TERRY JONES AND GLOBAL FREE SPEECH IN THE INTERNET AGE♦

INTRODUCTION

"It was intended to stir the pot," said Pastor Terry Jones after putting a Koran on trial, finding it guilty of rape and murder, and sentencing it to burn inside of his Florida church in March 2011.[1] Truth

[1] Lizette Alvarez, *Koran-Burning Pastor Unrepentant in Face of Furor*, N.Y. TIMES (Apr. 2, 2011), http://www.nytimes.com/2011/04/03/us/03burn.html (reporting an online poll via

TV recorded the mock trial, which Jones called "fair" despite a complete absence of defense witnesses, and streamed it live on his website with Arabic subtitles.[2] Jones openly admitted that he knew the Koran burning would provoke violence, but nonetheless remained committed to the act, as part of his overarching mission to spread a belief that Islam and the Koran are mere instruments of "violence, death and terrorism."[3] Within ten days, the Taliban organized Anti-American protests in Afghanistan.[4] An angry mob of twenty thousand killed at least twelve people, eight of them United Nations ("UN") staff members, in a ransacking of the UN compound in northern Afghanistan.[5] Spokesmen of the Ulema Council, an influential clerical body in Afghanistan, said they expected the retaliatory violence to endure unless Jones was tried and punished.[6] The protests continued, as the Council predicted, after word of Jones' production continued to proliferate. In the southern Afghan capital city of Kandahar, protesters burned a high school for girls supported by the United States Agency for International Development and killed international staff members in hiding, while others attempted a suicide bombing at an American military base in Kabul.[7]

Jones had originally scheduled the Koran burning to coincide with the ninth anniversary of September Eleventh, but agreed to postpone it after Secretary of Defense Robert Gates warned Jones that his actions would threaten the lives of American troops.[8] President Barack Obama also warned Jones in a televised interview,

> [a]s a very practical matter, as commander (in) chief of the armed forces of the United States, I just want him to understand that this stunt that he is pulling could greatly endanger our young men and women in uniform.[9]

Facebook that determined the sentencing, with burning garnering the most votes).

[2] *Id.* While Truth TV did not stream the actual burning, the burning footage became available almost immediately available on YouTube, where it has over 340,000 views and remains today. *See Florida Church Burnt Holy Quran*, YOUTUBE (Mar. 22, 2011), http://www.youtube.com/watch?v=XDmaFehshys&feature=related.

[3] Alvarez, *supra* note 1.

[4] Enayat Najafizada & Rod Nordland, *Afghans Avenge Florida Koran Burning, Killing 12*, N.Y. TIMES (Apr. 1, 2011), http://www.nytimes.com/2011/04/02/world/asia/02afghanistan.html.

[5] Id.

[6] Id.

[7] Taimoor Shah & Rod Nordland, *Protests Over Koran Burning Reach Kandahar*, N.Y. TIMES (Apr. 2, 2011), http://www.nytimes.com/2011/04/03/world/asia/03afghanistan.html.

[8] Christine Delargy, *Robert Gates Urged Terry Jones to Call Off Koran Burning*, CBS NEWS (Sept. 9, 2010, 6:38 PM), http://www.cbsnews.com/8301-503544_162-20016023-503544.html.

[9] Suzan Clark & Rich McHugh, *President Obama Says Terry Jones' Plan to Burn Korans Is 'A Destructive Act'*, ABC NEWS (Sept. 9, 2010), http://abcnews.go.com/GMA/president-obama-terry-jones-koran-burning-plan-destructive/story?id=11589122.

Despite both the government's and Jones' own recognition that his actions would likely result in the loss of American lives, these verbal warnings embodied the extent to which any government actor could constitutionally constrain Jones' speech to avoid inciting a violent response.

Under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech."[10] While the text of the Free Speech Clause is unequivocal, neither the Framers, nor any members of the judiciary who shaped its early application, could have envisioned the repercussions of such an absolute right in modern day, cross-cultural communications technology societies. As a result, under current law, an American citizen such as Jones may permissibly transmit speech over the Internet, knowing that it will probably incite violence against Americans in foreign countries whose laws and culture prohibit such speech. As many of the traditional justifications for freedom of speech do not apply to these cases,[11] we must begin developing measures that minimize the dangers created by unrestrained Internet speech without offending our well-settled First Amendment doctrine.

