

QURAN BURNING AND RELIGIOUS HATRED: A COMPARISON OF AMERICAN, INTERNATIONAL, AND EUROPEAN APPROACHES TO FREEDOM OF SPEECH

In July 2010, a pastor in Florida threatened to organize a mass burning of Qurans on September 11, 2010, the ninth anniversary of the 9/11 attacks on the World Trade Center and the Pentagon by commercial planes hijacked by members of Muslim extremist group Al Qaeda.¹ Though religious and political leaders objected strenuously to his plans and stressed that Jones did not speak for America, violent protests erupted in Afghanistan, Iran, Somalia, and elsewhere causing numerous injuries.² International leaders from the United States' closest allies called on President Obama to stop him.³

1. Ann Gerhart & Ernesto Londoño, *Fla. Pastor's Koran-Burning Threat Started with a Tweet*, WASH. POST, Sept. 11, 2010, at A6 (recounting from the beginning the story of Pastor Terry Jones's threats to hold "Burn a Quran Day," and the national and international dialogue that followed, resulting in Pastor Jones's cancellation of the event prior to September 11).

2. *Id.*; see also Aijaz Hussain, *15 Dead as Kashmir Tries to Quell Protests; Koran-Burning Fuels Anger in Troubled Region*, BOSTON GLOBE, Sept. 14, 2010, at 6 (reporting violent protests sparked by Iranian state television broadcasts of Qurans being burned in the United States). As Hussain articulated:

Violent antigovernment protests first erupted in June. While separatists had planned a new round of demonstrations after the end of the Muslim holy month of Ramadan over the weekend, the anger in the streets yesterday was far greater than in previous demonstrations. Protesters were inflamed by reports on the Iranian state-run channel Press TV that the Koran was desecrated over the weekend in the United States, Khoda said. Though a Florida pastor called off his plans to burn the Muslim holy book, the channel showed footage of a different man destroying a Koran in Tennessee. Most broadcasters around the world did not report prominently on scattered desecration events by a handful of fringe anti-Muslim activists in the United States; the Iranian broadcaster carried the footage repeatedly. The protesters chanted, 'Down with Koran desecrators,' and protest leaders denounced the alleged desecration in speeches to the crowds. There were also shouts of "Down with America" and "Down with Israel"—rarely heard in Kashmir, where anger is normally directed at India.

Id.

3. Jack Healy & Steven Erlanger, *Planned Koran Burning Drew International Scorn*, N.Y. TIMES, Sept. 9, 2010. Healy and Erlanger noted:

The French, British and German governments, all with troops serving in Afghanistan, have joined the condemnations. France's Foreign Ministry called the idea "an incitement to hatred," with spokesman Bernard Valero calling it an "insult to the memory of the victims of Sept. 11, like all the victims of acts of terrorism inspired by intolerance and the twisting of religion." The German chancellor, Angela Merkel, said on Wednesday that burning Qurans would be a "repugnant" sign of disrespect, and the Vatican said it would be an "outrageous and grave gesture." Brig. Gen. Hans-Werner Fritz, the commander of German troops in Afghanistan, said the burning would "provide a trigger for violence towards all ISAF troops, including the Germans in northern Afghanistan." A spokesman for the British Prime Minister, David Cameron, said, "We would strongly oppose any attempt to offend any member of any religious or ethnic group. We are committed to religious tolerance." Tony Blair, the former

The drama built to a crescendo as the ninth anniversary approached and only slightly leveled off when Pastor Jones announced the cancellation of his event.⁴ With this announcement came a sigh of relief from all the leaders who had vociferously condemned the pastor and his plans, but who did not question his right to such an act.⁵ In fact, many defended that right vigorously in response to an offhand suggestion that Quran burning might be unprotected speech.⁶

Meanwhile, the Quran-burning trend began its transatlantic journey. In Gateshead, England, a group of men allegedly burned a Quran, videotaped the incident, and posted the video on YouTube, an online media-sharing website.⁷ Subsequent copycat incidents occurred in Michigan⁸ and France.⁹ While racial-incitement laws permitted charges against the individuals in England and France,¹⁰ the Ingham County Prosecutor did not charge the man in Michigan because he could not find a violation of any state law and concluded that burning a Quran is constitutionally protected.¹¹

British prime minister and Middle East envoy, called the notion “disrespectful.” “I deplore the act of burning the Koran,” Mr. Blair said. “It is disrespectful, wrong and will be widely condemned by people of all faiths and none. In no way does this represent the view of any sensible person in the West or any other part of the world.”

Id.

4. Gerhart & Londoño, *supra* note 1, at A6.

5. *See id.*

6. When Justice Stephen Breyer, in an interview several days after Pastor Jones canceled his Quran-burning event, suggested that Quran burning might be unprotected speech, his comments unleashed such a frenzy that he retreated from the remarks hastily, highlighting the extent to which freedom of speech is defended in the United States. Tony Mauro & Marcia Coyle, *Justice Breyer’s Message: The Justice Talks About Battling Originalism and the Pitfalls of Simple Answers*, NAT’L L.J., Oct. 11, 2010, at 27, 30.

7. Nigel Bunyan & Heidi Blake, ‘Koran Burning:’ Men Expected to Be Charged with Inciting Racial Hatred, LONDON DAILY TELEGRAPH, Sept. 24, 2010, at A12; *see also* Koran Burners Bailed, HERALD SUN (Australia), Sept. 25, 2010, at 32 (reporting on the release of the Quran burners on bail pending further inquiries); 6 Suspected in Quran Burning, GRAND RAPIDS PRESS (Michigan), Sept. 24, 2010, at A12 (reporting on the arrest of the alleged English Quran burners in a Michigan newspaper, the same state where a similar incident was deemed unchargeable); Six Arrests Over Video of Koran Burning, HERALD (Glasgow), Sept. 24, 2010, at 12 (reporting on the arrest of six alleged Quran burners).

8. *Burned Quran Not a Hate Crime*, UNITED PRESS INT’L (Sept. 23, 2010, 4:55 PM), http://www.upi.com/Top_News/US/2010/09/23/Burned-Koran-not-a-hate-crime/UPI-21991285275323/ (reporting on the authorities’ inability to find a chargeable crime stemming from an incident of Quran burning in Michigan, because such action is protected speech); *see also* Steve Pardo, *Quran Burned in E. Lansing*, DETROIT NEWS, Sept. 14, 2010, at A3 (reporting on the burning of a Quran in E. Lansing, Michigan).

9. Gilbert Reilhac, *France Charges Man for Burning, Urinating on Koran*, REUTERS (Oct. 5, 2010, 3:50 PM), <http://af.reuters.com/article/maliNews/idAFLDE6941TG20101005>.

10. Bunyan & Blake, *supra* note 7; Reilhac, *supra* note 9.

11. *Burned Quran Not a Hate Crime*, *supra* note 8.

This Note examines the legal ramifications of Quran burning both in the United States and abroad, locating the recent international trend of Quran burning within the context of the new realities in the world after 9/11. With the rise of terrorism,¹² an increasingly vitriolic and polarized political dialogue,¹³ and the ever-increasing ubiquity of the Internet,¹⁴ the profile of these issues will continue to grow.

