

REGULATING CYBER RACISM IN THE UNITED STATES: LEGAL AND NON-LEGAL RESPONSES FROM A COMPARATIVE PERSPECTIVE

DR. YING CHEN*

ABSTRACT

The global outbreak of COVID-19 in 2020 unleashed virulent xenophobia and a tide of racial hatred. There have been increasing reports of racist hostility in the digital environment. Former President Trump's racist remarks on social media platforms allowed these divides to resurface in the United States. Racial hostility in the virtual world has already fostered aggressive behavior in the offline world. In some cases, it has crossed the line from online hate speech to real-world hate crime. Cyber racism creates new challenges for the American legal system.

This research investigates the possibility of regulating cyber racism in the United States from a comparative perspective. The introduction provides background information and introduces the structure of the research. Part I analyzes the international legal framework governing racial discrimination and suggests that due to the lack of enforcement power, the world cannot rely upon the international legal system for racial justice. Instead, individual countries must take responsibility for fighting racism. Part II examines cyber racism in the United States from two aspects: (1) the urgent need to address cyber racism, and (2) the constitutional challenges under current First Amendment jurisprudence. Part III proposes a multi-faceted approach that encompasses both legal and non-legal responses to combat cyber racism in the United States. In this Part, the practices of some of the world's most democratic countries, namely, France and Australia, are assessed from a comparative perspective. In the legal context, the French and Australian

* Dr. Ying Chen, Lecturer in Law, Chair of International Advisory Group, University of New England (UNE) School of Law, Armidale, NSW2351, Australia. Email: ychen56@une.edu.au. The author would like to thank Professor Michael Adams, Head of UNE Law School, for his continuous encouragement and support. The author is also grateful to Ms. Carlie Drew and WILJ editors for their extremely useful suggestions. The responsibility for any oversights or mistakes remains mine alone.

models provide persuasive authority for the United States Supreme Court to impose more restrictions on racist speech while interpreting the First Amendment. This article also suggests that the Australian scrutiny tests strike a better balance between the right of free speech and the right to freedom from racism than equivalent U.S. tests. Therefore, the Australian system could provide a great reference for the United States Supreme Court as it seeks to solve problems in applying the *Brandenburg* test. Furthermore, a well-designed conciliation process also provides an effective avenue for aggrieved parties to seek racial justice. In the non-legal context, increased responsibility for internet intermediaries and anti-racism education are crucial in combating cyber racism. Part IV concludes the research by re-emphasizing the importance of regulating cyber racism in the United States. It is hoped that the solutions proposed in this research can strengthen the arsenal of tools available to prevent cyber racism.

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It may be true that morality cannot be legislated, but behavior can be regulated. It may be true that the law cannot change the heart, but it can restrain the heartless.¹

Dr. Martin Luther King, Jr.

INTRODUCTION

International human rights law began to combat racism in the 1960s.² A half-century later, racism remains an immense global problem³ and continues “poisoning our racial atmosphere, with no cut-off date in sight.”⁴ Racism is nothing new in the offline world. In the United States, scholars have described racial hostility as “American poison” that “has stunted the development of nearly every institution crucial for a healthy society.”⁵ In Australia, according to data provided by the Australian

¹ MARTIN LUTHER KING, JR., *An Address Before the National Press Club, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 99, 100 (James M. Washington ed., 1986).

² For example, the United Nations General Assembly adopted the United Nations Declaration on the Elimination of All Forms of Racial Discrimination in 1963 to outline its view on racism. *See* G.A. Res. 1904 (XVIII), pmbl., United Nations Declaration on the Elimination of All Forms of Racial Discrimination (Nov. 20, 1963). Furthermore, in 1969, the United Nations General Assembly adopted the International Convention on the Elimination of All Forms of Racial Discrimination to “promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.” *See* G.A. Res. 2106 (XX), pmbl., International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965) [hereinafter ICERD].

³ Winston P. Nagan, *Reflections on Racism and World Order*, 14 U. FLA. J.L. & PUB. POL’Y 1, 1 (2002).

⁴ Ibram X. Kendi, *The Civil Rights Act Was a Victory against Racism. But Racists Also Won*, WASH. POST (July 2, 2017, 2:18 PM), <https://www.washingtonpost.com/news/made-by-history/wp/2017/07/02/the-civil-rights-act-was-a-victory-against-racism-but-racists-also-won/> [<https://perma.cc/58Y8-476A>].

⁵ Eduardo Porter, *American Poison*, <https://eduardoport.com/american-poison> (last visited Jul. 7., 2021); *see generally* EDUARDO PORTER, *AMERICAN POISON: HOW RACIAL HOSTILITY DESTROYED OUR PROMISE* (2020).

Human Rights Commission,⁶ about one in five Australians “report having experienced racial discrimination.”⁷ Although the European Union has made impressive progress in reducing racial inequality, it is by no means free of racism and xenophobia.⁸

There is also a growing concern with racism that manifests in the online world—particularly after the global outbreak of COVID-19 in 2020—in which there has been a massive surge in cyber racism targeting ethnic Asians.⁹ For example, an Instagram post in April 2020 called for shooting “every Asian we meet in Chinatown”¹⁰ and claimed that it was “the only way we can destroy the epidemic of coronavirus in NYC!”¹¹ Derogatory terms for ethnic Asians, particularly ethnic Chinese, have also been widely used on the internet.¹² The research conducted by Schild and his co-authors indicate that “c****” (a derogatory term referring to ethnic Chinese), “c****land” (a derogatory term referring to the land of China), and “c**n*****s” (an offensive word that combines “China” and “n*****”) are among the top ethnic slurs used in cyberspace after the global outbreak of COVID-19.¹³ Furthermore, terms that conflate COVID-

⁶ Austl. Hum. Rts. Comm’n, *About*, <https://humanrights.gov.au/about> (last visited Mar. 21, 2021) (noting that the Australian Human Rights Commission is an independent statutory organization, established by the Australian Human Rights Commission Act 1986. The Act was passed by the Federal Parliament).

⁷ Austl. Hum. Rts. Comm’n, *Let’s Talk Race: A Guide on How to Conduct a Conversation About Racism* (June 7, 2019), <https://humanrights.gov.au/our-work/race-discrimination/publications/lets-talk-race-guide-how-conduct-conversations-about> (In the 2019 annual survey, “about one in five Australians report[ed] having experienced racial discrimination during the previous 12 months.”).

⁸ For more details about racism issues in the European Union and how the European Union deals with these issues, see Eur. Comm’n, *Racism and Xenophobia*, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia_en [<https://perma.cc/FCJ5-XCG8>] (last visited Mar. 21, 2021).

⁹ Craig Timberg & Allyson Chiu, *As the Coronavirus Spreads, So Does Online Racism Targeting Asians, New Research Shows*, WASH. POST (Apr. 8, 2020, 4:01 PM), <https://www.washingtonpost.com/technology/2020/04/08/coronavirus-spreads-so-does-online-racism-targeting-asians-new-research-shows/> [<https://perma.cc/P6WC-WAE2>].

¹⁰ *Id.*

¹¹ *Id.* (the post was later removed by Instagram due to a violation of its policies).

¹² Leonard Schild et al., “Go Eat A Bat, Chang!”: An Early Look on the Emergence of Sinophobic Behavior on Web Communities in the Face of COVID-19, THE WEB CONFERENCE (WWW) (2021) (available for download at https://www.researchgate.net/publication/340523411_Go_eat_a_bat_Chang_An_Early_Look_on_the_Emergence_of_Sinophobic_Behavior_on_Web_Communities_in_the_Face_of_COVID-19 [<https://perma.cc/GZ5G-TJKX>]).

¹³ *Id.*

19 with ethnic and national identity, such as “Kung Flu,” were also created and used on the internet.¹⁴ Former President Donald Trump endorsed the term “Kung Flu.”¹⁵ He also referred to COVID-19 as the “Chinese Virus” in several of his Twitter posts, despite many officials (including the Chief of the Centers for Disease Control and Prevention (“CDC”) Robert Redfield) warning that the term is inaccurate, inappropriate, and harmful in tying racist associations between the virus and those with a Chinese background.¹⁶ Since Trump’s Twitter posts, reports of COVID-19-related racism have been on the rise in cyberspace.¹⁷ Even worse, online anti-Asian rhetoric has extended beyond the internet and spilled into the real world with damaging consequences.¹⁸ Asian-Americans across the country have been yelled at and attacked in public.¹⁹

¹⁴ See Timberg & Chiu, *supra* note 9.

¹⁵ *President Trump Calls Coronavirus ‘Kung Flu’*, BBC NEWS (June 24, 2020), <https://www.bbc.com/news/av/world-us-canada-53173436/president-trump-calls-coronavirus-kung-flu> [<https://perma.cc/9EQM-YPLK>] (noting that President Trump endorsed the term of “Kung Flu” and used it to describe COVID-19 while speaking at a campaign rally in Arizona in June 2020).

¹⁶ See Timberg & Chiu, *supra* note 9; see also Colby Itkowitz, *CDC Director Rejects Label ‘Chinese Virus’ after Trump, McCarthy Tweets*, WASH. POST (Mar. 11, 2020), https://www.washingtonpost.com/politics/cdc-director-rejects-label-chinese-virus-after-trump-mccarthy-tweets/2020/03/10/58bd086c-62e5-11ea-b3fc-7841686c5c57_story.html [<https://perma.cc/NMC5-6JRE>].

¹⁷ Schild, et al., *supra* note 12, at 4 (“[I]t is worrisome that the use of most [racial] slurs keeps increasing after the event where Donald Trump referred to COVID-19 as Chinese Virus.”).

¹⁸ Sabrina Tavernise & Richard A. Opiel Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html> [<https://perma.cc/N98N-U8RN>]; see also Itkowitz, *supra* note 16 (noting that President Trump calling COVID-19 “Chinese virus” on Twitter encourages racism, and Rep. Judy Chu (D-Calif.) had to send a letter to “all of her congressional colleagues [...] urging them to stop using terminology that stokes fear and prejudice against Asian Americans.”).

¹⁹ *Id.*

The development of social media platforms since the mid-2000s such as Facebook,²⁰ Twitter,²¹ Instagram,²² and YouTube²³ has enabled millions of users worldwide to interact with each other and to produce their own content (known as “user-generated content”) in a virtual environment.²⁴ Meanwhile, for individuals or groups with racist attitudes, it has also provided new avenues to spread, incite, promote, and justify racial hatred.²⁵ Cyber racism creates new challenges for our legal system. However, the law has yet to adjust to these changing technologies.

This research investigates the possibility of regulating cyber racism in the United States from a comparative perspective. Part I analyzes the international legal framework governing racial discrimination and suggests that, due to the lack of enforcement power, the world cannot rely upon the international legal system for racial justice. Instead, individual states must bear direct responsibility for reducing racism in both the offline and online worlds. Part II examines cyber racism in the United States from two main aspects: (1) the problems of cyber racism and the urgent need to address these problems, and (2) the barriers to cyber racism regulation; specifically, the constitutional challenges under current First Amendment jurisprudence. Part III proposes a multi-faceted approach that encompasses both legal and non-legal responses to combat cyber racism in the United States. In this section, the European and Australian approaches are assessed from a comparative perspective. This research suggests that some of the European and Australian approaches are useful

²⁰ H. Tankovska, *Number of Monthly Active Facebook Users Worldwide As of 1st Quarter 2020*, STATISTA, <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> [<https://perma.cc/47T7-AVWA>] (last visited Mar. 21, 2021) (noting that Facebook has over 2.6 billion monthly active users as of March 2020).

²¹ H. Tankovska, *Number of Monthly Active Twitter Users Worldwide from 1st Quarter 2010 to 1st Quarter 2019*, STATISTA, [https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/#:~:text=How%20many%20people%20use%20Twitter,daily%20active%20users%20\(mDAU\)](https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/#:~:text=How%20many%20people%20use%20Twitter,daily%20active%20users%20(mDAU)) [<https://perma.cc/BB5N-XY7Q>] (last visited Mar. 21, 2021) (noting that Twitter has over 330 million monthly active users as of the first quarter of 2019).

²² H. Tankovska, *Number of Monthly Active Instagram Users from January 2013 to June 2018*, STATISTA, <https://www.statista.com/statistics/253577/number-of-monthly-active-instagram-users/#:~:text=In%20June%202018%2C%20Instagram%20had,800%20million%20in%20September%202017> [<https://perma.cc/HT9F-DRE6>] (last visited Mar. 21, 2021) (“In June 2018, Instagram had reached one billion monthly active users.”).

²³ YouTube, *Youtube for Press*, <https://www.youtube.com/about/press/> [<https://perma.cc/E3DU-H2BD>] (last visited Sept. 20, 2020) (showing that, as of September 20, 2020, YouTube has over two billion users in the world).

²⁴ Gail Mason & Natalie Czapski, *Regulating Cyber-Racism*, 41 MELB. U.L. REV. 284, 292 (2017).

²⁵ *Id.*

for the United States and should be adopted. Part IV concludes the research by re-emphasizing the importance of regulating cyber racism in the United States. It is hoped that the solutions proposed in this article can strengthen the arsenal of tools available to prevent cyber racism.