Two phenomena arose over the last decade that require joint consideration in developing new free speech principles: first, the creation and proliferation of websites such as YouTube which provide live, global video streaming on the Internet have made it easier to communicate across borders and between cultures that treat free speech differently. This technology has created a novel environment in which anyone with Internet access can observe live speech from anywhere in the world. This creates a problem when the rules of the speaker's jurisdiction permit a wider range of lawful speech than those of the listener's. One source estimates that as of December 31, 2011, over 2.2 billion people used the Internet, marking a 528% increase over the previous ten years.[12] YouTube alone has hundreds of millions of international users who upload forty-eight hours of content per minute, or eight years worth of video streams per day.[13] The global adoption of the Internet instructs policymakers to reframe free speech analysis as a global issue because "[t]he widespread use of the Internet and the proliferation of media outlets make it more difficult to confine domestic

10 U.S. Const. amend. I.

11 *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–55 (1989) (analyzing the arguments that have dominated freedom of speech discussion in America, including, among others, truth discovery, social stability, deterring abuses of authority, personal development, promoting tolerance, and the marketplace of ideas).

12 World Internet Usage and Population Statistics, INTERNETWORLDSTATS, http://www.Internetworldstats.com/stats.htm (last visited Feb. 8, 2012).

13 Frequently Asked Questions, YOUTUBE, http://www.youtube.com/t/faq (last visited Feb. 10, 2012).

disputes and controversies to local, state, or even national boundaries."[14]

Second, conservative Islamic states hold very different views on the balance between freedom of speech and censorship, as demonstrated by the recent Danish cartoon controversy. In September 2005, a Danish newspaper published satirical images of the Islamic prophet Muhammad, one of which depicted the prophet as a terrorist. Media outlets in several countries, including Germany and France, then republished the cartoons,[15] sparking riots among radical Muslim populations throughout the Middle East and Africa that resulted in at least two hundred deaths, and the destruction of various embassies of countries whose laws permitted publication of the images.[16] The controversy prompted discussions about the line between free speech and respect for religion, and the extent to which Western democracies' policies on speech should accommodate other cultures.[17] Prior to the Jones Koran burning in 2011, that discussion was primarily situated in Europe. After Jones' stunt, however, Americans felt the modern-day implications of their free speech philosophy more directly. Out of that controversy, legal scholars began to question whether our free speech doctrine, molded into its current state in the 1960s, should still be applied with equal force today given the likely global consequences of doing so.[18]

This Note explores the problems associated with adhering to our current free speech doctrine in spite of these international events, surveys how various other democratic nations have dealt with these issues, discusses possibilities for domestic reform, and ultimately, makes two recommendations, one legal and one involving social policy. Keeping in mind the Jones controversy as an example of the adverse results permitted under our current system, the focus is on discovering whether similar tragedies can be avoided in the future, either by applying our judiciary's historical approach to free speech during war time, or through new legislative measures like those passed in other

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[14] Timothy Zick, *The First Amendment in Trans-Boarder Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 990 (2011).

[15] *Embassies Torched in Cartoon Fury*, CNN (Feb. 5, 2006), http://articles.cnn.com/2006-02-04/world/syria.cartoon_1_danish-newspaper-jyllands-posten-danish-government-embassy-staff?_s=PM:WORLD.

[16] *Id. See also* Patricia Cohen, *Danish Cartoon Controversy*, N.Y. TIMES (Aug. 12, 2009), http://topics.nytimes.com/topics/reference/timestopics/subjects/d/danish_cartoon_controversy/index.html.

[17] Cohen, *supra* note 16.

