.*; 1A LINDEY ON ENT., PUBL'G & THE ARTS § 3:11.30 (3d ed. 2004).

163. *See generally* Samuel D. Warren & Louis B. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196-206, 213-14 (1890) (articulating forcefully the need to protect "privacy").

164. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); *see also* WEAVER & LIVELY, *supra* note 26, at 48-52 (expanding on the right to privacy).

165. *See, e.g.*, Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989).

166. *See id.* at 523-34. In *Florida Star v. B.J.F.*, a newspaper asked the Court "to hold broadly that truthful publication may never be punished consistent with the First Amendment." *Id.* at 532. The Court declined, saying that "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the [particular] case." *Id.* at 533. The *Florida Star* case concerned a state statute that made it unlawful to "'print, publish or broadcast . . . in any instrument of mass communication' the name of a victim of a sexual offense." *Id.* at 526.

(in the sense that it knew that the publication was false or acted in reckless disregard for truth or falsity).[167]

Despite the divergence between the U.S. and Europe on scenarios like the Princess Caroline case, there are a number of areas where cooperation between the U.S. and other countries should be possible in terms of the treaty negotiations. U.S. courts would probably uphold appropriately drafted restrictions on paparazzi that are designed to halt harassment. Illustrative is the lower court holding in *Galella v. Onassis* in which the paparazzi was enjoined from certain types of behavior (although he was not enjoined from photographing Ms. Onassis in public).[168] In the United States, it might also be possible to gain judicial protection for one's name and likeness[169] or to protect against someone who intrudes into the plaintiff's seclusion or tries to appropriate the plaintiff's intellectual property.[170]

IV. CONCLUSION

As the Internet has become widely available to ordinary people, the need for international cooperation to apprehend and prosecute criminals has become essential. Internet communications frequently cross international borders, and no single nation is capable of dealing with Internet crime entirely on its own. For example, while child pornography might originate anywhere in the world (e.g., Asia), it can be transmitted to another part of the world (e.g., Europe), and be retransmitted to yet another part of the world (e.g., the Americas). A single country would find it extremely difficult to investigate such far-flung activities, much less to apprehend the perpetrators and bring them to justice.

Although there is an existing convention on the Internet, that document is relatively unambitious in scope.[171] Perhaps the limited scope is directly attributable to the inevitable tensions that arise when a treaty tries to reconcile the disparate values and traditions of many countries. As we have seen, although there are areas in which agreements can be reached, the First Amendment will significantly restrict the ability of U.S. treaty negotiators to negotiate an international treaty governing the Internet. They should have no difficulty agreeing to certain types of provisions. For example, U.S. negotiators could agree to criminalize child pornography, obscenity (assuming that they can

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

168. *See* Galella v. Onassis, 353 F. Supp. 196, 241 (S.D.N.Y. 1972).

169. *See* Ali v. Playgirl, Inc., 447 F. Supp. 723, 729 (S.D.N.Y. 1978); Eastwood v. Superior Court, 198 Cal. Rptr. 342, 348 (Cal. Ct. App. 1983).

170. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 577-79 (1977). In *Zacchini v. Scripps-Howard Broadcasting Co.*, an entertainer who performed a "'human cannonball' act in which he [was] shot from a cannon into a net some 200 feet away" performed his act in a fair ground surrounded by grandstands. *Id*. at 563. A reporter filmed the act and showed it on the news. *Id.* at 563-64. The entertainer sued for damages claiming that the station unlawfully appropriated his property. *Id.* at 564. The news station claimed that it was immune from suit under the First Amendment. *See id.* The Supreme Court disagreed. *Id.* at 578.

171. *See supra* Part III.B.

agree on a workable definition of the term "obscenity"), and various types of fraudulent schemes. In addition, U.S. negotiators can commit the U.S. government, including and especially police and prosecutors, to work with other governments to apprehend and punish those who engage in such activities.

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

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