I. INTERNATIONAL HUMAN RIGHTS LAW PROHIBITING RACIST BEHAVIOR

The prohibition against racial discrimination is enshrined in all core international human rights instruments, such as the United Nations Charter (1945),²⁶ the Universal Declaration of Human Rights (1948) (“UDHR”),²⁷ the International Covenant on Civil and Political Rights (1966) (“ICCPR”),²⁸ and the International Covenant on Economic, Social and Cultural Rights (1966) (“ICESCR”).²⁹ To “prevent and combat racist doctrines and practices [. . .] and to build an international community free from all forms of racial segregation and racial discrimination,”³⁰ the United Nations General Assembly promulgated the International Convention on the Elimination of All Forms of Racial

²⁶ The UN Charter does not use the term racism in its text. However, under Article 1.3, it “promot[es] and encourage[es] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” U.N. Charter art. 1, ¶ 3; see also *id.* art. 13.1, ¶ b; *id.* art. 55, ¶ c; *id.* 76, ¶ c.

²⁷ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948) [hereinafter UDHR]. For example, Article 2 states “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” *Id.* art. 2. Furthermore, Article 4 also prohibits slavery. *Id.* art. 4. Article 7 protects the right to equal protection under the law against discrimination. *Id.* art. 7.

²⁸ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. For example, Articles 2, 4, 24, and 26 of the ICCPR reference provisions that shall be undertaken without discrimination on the basis of race and a number of other factors such as colour, sex, language, religion or social origin. *Id.* arts. 2, 4, 24, 26. Moreover, Article 20.2 also provides “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” *Id.* art. 20, ¶ 2.

²⁹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. For example, Article 2, ¶ 2 provides “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” *Id.* art. 2, ¶ 2. Article 13.1 also requires the States Parties to recognize the right of everyone to education regardless of race. *Id.* art. 13, ¶ 1.

³⁰ ICERD, *supra* note 2, pmbl.

Discrimination (1965) (“ICERD”)³¹ in 1965.³² ICERD stresses that “any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory, or in practice.”³³ It requires State Parties to “pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.”³⁴ Furthermore, the Durban Declaration and Program of Action (2001),³⁵ adopted by governments attending the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (known as “Durban I”), also sets a series of goals and actions for combating racial discrimination.³⁶ Some examples include reinforcing anti-discrimination and anti-racism components in human rights programs for children and youth,³⁷ as well as developing and strengthening anti-racist and gender-sensitive human rights training for public officials and professionals.³⁸

However, there are two key weaknesses in the United Nations’ (UN) strategy when fighting against racism. Although the UN aims to eradicate racism, it has predominantly focused on racism in the physical world while largely neglecting racism on the internet. Cyber racism is yet to be placed on the UN’s human rights agenda. Additionally, the UN’s lack of enforcement power also restricts its ability to implement human

³¹ *Id.*

³² U.N. Hum. Rts. Off. High Comm’r, *International Convention on the Elimination of All Forms of Racial Discrimination*, <https://indicators.ohchr.org/> [<https://perma.cc/E23Y-L3G7>] (last visited Mar. 21, 2021) (indicating that the ICERD has 182 state parties and three signatories, and only twelve countries did not take actions, including South Sudan, Myanmar, North Korea and Malaysia).

³³ ICERD, *supra* note 2, pmb1.

³⁴ *Id.* art. 2.

³⁵ World Conference Against Racial Discrimination, Xenophobia, and Related Intolerance, *Durban Declaration and Programme of Action*, U.N. Doc. A/CONF.189/12 (Sept. 8, 2001) [hereinafter “Durban Declaration and Programme of Action”].

³⁶ Dimitrina Petrova, ‘Smoke and Mirrors’: *The Durban Review Conference and Human Rights, Politics at the United Nations*, 10 HUM. RTS. L. REV. 129, 129–30 (2010) (noting that the Durban Declaration and Program of Action includes “important and timely recommendations for states to combat racism and racial discrimination[.]” but the positive outcomes of the World Conference against Racism were “overshadowed by two related occurrences concerning anti-Semitism and Israel”); *see also* Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1, 19 (2019) (noting that the following review conferences in 2009 and 2011 respectively were controversial because “[a] draft text of the declaration named Zionism in connection to racism causing the delegations from Israel and the U.S. to withdraw”).

³⁷ Durban Declaration and Programme of Action, *supra* note 35, arts. 129–32.

³⁸ *Id.* arts. 133–39.

rights treaties. This is a problem widely recognized by legal scholars. For example, Professor Cassidy points out: “[t]he enforcement of international human rights laws has always been seen as the weak link in the international legal system.”³⁹ This inherent flaw prevents the UN from eliminating racial discrimination at the global level. Therefore, it is imperative that individual nations take affirmative action to tackle racism on the internet.

At the national level, some countries have been more proactive than others in regulating cyber racism. For example, Australia and many European countries, such as France, have made cyber racism unlawful, and they have established comprehensive enforcement mechanisms to address racism on the internet.⁴⁰ On the contrary, the United States still faces significant constitutional barriers to regulating racism in both the offline and online worlds.⁴¹ The discussion below outlines cyber racism problems in the United States and explains the urgent need for regulation despite constitutional barriers. Through a comparative analysis of the European and Australian approaches, this article proposes that the United States adopt a multi-faceted approach to combat growing cyber racism problems.

II. CYBER RACISM IN THE UNITED STATES

A. THE IMPORTANCE OF REGULATING CYBER RACISM

In the United States, it has been fifty-six years since the passage of the Civil Rights Act of 1964,⁴² a landmark statute that officially outlaws discrimination on the basis of race and other factors.⁴³ Although the 1964 Civil Rights Act intends to “dismantle racism” and has spurred some racial

³⁹ Julie Cassidy, *Watchdog or Paper Tiger: The Enforcement of Human Rights in International Forums*, 10 NOTRE DAME L. REV. 37, 37 (2008).

⁴⁰ See discussion *infra* Part III.

⁴¹ Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 963, 967 (2009) (“In the United States the biggest obstacle to state regulation of racist speech is the First Amendment of the U.S. Constitution . . .”).

⁴² Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241.

⁴³ See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C.L. REV. 431, 434 (1966) (noting that other factors include, for example, color, religion, sex, or national origin).

progress,⁴⁴ racism persists throughout modern American history.⁴⁵ In the physical world, extreme racist behavior has been occurring more often than we would like to admit. Recent examples include the deadliest anti-Latino mass shooting in El Paso, Texas, in August 2019⁴⁶ and the killing of George Floyd in Minneapolis, Minnesota, in May 2020.⁴⁷ Meanwhile, in cyberspace, racism is being spread quickly across the internet and has become a major concern of American society in the twenty-first century. University of California Los Angeles (UCLA) Law Professor Jerry Kang acknowledges that in the United States, the internet “[r]einscribes a repressive racial mechanics” deep into the nation.⁴⁸ Similarly, Professor Brendesha Tynes of the University of Southern California Rossier School of Education also finds that racial discrimination in cyberspace is prevalent and has become a worrying problem affecting American adolescents.⁴⁹ Tynes’ research reveals that up to 69 percent of minority youth have experienced direct or vicarious discriminatory incidents on the internet.⁵⁰ The forms of cyber racism vary. According to Tynes, it includes, experiences such as, “people have said mean or rude things about me because of my race or ethnic group,” “people have shown me a racist

⁴⁴ See Kendi, *supra* note 4 (noting that racial progress spurred by the Civil Rights Act of 1964 include desegregating Southern establishments, driving anti-discrimination lawsuits, and opening the doors of opportunity for the new black middle class).

⁴⁵ See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 267 (1991) (“The curse of racism continues to haunt the Nation.”); see also Bradley, *supra* note 36, at 2–3 (“The United States offers a sad example where, despite anti-discrimination laws and equal protection rights, the government has failed to protect its people from racism. Police continue to racially profile and murder African Americans at alarming rates, prompting public outcry but little remedy . . . Islamophobia against Muslims persists across racial groups . . . [i]n New York City, hate crimes against Jewish people were up by approximately 6 percent in 2018. Notably, 60 percent of Americans say the election of Donald Trump as president has worsened race relations.”).

⁴⁶ *All States Have ‘Primary Responsibility’ to Protect Against Hate Attacks*, UN NEWS (Aug. 6, 2019), <https://news.un.org/en/story/2019/08/1043791> (noting that UN human rights official called on U.S. to take positive steps to eradicate racism in the wake of the El Paso shooting).

⁴⁷ *Human Rights Council Picks Up Again After COVID Suspension, To Hold Racism Debate*, UN NEWS (June 15, 2020), <https://news.un.org/en/story/2020/06/1066312> (noting the statement by the Permanent Representative of Burkina Faso to the United Nations Office and other international organizations in Geneva, stating that “[t]he death of George Floyd is unfortunately not an isolated incident” and pointing out that people of African descent “faced the same fate because of their origin and police violence.”).

⁴⁸ Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1208 (2000).

⁴⁹ Brendesha Tynes, *Online Racial Discrimination: A Growing Problem for Adolescents*, AM. PSYCH. ASS’N (Dec. 2015), <https://www.apa.org/science/about/psa/2015/12/online-racial-discrimination> [<https://perma.cc/PN88-223D>].

⁵⁰ *Id.*

image online,” “people have cracked jokes about people of my race or ethnic group online,” “people have said things that were untrue about people in my race or ethnic group,” “I have witnessed people saying mean or rude things about another person’s ethnic group online,” “people have excluded me from a site because of my race or ethnic group online,” and “people have threatened me online with violence because of race or ethnic group.”⁵¹ Among these forms of discrimination, the most common direct discriminatory incident is “[p]eople have shown me a racist image online,” while the most common vicarious discriminatory incident is “I have witnessed people saying mean or rude things about another person’s ethnic group online.”⁵² The high prevalence of cyber racism in the United States is alarming. Cyber racism is an issue that must be addressed for the following reasons.

First, cyber racism harms individuals and society at large. Regardless of the medium people use to communicate, public expressions of racial hostility are hurtful and damaging, and they cause “significant individual harm to the recipient’s sense of dignity, well-being and safety, and group harm to the target community who may interpret such expressions as a sign of intolerance and victimisation.”⁵³

Furthermore, the real-world implications of cyber racism are the most worrying concern.⁵⁴ It is true that there is limited evidence available on how cyber racism affects people’s behavior in the physical world. Nevertheless, online racial materials and comments have indeed led to “actions that are visible”⁵⁵ in the physical world. As previously mentioned, the COVID-19 anti-Asian rhetoric has already extended beyond the internet and spilled into the real world with consequences.⁵⁶ After Trump publicly called COVID-19 the “Chinese virus” on Twitter and during

⁵¹ *Id.*

⁵² *Id.*

⁵³ Mason & Czapski, *supra* note 24, at 289–94 (“[O]nline racism can negatively affect self-esteem and produce feelings of anger, frustration and hopelessness. It is also related to higher levels of depression and anxiety.”); see also Post, *supra* note 45, at 271–77 (discussing the harms of racist speech, including the intrinsic harm of racist speech, harm to identifiable groups, harm to individuals, harm to the marketplace of ideas, and harm to educational environment).

⁵⁴ N.J. ATT’Y GEN. & N.J. COMM’N INVESTIGATION, COMPUTER CRIME: A JOINT REPORT 36–37 (2000) (discussing the fear of websites that do not explicitly promote violence, but “provide enough misinformation to rationalize violent action by some of the sites’ adherents...”), (available for download at <https://www.state.nj.us/sci/pdf/computer.pdf> [<https://perma.cc/TJ2N-XL2E>]) [hereinafter “JOINT REPORT”].

⁵⁵ Timberg & Chiu, *supra* note 9.

⁵⁶ Tavernise & Oppel, *supra* note 18.

several news briefings,⁵⁷ Asian-Americans across the United States started fearing for their lives and safety, as many of them were yelled at and attacked in broad daylight.⁵⁸ Although it is hard to measure the actual damage of Trump's use of racially insensitive terms on the internet, one "cannot easily dismantle the ideas that these terms convey."⁵⁹

In addition, cyber racism can be more destructive than racism in the physical world. The reasons are fourfold. First, racist views spread more rapidly and widely on social networks than in the physical world.⁶⁰ Nowadays, materials and commentaries published online can "be disseminated instantaneously, continuously and globally, reaching far greater audiences than practicable in the offline world."⁶¹ This means, unlike isolated racist events or commentaries in the physical world, racist content can spread across the country and even the world minutes after it is posted on the internet, regardless of the location of the individual posting the content.⁶² The effect of cyber racism is almost instant.

Second, the complete removal of racist content from the internet can be challenging. This is because materials and commentaries published online are "ubiquitous and relatively permanent."⁶³ Once comments are published, they remain "cached or stored, and can potentially be accessed via search engines, and easily duplicated."⁶⁴ The removal of racist content from one social media platform does not guarantee that it is completely erased from cyberspace.⁶⁵ Racist content may continue to spread across the internet.⁶⁶

⁵⁷ Maali Luqman, *The Trump Effect: Impacts of Political Rhetoric on Minorities and America's Image 4* (Mar. 2018) (Master's thesis, Harvard University) (on file with the Harvard Library Office of Scholarly Communication), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:42004012> [<https://perma.cc/G2Z9-RUBL>].

⁵⁸ Tavernise & Opper, *supra* note 18.

⁵⁹ Timberg & Chiu, *supra* note 9.

⁶⁰ Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 818 (2001) ("Persons with disparate goals can access and affect large audiences through it.").

⁶¹ Mason & Czapski, *supra* note 24, at 295.

⁶² Iris Mohr, *Going Viral: An Analysis of YouTube Videos*, 8 J. MKTG. DEV. & COMPETITIVENESS 43, 43–44 (2014) (describing news media as an "infectious disease" because online materials can "go viral" and be viewed by millions of internet users within a very short timeframe); *see also* Tsesis, *supra* note 60, at 818 ("The speed at which information can be spread throughout the United States and other countries has been greatly enhanced by the Internet.").