The public burning of Qurans highlights some of the more controversial aspects of the American First Amendment as well as suggests the true dangers of the European limitations on free speech.¹⁵ The significant risks the United States assumes when it allows controversial speech¹⁶ are still less than the grave risks people could otherwise take

12. Susan B. Glasser, *U.S. Figures Show Sharp Global Rise in Terrorism*, WASH. POST, Apr. 27, 2005, at A1.

13. On January 8, 2011, a shooting rampage targeting conservative Democratic Congressional Representative Gabrielle Giffords in the suburbs of Tucson, Arizona immediately sparked a nationwide debate over the correlation between violent political rhetoric and violent actions against public officials. Paul Krugman, *Climate of Hate*, N.Y. TIMES, Jan. 10, 2011, at 21. The debate centered around Sarah Palin, who had, in the course of the 2008 campaign, released a graphic depicting a map of the United States with what appeared to be crosshairs over the top targeted Congressional districts, including Rep. Giffords's district. Carl Hulse & Kate Zernike, *Bloodshed Puts New Focus on Vitriol in Politics*, N.Y. TIMES, Jan. 9, 2011, at 1. This, combined with Gov. Palin's oft-repeated refrain "don't retreat . . . reload," led to calls by many, mostly on the left, for a reduction in violent rhetoric. Krugman, at 21. Krugman's piece, "true to the American tradition," calls not for new restrictions on speech, but for Republican leaders to publicly renounce violent rhetoric. *See id.*

There is no way to tell for certain whether a uniform (e.g. legislative) reduction in violent rhetoric would decrease the frequency of incidents of politically motivated violence. However, this shooting and the debate that has followed have called into question whether more speech can truly be the best remedy for bad speech, as Justice Brandeis stated in concurrence in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). *See also* Brian J. Buchanan, *First Amendment Not on Trial in Giffords Shooting*, FIRST AMENDMENT CENTER BLOG (Jan. 10, 2011, 8:21:07 PM), <http://www.firstamendmentcenter.org/free-speech-not-on-trial-in-giffords-shooting> (arguing the absence of causal effect between mass media vitriol and political assassination); Frank Rich, *No One Listened to Gabrielle Giffords*, N.Y. TIMES, Jan. 16, 2011, at 10 (arguing the futility of calls for civil political discourse.).

14. *See Superpower: Visualising the Internet*, BBC NEWS, <http://news.bbc.co.uk/2/hi/technology/8552410.stm> (last visited Apr. 15, 2011); *Internet World Stats: Users and Population Statistics*, GLOBAL VILLAGE, <http://www.internetworldstats.com/emarketing.htm> (last updated Feb. 6, 2012).

15. *See* Howard Simon & Benetta Standly, *An Ugly But Legal Form of Free Speech*, GAINESVILLE.COM, Aug. 30, 2010, <http://www.gainesville.com/article/20100830/OPINION03/8301002> ("The Dove World Outreach Center plans to commemorate the September 11th terrorist attacks by burning copies of the Quran in a presumably sincere, but woefully misguided belief that America is at war with the Islamic faith. . . . But with the guarantee of religious freedom for all, the fundamental American right to protest—an essential element of the First Amendment's guarantee of freedom of expression—should also be honored."); *see also Remembering Our Values*, DETROIT NEWS, Sept. 11, 2010, at A11 ("[F]ree speech, including loud debate, is the defining characteristic of our form of government.").

16. *Whitney*, 274 U.S. at 377 ("If there be a time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."). For an example of this principle, *see* President Barack Hussein Obama, *Remarks*

when the state is allowed to decide what is acceptable speech, like in the European model.

I. THE U.S. PERSPECTIVE: THE FIRST AMENDMENT AND QURAN BURNING

The freedom of speech is protected in the First Amendment of the U.S. Constitution, and states that “Congress shall make no law . . . abridging the freedom of speech”¹⁷ Since its ratification, those few words have begat numerous doctrines, some still good law, some long since cast aside, outlining the exceptions to freedom of speech, including incitement, fighting words, and symbolic speech.¹⁸ Beginning around the turn of the twentieth century, however, freedom of speech evolved into a sacrosanct principle of American culture, with doctrinal exceptions drawn only in rare circumstances.¹⁹ Protected speech “is an integral part of American culture, resulting from our own history and experience. It is an American phenomenon.”²⁰

When examining the question of Quran burning through the lens of each freedom of speech doctrine—symbolic speech, incitement, and fighting words—the strong presumption of protection for speech is evident based on historical and present interpretations of it.²¹ Because freedom of speech is a fundamental right,²² a review level of strict scrutiny review would likely apply to questions of whether speech is protected. Strict scrutiny review of any government restriction on the right would require the lawmaker to demonstrate that (1) there is a compelling interest for the restriction, (2) the restriction is narrowly tailored to meet that interest, and

at *Pentagon Memorial* (Sept. 11, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/11/remarks-president-pentagon-memorial> (“They may seek to spark conflict between different faiths, but as Americans we are not—and never will be—at war with Islam. It was not a religion that attacked us that September day—it was al Qaeda, a sorry band of men which perverts religion. And just as we condemn intolerance and extremism abroad, so will we stay true to our traditions here at home as a diverse and tolerant nation. We champion the rights of every American, including the right to worship as one chooses—as service members and civilians from many faiths do just steps from here, at the very spot where the terrorists struck this building.”).

17. U.S. CONST. amend. I (“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.”).

18. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 931 (1st ed. 1997).

19. *Id.*

20. Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377, 378 (2006) (musing on the sharp divide between speech protections in the United States and abroad, and on the deeply ingrained nature of free speech in the United States as a part of its cultural heritage).

21. The framework for this section is based on CHERMERINSKY, *supra* note 18, at 986–1122.

22. CHERMERINSKY, *supra* note 18, at 924–30.

(3) the government has chosen the least restrictive means to address the interest.²³

Given this framework, what would happen if, hypothetically, Terry Jones went through with his plans to burn the Quran and was subsequently arrested and convicted?

A. Symbolic Speech

If Jones had actually staged a mass burning of Qurans, it would have met the definition of symbolic speech, as opposed to mere conduct, defined by *Spence v. Washington*.²⁴ After determining that it is symbolic speech, the question of whether this hypothetical Quran burning is *protected* speech remains unanswered. For that inquiry, the analysis turns to *United States v. O'Brien*.²⁵

In *O'Brien*, a draft card was burned in protest of the Vietnam War.²⁶ The draft card burner was convicted under a federal law prohibiting the destruction of such a document.²⁷ Laying out a test for protected speech, the Supreme Court stated that regulation of conduct can sometimes infringe on the freedom of speech, but government regulation of conduct is justified if (1) it is within the constitutional powers of government, free speech aside; (2) it advances a significant government interest; (3) that interest is unrelated to the suppression of free speech; and (4) the restriction on First Amendment freedoms is no greater than necessary to accomplish the government interest.²⁸

Under the test in *O'Brien*, Pastor Jones' Quran-burning event would be considered protected speech, and government restriction of such an act would be unconstitutional. Holding a bonfire in an urban area would likely fall within government purview, and the regulation of it would advance a significant government interest—namely, the health and safety of local residents. However, because that interest is entirely related to the

23. CHEMERINSKY, *supra* note 18, at 671.

24. 418 U.S. 405 (1974). The initial question is whether Quran burning meets the definition of symbolic speech. In *Spence v. Washington*, a conviction under a Washington State statute dictating the proper display of an American flag was reversed, because it was unconstitutional as applied to the defendant. *Id.* In that case, the Supreme Court stated “an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.” *Id.* at 410–11. Quran burning meets this test, but that simply means that it is considered speech, not conduct.