[18] See, e.g., R. Ashby Pate, Blood Libel: Radical Islam's Conscription of the Law of Defamation into a Legal Jihad Against the West—And How to Stop It, 8 FIRST AMEND. L. REV. 414 (2010) and Lyrissa Barnett Lidsky, Incendiary Speech and Social Media, 44 TEX. TECH L. REV. 147 (2011).

Westernized countries.[19]

Ultimately, a wholesale departure from current free speech doctrine would be unwise due to the costs and impracticability of executing such a change. However, one way to begin addressing the problem is to impose modest requirements on Internet Service Providers and encourage cross-cultural dialogue to foster co-existence, despite seemingly incompatible free speech norms and the ubiquity of Internet communications. Doing so may ease the tensions with those who disagree with our free speech philosophy, thereby helping to build international accord and protect Americans abroad.

I. WHY IS SPEECH THAT INCITES VIOLENCE IN ACTIVE MILITARY ZONES ABROAD CONSTITUTIONALLY PROTECTED?

A. *The Court Attempts to Delineate Speech Falling Outside of Constitutional Protection Through the Espionage Act Cases and the Clear and Present Danger Test.*

Before seeking a solution to issues presented by modern communication forms and ongoing combat overseas, it is instructive to review how the courts have historically treated free speech during military engagements, and whether that strategy could resolve some of the problems that the Jones controversy exemplifies. Zachariah Chafee, in a *Harvard Law Review* article compiled on the heels of World War I, grappled with the issue of whether the government may impose punishment for the utterance of words that tend to result in lawlessness, or whether the speech must directly incite acts in violation of the law to render them punishable.[20] He did so by discussing the cases involving violations of the Espionage Act,[21] which was amended during the First World War. Of particular interest considering the Jones dilemma today, are the Act's added offenses:

> uttering, printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language, or language intended to cause contempt, scorn, contumely or disrepute as regards the form of government of the United States . . . or the uniform of the Army or

[19] *See, e.g.*, Racial and Religious Hatred Act, 2006, c. 1, §§ 29B, 29C, 29E, 29F (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2006/1/pdfs/ukpga_20060001_en.pdf; Criminal Code, R.S.C. 1985, c. C-46, s. 319, *amended by* 2012, c. 14, s. 2 (Can.), *available at* http://laws-lois.justice.gc.ca/eng/acts/C-46/page-150.html#h-92; *Anti-Terrorism Act (No. 2) 2005* s 80.2 (Austl.), *available at* http://www.comlaw.gov.au/Details/C2005A00144.

[20] See generally Zechariah Chafee, Freedom of Speech in War Time, 32 HARV. L. REV. 932 (1919).

[21] 18 U.S.C. §§ 794–99 (1996).

> Navy . . . *or any language intended to incite resistance to the United States* or promote the cause of its enemies.[22]

To Chafee, those amendments executed by Congress in 1918 and the resulting Supreme Court decisions, discussed more fully below, showed that "[t]he government regards it as inconceivable that the Constitution should cripple its efforts to maintain public safety."[23] One must naturally ask, then, under what circumstances the constitutional mandate that the government refrain from abridging an individual's freedom to discuss matters of public concern trumps its duty to protect its citizens, particularly in times of war.

In reviewing the constitutionality of the Espionage Act, the courts first had to decide whether Congress had the power to criminalize certain classes of speech, such as opposition to the war, and therefore deem those classes outside of First Amendment protection.[24] Second, the courts had to determine, for speech to be unprotected by the First Amendment, whether the speaker must have intended for his words to put the public safety at risk, or merely to publish words that would have a tendency to jeopardize a public interest, such as war victory.

The Supreme Court took the latter approach by recognizing a series of convictions under the Espionage Act, where the speakers' words were constitutionally criminalized despite the fact that they could not have had a direct or immediate impact on public safety.[25] In doing so, the Court inherently approved of the doctrine of indirect causation during wartime.[26] That is, one's speech need not directly cause or incite an illegal act for it to fall outside of the First Amendment. This, coupled with the doctrine of constructive intent, which presumes a speaker's violent intent due to the bad tendency of the words, allowed judges and juries to effectively engage in ex post facto censorship.[27]

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[22] Chafee, *supra* note 20, at 936 (emphasis added). While the Act has been amended, actions like those of Jones' could arguably, yet with more difficulty, be prosecuted under the current language, which states,

> Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits . . . any document, writing, . . . note, instrument, appliance, or information relating to the national defense, shall be punished.