⁶³ Mason & Czapski, *supra* note 24, at 295.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

Third, as compared to the physical world, social media provides a much broader platform for spreading racist content in the virtual environment. As previously discussed, social media enables new forms of social interaction.⁶⁷ It allows people to connect with others who share the same or similar values on social media platforms, regardless of their physical locations.⁶⁸ When people with racist views connect in the virtual environment, they may intentionally or unintentionally inspire or encourage each other to express these views and, in some cases, to put them into practice.⁶⁹ In fact, researchers have confirmed that they are “startled to discover the range and intensity of hateful language on social media.”⁷⁰

Fourth, studies have shown that as compared to people interacting in the physical world, internet users are often more aggressive and less willing to compromise their views.⁷¹ People interacting online tend to “lose their inner constraints and feel less self-aware, inhibited, and responsible for their behaviour,” particularly when their profiles are anonymous.⁷² This easily “[f]uels a ‘mob-like’ approach to harassment of victims”⁷³ in the online environment.

Despite the growing problems of cyber racism in the United States, protection of free speech still prevails. The right to freedom of speech is considered a more cherished constitutional right than the right to freedom from racism (to be discussed in Part II.B).⁷⁴ American society and its legal system continue to tolerate public expressions of racial hostility in the online and offline environment. Moreover, the defense of a constitutional right to free speech essentially excludes cyber racism from the jurisdictions of cybercrime and hate crime. Although cybercrime legislation has been adopted at both federal and state levels, it primarily focuses on the regulation of hacking and cracking, virus dissemination,

⁶⁷ Kang, *supra* note 48, at 1135.

⁶⁸ Mason & Czapski, *supra* note 24, at 295.

⁶⁹ Timberg & Chiu, *supra* note 9 (noting that an Instagram post in April 2020 called for shooting “every Asian we meet in Chinatown,” and claimed that it was “the only way we can destroy the epidemic of coronavirus in NYC!”).

⁷⁰ *Id.*

⁷¹ See generally Leonie Rösner & Nicole C. Krämer, *Verbal Venting in the Social Web: Effects of Anonymity and Group Norms on Aggressive Language Use in Online Comments*, SOC. MEDIA + SOC’Y, JULY-SEPT. 2016, at 1.

⁷² *Id.*

⁷³ Mason & Czapski, *supra* note 24, at 295.

⁷⁴ See generally OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996) (discussing how freedom of speech is often treated as a “super” right, of greater importance than other rights).

online fraud, theft, gambling, pornography (including child pornography), and stalking and harassment.⁷⁵ Generally, cyber racism is not considered a form of cybercrime covered by federal or state legislation. A hate crime is interpreted as a “criminal offense against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.”⁷⁶ Although race is clearly one of the considerations for hate crime, the Federal Bureau of Investigation (FBI), the lead investigative agency for criminal violations of federal civil rights statutes, tends to be “mindful of protecting freedom of speech.”⁷⁷ The FBI is often reluctant to prosecute individuals or organizations that engage in cyber racism activities unless, for example, there is likely a severe real-world consequence.⁷⁸

Cyber racism hurts individuals and society at large, and thus, must not be tolerated. Nevertheless, the current legal system in the United States fails to address the problems of cyber racism; governments and law enforcement agencies continue to perpetuate and permit online racist activities with impunity. In response to this regulatory loophole, this article calls for the American legal community to act immediately and suggests that an enhanced regulatory framework can substantially reduce cyber racism and its undesirable real-world implications. In the 1960s, to end racism in the United States, Dr. Martin Luther King, Jr. also advocated for regulation.⁷⁹ In his speech to the UCLA community in 1965, Dr. King remarked, “[i]t may be true that morality cannot be legislated, but behavior can be regulated. It may be true that the law cannot change the heart, but it can restrain the heartless.”⁸⁰ Although this approach was proposed prior to the digital age, the principle remains the same and is applicable to racism occurring in the online environment. Regulation may not change internet users’ racial prejudice, but it can regulate their behavior. Nevertheless, the regulation of cyber racism faces a major obstacle: the First Amendment’s protection of free speech.

⁷⁵ Marc D. Goodman & Susan W. Brenner, *The Emerging Consensus on Criminal Conduct in Cyberspace*, 10 INT’L J.L. & INFO. TECH. 139, 141–150 (2002).

⁷⁶ *What We Investigate – Hate Crimes*, FBI, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> [<https://perma.cc/8UQZ-23V3>] (last visited Aug. 15, 2020).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *UCLA History, April 27, 1965, “Segregation Must Die”*, UCLA ALUMNI (last visited Sept. 20, 2020) (this article is on file with the *Wisconsin International Law Journal*).

⁸⁰ *Id.*

B. THE CHALLENGE: DEALING WITH CONSTITUTIONAL CONSTRAINTS ON CYBER RACISM REGULATION

Freedom of speech, one of the most cherished civil rights in liberal democracies, allows people to say, write, and express what they think, privately or publicly, and to discuss their ideas with others.⁸¹ The First Amendment guarantees freedom of speech and forbids Congress and governments at all levels from making laws and policies that restrict individuals, groups, or the press from speaking freely.⁸² Nevertheless, when people are allowed to say or write whatever they want, they may hurt others with their words. The right to freedom of speech often conflicts with the right to freedom from racism and other civil rights and liberties.

Scholars hold very different views in relation to the conflict between the right to freedom of speech and the right to freedom from racism. Some scholars, such as Mike Godwin, an American attorney, author, and cyberlibertarian, “view the Internet and regulation as antithetical to principles of the US constitution that they interpret as guaranteeing an absolute right to free speech, regardless of content.”⁸³ They argue that cyber racism is “a trivial concern” while the regulation of cyber racism is “a more serious threat” to democracy.⁸⁴ On the contrary, other scholars, such as Gail Mason and Natalie Czapski, assert that “[t]he United States has extensively entrenched protections around the freedom to express offensive and provocative speech.”⁸⁵ Rachel Weintraub-Reiter also argued that the constitutional protection for speech is unreasonably strong. In a sense, online racist abusers are given permission to hurt others with their words while hiding behind powerful free speech norms.⁸⁶

⁸¹ See WALTER GELLHORN, *AMERICAN RIGHTS: THE CONSTITUTION IN ACTION* 41 (1960).

⁸² U.S. CONST. amend. I, § 1 (stating “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

⁸³ Jessie Daniels, *Race and Racism in Internet Studies: A Review and Critique*, 15 *NEW MEDIA & SOC’Y* 695, 706 (2013). For more details about Godwin’s view on free speech on the internet, see MIKE GODWIN, *CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE* (1998).

⁸⁴ *Id.*; see also Tsesis, *supra* note 60, at 837.

⁸⁵ Mason & Czapski, *supra* note 24, at 291.

⁸⁶ Rachel Weintraub-Reiter, *Hate Speech over the Internet: A Traditional Constitutional Analysis or A New Cyber Constitution?*, 8 *B.U. PUB. INT. L.J.* 145, 150 (1998).

This article acknowledges that free speech is one of the key elements of democracy and that it brings about positive changes in society. The right to freedom of speech must be protected. Nevertheless, this article also agrees with Mason and Czapski that speech is almost unrestricted under the First Amendment, and such strong protection has undermined other imperatives in a democratic society, such as the right to freedom from racism. There is an urgent need to regulate offensive and provocative speech and strike a more reasonable balance between various civil rights and liberties. For the reasons outlined below, the right to freedom of speech should not be regarded as unlimited,⁸⁷ and there must be restrictions “when there are legitimate grounds.”⁸⁸

First, freedom of speech is not an absolute right.⁸⁹ At the international level, human rights law only recognizes freedom from torture and other inhuman or degrading treatment or punishment,⁹⁰ freedom from slavery and servitude,⁹¹ freedom from imprisonment for inability to fulfill a contractual obligation,⁹² a prohibition against the retrospective operation of criminal laws,⁹³ and the right to recognition before the law⁹⁴ as absolute rights. That means, apart from the rights listed above, all other rights—including the right to freedom of speech—are not absolute, and thus, are

⁸⁷ Alana Schetzer, *What Does ‘Freedom of Speech’ Really Mean in Australia?*, SPECIAL BROADCAST SERVICE (Aug. 30, 2017, 10:20 AM), <https://www.sbs.com.au/topics/voices/culture/article/2017/08/29/what-does-freedom-speech-really-mean-australia#:~:text=at%20any%20time%E2%80%9D,%E2%80%9CFree%20speech%20is%20not%20absolute%2C%20and%20like%20any%20human%20right,of%20libel%2C%20defamation%20or%20vilification> [https://perma.cc/EJ5N-DPTW] (“Free speech is not absolute, and like any human right, free speech carries with it responsibilities. We have a responsibility to speak in ways that don’t harm other people.”).

⁸⁸ See generally Austl. Hum. Rts. Comm’n, *Cyber-Racism Symposium Report*, <https://humanrights.gov.au/our-work/cyber-racism-symposium-report#1> (last visited July 24, 2020).

⁸⁹ Eur. Comm’n, *Fundamental Rights*, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/fundamental-rights_en [https://perma.cc/KBD6-QC45] (last visited Mar. 21, 2021) (indicating that absolute rights refer to rights that cannot be limited or interfered with under any circumstances, not even during a declared state of emergency and noting that “Art. 3 of the European Convention on Human Rights (ECHR) and Art. 2 of the United Nations Convention against Torture (UNCAT) are absolute rights that cannot be limited for any reason.”).

⁹⁰ ICCPR, *supra* note 28, art. 7.

⁹¹ *Id.* art. 8, ¶¶ 1, 2.

⁹² *Id.* art. 11.

⁹³ *Id.* art. 15.

⁹⁴ *Id.* art. 16.

subject to reasonable limits.⁹⁵ At the national level, the United States Supreme Court has also determined that it is possible to restrict the application of free speech norms in rare circumstances.⁹⁶ In *Brandenburg v. Ohio*,⁹⁷ the Supreme Court held that speech is not protected by the First Amendment if it satisfies the following three key elements (“the *Brandenburg* test”): (1) intent to speak (embodied in the requirement that such speech be “directed to inciting or producing” lawless action), (2) imminence of lawless action, and (3) likelihood to incite or produce such lawless action.⁹⁸ In practice, despite the *Brandenburg* test, the Supreme Court has yet to invoke the doctrine in favor of restricting speech.⁹⁹ This is an issue discussed below.

Second, the core value of free speech under the First Amendment lies in the fact that it “facilitates deliberation about public issues and . . . promotes democratic governance.”¹⁰⁰ Speech must be protected if it “promotes ideas and information necessary for a self-governing citizenry to make decisions about what kind of life it wishes to live.”¹⁰¹ Cyber racism does not promote democracy or the rule of law. Instead, online racist attacks fundamentally “deprive vulnerable individuals of their right to engage in political discourse.”¹⁰² Regulating cyber racism essentially upholds the core value of free speech under the First Amendment. Furthermore, if regulation of defamation and online child pornography can be justified, protecting people from being discriminated against on the ground of their race should also be justified, although a proper scrutiny test must be established to ensure a reasonable balance between the rights.

Thirdly, there have already been a few cases in the United States addressing the conflict between the right to freedom of speech and the right to freedom from racism in the online environment. These cases bring

⁹⁵ Austl. Gov’t Att’y-Gen. Dep’t, *Absolute Rights*, <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights>.

⁹⁶ Weintraub-Reiter, *supra* note 86, at 145.

⁹⁷ 395 U.S. 444, 447 (1969).

⁹⁸ *Id.*; see also Rodney A. Smolla, *Should the Brandenburg v. Ohio Incitement Test Apply in Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 10 (2000).

⁹⁹ Melissa J. Morgans, *Freedom of Speech, The War on Terror, and What’s YouTube Got to Do with it: American Censorship During Times of Military Conflict*, 69 FED. COMM’N L.J. 145, 158 (2017).

¹⁰⁰ Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 101 (2009).

¹⁰¹ *Id.*; see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (discussing the importance of protecting political speech).

¹⁰² Citron, *supra* note 100, at 101.

hope to cyber racism regulation, although the level of protection to be afforded to racist materials and commentaries transmitted over the internet remains ambiguous, and how to strike a compromise between freedom of speech and freedom from racism is another challenge yet to be overcome. *United States v. Machado*¹⁰³ is the first prosecution and conviction of cyber racism. In 1996, Richard Machado, a former student of the University of California at Irvine (UCI), sent an e-mail to a group of UCI Asian students, threatening that “I personally will make it my life career to find and kill every one of you personally.”¹⁰⁴ He was charged for using race, ethnicity, or nationality to interfere with a federally protected activity, i.e., students attending a public university, and was later found guilty in federal court.¹⁰⁵ Similarly, a joint report produced by the New Jersey Attorney General and the State Commission of Investigation (the “Joint Report”) also recorded a case restricting online racist speech. According to the Joint Report, in 1998, Pennsylvania Attorney General D. Michael Fisher “sought injunctive relief against those associated with White Power World Wide, an offensive Website created by a white supremacist,”¹⁰⁶ and later, Fisher pursued a lawsuit.¹⁰⁷ Although the American Civil Liberties Union described the action as “an unconstitutional prior restraint against free speech,”¹⁰⁸ the court found that threatening to kill someone over the internet was illegal, and “a posted disclaimer discouraging acts of violence was ineffective in the face of specific posted threats.”¹⁰⁹ As a result, the court “enjoined the site from appearing on the Web.”¹¹⁰ The conviction of Machado and the removal of the white supremacist website are victories of federal authorities seeking to police and prosecute cyber racism. They set an important precedent for restricting racist speech and deterring the toxic spread of racism in the online environment.

¹⁰³ 195 F.3d 454, 455 (9th Cir. 1999).