25. 391 U.S. 367 (1968).

26. *Id.* at 377 (clarifying the symbolic speech doctrine with a four-part test to determine if speech is protected).

27. *Id.* at 370.

28. *Id.* at 377.

suppression of free speech, the government regulation would fail the third element.²⁹

B. Incitement

Under the theory of “incitement,” speech is not protected when the speaker advocates or encourages unlawful action. In 1919, Justice Oliver Wendell Holmes wrote in *Schenck v. United States*³⁰ that “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,” and coined the phrase “clear and present danger” as a test of speech protection.³¹ This test and three other decisions that year evaluated the “likelihood of imminent and significant harm” from the actions in question.³² The “clear and present danger” doctrine was invoked often over the next three decades, though the test was criticized for its malleability.³³

A “reasonableness approach” developed four years later with *Gitlow v. New York*³⁴ and *Whitney v. California*,³⁵ which declared that the courts will defer to the government so long as the government is reasonable in the exercise of its power.³⁶ The “risk formula” approach came next with

29. Subsequent cases, namely *Texas v. Johnson* and *United States v. Eichmann*, which apply the *O'Brien* rule to the burning of American flags, bear out this analysis. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichmann*, 496 U.S. 310 (1990).

30. 249 U.S. 47 (1919).

31. *Id.* at 52 (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”). In his concurrence to *Whitney v. California*, Justice Brandeis wrote that “to courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.” *Whitney v. California*, 274 U.S. 357, 377 (1927).

32. See, e.g., *Debs v. United States*, 249 U.S. 211, 216–21 (1919) (ruling that when the intent of a speech is to prevent recruiting, it is unprotected speech and a violation of the Espionage Act); *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (upholding the *Debs* argument that when speech is intended to hinder recruiting it is unprotected, and commenting that “the *First Amendment* while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language”); *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (ruling that the incitement of a wartime munitions production strike for the express purpose of paralyzing the U.S. war effort was too great a likelihood of harm to garner speech protections).

33. Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1166–73 (1982) (chronicling the establishment, application and judicial criticism of the “clear and present danger” test from *Schenck* in 1919 to *Dennis* in 1951).

34. 268 U.S. 652 (1923).

35. *Whitney*, 274 U.S. at 357.

36. See *id.* at 372 (“We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and

*Dennis v. United States*³⁷ in 1951, with the argument that probability and imminence are irrelevant, and that all that matters is the last prong of the *Schenck* test, the enormity of the risk of harm.³⁸

In 1969, the Supreme Court decided *Brandenburg v. Ohio*,³⁹ which has since become the cornerstone case on evaluating the protection of speech. In the decision, the Court adopted a modified version of the *Schenk* test.⁴⁰ In order for government suppression of speech to be constitutional, the government must demonstrate three elements: (1) imminent harm from the speech, (2) a likelihood that the speech will produce illegal action, and (3) an intent to cause imminent illegality.⁴¹ This modern standard governs Jones's proposed Quran burning.

Applying the *Brandenburg* test, Jones' proposed Quran burning event fails to meet the first element requiring imminent harm. Provided that he holds the event on his own land with proper permits and his own books, he will not physically harm people, animals, or the property of others, imminently or otherwise.⁴² The second element, a likelihood of inciting illegal acts, is also not present because there is no evidence of motivation from anyone to violate the law in support of Quran burning. Jones merely invited people to join him at his event.⁴³ The third element, intent to cause imminent illegality, also fails. Pastor Jones' intent was an expression of his anger at Islam.⁴⁴ With none of the three elements satisfied, Jones' hypothetical Quran burning event fails the modern test of incitement.

we must and do sustain its constitutionality.”).

37. 341 U.S. 494, 516–17 (1951).

38. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

39. 395 U.S. 444, 447–49 (1969) (outlining the surviving test for speech protection, featuring the elements of likelihood of imminent harm, risk of illegal action, and illegal intent).

40. *Id.*

41. *Id.* at 447 (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

42. John Couwels, *City Plans to Bill Pastor for Security Around Planned Quran Burning*, CNN.COM (Sept. 17, 2010), http://articles.cnn.com/2010-09-17/us/florida.quran.pastor_1_security-plans-qurans-security-costs?_s=PM:US (specifying that Jones's church was the planned site of the event).

43. Lauren Russell, *Church Plans Quran-Burning Event*, CNN.COM (July 30, 2010), http://articles.cnn.com/2010-07-29/us/florida.burn.quran.day_1_quran-burning-florida-church-terry-jones-american-muslims-religion?_s=PM:US (“Dove’s Facebook page, set up for the September event, has more than 1,600 fans. ‘Eternal fire is the only destination the Quran can lead people to, so we want to put the Quran in it’s [sic] place—the fire!’ the page says.”).

44. *Id.* (“The Dove World Outreach Center says it is hosting the event to remember 9/11 victims and take a stand against Islam.”).

C. *Fighting Words*

Finally, the “fighting words” doctrine evaluates the protection of speech when, in response, the speech elicits an unlawful reaction from others. In 1942, the Supreme Court decided *Chaplinsky v. New Hampshire*,⁴⁵ where the Court defined “fighting words” as “those [that] by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁴⁶ *Chaplinsky* contemplates two situations that would be considered unprotected speech: (1) those words that are likely to cause a violent response against the speaker, and (2) those words that are likely to inflict emotional harm.⁴⁷ While *Chaplinsky* has not been overturned, subsequent cases have narrowed the definition of unprotected “fighting words” to the effect that no set of facts fits the definition. Indeed, in *Gooding v. Wilson*,⁴⁸ a statute identical to the *Chaplinsky* statute was thrown out for overbreadth.⁴⁹ The most recent illustration of the narrowness of this doctrine is the case of *R.A.V. v. St. Paul*,⁵⁰ decided in 1992, where a fighting words statute was struck down for viewpoint discrimination.⁵¹ A statutory restriction on Quran burning would likely follow this pattern, and would either be considered overbroad or viewpoint discrimination. Therefore, Terry’s proposed Quran burning would likely be considered protected speech.

Because of the strict limits on exceptions to protected speech in the United States that have evolved over a century of Supreme Court decisions, Quran burning would likely be considered protected speech by American courts.

45. 315 U.S. 568 (1942).

46. *Id.* at 572 (introducing the “fighting words” doctrine, a ruling that was subsequently narrowed into obscurity but never overruled).

47. *Id.*

48. 405 U.S. 518 (1972).

49. *Id.* at 527 (1972) (finding that a statute identical to that in *Chaplinsky v. New Hampshire* was overbroad because it did not limit state restrictions to situations where there existed a risk of immediate breach of the peace); see also *Street v. New York*, 394 U.S. 576, 594 (1969) (finding a state statute that outlaws verbal disparagement unconstitutionally overbroad, and Street’s words fundamental to his protest).

50. 505 U.S. 377 (1992).