¹⁰⁴ JOINT REPORT, *supra* note 54, at 39.

¹⁰⁵ *Machado*, 195 F.3d at 455 (noting that Machado was charged with “misdemeanor interference with federally protected activities in violation of 18 U.S.C. § 245(b)(2)(A)”).

¹⁰⁶ JOINT REPORT, *supra* note 54, at 38–39 (noting that Fisher’s lawsuit objected to several entries that appeared on the Web site. “One statement warned that people such as a named and pictured anti-hate activist would be ‘hung from [her] neck from the nearest tree or lamp post.’ The Web site also showed a computer-generated image of the activist’s office exploding.”).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

From the two cases above, it appears that the prosecution and conviction of cyber racists is fairly straightforward. If one threatens to kill someone based on their race, ethnicity, or nationality in the virtual environment, he or she can be held accountable for such hateful speech. Nonetheless, the reality is that racism takes many forms. Abusers may not necessarily make a threat to kill someone, but their speech can still incite violence, or even riots, and can result in irreparable harm to individuals or groups with certain ethnic background. Trump's use of ethnic slurs and its damaging effect on the Asian-American community is one example of speech that incited violence. There also exist many obstacles to prosecuting cyber racists. Despite the tiny ripple of hope sent forth by the two cases above, over the last three decades, most online racist materials are still protected by the First Amendment.¹¹¹ As such, it is necessary to investigate the cause for the (over)protection of racist speech in the virtual environment.

The problems associated with the application of the *Brandenburg* test are the primary cause. These problems reflect an imbalance between various civil rights and liberties. Such imbalance creates an unreasonably high threshold for speech restrictions that most other democratic countries in the world would not agree with (to be discussed in Part III. A).

As mentioned previously, the Supreme Court's decision in *Brandenburg v. Ohio*¹¹² defines the limits of protected speech;¹¹³ speech is not constitutionally protected if it satisfies the three key elements of the *Brandenburg* test.¹¹⁴ The test itself appears to be clear and reasonable, but there are a number of serious problems with its application.¹¹⁵ First, it is difficult to prove the first element of *intent*, particularly when "a speaker denies an intent to incite violence"¹¹⁶ or "the speaker's words do not directly reference violence,"¹¹⁷ even if these words indeed incite violence.¹¹⁸ In practice, the prosecution and the complainants find it difficult to prove a speaker's subjective intent in delivering a speech.¹¹⁹

¹¹¹ *Id.* ("[A] bigot legally can put all sorts of racist invective on a website.")

¹¹² 395 U.S. 444 (1969).

¹¹³ Clay Calvert, *First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer*, 51 CONN. L. REV. 117, 122 (2019).

¹¹⁴ *Id.*

¹¹⁵ *Id. passim* (discussing these application problems).

¹¹⁶ *Id.* at 153 (using the Trump case to demonstrate the difficulty to prove intent).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 119–21.

¹¹⁹ *Id.* at 153.

Second, the incitement test (the third element) has a high standard and is often described by scholars as “an extremely speech protective doctrine.”¹²⁰ A recent example is *Nwanguma v. Trump*.¹²¹ In response to former President Trump’s “get ‘em out” order directed at campaign rally protesters, as well as the subsequent violence, the United States Court of Appeals for the Sixth Circuit held that urging supporters to remove protesters was not a valid incitement to riot.¹²² The court further commented that “[i]t is not an easy task to find [Trump’s] speech rises to such a dangerous level that it can be deemed incitement to riot.”¹²³ Third, the imminence test (the second element) requires a “clear and present danger,”¹²⁴ and that could potentially pose an additional challenge specific to racism occurring on the internet. The internet is perceived as “a relatively emotionless medium” because users are often physically isolated.¹²⁵ This technical nature of the internet, i.e., physical isolation, complicates the analysis of the *Brandenburg* test.¹²⁶ Although materials and commentaries published online can “be disseminated instantaneously, continuously and globally,”¹²⁷ they are often “deemed too remote in time and space to incite an immediate illegal reaction.”¹²⁸

Due to the obstacles above, the Supreme Court has yet to invoke the doctrine in favor of restricting speech.¹²⁹ To date, very few cases have reached the Supreme Court to test the limits of the *Brandenburg* decision.¹³⁰ It is not surprising that most racist materials and commentaries on the internet are still permissible under the First Amendment.¹³¹ As observed by the New Jersey Attorney General and State Commission of

¹²⁰ Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 339 (2011).

¹²¹ 903 F.3d 604 (6th Cir. 2018).

¹²² Calvert, *supra* note 113, at 119–21.

¹²³ *Id.* at 153.

¹²⁴ See David R. Dow, *The Moral Failure of the Clear and Present Danger Test*, 6 WM. & MARY BILL RTS. J. 733, 733 (1998).

¹²⁵ JOINT REPORT, *supra* note 54, at 39.

¹²⁶ *Id.*

¹²⁷ Mason & Czapski, *supra* note 24, at 294.

¹²⁸ JOINT REPORT, *supra* note 54, at 39.

¹²⁹ Morgans, *supra* note 99, at 158.

¹³⁰ See Calvert, *supra* note 113, at 153–54.

¹³¹ Morgans, *supra* note 99, at 158 (“[I]mmminent lawless action would be difficult to satisfy due to the requirement of ‘imminence.’”).

Investigation, “[a] bigot legally can put all sorts of racist invective on a website.”¹³²

High tolerance for racism impedes the enjoyment of other fundamental rights and liberties. When a case dealing with this question of law comes before it, the Supreme Court should consider refining the *Brandenburg* test to reflect the true values of modern democracy.¹³³ On this topic, it is imperative that the United States recalibrate the balance between the various civil rights and liberties. Part III. A. 3 (scrutiny tests) proposes a solution the Supreme Court may consider adopting.

Apart from the constitutional barriers, cyber racism regulation also faces many practical challenges; for example, the difficulty of investigation and prosecution in the digital environment. In cyberspace, people “can defy the conventional jurisdictional realms of sovereign nations, originating an attack from almost any computer in the world, passing it across multiple national boundaries, or designing attacks that appear to be originating from foreign sources.”¹³⁴ The cross-jurisdictional and sometimes transnational nature of cyberspace complicates the investigation and prosecution of cyber racists.¹³⁵ Mason and Czapski’s research confirms that “[d]ealing with any one instance of cyber-racism may require coordination between law enforcement and government agencies from multiple countries and intermediaries such as online host platforms and connectivity providers, bringing to light legal inconsistencies between jurisdictions.”¹³⁶ The lack of collaboration between countries, unfortunately, leads to unsuccessful investigation and prosecution of cyber racists, threatening global democracy and human rights (to be discussed in Part III. A. 4).

III. A MULTI-FACETED APPROACH THAT ENCOMPASSES BOTH LEGAL AND NON-LEGAL RESPONSES

Enhanced regulation is critical to guard the meaningful exercise of the right to free speech and protect people from being discriminated

¹³² JOINT REPORT, *supra* note 54, at 39.

¹³³ See Richard Ashby Wilson & Jordan Kiper, *Incitement in an Era of Populism: Updating Brandenburg after Charlottesville*, 5 U. PA. J.L. & PUB. AFFS. 57, 57 (2020) (“[T]he regulatory framework for direct incitement to imminent lawless action established fifty years ago in *Brandenburg* is showing signs of severe strain ... [A] systematic evidence-based framework for assessing the likelihood that inciting speech will result in imminent lawless action.”).

¹³⁴ Goodman & Brenner, *supra* note 75, at 3.

¹³⁵ *Id.*

¹³⁶ Mason & Czapski, *supra* note 24, at 296.

against on the basis of their race. Due to constitutional constraints, this article proposes a multi-faceted approach that encompasses not only legal but also non-legal responses to combat cyber racism.

A. LEGAL RESPONSES: A COMPARATIVE ANALYSIS OF EU AND AUSTRALIAN MODELS

Let's face it—it is not realistic to amend the United States Constitution.¹³⁷ However, in interpreting the First Amendment, there is sufficient justification for the Supreme Court to consider imposing more restrictions on racist speech and protecting people from being abused by racists. Apart from the fact that cyber racism causes harm to the American people and society as a whole, this article also provides international experience to justify public intervention in cyber racism. The practices of two of the world's leading democracies, France and Australia, are to be assessed in depth. Furthermore, the First Amendment's overprotection for racist content on the internet has undermined other democratic countries' efforts to eliminate racism, posing a threat to global democracy and human rights.

1. *Global Regulation of Cyber Racism*

Racism is not a problem unique to the United States. People in other parts of the world also suffer from ongoing racial hostility in both the online and offline environment.¹³⁸ A major difference is that most democratic countries in the world choose not to tolerate racism regardless of the medium,¹³⁹ while the United States preserves its near-unlimited freedom of speech.

In Europe, freedom of speech is protected, but its interference with other civil rights must be regulated by law.¹⁴⁰ Jessie Daniels, Professor at the City University of New York (CUNY), precisely summarizes the European model as “a human rights framework that values free speech as

¹³⁷ Morgans, *supra* note 99, at 170 (arguing that “the practical limitations on the actions of Congress and the harsh reality of the strict scrutiny test” makes it difficult to rely on the government to eradicate racial discrimination).

¹³⁸ See Bradley, *supra* note 36, at 4 (“[R]acism is a global problem. Its harms know no national boundaries.”).

¹³⁹ For example, France and Australia, as discussed in this Article *infra* Parts III.A.2–3.

¹⁴⁰ See AUSTL. HUM. RTS. COMM’N, *supra* note 88.

a fundamental right, but conceptualizes the need to balancing that right against the important human right of being free from discrimination or harassment based on race.”¹⁴¹ To date, most European countries “have made incitement to racial hatred and dissemination of racist materials criminal offences,”¹⁴² and that includes racism which occurs on the internet.¹⁴³

At the European Union level, the European Convention on Human Rights (the “Convention”) protects people’s right to hold their own opinions and the right to express their opinions freely without government interference.¹⁴⁴ It also imposes restrictions on racist speech, requiring that individuals behave responsibly and to respect other people’s human rights. Article 10 of the Convention states:

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.¹⁴⁵

Additionally, in 2003, the Council of Europe adopted *Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems* (hereinafter “the Protocol”).¹⁴⁶ The Protocol is concerned with “the risk of misuse or abuse of such computer systems to disseminate racist and xenophobic propaganda.”¹⁴⁷ It criminalizes racist and xenophobic acts committed through computer systems.¹⁴⁸ Chapter II of the Protocol details acts that should be criminalized, including, dissemination of racist and xenophobic material through computer

¹⁴¹ Daniels, *supra* note 83, at 706–07.

¹⁴² See AUSTL. HUM. RTS. COMM’N, *supra* note 88.

¹⁴³ *Id.*

¹⁴⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, ¶ 1, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

¹⁴⁵ *Id.* art. 10, ¶ 2.

¹⁴⁶ Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, Jan. 28, 2003, E.T.S. No. 189.

¹⁴⁷ *Id.* pmb1.

¹⁴⁸ *Id.* arts. 3–7.

systems, racist and xenophobic motivated threat and insult, denial, gross minimization, approval or justification of genocide or crimes against humanity, as well as aiding and abetting the commission of any of the acts listed above.¹⁴⁹ The Protocol also establishes criminal enforcement mechanisms at the EU level, promoting international cooperation on the basis of uniform criminal standards across Europe.¹⁵⁰

Similarly, in the Southern Hemisphere, cyber racism is also unlawful under Australian law at both the federal (usually called Commonwealth) and state levels.¹⁵¹ Racism occurring online can have the same effects as offline remarks, and thus, is treated the same as racism in the physical world.¹⁵² Serious racial vilification is a criminal offense under Australian laws.¹⁵³

The following discussion examines the French and the Australian models in more detail. Through a comparative lens, this article provides some insights and practical solutions for the United States to take into account when considering cyber racism regulation reform.

2. The European Model: A Case Study of France

In France, freedom of speech has been protected by law since 1789, but such protections come with conditions.¹⁵⁴ The Declaration of the Rights of Man and of the Citizen (hereinafter “the Declaration”),¹⁵⁵ passed by the National Constituent Assembly of France on August 26, 1789, and

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* pmb1 (“[The Protocol] provides for modern and flexible means of international co-operation and [is] convinced of the need to harmonise substantive law provisions concerning the fight against racist and xenophobic propaganda.”).

¹⁵¹ *Racial Discrimination Act 1975* (Cth) s 18C (Austl.) (making racism unlawful at the federal level); see also Mason & Czapski, *supra* note 24, at 297–98 (noting that state laws in Australia also make racial vilification unlawful and that serious racial vilification can be a criminal offence in most states).

¹⁵² See *Jones v Toben* [2002] FCA 1150 (17 September 2002) (Austl.) (interpreting Section 18C of the Racial Discrimination Act to include cyber racism unless password protected).

¹⁵³ For example, Western Australia takes an exclusively criminal approach to dealing with racism, including cyber racism. See, e.g., *Criminal Code Act Compilation Act 1913* (WA) s 78–80D (Austl.).

¹⁵⁴ Ronald P. Sokol, *Freedom of Expression in France: The Mitterrand – Dr. Gubler Affair*, 7 TUL. J. INT’L & COMP. L. 5 (1999); see also Caitlin T. Murphy, *International Law and the Internet: An Ill-Suited Match – Case Note on UEIF & LICRA v. Yahoo! Inc.*, 25 HASTINGS INT’L & COMP. L. REV. 405, 423 (2002).

¹⁵⁵ Déclaration des Droits de l’Homme et du Citoyen de 1789 [Declaration of the Rights of Man and of the Citizen], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 26, 1789 [hereinafter The Declaration].

later incorporated by reference into the French Constitution,¹⁵⁶ is a fundamental document of the French Revolution that granted basic human rights to some commoners.¹⁵⁷ Article 10 of the Declaration stipulates that “[n]o one shall be disquieted on account of his opinions, including his religious views.”¹⁵⁸ This is built on the condition that “their manifestation does not disturb the public order established by law.”¹⁵⁹ Article 11 also declares that “[t]he free communication of ideas and opinions is one of the most precious of the rights of man.”¹⁶⁰ Although “[e]very citizen may, accordingly, speak, write, and print with freedom,”¹⁶¹ they must be “responsible for such abuses of this freedom as shall be defined by law.”¹⁶²

The principle embedded in the Declaration is similar to those in the First Amendment to the United States Constitution.¹⁶³ Both the United States and France value freedom of speech as an important constitutional right and they both strive to protect this right and uphold democracy. Nevertheless, as many scholars have witnessed, France interprets the breadth of this right quite differently from the United States; it seeks to balance freedom of speech with other imperatives.¹⁶⁴ While respecting the right to freedom of speech, France explicitly allows legislation to limit this right in certain circumstances, specifically when other fundamental human rights, such as freedom from racism, are at stake, or public order is disturbed, for example, by racist speech promoting violence or terrorism.¹⁶⁵

¹⁵⁶ 1958 CONST. pmbi. (Fr.) (“The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946.”).

¹⁵⁷ The Declaration, *supra* note 155.

¹⁵⁸ *Id.* art. 10.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* art. 11.

¹⁶¹ *Id.* art. 11.

¹⁶² *Id.*

¹⁶³ Murphy, *supra* note 154, at 423.

¹⁶⁴ *Id.*; see also Karen L. Bird, *Racist Speech or Free Speech? A Comparison of the Law in France and the United States*, 32 COMP. POL. 399, 413 (2000) (“In France, the legislative response to racist speech arises out of a tradition of securing liberty and equality through collective authority.”).

¹⁶⁵ Nicholas Boring, *Limits on Freedom of Expression: France*, LIBR. CONG., <https://www.loc.gov/law/help/freedom-expression/france.php> [https://perma.cc/9K7B-898J] (last visited Mar. 19, 2021).

In fact, an important idea of French law is that legislation better promotes and communicates government standards.¹⁶⁶ France takes a strong legislative approach to protect people from racial discrimination and harassment.¹⁶⁷ For example, the Pleven Law, passed by the French Parliament in 1972, makes it “illegal to incite racial hatred or to use language that [is] racially defamatory, contemptuous, or offensive.”¹⁶⁸ It also provides “criminal and civil remedies against racial discrimination and racist speech.”¹⁶⁹ To battle the rising problems of cyber racism, the French Parliament also promulgated the *Online Hate Speech Law* (known as “Loi Avia”) in May 2020.¹⁷⁰ The French legal system essentially establishes three main principles in dealing with racism. First, “racism, anti-Semitism, racial hatred, and justification of terrorism are not opinions . . . [but] offences.”¹⁷¹ Second, “[a]ll speeches, cries or threats made publicly, that is to say by any public means of communication, are punishable, including on the Internet.”¹⁷² Third, “[t]he absence of publicity [of the racist materials] does not make them less reprehensible. Non-public racial, national or religious provocation, defamation, and slander are punishable under the penal code.”¹⁷³

As compared to the United States, France has been quite successful in protecting its people from racism while also respecting the

¹⁶⁶ See Vernon Palmer, *Introducing A New Kind of Letter*, 12 TUL. EUR. & CIV. L.F. 181 (1997) (noting that France has a civil law legal system). For more details regarding the French legal system, see CATHERINE ELLIOTT, CATHERINE VERNON, & ERIC JEANPIERRE, *FRENCH LEGAL SYSTEM* (2006).

¹⁶⁷ Bird, *supra* note 164, at 400 (“The French laws [that restrict racist speech] are among the strictest and most vigorously enforced of any in Europe.”).

¹⁶⁸ *Id.* at 399.

¹⁶⁹ *Id.*

¹⁷⁰ Aurelien Breeden, *French Court Strikes Down Most of Online Hate Speech Law*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/world/europe/france-internet-hate-speech-regulation.html> [<https://perma.cc/58MY-D9CM>] (despite the passage of the law, France’s constitutional authority the French Constitutional Council, declared the main provisions of the “Loi Avia” unconstitutional).

¹⁷¹ GOVERNMENT INFORMATION SERVICE, EVERYTHING YOU NEED TO KNOW ABOUT FREEDOM OF EXPRESSION IN FRANCE (2015), <https://www.gouvernement.fr/en/everything-you-need-to-know-about-freedom-of-expression-in-france> [<https://perma.cc/TV8Q-HJMW>] (noting that the following are punishable by law: “Public provocation to hatred, violence or racial discrimination. Public defamation on the grounds of an actual or assumed membership or non-membership to a specific ethnic group, nation, race or religion. Public slander on the grounds of an actual or assumed membership or non-membership to a specific ethnic group, nation, race or religion. Disputing crimes against humanity.”).

¹⁷² *Id.*

¹⁷³ *Id.*

right to freedom of speech.¹⁷⁴ According to a report by La Commission Nationale Consultative Des Droits De L'Homme (CNCDDH), France has made exceptional progress in reducing racism, anti-Semitism, and xenophobia.¹⁷⁵ In the report, the longitudinal tolerance index (LTI) was used to measure the overall changes in racial prejudice in France from 1990 to 2018.¹⁷⁶ CNCDDH data (Table 1) demonstrates that the LTI increased by 19 points, rising from 48 in the early 1990s to 67 in 2018.¹⁷⁷ This reflects a strong trend for racial justice and social inclusion.¹⁷⁸

Table 1. The Longitudinal Tolerance Index (1990-2018)¹⁷⁹



Source: CNCDDH barometer, November 2018

¹⁷⁴ See Bird, *supra* note 164, at 399 (“In 1997 there were eighty-eight convictions for racist speech with fines averaging 10,000 francs and prison sentences averaging two months, depending on the category of infraction. One of the most notable targets of the law has been Jean-Marie Le Pen, the leader of the extreme right-wing National Front. Le Pen has been convicted and fined for racist speech on five occasions, and there have been dozens of convictions against other principal members of his party.”).

¹⁷⁵ COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L’HOMME, REPORT ON THE FIGHT AGAINST RACISM, ANTI-SEMITISM AND XENOPHOBIA 8–9 (2018) (available for download at https://www.cncdh.fr/sites/default/files/english_essentiels_rapport_racisme_2018.pdf [<https://perma.cc/5TPD-UWZ6>]).

¹⁷⁶ *Id.* at 8 (“The closer the index is to 100, the higher the level of tolerance; the lower the score, the lower the level of tolerance.”).

¹⁷⁷ *Id.* at 9.

¹⁷⁸ *Id.* at 8–9.

¹⁷⁹ *Id.* at 9.

The United States should consider adopting France's legislative approach to regulating cyber racism, especially as both countries share fundamental similarities in their respective constitutions. Legislative intervention demonstrates the government's determination to fighting racism; it also provides a great opportunity for the government to correct the imbalance that has long been interfering with or curtailing the right to freedom from racism. However, this article also admits this is a very controversial approach one might propose. The regulation of cyber racism through legislative action is unlikely to happen in the foreseeable future due to the constitutional barrier in the United States. Despite the fundamental similarities in the respective constitutions, opponents may still argue that the United States Constitution was never intended to attach any conditions to the right to freedom of speech like the French one. Regardless of the controversy, at least, the French model provides a strong justification for the United States Supreme Court to consider imposing more restrictions on racist speech when interpreting the First Amendment.

3. *The Australian Model*

a. The Mechanism

Racism is also a persistent problem in Australia. According to the 2019 annual survey of the Australian Human Rights Commission ("AHRC"),¹⁸⁰ about 20 percent of Australians reported having experienced racial hostility during the previous twelve months.¹⁸¹ Notably, cyber racism has become a substantial part of racism in recent years.¹⁸² Among the racial hatred complaints received by the AHRC over the last decade, a significant proportion were about online racial materials.¹⁸³ However, contrary to most Americans, 88 percent of Australians believe "it should be unlawful to offend, insult or humiliate others on the basis of race."¹⁸⁴ This demonstrates strong public support for formal regulation of

¹⁸⁰ See AUSTRAL. HUMAN RTS. COMM'N, *supra* note 7, at 5.

¹⁸¹ See *id.*

¹⁸² Mason & Czapski, *supra* note 24, at 284 ("[C]yber racism and other forms of cyber bullying has become an increasing part of the internet mainstream, with 35% of Australian internet users witnessing such behaviour online").

¹⁸³ *Id.* at 294.

¹⁸⁴ *Id.* at 292.

cyber racism.¹⁸⁵ In Australia, the law's role has been expanded to regulate racism in both the physical world and on the internet.

Despite being a common law country that heavily relies on the doctrine of precedent, Australia takes a similar approach to France in the sense it has enacted legislation to regulate cyber racism. To date, Australia has established a comprehensive network of laws and policies to combat cyber racism. At the federal level, although the Australian Constitution (Commonwealth) does not contain a Bill of Rights,¹⁸⁶ the Racial Discrimination Act 1975 (RDA)¹⁸⁷ explicitly promotes equality and inclusion, and protects people from being discriminated against on the basis of their race.¹⁸⁸ Section 18C of the RDA makes it a civil wrong (not necessarily a criminal offense)¹⁸⁹ to engage in an act that is “reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people”¹⁹⁰ based on their race, color, or national or ethnic origin.¹⁹¹ In Australia, cyber racism is treated the same as offline racism; the RDA applies to internet content.¹⁹² For example, in *Jones v. Toben*,¹⁹³ the Federal Court of Australia interpreted Section 18C of the RDA to include cyber racism (unless password protected) as an act of racism.¹⁹⁴ In this case, Fredrick Toben published materials on the internet that “constitutes malicious anti-Jewish propaganda;”¹⁹⁵ he “[denied] the Nazi Genocide of the Jews and blame[d] Jews for the crimes of Stalin”¹⁹⁶ during the World War II. Although this case raised a broader issue that involves the publication of materials on the internet, the Court

¹⁸⁵ *Id.*

¹⁸⁶ See generally *Australian Constitution*; see Hon. Alastair Nicholson, *The United Nations Convention on the Rights of the Child and the Need for Its Incorporation into a Bill of Rights*, 44 FAM. CT. REV. 5, 8 (2006).

¹⁸⁷ *Racial Discrimination Act 1975* (Cth) s 10(1) (Austl.).

¹⁸⁸ *Id.* s 9 (the short title, *An Act Relating to the Elimination of Racial and Other Discrimination*, clearly demonstrates the purpose of the Act).

¹⁸⁹ *Id.* s 18C.

¹⁹⁰ *Id.* s 18C(1)(a).

¹⁹¹ *Id.* s 18C(1)(b).

¹⁹² ANDREW JAKUBOWICZ ET AL., CYBER RACISM AND COMMUNITY RESILIENCE PROJECT: PROJECT REPORT AND RECOMMENDATIONS TO AUSTRALIAN HUMAN RIGHTS COMMISSION 9 (2017) (available for download at <https://www.sydney.edu.au/content/dam/corporate/documents/sydney-law-school/research/centres-institutes/mason-cyber-racism-report-2017.pdf> [<https://perma.cc/5WLA-5KS7>]).

¹⁹³ *Jones v Toben* [2002] FCA 1150 ¶¶ 72–74 (Austl.).

¹⁹⁴ *Id.* ¶¶ 99–102.

¹⁹⁵ *Id.* ¶ 4.

¹⁹⁶ *Id.*

found the application of Section 18C was rather straightforward.¹⁹⁷ The Court determined that “placing material on a website which is not password protected and is available to the public is an act done otherwise than in private;”¹⁹⁸ it ordered Toben to remove all relevant materials on the internet within seven days.¹⁹⁹ Furthermore, the cyber-bullying law, Enhancing Online Safety Act 2015 (Commonwealth),²⁰⁰ and in rare circumstances, the Criminal Code Act 1995 (Commonwealth), can also be used to deal with cyber racism cases.²⁰¹ For example, Section 474.15 of Criminal Code Act 1995 (Commonwealth) criminalizes the use of a carrier service, such as phones, text messages, emails, or online posts, to intentionally threaten to kill others.²⁰² That includes threats made on the basis of race.²⁰³

At the state level, Australia has anti-racism legislation in all states and territories, save for the Northern Territory.²⁰⁴ These state and territory laws “operate concurrently with Commonwealth laws”²⁰⁵ and generally apply to offline and online racism.²⁰⁶ Most states and territories have both civil and criminal provisions regulating racism.²⁰⁷ However, Western Australia takes a far different, exclusively criminal approach,²⁰⁸ and has had prosecutions in serious cases of cyber racism. For example, in 2011, Brendon Lee O’Connell was convicted for posting an anti-Semitic video on YouTube.²⁰⁹ This was the first conviction for cyber racism in Western Australia.²¹⁰ Similarly, in 2014, another Western Australian man was charged for “a series of abusive tweets directed at an AFL player of Fijian heritage.”²¹¹ He pleaded guilty to the charge and received a conditional

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* ¶ 71.

¹⁹⁹ *Id.* ¶ 113(a).

²⁰⁰ See generally *Enhancing Online Safety Act 2015* (Cth) (Austl.).

²⁰¹ *Criminal Code Act 1995* (Cth) s 474.15 (Austl.).

²⁰² *Id.*

²⁰³ Mason & Czapski, *supra* note 24, at 304.