51. See *id.* at 379. Here, a municipal ordinance prohibited expression known to arouse ire or alarm in those who see it. *Id.* The Supreme Court ruled that the ordinance, while meeting the standard for vagueness, is unconstitutional because it is not “content-neutral,” *e.g.*, it targets a particular type of speech and prohibits it on the basis of its substance. *Id.* at 394. This case illustrates the challenge of statutes utilizing the “fighting words” doctrine—a statute that is not overly vague, and therefore unconstitutional, is unlikely to be content-neutral and therefore must be reviewed by courts under strict scrutiny, the most difficult standard of review under which a statute will survive. CHEMERINSKY, *supra* note 18, at 1007.

II. INTERNATIONAL AND EUROPEAN PERSPECTIVES: SPEECH AND OTHER RIGHTS

In 2005, France passed a law prohibiting incitement to religious hatred,⁵² and England and Wales followed suit a year later with the Racial & Religious Hatred Act 2006.⁵³ These statutes built on a series of laws were passed long before the 9/11 attacks and restrict speech and conduct based on the content of the message.⁵⁴ As critical race theorist⁵⁵ Mari Matsuda observes, “the knowledge that anti-Semitic hate propaganda and the rise of Nazism were clearly connected guided development of the emerging international law on incitement to racial hatred.”⁵⁶ Many countries, but especially European countries, crafted their laws so that “international human rights norms . . . treat freedom of speech as an important right, but one that must be balanced against other democratic rights.”⁵⁷

52. Decree No. 2005-284 of Mar. 25, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 30, 2005, p. 5752, available at http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=1B09771D3B23D96B137C9169E86B67F4.tpdjo13v_2?cidTexte=JORFTEXT000000257363&dateTexte=&oldAction=rechJO&categorieLien=id (providing the French law prohibiting incitement to religious hatred).

53. See Racial and Religious Hatred Act, 2006, c. 1, § 1, sched. 3A (Eng.) (providing the English law prohibiting incitement to racial and religious hatred).

54. See Public Order Act, 1986, c. 64, § 17 (Eng.) (meaning of “racial hatred”); see also Race Relations Act, 1965, c. 73, § 6 (Eng.) (outlawing incitement to racial hatred); Race Relations Act, 1976, c. 74, § 70 (Eng.) (incitement to racial hatred); Law No. 90-615 of July 13, 1990, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 14, 1990, p. 8333, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000532990&dateTexte=&categorieLien=id> (providing the Gayssot Act, the French law prohibiting Holocaust denial).

55. Critical race theory is an academic discipline, developed in the 1970s, that encourages the consideration of legal and political issues through the prism of race. For a more detailed explanation of the genre, see MARI MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO, & KIMBERLÈ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 3–7 (1993).

56. Mari Matsuda, *Public Response to Racist Speech: Telling the Victim’s Story*, 87 MICH. L. REV. 2320, 2342 (1989). Matsuda articulated:

To those who struggled through early international attempts to deal with racist propaganda, the competing values [of free speech, association and conscience] had a sense of urgency. The imagery of both book burnings and swastikas was clear in their minds. Hitler had banned ideas. He had also murdered six million Jews in the culmination of a campaign that had as a major theme the idea of racial superiority. While the causes of fascism are complex, the knowledge that anti-Semitic hate propaganda and the rise of Nazism were clearly connected guided development of the emerging international law on incitement to racial hatred.

57. Sedler, *supra* note 20, at 379 (describing the freedom of speech as a right that, in Europe, is held equal to, not above, other human rights).

A. *International Law: The European Court of Human Rights*

Founded in 1959 under the terms of the 1953 European Convention, the European Court of Human Rights (“European Court”) interprets the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) in cases brought by individuals and states against the member states of the Council of Europe who are party to the European Convention.⁵⁸ Article 10 Section 1 of the ECHR guarantees the freedom of expression “without interference by public authority,”⁵⁹ but Section 2 of the same article states that this freedom is “subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society”⁶⁰ While the U.S. Constitution holds freedom of speech as a paramount right, the European model treats it merely as one right that must be weighed against other democratic rights, such as dignity and privacy.⁶¹

The decisions of the European Court, per a protocol that came into force in April 2010, are binding on the member states in judgments to which they are parties.⁶² This new protocol strengthened the enforcement abilities of the European Court.⁶³ Several decisions have come out of the European Court concerning the intersection of freedom of speech and

58. European Court of Human Rights In Brief, (2009), http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_EN_Portes_ouvertes.pdf (introducing the European Court of Human Rights).

59. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10 § 1, Nov. 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”).

60. ECHR, *supra* note 59, art. 10 § 2 (“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”).

61. Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT’L L.J. 277, 279 (2008) (arguing that the United States stands alone in regarding freedom of speech as a higher priority than other human rights).

62. ECHR, *supra* note 59, art. 46 § 1 (“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”).

63. Alex Ballin & Alison McDonald, *A Law with Sharper Teeth*, THE GUARDIAN (U.K.), Mar. 24, 2010, at 32, available at <http://www.guardian.co.uk/commentisfree/libertycentral/2010/mar/23/european-court-human-rights> (“The Committee of Ministers can refer a case back to the European court if it considers that the state has not fully complied with a decision of the court. If the court agrees, the committee can decide to take action against the state for noncompliance—including, in theory, suspension or expulsion from the Council of Europe.”).

incitement to racial and religious hatred, including two cases which illuminate the boundary between what is acceptable and unacceptable speech, as determined by the ECHR.⁶⁴

In *Sürek v. Turkey*,⁶⁵ a news publication was charged under Turkish law with “disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people” when it published several letters denouncing the Turkish Army for attacks against Kurds.⁶⁶ The European Court derived three elements from Article 10 in order to evaluate whether the interference with the applicant’s right to freedom of expression: (1) whether it was “prescribed by law”; (2) whether it possessed one or more of the goals listed in Section 2 of Article 10; and (3) whether the interference was “necessary in a democratic society” to achieve the aims of Section 2.⁶⁷

The European Court found no violation of Article 10 in this case, stating that “where such remarks incite to violence . . . , the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.”⁶⁸

Conversely, in *Giniewski v. France*,⁶⁹ the European Court found a violation of the applicant’s freedom of speech right when the author of a news article criticizing a papal encyclical was charged with making “racially defamatory statements against the Christian community.”⁷⁰ The European Court noted that “such views do not in themselves preclude the enjoyment of freedom of expression. . . . Moreover, the article in question is not ‘gratuitously offensive’ . . . and does not incite disrespect or hatred.”⁷¹ The European Court also incorporated truth as a possible

64. ECHR, *supra* note 59, art. 10 § 1 (defining legal and illegal speech when incitement to racial and religious hatred is a factor).

65. *Sürek v. Turkey* (No.1), 1999-IV Eur. Ct. H.R. 1, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=surek&sessionid=96127695&skin=udoc-en>.

66. *Id.* at 6 (holding the Turkish statute did not violate Article 10 of the ECHR).

67. *Id.* at 22.

68. *Id.* at 26–27 (“[I]t certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of the public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks [W]here such remarks incite to violence against and individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.”).

69. *Giniewski v. France*, 2006-II Eur. Ct. H.R. 1, available at <http://strasbourgconsortium.org/document.php?DocumentID=4183> (European Court of Human Rights found the conviction to have violated the free speech right of the applicant).