²⁰⁴ JAKUBOWICZ ET AL., *supra* note 192, at 9.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 10.

²⁰⁷ *Id.* at 9.

²⁰⁸ *Criminal Code Act Compilation Act 1913* (W. Austl.) ss 78–80D.

²⁰⁹ *O’Connell v. Western Australia* [2012] WASCA 96, ¶ 4 (Austl.) (appeal from unreported District Court trial).

²¹⁰ Renae Barker, *Racial Vilification Conviction*, 36(2) ALT. L.J. 136, 136 (2011).

²¹¹ Mason & Czapski, *supra* note 24, at 304.

release order and a fine of \$250 AUD.²¹² Abusers in other Australian states and territories have also been prosecuted and convicted for their racist activities online.²¹³

To summarize, Australia, one of the most democratic countries in the Southern Hemisphere, operates in a similar way to the French model. Nevertheless, as previously mentioned, legislation may not be an option for the United States due to the First Amendment obstacle. At the very least, the Australian model, together with the French model, provides a strong justification for the United States Supreme Court to consider interpreting the First Amendment in a way that restricts harmful racist speech and protects other civil rights and liberties fundamental to modern democracy.²¹⁴

b. Other Components of the Australian Approach

Aside from this effective but controversial legislative approach, two other Australian practices are particularly useful in combating cyber racism and should be adopted by the United States: scrutiny tests and racial conciliation.

i. Scrutiny Tests

Mason and Czapski summarized Australia's cyber racism scrutiny tests in their research paper *Regulating Cyber-Racism*.²¹⁵ According to Mason and Czapski, a community standard test is a special feature in Australian scrutiny tests.²¹⁶ Furthermore, Australian tests focus more on incitement,²¹⁷ but less on intent and imminence.²¹⁸

²¹² *Id.*

²¹³ *Id.* (Mason and Czapski recorded a New South Wales Case. In 2016, "a [...] chiropractor was convicted under the section for abusing Indigenous NT former Senator Nova Peris on Facebook, calling her a 'black c***' and demanding that she '[g]o back to the bush and suck on witchity [sic] grubs and yams.'")

²¹⁴ Andrew Jakubowicz, *Six Actions Australia's Government Can Take Right Now to Target Online Racism*, THE CONVERSATION (June 14, 2019), <https://theconversation.com/6-actions-australias-government-can-take-right-now-to-target-online-racism-118401> [<https://perma.cc/9SZL-Q2G4>] (stressing the importance of legislation and regulation in combating cyber racism. Jakubowicz argues that "[l]egislation and regulation should enshrine, promote and communicate these standards – otherwise the vulnerable remain unprotected, and the aggressors continue smirking.")

²¹⁵ See Mason & Czapski, *supra* note 24, at 299.

²¹⁶ *Id.*

²¹⁷ *Id.* at 299–300.

²¹⁸ See *id.* at 298–313.

ii. *A Community Standard Test*

The Commonwealth scrutiny test requires that the impact of an action in question be “measured objectively from the perspective of a hypothetical reasonable person in the position of the applicant or the applicant’s victim group.”²¹⁹ The subjective views of the complainant are not the main consideration of the test.²²⁰ If “a particular subset of a racial group is reasonably likely”²²¹ to be negatively affected by the action, the act satisfies the community standard test.²²² State and territory legislation does not apply the same community standard test as the Commonwealth. Instead, state and territory legislation implement a broader approach. The impact of an action in question is measured from the perspective of a third party rather than a particular victim group.²²³ More specifically, state and territory legislation require the complainant to demonstrate that “a third party, an ordinary, reasonable member of the general community rather than a hypothetical reasonable member of the victim group, could have been incited to feel hatred towards the victim group as a result of the respondent’s conduct.”²²⁴ The difference between the two community standard tests may appear to be subtle, but scholars often argue that the state and territory approach has a higher harm threshold that is disadvantageous to victims.²²⁵ Scholars perceive the state and territory approach as unfair because it often leads to a situation where victims feel distressed by the internet content that they would interpret as racism, which a third party may not entirely understand due to a lack of understanding for a particular race or culture.²²⁶

Contrary to the Australian scrutiny test, a community standard test has been largely overlooked in the *Brandenburg* test.²²⁷ Nevertheless, it is

²¹⁹ *Id.* at 299.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 299–300.

²²⁴ *Id.* at 300 (“This is difficult to prove and less satisfactory for the victim, being divorced from their own personal reactions” or any assessment of the respondent’s motive or intention in performing the act. Incitement is also difficult to satisfy.”).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that speech is not protected by the First Amendment if it satisfies the following three key elements (“the *Brandenburg* test”): 1) intent to speak (embodied in the requirement that such speech be “directed to inciting or producing” lawless action), 2) imminence of lawless action, and 3) likelihood to incite or produce such lawless action.).

an important tool for the courts to assess the impact of racist speech and to decide if the fundamental right of freedom from racism is infringed. Thus, in addition to the three elements required by the *Brandenburg* test, a fourth element—a community standard test—should be incorporated into the test. Furthermore, this article supports the Commonwealth approach, which is the narrow interpretation of community standard for fairness reasons discussed above.

iii. Intent and Incitement

In Australia, federal legislation imposes a high threshold for incitement. Federal legislation focuses exclusively on the actual consequences and requires that the racist act in question “cause profound and serious effects, not to be likened to mere slights.”²²⁸ The standard set by the federal legislation is so high that most racism cases, if not all, are practically handled at the state level or outside of the legal regime through a conciliation process (arguably quasi-legal) by the AHRC.²²⁹ At the state level,

[t]here is no need to prove that the respondent intended to incite or actually did incite anyone, provided that an ordinary member of the audience to whom it was directed would understand from the respondent’s conduct that they were being incited towards hatred, serious contempt for, or severe ridicule of a person or persons, on the grounds of race.²³⁰

Under the state and territory legal system, there is no explicit requirement for evidence of causation; it only carries “the connotation of ‘inflamm’ or ‘set alight’ and is directed at conduct that is likely to generate strong and negative passions.”²³¹ On this point, the Australian state and territory approach appears to be similar to the *Brandenburg* test as they both emphasize “*the likelihood to . . .*”²³² Nevertheless, there are two distinct differences between the Australian state and territory approach and the *Brandenburg* test. The first difference is that the Australian state and

²²⁸ Mason & Czapski, *supra* note 24, at 299.

²²⁹ *See id.* at 284–340.

²³⁰ *Id.* at 300.

²³¹ *Id.*

²³² *Id.*

territory approach does not require intent.²³³ The removal of the *intent*²³⁴ requirement would solve the first application problem of the *Brandenburg* test. Whether “a speaker denies an intent to incite violence”²³⁵ or “the speaker’s words do not directly reference violence”²³⁶ is not relevant. The second difference is that the Australian state and territory approach recognizes the potential negative impact of strong negative feelings caused by racist speech or activities.²³⁷ Thus, it only requires the likelihood to incite “towards hatred, serious contempt for, or severe ridicule of a person or persons, on the grounds of race”²³⁸ without reaching a more serious level, the likelihood to incite lawless *actions*.²³⁹ The Australian state and territory approach provides useful insight for the Supreme Court to solve the second application problem associated with the *Brandenburg* test.

iv. Imminence

Lastly, the Australian scrutiny tests, including tests at both the federal and state levels, do not specifically require imminence unless it is a criminal charge.²⁴⁰ The removal of the imminence test could potentially resolve the third application problem of the *Brandenburg* test. When a clear and present danger test is not required to determine what speech the government may restrain,²⁴¹ materials and commentaries posted on the internet are no longer “too remote in time and space to incite an immediate illegal reaction.”²⁴² Nevertheless, in reality, the United States Supreme Court will be reluctant to remove the clear and present danger test on the grounds that the standard for the *Brandenburg* test would become

²³³ *Id.*

²³⁴ Emphasis added by the author.

²³⁵ Calvert, *supra* note 113, at 153.

²³⁶ *Id.*

²³⁷ Mason & Czapski, *supra* note 24, at 300.

²³⁸ *Id.*

²³⁹ Emphasis added by the author.

²⁴⁰ Mason & Czapski, *supra* note 24, at 306; see generally Sarah Sorial, *What Does It Mean to Offend, Insult, Humiliate and Intimidate: Section 18C of the Racial Discrimination Act 1975 (Cth) and the Problem of Harm*, 42 AUSTL. J. LEGAL PHIL. 165 (2017).

²⁴¹ For more details about the clear and present danger test, see Hans A. Linde, “*Clear and Present Danger*” Reexamined: *Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970).

²⁴² JOINT REPORT, *supra* note 54, at 39.

extremely low, compromising the fundamental right to freedom of speech.²⁴³

v. *Summary*

Admittedly, the Australian scrutiny tests are not perfect, and there still exists “a divergence of views about where to set the legal threshold between acceptable and unacceptable speech.”²⁴⁴ At the very least, the Australian scrutiny approach demonstrates a possible way for the United States Supreme Court to update the *Brandenburg* test. The Australian approach draws a relatively clear distinction between protected and racist speech and strikes a reasonable balance between the right to free speech and the right to freedom from racism. As such, it is highly recommended that the United States Supreme Court consider the merits of the Australian approach and develop an enforceable scrutiny test that expands human rights protection through imposing more restrictions on racist speech.

c. Conciliation Through the AHRC

In Australia, the AHRC, an independent third party, is authorized to administer the RDA,²⁴⁵ although it is outside the legal regime (arguably quasi-legal) and is “not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with [the AHRC Act].”²⁴⁶ The primary role of the AHRC is to investigate and attempt to resolve complaints about discrimination and human rights breaches, including cyber racism complaints, through a confidential process known as “conciliation.”²⁴⁷ In practice, most complaints of cyber racism in the majority of Australian jurisdictions are handled by the

²⁴³ E.g., Elisa Kantor, *New Threats, Old Problems: Adhering to Brandenburg's Imminence Requirement in Terrorism Prosecutions*, 76 GEO. WASH. L. REV. 752, 785 (2008) (“Protecting Brandenburg’s imminence requirement in today’s period of crisis may be our best defense against terrorism; although terrorism will continue to threaten our national security, we can ensure that our liberty, which we fight so assiduously to defend, remains intact.”).

²⁴⁴ Mason & Czapski, *supra* note 24, at 291.

²⁴⁵ *Australian Human Rights Commission Act 1986*, (Cth) s 11 (Austl.) (The AHRC is authorized to administrate the Age Discrimination Act 2004, the Disability Discrimination Act 1992, and the Sex Discrimination Act 1984.).

²⁴⁶ *Id.* s 4(1).

²⁴⁷ *Id.* s 46PF.

AHRC.²⁴⁸ Unlike a court, the AHRC does not have a determination function in relation to the complaints it receives.²⁴⁹ If a complaint cannot be resolved or is discontinued for any reason, the complainant may apply to have the allegation heard and decided by a court.²⁵⁰

It is recommended that the United States develop a conciliation process similar to the Australian one in response to rising cyber racism problems. Conciliation can operate outside the legal system while still protecting people from being discriminated against or abused on the basis of their race.

Racial conciliation, as an alternative form of dispute resolution, has many advantages over litigation. Conciliation provides a great opportunity for aggrieved parties to seek justice. The process is flexible, confidential, and interest-based, and most importantly, it is time and cost-efficient and easily accessible to the public.²⁵¹ Neither party needs an attorney to participate in conciliation.²⁵² Conciliators “assist the parties to consider different options to resolve the complaint and provide information about possible terms of settlement.”²⁵³ Mason and Czapski also endorse this approach. They contend that “the process of conciliation inherent in racial vilification laws can be advantageous, allowing for harmful conduct to be dealt with quickly and informally without resort to the court system.”²⁵⁴ Moreover, they find that “[v]ictims of racist conduct often are not looking for the perpetrator to face heavy penalties;”²⁵⁵ monetary compensation is usually not the main purpose of the complaint.²⁵⁶ Often, victims simply need “a genuine apology acknowledging the harm.”²⁵⁷ Due to the reasons above, conciliation suits the needs of most victims in racism complaints.

²⁴⁸ Austl. Human Rts. Comm’n, *Conciliation-How It Works*, <https://humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works> (last visited Mar. 21, 2021).

²⁴⁹ Austl. Human Rts. Comm’n, *Information for People Making Complaints- Unlawful Discrimination*, <https://humanrights.gov.au/complaints/information-people-making-complaints> (last visited Mar. 21, 2021).

²⁵⁰ See generally *Australian Human Rights Commission Act 1986*, *supra* note 245, ss 46PO, 49B (usually, the Federal Court of Australia or the Federal Magistrates Court hears these cases).

²⁵¹ Austl. Human Rts. Comm’n, *supra* note 248.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Mason & Czapski, *supra* note 24, at 319–20.

²⁵⁵ *Id.* at 320.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

While developing its own racial conciliation process, the United States should consider the following suggestions. First, the scope of cyber racism must be clearly defined. For example, the AHRC provides a clear and precise interpretation of cyber racism. According to the AHRC, racism is “doing or saying something in public [. . .] based on the race, colour, national or ethnic origin of a person or group of people, which is likely to offend, insult, humiliate or intimidate.”²⁵⁸ It further states that “[o]n the Internet, cyber racism can take the form of a website itself, its written content, its images, blogs, videos, and on-line comments. Additionally, racist comments, images or language in text messages, on social networking sites or in emails are also examples of cyber racism.”²⁵⁹ A well-written definition enables the public to have a good understanding of cyber racism problems while reducing ambiguity in interpretation.²⁶⁰ Second, information on how conciliation works must be made clear, transparent, and easy to understand. This includes information about how to lodge a complaint, how to respond to a complaint, the role of conciliators, how conciliators investigate complaints, and how conciliation works must be made clear, transparent, and easy to understand. This helps increase accessibility to the grievance mechanism in the event of cyber racism. The AHRC has done quite well in this aspect; it has a dedicated webpage for discrimination and human rights breaches complaints.²⁶¹ The webpage contains all the information mentioned above²⁶² and the entire process is user-friendly. The complaint process is so clear that complainants do not need to seek professional legal advice.