70. *Id.*

71. *Id.* at 14.

defense and stated, “Nor does [the article in question] cast doubt in any way on clearly established historical facts.”⁷²

Applying Article 10 to Quran burning, the European Court is likely to find that a state is within its rights to restrict such an act. Quran burning is proscribed in the domestic laws of many member states.⁷³ Those laws comport with the goals listed in Article 10 Section 2 because, arguably, they protect “the interests of national security” by limiting violence against nationals, both in country and in military theaters, like Iraq and Afghanistan.⁷⁴ They protect “the rights of others” by limiting violent demonstrations aimed squarely at one sector of society: Muslims.⁷⁵ Furthermore, like in *Giniewski*, Quran burning is likely to be considered violence, so the European Court would broadly construe its responsibility to intervene.⁷⁶

B. The International Convention on Civil and Political Rights

The International Covenant on Civil and Political Rights, (“ICCPR”) signed in 1966 and entered into force in 1976, is an international agreement that names all civil and political rights enjoyed by the citizens of its member states, including freedoms of speech.⁷⁷ It is unique because no single designated court adjudicates this convention.⁷⁸ The Human Rights Committee of the UN High Commissioner for Human Rights is empowered to receive reports from the participating countries on the status of their enumerated rights, hear individual complaints of violations, and publish “general comments” about the state of the enumerated rights within the participating countries.⁷⁹ Article 19 of the ICCPR guarantees

72. *Id.*

73. *See* Decree No. 2005-284 of Mar. 25, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 30, 2005, p. 5752; Racial and Religious Hatred Act 2006, c. 1, § 1, sched. 3A (Eng.).

74. ECHR, *supra* note 59, art. 10 § 2.

75. *Id.*

76. *Giniewski v. France*, 2006-II, Eur. Ct. H.R. 1.

77. Int’l Covenant on Civil and Political Rights, Dec. 1, 1966, S. EXEC. DOC. E, 95-2 999 U.N.T.S. 171 [hereinafter ICCPR] (providing an international agreement governing the civil and political rights of individuals).

78. The International Court of Justice has interpreted the ICCPR in past cases, such as the case about Ahmadou Sadio Diallo. Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), 2010 I.C.J. 103 (Nov. 30, 2010).

79. Office of the U.N. High Comm’r for Human Rights, *Human Rights Comm.: Monitoring Civil and Political Rights*, <http://www2.ohchr.org/english/bodies/hrc/> (describing the charge of the United Nations High Commissioner for Human Rights with regard to the International Covenant on Civil and Political Rights).

freedom of expression in general,⁸⁰ but Article 20 proscribes war propaganda⁸¹ and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”⁸²

The ICCPR clearly illustrates the difference in the American and European approaches to the issue of speech protection.⁸³ Essentially, European law declines to subscribe to the principle of content neutrality, the idea that speech cannot be restricted based on the substance of a message.⁸⁴ By qualifying speech freedom so dramatically in Article 20, the drafters of the ICCPR weaken the “value judgment in Article 19 that freedom of speech is an important individual right that should be protected,”⁸⁵ thereby declaring that some ideas are so harmful that they should not be protected.⁸⁶ Indeed, the United States ratified the ICCPR only after asserting its reservation to Article 20.⁸⁷

The laws of each country that ratified the ICCPR are subject to review under the Covenant, which means that while France, the United Kingdom, Denmark, and most other countries have passed their own laws on freedom of speech and incitement of racial hatred, those laws must conform to the ICCPR as well as any applicable national constitution.⁸⁸

80. ICCPR, *supra* note 77, art. 19.

81. *Id.* art. 20 (“Any propaganda for war shall be proscribed by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”).

82. *Id.*

83. See generally Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305 (1999).

84. *Id.* at 317.

85. Sedler, *supra* note 20, at 381.

86. *Id.* at 380–81 (“The drafters of the International Covenant on Civil and Political Rights made a value judgment in Article 19 that freedom of speech is an important individual right that should be protected. But in Article 20, they qualified the protection given to freedom of speech by denying protection to what they considered to be particularly harmful ideas, such as the ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.’”) (citing ICCPR, *supra* note 77, art. 20).

87. S. Exec. Res. 95-2, 102d Cong., 138 Cong. Rec. 4783 (1992) (enacted) (“Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.”).

88. See U.N. Human Rights Comm. [HRC], *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶¶ 6–8 (May 26, 2004). The comment provides:

(6) . . . States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

Thus, anyone charged under these laws can argue that as applied, the laws are not in keeping with the guarantees of the ICCPR.⁸⁹

III. TREATMENT OF HATE SPEECH IN THE UNITED KINGDOM

Within many European countries, hate speech has traditionally been curtailed in the context of both racial and religious hatred.⁹⁰ While these countries have stressed the need for restraint in legislation, they apply stricter measures than the United States in restricting unacceptable speech.⁹¹ Events in other European countries, such as Denmark⁹² and France,⁹³ have catalyzed discussion of the balance of various human rights and set the stage for Britain's dialogue about Quran burning.

(7) Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large. (8) The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law.

Id. ¶¶ 6–8.

89. *See id.* ¶ 3 (“A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction . . .”).

90. Mike Sacks, *What if Terry Jones Went to Sweden?* CHRISTIAN SCI. MONITOR, Oct. 2, 2010, at 7, available at <http://www.csmonitor.com/USA/Justice/2010/1002/Free-speech-What-if-Terry-Jones-went-to-Sweden> (speculating on the potential consequences of Quran burning in various European countries, just prior to actual incidents that occurred in England and France). Sacks articulates,

[M]uch of Europe has also enacted hate speech laws that allow for prosecution of expression where the United States does not. Had Terry Jones, pastor of the Dove World Outreach Center in Gainesville, Fla., taken his “International Burn a Koran Day” overseas and arrived in Stockholm wearing one of the “Islam Is of the Devil” T-shirts that his church sells, he could have been charged under Sweden’s prohibition on expressing disrespect for a group based on their faith.

Id.

91. *See Carmi, supra* note 61.

92. A recent controversy over the depiction of a sacred religious figure in a European newspaper gives a good illustration of the European climate with regard to speech protections.

In 2005, Flemming Rose, the editor of Danish newspaper *Jyllands Posten*, solicited cartoons featuring the Islamic prophet Mohammed and then published a selection of them. JYTTE KLAUSEN, *THE CARTOONS THAT SHOOK THE WORLD 1* (2009). This outraged Muslims all over the world, not only because most of the depictions were caricatures but also because of a fundamental belief that depictions of the Prophet in general are blasphemy within Islam. Kahn, *supra* note 37, at 260–63.

Instead of backing down in the face of Muslim outrage, Rose grew louder and more obstinate in defending his actions on free speech grounds. *Id.* at 263–67. Rose essentially made two arguments: (1) that absolute free speech, without restriction, was needed to fight totalitarianism; and (2) a convoluted argument that the cartoons were a way of bringing Muslim immigrants into the mainstream satirical culture of Denmark. *Id.* at 254–58. Flemming’s first argument draws from the American tradition of free speech. *Id.* at 267.

93. *Designer Galliano is Fined for Insults*, L.A. TIMES, Sept. 9, 2011, at A7 (detailing the conviction of French fashion designer John Galliano for anti-Semitic rants). Galliano was convicted of

The primary law regulating incitement of racial hatred in the United Kingdom is Public Order Act 1986, which defined racial hatred and criminalized a number of actions that incited it.⁹⁴ It was amended by the Racial and Religious Hatred Act 2006, which expanded the crimes against racial hatred to explicitly include religious hatred.⁹⁵

The Crown Prosecution Service (“CPS”), which handles criminal prosecutions in England and Wales,⁹⁶ publishes guidance on its website for the prosecution and handling of cases involving “violent extremism.”⁹⁷ It advises that while “free speech includes the right to offend . . . there have been prosecutions for deeply insulting behavior. This is behavior which falls short of a desire to commit violence but is nevertheless threatening, abusive or insulting, and intends to stir up racial hatred.”⁹⁸

The CPS’s guide states that in order to charge an actor with stirring racial hatred under Public Order Act 1986, “[i]f we are not able to prove that the accused intended to stir up racial hatred, we have to show that . . . hatred was likely to be stirred up, not simply liable or possible.”⁹⁹ Considering that freedom of speech is regarded as a core democratic value, this standard is an extremely low bar, given that a prosecutor need not even prove intent except in cases of religious hatred, but rather needs merely prove a conscious disregard, effectively, of the likelihood of incitement.

A variety of cases have been tried under the 1986 U.K. statute. In *Regina v. Saleem*,¹⁰⁰ decided in 2007, a protestor shouting slogans calling for massacre of “those who insult Islam” was convicted on several charges

making “public insults based on origin, religious affiliation, race or ethnicity.” *Id.* He was ordered to pay nominal damages to his victims. *Id.*

94. Public Order Act, 1986, c. 64, pt. III (Eng.).

95. Racial and Religious Hatred Act, 2006, c. 1, §§ 1, sched. 3A, 29A (Eng.) (“The Public Order Act 1986 (c. 64) is amended in accordance with the Schedule to this Act, which creates offences involving stirring up hatred against persons on religious grounds. . . . Meaning of ‘religious hatred’[:].

In this Part ‘religious hatred’ means hatred against a group of persons defined by reference to religious belief or lack of religious belief.”).

96. *Facts About the Crown Prosecution Serv.*, CROWN PROSECUTION SERV. [CPS], <http://www.cps.gov.uk/about/facts.html> (last visited Apr. 18, 2012) (describing the function of the crown prosecution service).

97. *Violent Extremism and Related Offences*, CROWN PROSECUTION SERV. [CPS], http://www.cps.gov.uk/publications/prosecution/violent_extremism.html#a3 (describing its authority to prosecute cases where actions fall short of violence but are so offensive as to illegally stir up racial or religious hatred).

98. *Id.*

99. *Id.* pt. 3. Although intent is not a required element to prove racial hatred, it is a required element in cases of religious hatred. *Id.*

100. *R v. Saleem* [2007] EWCA Crim. 2692, [2007] 2 Crim. App. 12 (appeal taken from Eng.) (upholding the conviction of individuals protesting the Mohammed cartoon controversy for inciting religious hatred with signs that read, “massacre those who insult Islam” and similar slogans).

and was sentenced to two years and six months in jail specifically on the charges of stirring racial hatred.¹⁰¹ In *Regina v. Rahman*,¹⁰² decided in 2008, a protestor was sentenced to three years in jail for “using threatening, abusive or insulting words or behavior with intent to stir up racial hatred or in circumstances where racial hatred was likely to be stirred up.”¹⁰³ In *Regina v. Sheppard*,¹⁰⁴ decided in 2010, two defendants were convicted of numerous charges of stirring up racial hatred by way of possessing, distributing, and publishing racially inflammatory material and sentenced to three years and ten months and one year and ten months, respectively.¹⁰⁵

Upon the arrest of the two individuals in Gateshead, England who were shown in the Quran-burning video on YouTube, the Northumbria Police Department issued a statement saying that “[t]he kind of behaviour displayed in this video is not at all representative of our community as a whole. Our community is one of mutual respect and we continue to work together with community leaders, residents and people of all faiths and beliefs to maintain good community relations.”¹⁰⁶ Clearly, the emphasis in the Police Department’s statement is not on the individual rights of the arrested parties to freedom of speech but on the community’s right to avoid enduring such speech.

The CPS declined to prosecute the Gateshead case, claiming a lack of evidence.¹⁰⁷ However, in applying the amended Public Order Act 1986 to incidents of Quran burning, a court would likely find the facts to fit squarely within the elements enumerated by CPS for charging and conviction. The burning of a Quran demonstrates intent to stir up religious hatred, as defined by Section 17,¹⁰⁸ with its message, and the

101. *Id.*

102. *R v. Rahman* [2008] EWCA Crim. 2290, [2008] W.L. 4552817 (appeal taken from Eng.) (upholding the conviction of individuals protesting as inciting religious hatred but allowing for the concurrent service of sentence for the more serious charge of solicitation of murder as well as allowing credit for time served, which effectively nullified the sentence but held in place the conviction).

103. *Id.*

104. *R. v. Sheppard* [2010] EWCA Crim 65, [2010] W.L. 308489 (appeal taken from Eng.) (upholding conviction of an inciting racial hatred violation for the publishing of inflammatory material on a website, and upholding the length of the imprisonment sentence as neither excessive nor unusual).

105. *Id.*

106. *Arrests for Stirring Hatred*, NORTHUMBRIA POLICE AUTHORITY (Sept. 23, 2010), http://www.northumbria.police.uk/news_and_events/news/newsindex/details.asp?id=32209 (describing the arrest of two individuals in Gateshead, England and their subsequent charging with incitement to racial or religious hatred violations in connection with the videotaped burning of a Quran and uploading of the act on YouTube).

107. *No Prosecution Over Gateshead Car Park Koran Burning*, BBC NEWS (Jan. 21, 2011), <http://www.bbc.co.uk/news/uk-england-tyne-12253315>.

108. *Guidance on Prosecuting Cases of Racist and Religious Crime: Part III Public Order Act*

dissemination of the video of the Quran burning falls within Section 21 of the statute.¹⁰⁹

IV. NO BOUNDARIES: INTERNATIONAL HATE SPEECH AND THE INTERNET

In order to evaluate the efficacy of modern speech-freedom rules, one must consider the influence of the internet, which has presented two new distinct but related challenges to the question of protected speech: (1) the elimination of traditional national boundaries, and (2) the evolving definition of “immediacy.”

A. *Immediacy*

The definition of “immediacy” has shifted, as contemplated by the U.S. Supreme Court in *Brandenburg*.¹¹⁰ Describing the internet in *Reno v. ACLU*,¹¹¹ the Supreme Court observed that “any person with a phone line can become a town crier with a voice that resonates further than it would from any soap box,” highlighting the significant difference between the

1986—*Incitement to Racial Hatred*, CROWN PROSECUTION SERV. [CPS], <http://www.cps.gov.uk/publications/prosecution/rpberpol.html> (“Racial hatred is defined in Section 17 of the Act. The prosecution must prove that hatred was intended to be stirred up or that it was *likely* to be stirred up. ‘Likely’ does not mean that racial hatred was simply possible. We therefore have to examine the context of any behaviour very carefully, in particular the likely audience, as this will be highly relevant.”).