Meanwhile, there are also a few potential issues that need to be addressed by legislators while designing the conciliation process. A practical challenge facing many cyber racism victims is the identification of online abusers, especially when their profiles are anonymous. In response to this problem, it is imperative to develop a system that enables

²⁵⁸ Austl. Human Rts. Comm’n, *Racism*, <https://humanrights.gov.au/quick-guide/12083> (last visited Mar. 20, 2021).

²⁵⁹ Austl. Human Rts. Comm’n, *Cyber Racism*, <https://humanrights.gov.au/extended-area-work/cyber-racism> (last visited Mar. 20, 2021).

²⁶⁰ See ANDREW JAKUBOWICZ ET AL., *CYBER RACISM AND COMMUNITY RESILIENCE: STRATEGIES FOR COMBATING ONLINE RACE HATE* 45–64 (2017) (noting that scholars review the definition of cyber racism in order to propose an effective approach to curtail cyber racism).

²⁶¹ See Austl. Human Rts. Comm’n, *Complaints*, <https://humanrights.gov.au/complaints> (last visited Mar. 20, 2021).

²⁶² See Austl. Human Rts. Comm’n, *Make a Complaint*, <https://humanrights.gov.au/complaints/make-complaint> (last visited Mar. 20, 2021) (AHRC provides a step-by-step guide on how to lodge a complaint.).

conciliators to work with internet intermediaries and deal with abusive content that appears on the online platforms.²⁶³ For instance, in Australia, the AHRC has been working closely with internet intermediaries in fighting cyber racism.²⁶⁴ Internet intermediaries have also shown some willingness to cooperate with the AHRC to remove racist and abusive materials.²⁶⁵ Another concern is the social effect of the conciliation process. Unlike courtroom trials, conciliation is a confidential process. The confidential nature of the conciliation process has determined that such a process “struggles to achieve ‘the educational and standard setting objectives’ which lie behind racial vilification legislation.”²⁶⁶ Using Australia as an example, most complaints are settled by the AHRC; only a very small portion of cases proceed to court. Therefore, it is hard to accomplish the goal of “[c]reating important precedents that help set community expectations.”²⁶⁷

5. An Urgent Need for Fundamental Change in the Law: The First Amendment’s Threat to Global Democracy and Human Rights

In response to cyber racism, it is apparent that what is illegal in Europe, Australia, and other democratic countries is likely considered acceptable in the United States. The two cases below reveal that the First Amendment’s (over)protection for racist speech has severely undermined other countries’ efforts to eliminate racism, posing a threat to global democracy and human rights.

In Germany, a group of Jewish students received more than 17,000 messages from the email address of “adolf@hitler.com” threatening to kill six million more Jews and repeat the Holocaust on the

²⁶³ Mason & Czapski, *supra* note 24, at 320 (in Australia, there have already been a few complaints against the websites hosting the content. Mason and Czapski provided an example. They revealed that “intermediaries have shown some willingness to cooperate with the AHRC to remove racially vilifying material.” For example, “[a] complainant of Asian background reported a website that advocated violence against Asian people. The AHRC contacted the ISP to establish the identity of the website owner. Within a few days the website had been disabled by the ISP on account of it breaching their ‘Acceptable Use Policy’. A complainant reported a user posting racially derogatory comments in a video posted on a file-sharing website. When the website was contacted, the comments were removed.”).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* (noting that “less than 2% of matters under civil vilification laws are resolved in this public manner.”).

anniversary of Kristallnacht.²⁶⁸ Under the German Criminal Code, neo-Nazi propaganda is a crime.²⁶⁹ Nevertheless, in investigating this online Holocaust threat, German cyber police acknowledged that they felt powerless when they found out the e-mails were sent via a server in the United States, which fell outside of its jurisdiction.²⁷⁰ The strong First Amendment protection “crippled [Germany’s] efforts to stop the spread of [n]eo-Nazi ideas via the Internet.”²⁷¹

*Ligue contre le racisme et l’antisémitisme et Union des étudiants juifs de France c. Yahoo! Inc. et Société Yahoo! France (LICRA c. Yahoo!)*²⁷² was a French case decided by the Tribunal de grande instance of Paris (hereinafter “the Paris Court”) in 2000.²⁷³ In this case, the League Against Racism and Anti-Semitism (la Ligue Internationale Contre le Racisme et l’Antisemitisme) (LICRA) and the Union of French Jewish Students (UEJF) filed a civil complaint against Yahoo! for violating Article R645-1 of the French Penal Code²⁷⁴ about hate speech by posting and selling Nazi memorabilia through its American online auction site that users in France could access.²⁷⁵ The Paris Court upheld the claim filed by UEJF and LICRA, and found that Yahoo! had contravened French law.²⁷⁶ It also ordered the United States-based Yahoo! to “censor Nazi-related auction items on its United States-based Web sites so that French users who access the sites are not exposed to materials that are constitutionally protected in this country but are illegal in France.”²⁷⁷ Nevertheless, Yahoo!

²⁶⁸ Goodman & Brenner, *supra* note 75, at 17 (Kristallnacht is also called the “Night of Broken Glass.” On Nov. 9, 1938, Nazis in Germany orchestrated a series of violent anti-Semitic attacks on Jews and Jewish businesses across the country).

²⁶⁹ David E. Weiss, *Striking a Difficult Balance: Combatting the Threat of Neonazism in Germany While Preserving Individual Liberties*, 27 VAND. J. TRANSNAT’L L. 899, 925–26 (1994).

²⁷⁰ Goodman & Brenner, *supra* note 75, at 17.

²⁷¹ *Id.* at 6.

²⁷² *La Ligue Contre Le Racisme et L’Antisémitisme et Union Des Étudiants Juifs de France c. Yahoo! Inc. et Société Yahoo! France (LICRA c. Yahoo!)*, No. RG00/05308.

²⁷³ JAN OSTER, EUROPEAN AND INTERNATIONAL MEDIA LAW 112 (2017).

²⁷⁴ Pamela G. Smith, *Free Speech on the World Wide Web: A Comparison Between French and United States Policy with A Focus on UEJF v. Yahoo! Inc.*, 21 PA. ST. INT’L L. REV. 319, 332–33 (2003).

²⁷⁵ OSTER, *supra* note 273.

²⁷⁶ Murphy, *supra* note 154, at 407–08 (noting that Yahoo! broke the law on the ground that exposing France to Nazi artifacts is “an offense to the collective memory of a nation profoundly murdered by the atrocities committed by and in the name of the Nazi criminal enterprise.”).

²⁷⁷ Carl S. Kaplan, *Was the French Ruling on Yahoo Such a Victory After All?*, N.Y. TIMES (Nov. 16, 2001), <https://www.nytimes.com/2001/11/16/technology/was-the-french-ruling-on-yahoo-such-a-victory-after-all.html> [<https://perma.cc/2SGM-EM65>].

did not comply with this court order.²⁷⁸ Instead, Yahoo! filed a lawsuit against UEJF and LICRA in the United States.²⁷⁹ The District Court for the Northern District of California held that the Paris Court's decision was not enforceable because the enforcement would be repugnant to the First Amendment, thus it would be "prejudicial or contrary to the country's interests."²⁸⁰ The American court's decision denied enforcement of the judgment made by the Paris Court and fundamentally undermined France's anti-racism efforts.²⁸¹

The existing legal system in the United States creates a safe haven for cyber racism. The near-unlimited protection for free speech is achieved at the cost of other imperatives in democratic societies, posing a threat to democracy and human rights in the United States and other countries.²⁸² It is imperative that legislative bodies and courts in the United States consider imposing more restrictions on freedom of speech to ensure the protection and promotion of other fundamental human rights.

B. NON-LEGAL RESPONSES

Legal avenues alone cannot solve the growing problems of cyber racism. Non-legal approaches play a critical role in filling the gaps in the legal environment. To eradicate cyber racism, the United States must adopt a multi-faceted holistic approach that involves both public and private sectors. This Article proposes two non-legal strategies to address cyber racism problems, i.e., increased responsibility for internet intermediaries (including internet service providers, search engines, and social media platforms) through voluntary initiatives, and the promotion of anti-racism education.

²⁷⁸ *Id.*

²⁷⁹ *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisémitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

²⁸⁰ *Id.* at 1192.

²⁸¹ Daniels, *supra* note 83, at 706 (noting that UEJF and LICRA later appealed the District Court's decision. After several lawsuits under different jurisdictions and years of resistance on the part of Yahoo!, the French eventually won, and Yahoo! agreed to amend its auction guidelines and remove the offensive material.).

²⁸² Murphy, *supra* note 154, at 424–25 (French Judge Gomez of the Yahoo! case criticizes the American approach to free speech. Gomez remarks that "it would most certainly cost the company very little to extend its ban to symbols of Nazism, and such an initiative would also have the merit of satisfying an ethical and moral imperative shared by all democratic societies.").

1. Increased Responsibility for Internet Intermediaries

Constitutional protection for free speech constrains state actors,²⁸³ but it does not apply to private actors unless they perform functions exclusively reserved to state actors.²⁸⁴ That means government censorship is severely restricted, while private internet intermediaries are generally permitted to remove anything they deem offensive, unethical, or intolerable from their sites.²⁸⁵ If internet intermediaries can voluntarily increase their responsibility in cyber racism censorship and complaint handling,²⁸⁶ particularly through their terms of service (ToS), they can significantly reduce racial discrimination and harassment in cyberspace.

Reputation is important for internet intermediaries. The majority of internet intermediaries, if not all, would not want to associate with racism.²⁸⁷ Therefore, it is critical that internet intermediaries voluntarily set up rules and procedures that prohibit racist content on their sites. As compared to government regulation, these voluntary actions are more viable. This article recommends that anti-racism policies and reporting mechanisms be incorporated into internet intermediaries' ToS; a legally binding agreement that typically outlines the rights and responsibilities users are obligated to follow if they subscribe to the service.²⁸⁸ The inclusion of anti-racism policies in the ToS prohibits users from abusing the service or abusing other users of the service; it also gives intermediaries the authority to deal with racist content on their websites. Moreover, guidelines on reporting mechanisms also promote transparency and encourage users to file complaints of racist content that violates the ToS.²⁸⁹ After a complaint is filed, an intermediary mediator will conduct a

²⁸³ U.S. CONST. amend. I, § 1 (the First Amendment guarantees that "Congress shall make no law [. . .] abridging the freedom of speech, or of the press.").

²⁸⁴ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926–28 (2019).

²⁸⁵ JOINT REPORT, *supra* note 54, at 41–42.

²⁸⁶ *Mason & Czapski*, *supra* note 24, at 287 (Mason and Czapski argue that it is important to adopt "a multi-pronged approach that places greater responsibility on internet intermediaries" and offer "aggrieved parties effective and enforceable avenues for confronting speech they find intolerable.").

²⁸⁷ *See generally*, Austl. Human Rts. Comm'n, *supra* note 88.

²⁸⁸ JOINT REPORT, *supra* note 54, at 41–42 (noting that many ISPs have already "developed a range of policies, delineated in terms of service agreements." These policies define what is and is not appropriate).

²⁸⁹ *See* NEW S. WALES GOV'T CENTRE FOR EDUC. STATS. & EVALUATION, ANTI-BULLYING INTERVENTIONS IN SCHOOLS – WHAT WORKS? 6 (July 2017) (available for download at <https://www.cese.nsw.gov.au/publications-filter/anti-bullying-interventions-in-schools-what-works> [<https://perma.cc/DAK6-PKR8>] (noting that "[a] range of researchers state that promoting

thorough investigation and decide whether to remove the content, restrict access to certain features, disable an account, or even contact law enforcement.²⁹⁰ This approach offers users an effective and enforceable avenue to deal with online content they find intolerable. It has been proven to be satisfactory as most internet users choose to make initial complaints about offensive or racist content directly to online content hosts before they turn to other organizations for justice.²⁹¹ To fight cyber racism, internet intermediaries are urged to bear greater responsibility in censorship and complaint handling.

To make users from all backgrounds feel safe in the virtual community, many prominent social media platforms have already incorporated anti-racism policies into their ToS as community guidelines for users to follow.²⁹² They have established reporting mechanisms and articulated their ability to censor, block, and take down racist content from their sites.²⁹³ YouTube provides a good example of an intermediary taking greater responsibility for protecting its service and users from abuse by cyber racists.

a culture of reporting bullying is an important means of preventing bullying behaviours in schools.”); see also Ganga Vijayasiri, *Reporting Sexual Harassment: The Importance of Organizational Culture and Trust*, 25 GENDER ISSUES 43, 48 (2008) (addressing sexual harassment issues in the workplace and suggesting a formalized reporting process in the military “provides an especially useful context for examining the problem of sexual harassment and victim response.”).

²⁹⁰ Facebook has pledged to take appropriate action to combat harmful conduct and protect the community, including for example, “offering help, removing content, removing or restricting access to certain features, disabling an account, or contacting law enforcement.” See Facebook, *Terms of Service*, <https://www.facebook.com/terms.php> [<https://perma.cc/76CV-WPYX>] (last visited Mar. 21, 2021).

²⁹¹ Mason & Czapski, *supra* note 24, at 332.

²⁹² E.g., Facebook, *supra* note 290.