109. Public Order Act, 1986, c. 64, pt. III, § 21 (Eng.). The Act provides:

Distributing, showing or playing a recording

(1) A person who distributes, or shows or plays, a recording of visual images or sounds which are threatening, abusive or insulting is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) In this Part ‘recording’ means any record from which visual images or sounds may, by any means, be reproduced; and references to the distribution, showing or playing of a recording are to its distribution, showing or playing to the public or a section of the public.

(3) In proceedings for an offence under this section it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

(4) This section does not apply to the showing or playing of a recording solely for the purpose of enabling the recording to be broadcast or included in a programme service.

Id. § 21.

110. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

111. 521 U.S. 844 (1997).

speech contemplated less than a century ago and the modern reality.¹¹² Several recent cases have grappled with this new challenge.¹¹³

The internet is unique because it makes dissemination of information and ideas to the world effortless, making it available for all to access. Is this characteristic significant enough to warrant a revision of the rules of speech protection? Judge Lynn Adelman in the U.S. District Court of the Eastern District of Wisconsin argues against that notion, stating, “nothing about the Internet requires a new test. We should resist letting fear of a new technology get the better of us. The First Amendment challenges posed by the twenty-first century are not new.”¹¹⁴ She continues to explain that “when the Supreme Court decided *Brandenburg v. Ohio* in 1969, it established a framework that has well protected the values served by the First Amendment, and . . . nothing about the Internet suggests a need to modify that framework.”¹¹⁵

B. International Regulation of the Internet

Since the creation of YouTube in 2005¹¹⁶ and the advent of innumerable news websites and blogs in the last two decades, the legal boundaries between countries have, in a technological context, become vestigial.¹¹⁷ While countries have attempted to regulate the internet and

112. *Id.* at 870 (“This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it would from any soapbox.”).

113. A recent case, *Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists*, illustrates the phenomenon described by the *Reno* Court. 290 F.3d 1058 (9th Cir. 2002). In *Planned Parenthood*, the names and pictures of abortion providers were published on a website “Wanted” poster. *Id.* The Ninth Circuit Court of Appeals ruled that act constituted unlawful incitement and therefore unprotected speech, because the posters identified specific doctors as targets and the organization that created the website was aware of its potential to encourage others to act unlawfully. *Id.* at 1063.

114. Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of Brandenburg*, 4 HARV. L. & POL’Y REV. 361, 363 (2010) (“For much of the twentieth century, the Supreme Court struggled to formulate a standard for evaluating advocacy under the First Amendment. In *Brandenburg*, the Court settled on a test that balances the genuine security needs of society with the need to maintain a public sphere open to all. Nothing about the internet requires a new test. We should resist letting fear of a new technology get the better of us. The First Amendment challenges posed by the twenty-first century are not new.”).

115. *Id.*

116. John Cloud, *The Gurus of YouTube*, TIME, Dec. 16, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1570721,00.html> (describing the creation and subsequent rise in popularity of YouTube, a website facilitating the public uploading and sharing of video and audio files).

117. Christopher D. Van Blarcum, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. & LEE L. REV. 781, 782 (2005) (describing the differences

control its content, these efforts have achieved limited success.¹¹⁸ Because of the anonymity and global accessibility of the internet, countries have struggled to find both appropriate legal limitations and the requisite regulatory technology.¹¹⁹

There have been notable cases testing the question of whether European countries can regulate internet content that is uploaded beyond its continental shores: *Jones v. Toben*,¹²⁰ *People v. Somm*,¹²¹ and *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme (LICRA)*.¹²² In *Toben*, a website based in Australia hosted content that violates Germany's Holocaust denial laws.¹²³ A German lower court ruled that the laws could not reach content hosted outside the country, but Germany's High Court reversed the decision in 2003.¹²⁴ In *Somm*, a German court found that these laws could apply when content was hosted outside the country, and that the internet service provider could be held liable for violation of the laws.¹²⁵ In *Yahoo!*, an American company was sued in a French court for selling Nazi merchandise on its auction website.¹²⁶ In 2000, the French court ordered Yahoo! to take the content off its website, and Yahoo! counter-sued in the Northern District of California, a U.S. federal court, for a declaratory judgment that the French order could not be executed.¹²⁷ In issuing the judgment, the district court cited the free speech protections of the First Amendment; the Ninth Circuit Court of Appeals later reversed because the district court lacked personal jurisdiction.¹²⁸

The Terry Jones "Burn a Quran" Day and the U.K. Quran-burning episode pull into clear focus the nature of the problem. In the case of

between speech protection in the United States and Europe, the reasons behind those differences, and the practical consequences therein.).

118. *See id.* at 803–07.

119. *Id.* at 802–03 (“The effect of the [Council of Europe’s Additional] Protocol [to the Convention on Cybercrime] and the hate speech legislation adopted by Europe is likely to extend beyond the parties to the agreement. European nations have a history of attempting to enforce their Internet content laws against content uploaded from sources outside Europe, and they view their jurisdiction based on where the content was read. Such litigation has produced three high-profile cases: *Toben*, *Somm*, and *Yahoo!*”).

120. *Jones v. Toben*, (2002) 71 A.L.D. 629 (Austl.).

121. Amtsgericht [Munich Regional Court] 17 Nov. 1999, File no. 20 Ns 465 Js 173158/95, available at <http://www.cyber-rights.org/isps/somm-dec.htm>.

122. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1184 (N.D. Cal. 2001), *rev'd*, 379 F.3d 1120 (9th Cir. 2004).

123. *Van Blarcum*, *supra* note 117, at 803.

124. *Id.* at 803–04.

125. *Id.* at 804.

126. *Id.* at 805.

127. *Id.* at 806.

128. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 379 F.3d 1120, 1126 (9th Cir. 2004).

Jones, the news of “Burn a Quran” Day traveled around the world within minutes and resulted in violent protests in many different countries.¹²⁹ In England, the six Quran burners allegedly posted their video on YouTube,¹³⁰ which meant that with the click of a button, users all over the world could access the footage.

While Judge Adelman’s assessment of the changes in immediacy is too dismissive of the power of YouTube and other newer sites that enhance the ease with which hate speech is disseminated, she is right that there is no better standard than the *Brandenburg* rule.¹³¹ While YouTube and other media-sharing sites may amplify free speech to an uncomfortable extent, the alternative, government regulation of speech based on content, is incompatible with American concepts of free speech.

V. A HARD CHOICE: DISTASTEFUL SPEECH OR GOVERNMENT CENSORSHIP?

The primary difference between the freedom of speech in the United States and Europe is the question of whether speech can be restricted on the basis of its content under current laws. Robert Sedler highlights this difference when he states that “[i]n the United States, as a constitutional matter, the value of freedom of speech generally prevails over other democratic values, such as equality, human dignity, and privacy.”¹³² This principle lies in stark contrast to the European vision of freedom of speech, in which “freedom of speech is an important right, but one that must be balanced against other democratic rights.”¹³³

Ultimately, the decision whether to judge speech based on its content becomes a choice between the lesser of two evils: Do we trust the people to police themselves when there is an opportunity for full discussion on a controversial message (the Brandeis “more speech as a remedy for bad speech” paradigm)?¹³⁴ Alternatively, do we delegate the responsibility for discerning acceptable speech to the government?

The recent Quran-burning incidents demonstrate the messiness of the American approach. The law did not restrict Pastor Jones at all in his threats. Instead, what occurred was a proliferation of Brandeis’ “more

129. Gerhart & Londoño, *supra* note 1.

130. See Bunyan & Blake, *supra* note 7.

131. Adelman & Deitrich, *supra* note 114, at 373.

132. Sedler, *supra* note 20, at 379.

133. *Id.*

134. *Whitney v. California*, 274 U.S. 357, 377 (1927) (introducing the modern free speech doctrine of more speech as a remedy for bad speech).

speech.” Leaders including President Obama, Secretary of Defense Robert Gates, Secretary of State Hillary Clinton, General David Petraeus, and even the owner of a car dealership in New Jersey, urged Jones to cancel his event. All declined to question his right to burn Qurans.¹³⁵ The outcry succeeded: Jones retreated in his rhetoric and cancelled his event.¹³⁶

The incident and the American reaction to it resulted in two adverse consequences. First, the international community, including many who were not well acquainted with the American concept of protected speech,¹³⁷ reacted violently to both Jones’ threats and to the lack of government restriction on his speech.¹³⁸ This response is an internationalization of the “heckler’s veto,” the notion that the speaker’s speech rights should be curtailed for fear of the reaction of his audience. The idea has already been debated in the U.S. court system and discarded as an invalid exception to free speech.¹³⁹

135. Gerhart & Londoño, *supra* note 1; *Pastor Who Said He’d Burn Koran Gets Free Car, Gives It To Charity*, BOSTON GLOBE, Oct. 23, 2010, at 2, available at http://articles.boston.com/2010-10-23/news/29293713_1_florida-pastor-koran-car-dealer (describing the aftermath of Pastor Terry Jones’s threat to burn Qurans in protest on September 11).

136. Gerhart & Londoño, *supra* note 1.

137. An unfortunate illustration of the lack of international familiarity with the American system of free speech occurred during the daily press briefing at the White House on January 13, 2011, in the wake of the Gabrielle Giffords shooting rampage. Ed Henry, *Chill in the White House Briefing Room*, CNN ONLINE (Jan. 13, 2011), <http://whitehouse.blogs.cnn.com/2011/01/13/chill-in-the-white-house-briefing-room/>. At the end of the briefing, a Russian reporter with *Itar-Tass*, the official Russian news agency, asked whether “the quote, unquote ‘freedom’ of a deranged mind to react in a violent way is also American,” implying that the United States, with its liberal interpretation of Constitutional freedoms, condones behavior like the rampage that had taken place in Tucson, Arizona five days before. *Id.* Robert Gibbs, the outgoing White House Press Secretary, quickly responded that,

We had people that died. We had people whose lives will be changed forever because of the deranged actions of a madman. Those are not American. Those are not in keeping with the important bedrock values by which this country was founded and by which its citizens live each and every day of their lives in hopes of something better for those that are here.

Id. Later, the correspondent Andrei Sitov, when asked about the interchange, proffered essentially the same viewpoint given by this note, saying he “believe[d] that what happened is a terrible price that the United States pays for the freedoms and liberties that Americans enjoy.” *Id.* While it would be a disservice to attribute the views of the world at large to one White House reporter, Sitov’s comments do suggest that perhaps it is more than mere misunderstanding or ignorance of the American system of Constitutional freedoms, but perhaps a fundamental disagreement with it. *Id.* See also Robert Gibbs, *White House Press Briefing*, WHITE HOUSE ONLINE (Jan. 13, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/13/press-briefing-press-secretary-robert-gibbs-1132011>. A *Lecture Russia Wouldn’t Permit*, WASHINGTON POST, Jan. 16, 2011, at A17 (editorial reaction to the exchange between Gibbs and Sitov that criticizes the very premise of Sitov’s argument because his country has historically exemplified excessive governmental restriction on speech.)

138. See *id.*

139. In *Smith v. Collin*, the Seventh Circuit Court of Appeals ruled that “[a] conviction for less than words that at least tend to incite an immediate breach of the peace cannot be justified,” once again affirming the high standard that must be met in order to justify a lack of protected speech. 578 F.2d 1197, 1203 (7th Cir. 1978). In that decision, the Seventh Circuit wrote, “The concession also

Second, the incident led to similar episodes in Michigan, England, and France.¹⁴⁰ There will likely be more Quran-burning incidents, especially in the United States around the anniversary of 9/11. These occurrences are unfortunate, but they will happen regardless of whether the act is illegal.¹⁴¹ Especially with the prevalence of online-media sharing, prior restraint is simply not feasible in most circumstances, yet prior restraint would be required in order to keep these destructive ideas from spreading virally.

In contrast, individuals were criminally charged after burning Qurans in Strasbourg, France and Gateshead, England. Instead of calming public furor over the burning of Qurans, the incident sparked a debate over speech restrictions.¹⁴² Some might argue that criminalizing bad speech provides a channel for public anger and reduces vigilantism against the speakers,¹⁴³ but these cases have not borne out that theory.

Speech protection via the First Amendment of the U.S. Constitution is a messy system that allows ideas to circulate in a manner disagreed with by many. Nonetheless, the U.S. approach to freedom of speech is still a superior system to one that circumvents the right of the people to decide

eliminates any argument based on the fighting words doctrine of *Chaplinsky v. New Hampshire*. . . . The Court in *Chaplinsky* affirmed a conviction under a statute that, as authoritatively construed, applied only to words with a direct tendency to cause violence by the persons to whom, individually, the words were addressed.” *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942)).

140. See *Burned Koran Not a Hate Crime*, *supra* note 8; Bunyan & Blake, *supra* note 7; Reilhac, *supra* note 9.

141. Sacks, *supra* note 90 (offering examples of individuals expressing themselves even where it is illegal to do so).

142. See William Dove, *Gateshead Koran Burning: Since When Was Islam a Race and Why Are the Police Watching YouTube When They Could Be Stopping Real Crime?* INT’L BUS. TIMES (Sept. 23, 2010), <http://uk.ibtimes.com/articles/65079/20100923/gateshead-koran-burning-since-when-was-islam-a-race-and-why-are-the-police-watching-youtube-when-the.htm> (questioning the incitement of hatred doctrine in British law as a misappropriation of police resources); see also Pdraig Reidy, *Koran Burning in the U.K.*, FREE SPEECH BLOG (Sept. 23, 2010), <http://blog.indexcensorship.org/2010/09/23/koran-burning-gateshead-islam-free-speech/> (objecting to the arrest of the individuals in Gateshead on incitement charges).

143. *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting) (“Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive.”).

for themselves what ideas they disagree with and to respond accordingly.¹⁴⁴

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144. In a fitting epilogue to the tale of “Burn a Quran Day,” Pastor Terry Jones was banned from the United Kingdom in January 2011, ahead of a planned address to a right-wing group in Buckinghamshire, England. *US Pastor Terry Jones Banned from Entering UK*, BBC NEWS ONLINE (Jan. 19, 2011), <http://www.bbc.co.uk/news/uk-12231832> (“The Home Office said Mr Jones could not enter the UK as the government ‘opposes extremism in all its forms’ A Home Office spokesman said: ‘Numerous comments made by Pastor Jones are evidence of his unacceptable behaviour. Coming to the UK is a privilege not a right and we are not willing to allow entry to those whose presence is not conducive to the public good. The use of exclusion powers is very serious and no decision is taken lightly or as a method of stopping open debate.’”).

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