²⁹³ For example, YouTube has a hate speech policy. Hate speech is prohibited on YouTube. YouTube reserves the right to “remove content promoting violence or hatred against individuals or groups” based on race, nationality, age, gender and others. See YouTube, *Hate Speech Policy*, https://support.google.com/youtube/answer/2801939?hl=en&ref_topic=9282436 [<https://perma.cc/M9BG-SEM5>] (last visited Mar. 21, 2021); Twitter has also published a hateful conduct policy, and expressed their desire to address the growing concern of cyber racism. It is “committed to combating abuse motivated by hatred, prejudice or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized.” See Twitter, *Hateful Conduct Policy*, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [<https://perma.cc/Z8C8-KRKZ>] (last visited Mar. 21, 2021).

Under YouTube policy, users must agree to the ToS²⁹⁴ and respect the Community Guidelines.²⁹⁵ Hate speech is strictly prohibited,²⁹⁶ whether that be a video, comment, link, or thumbnail.²⁹⁷ To protect the safety of the community, YouTube also developed a user-friendly reporting mechanism.²⁹⁸ Users only need to follow the “Report” link that appears near the content itself.²⁹⁹ This link takes users to the next page where they can identify the specific problem(s), for example, hateful or abusive content, harmful or dangerous acts, and terrorism, among others.³⁰⁰ YouTube reviews the complaint and removes content that does not follow its Community Guidelines.³⁰¹ As a result of the rigorous self-censorship and effective complaint handling, YouTube has largely prevented the toxic spread of cyber racism. For instance, from April to June in 2019, YouTube “removed more than 100,000 videos and over 17,000 channels for violating its hate speech rules,”³⁰² and deleted more than 500 million comments over hate speech.³⁰³

Despite the positive aspect of self-regulation, YouTube has been criticized on numerous occasions for its failure to remove racist content and crack down on racist groups and individuals.³⁰⁴ One of the main

²⁹⁴ Youtube, *Terms of Service*, (Mar. 17, 2021), <https://www.youtube.com/static?template=terms&gl=AU> [<https://perma.cc/F7X6-7TNF>] (noting that “[the] use of the service is subject to these terms, the YouTube Community Guidelines and the Policy, Safety and Copyright Policies.”).

²⁹⁵ *Id.*

²⁹⁶ Youtube, *Hate Speech Policy*, *supra* note 293.

²⁹⁷ YouTube, *Community Guidelines – Overview*, <https://www.youtube.com/howyoutubeworks/policies/community-guidelines/> [<https://perma.cc/7ZAN-C6M2>] (last visited Mar. 21, 2021) (noting that YouTube Community Guidelines are “designed to ensure that our community stays protected. They set out what’s allowed and not allowed on YouTube, and apply to all types of content on our platform, including videos, comments, links and thumbnails.”).

²⁹⁸ YouTube, *Report Inappropriate Content*, <https://support.google.com/youtube/answer/2802027?co=GENIE.Platform%3DDesktop&hl=en> [<https://perma.cc/HN89-5KHS>] (last visited Mar. 21, 2021).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ YouTube, *Hate Speech Policy*, *supra* note 293.

³⁰² Kaya Yurieff, *YouTube Says It’s Removing More Hate Speech Than Before But Controversial Channels Remain Up* (Sept. 3, 2019), CNN BUSINESS, <https://edition.cnn.com/2019/09/03/tech/youtube-hate-speech/index.html> [<https://perma.cc/K9VM-ZDBT>].

³⁰³ *Id.*

³⁰⁴ See, e.g., Mahita Gajanan, ‘Not Everyone Will Agree.’ *How YouTube Is Defending Its Handling of Homophobic, Racist Videos* (June 6, 2019), <https://time.com/5602200/youtube-hate-speech-carlos-maza-steven-crowder/> [<https://perma.cc/9UTH-XMUF>].

reasons behind the criticism is that the public tends to place high expectations on Facebook and other intermediaries alike.³⁰⁵ Although internet intermediaries effectively prevent the toxic spread of cyber racism, without government intervention in free speech rights, heavy reliance on intermediaries, such as YouTube, also raises two concerns that need to be noted. First, large social media platforms, such as YouTube, Facebook, Twitter, Instagram, and TikTok have millions of active users across the world.³⁰⁶ Their users create an incredible amount of content on the internet every single second.³⁰⁷ It is not realistic to expect intermediaries to take responsibility for protecting every single user from the evils of the world.³⁰⁸ Second, internet intermediaries only provide informal responses to racial complaints,³⁰⁹ and the responses are only limited to, for example, deleting content and suspending or shutting down an abuser's account.³¹⁰ If the violation is severe enough to be a criminal offense, internet intermediaries are not capable of providing appropriate redress.³¹¹ Under such circumstances, the legal system needs to step in. Undoubtedly, both legal and non-legal responses are essential in order to effectively combat cyber racism.

³⁰⁵ See generally Abdallah Alsaad, Abdallah Taamneh, & Mohamad Noor Al-Jedaiah, *Does Social Media Increase Racist Behavior? An Examination of Confirmation Bias Theory*, 55 TECH. SOC'Y 41, 41–46 (2018) (“With the increased rate of hate crimes and racist behavior around the world, a growing school of thought draws a connection between social media use and the rise in racist and hateful behaviour.”).

³⁰⁶ See, e.g., Statista, *supra* note 20 (Facebook has over 2.6 billion monthly active users as of March 2020); Youtube, *supra* note 23 (as of September 20, 2020, YouTube has over two billion users in the world); Instagram, *supra* note 22 (as of September 20, 2020, Instagram has over one billion users); see also, Statista, *Instagram: Distribution of Instagram Users Worldwide as of January 2021, by Age Group*, <https://www.statista.com/statistics/325587/instagram-global-age-group/#:~:text=With%20roughly%20one%20billion%20monthly,million%20million%20Instagram%20users%20each> [<https://perma.cc/X6QY-UTLT>] (last visited Mar. 21, 2021).

³⁰⁷ See generally Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read* (May 21, 2018), FORBES, <https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/?sh=26f9e10360ba> [<https://perma.cc/FY7X-ZT72>].

³⁰⁸ JOINT REPORT, *supra* note 54, at 41–42 (stressing that ISPs cannot possibly monitor all members.)

³⁰⁹ Mason & Czapski, *supra* note 24, at 318.

³¹⁰ See, e.g., Facebook, *supra* note 290.

³¹¹ *Id.* (noting that Facebook has pledged to take appropriate action to combat harmful conduct and protect the community, including for example, “offering help, removing content, removing or restricting access to certain features, disabling an account, or contacting law enforcement.”).

2. Anti-Racism Education

Research suggests that the public generally has limited knowledge about cyber racism.³¹² The misconception people often have is that they think their speech, regardless of the content and the medium, is protected by the Constitution³¹³ and the harm cyber racism brings to the people and society can be justified.³¹⁴ This is factually wrong.³¹⁵ With the rise in cyber racism, there is a pressing need to educate people about the importance of racial justice and inclusion. Through equipping the public with a better understanding of the nature of cyber racism, its manifestations, and effects, end-user education programs can be an effective tool to reduce race-based discrimination in the digital environment, and therefore, bring about positive social change. In fact, ICERD has explicitly emphasized the importance of anti-racism education. Specifically, Article 7 of ICERD encourages States Parties 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 friendship among nations and racial or ethnical groups, and 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.³¹⁶

There are numerous strategies the public and private sectors could undertake in order to create an effective anti-racism education program and it is an area that is worth further investigation. Nevertheless, it goes beyond the scope of this article and will not be examined in depth.³¹⁷ This

³¹² Mason & Czapski, *supra* note 24, at 336.

³¹³ In practice, freedom of speech must meet the strict scrutiny test. For example, see Morgans, *supra* note 99, at 155–56 (noting that national security and foreign affairs issues often satisfy the Supreme Court’s strict scrutiny test for restricted speech); see also Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 24–25 (2006) (“The ‘War on Terror’ has [also] [. . .] sought leverage by pressing intermediaries to monitor or interdict otherwise unreachable Internet communications.”).

³¹⁴ *E.g.*, United States v. Machado, 195 F.3d 454 (9th Cir. 1999) (noting that Machado was found guilty in the Federal Court for threatening to kill UCI Asian students via email).

³¹⁵ *Id.*

³¹⁶ ICERD, *supra* note 2, art. 7.

³¹⁷ The author acknowledges that the public and private sectors need to be a part of the broader discussion.

article only provides a few general ideas in relation to the development of such programs.

First, an isolated government education program will not solve the problems of cyber racism. Rather, prevention and education strategies should include a series of programs at the national, state, and local levels. These programs should be a collective effort and require commitment from both the public and private sectors. Second, depending on the main audience of a program, the focus may vary. For example, the State of New Jersey set up the Office of Bias Crime and Community Relations (hereinafter “the Office”) to deal with the state-wide prosecution and monitoring of hate crime.³¹⁸ Apart from this responsibility, the Office also provides a wide array of educational programs to achieve different learning outcomes. For example, through the Prejudice Reduction Education Program (PREP), the Office teaches students about hate crime prevention.³¹⁹ Through a one-hour intensive training program, *The Hate on the Internet*, the Office provides educators and families with information on “how to protect young people from the influence of hate groups and their websites.”³²⁰ Additionally, the Office designed a professional training program for law enforcement officers. This program helps improve officers’ skills in bias crime investigation.³²¹ Third, all minors must be warned about “the dangers that lurk on the Internet”³²² because they are more likely to be harmed or influenced by cyber racism than adults are.³²³ American schools are encouraged to further strengthen their efforts in incorporating anti-racist education into their curricula.³²⁴

IV. CONCLUSION

The global outbreak of COVID-19 in March 2020 unleashed “a virulent xenophobia and tide of racial hatred.”³²⁵ There have been

³¹⁸ JOINT REPORT, *supra* note 54, at 42.

³¹⁹ *Id.*

³²⁰ *Id.* at 42–43.

³²¹ *Id.* at 42.

³²² *Id.* at 42–43.

³²³ *Id.*

³²⁴ See generally KRISTIN HALTINER, TEACHING RACE AND ANTI-RACISM IN CONTEMPORARY AMERICA (2014).

³²⁵ PODCAST: ‘Entrepreneurs of Intolerance’ Compound COVID-19 Racist Backlash, UN NEWS (Apr. 17, 2020), <https://news.un.org/en/audio/2020/04/1061952> [<https://perma.cc/7T3R-V6EG>].

increasing reports of racist abuse in the digital environment.³²⁶ Former United States President Donald Trump's racist remarks on social media platforms further fueled this new round of racial division in the United States.³²⁷ Even worse, racial hostility in the virtual world had already fostered aggressive behavior in the offline world. In some cases, it has crossed the line from online hate speech to real-world hate crime. Although racism is strictly prohibited under international human rights law,³²⁸ its elimination "remains an unrealized promise of universal human rights."³²⁹ This is a particularly worrying concern in the United States due to the First Amendment's (over)protection of free speech. Online racist content's negative impact on human rights, such as the right to freedom from racism, has gone largely, if not completely, neglected.³³⁰

In response to the clash between the right to free speech and the right to freedom from racism, some of the leading democratic countries in the world, such as France and Australia, offer the United States a model answer. The difficulties and sensitivities around cyber racism regulation should not be excuses for a "hands-off" approach. The ubiquity of cyber racism and its destructive real-world implications³³¹ have demonstrated that the United States cannot afford to ignore this problem.

The United States should take immediate action on racial inequality. In the absence of legislative protection, "the vulnerable remain unprotected, and the aggressors continue smirking."³³² Thus, in the legal context, this article suggests new laws should be enacted to regulate racist behavior and "restrain the heartless," although it admits this proposal is over-ambitious and unlikely to be implemented in the foreseeable future. Nevertheless, the French and Australian models provide persuasive authority for the United States Supreme Court to impose more restrictions on racist speech while interpreting the First Amendment. In the non-legal

³²⁶ Schild et al., *supra* note 12, at 4.

³²⁷ *Id.*

³²⁸ ICERD, *supra* note 2, art. 6 ("States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, and the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.").

³²⁹ Bradley, *supra* note 36, at 2.

³³⁰ Citron, *supra* note 100, at 125.

³³¹ Jakubowicz, *supra* note 214 (noting that sometimes "online racism spills into the real world with deadly consequences.").

³³² *Id.*

context, this article encourages internet intermediaries to take greater responsibility in monitoring racism on their websites and resolving complaints of racial discrimination and breaches of human rights. Other non-legal approaches, such as anti-racism education, are also crucial in combating cyber racism.

It is not realistic to completely eradicate cyber racism within a short timeframe because it has deep structural roots that are not easy to remove.³³³ Nevertheless, as pointed out by Emeritus Professor Andrew Jakubowicz, it is an achievable goal to contain cyber racism and “push it back into ever smaller pockets.”³³⁴ Robust protection of human rights in the digital environment would “promote far more valuable speech than it would inhibit.”³³⁵ We must protect people from racism while ensuring free speech. This article calls for both public and private sectors in the United States to take positive steps to fight cyber racism. The world needs everyone to speak and act in a way that does not splinter our society along racial lines.

³³³ U.N. HUMAN RTS. OFF. HIGH COMM’R, DEVELOPING NATIONAL ACTION PLANS AGAINST RACIAL DISCRIMINATION: A PRACTICAL GUIDE 12 (2014), (available for download at <https://www.ohchr.org/Documents/Publications/HR-PUB-13-03.pdf> [<https://perma.cc/Z3SW-5T3C>]).

³³⁴ Jakubowicz, *supra* note 214.

³³⁵ Citron, *supra* note 100, at 97.