18 U.S.C. § 794(a) (1996).

[23] Chafee, *supra* note 20, at 937.

[24] *Id.* at 943–44. The classic argument for the government's ability to declare certain speech outside of the First Amendment in the name of public safety is that the constitution should not protect someone who yells "fire" in a crowded theater. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[25] See infra, notes 30, 33-35.

[26] Chafee, *supra* note 20 at 948–49. Otherwise, if speech needed to directly incite illegal activity, it would already be outlawed by criminal solicitation and attempt, which prohibits speech that is reasonably close to producing an unlawful end.

[27] Id. at 949.

The fact-finders at trial, therefore, independently decided where to draw the line between the government's interest in a successful war effort and interests in the open exchange of opinions.[28] This was a particularly troublesome practice in the Espionage Act cases, where patriotic jurors were prone to find anti-war speech detestable, and therefore to find a sufficiently injurious intent on the part of the speaker to place it within the class of speech punishable under the Constitution.[29]

The Supreme Court, had ample opportunity in the World War I era to address this issue and avoid future divergent rulings on what types of speech fell within the First Amendment's protection, but failed to do so. In *Schenck v. United States*,[30] a member of the Socialist party challenged his Espionage-Act conviction after having printed and mailed anti-war leaflets to thousands of potential draftees. Upholding the conviction, Justice Holmes attempted to clarify the free speech line of cases by articulating the Clear and Present Danger test, which allowed courts to consider how likely the speech was to produce negative results, including an impediment to the war effort.[31] The new test, however, failed to dispose of the question of what speech could be constitutionally proscribed because it did not explain whether the "substantive evils" that Congress had a right to prevent by curbing speech included only overt acts that directly interfered with the war, or more incidental conduct that had a chance of impacting the war effort down a further chain of events.[32]

In the year after the *Schenk* ruling, the Supreme Court used the Clear and Present Danger test to uphold convictions against freedom-of-speech defenses in *Frohwerk v. United States*,[33] *Debs v. United States*,[34] and *Abrams v. United States*.[35] In *Abrams*, the defendants had thrown

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[28] *Id.* at 959. In doing so, courts were permitted to make declarations such as

> [n]o man should be permitted, by deliberate act, or even unthinkingly, to do that which will in any way detract from the efforts which the United States is putting forth or serve to postpone for a single moment the early coming of the day when the success of our arms shall be a fact.

Id. (citing United States v. "The Spirit of '76", 252 F. 946, 947 (S.D. Cal. 1917)).

[29] Chafee, *supra* note 20, at 949.

[30] Schenck v. United States, 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. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.").

[32] Chafee, *supra* note 20, at 967.

[33] Frohwerk v. United States, 249 U.S. 204 (1919) (upholding conviction under the Espionage Act where defendant prepared and distributed twelve newspaper articles critical of the war effort).

[34] Debs v. United States, 249 U.S. 211 (1919) (upholding conviction for a public speech intended to disrupt recruiting and enlistment efforts of the United States armed forces).

[35] Abrams v. United States, 250 U.S. 616 (1919) (upholding conviction for distributing leaflets

leaflets out a window that, among other things, urged the cessation of production of weapons to be used against Russia, which directly contravened an Espionage Act provision outlawing acts that intentionally hindered progress of the war.[36] Justice Holmes dissented, believing the facts did not support curtailing the defendants' First Amendment rights, and attempted to contract the reach of his Clear and Present Danger test, stating, "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[37]

But Holmes' iteration still leaves two key questions unanswered when applied to the modern-day communication problem. First, it does not define how immediate the evil must be, nor when the evil begins.[38] In the situation ignited by Jones, it took a mere two weeks after the Koran burning's online publication for word to spread and the deadly rallies to be organized, but given the unprecedented immediacy of Internet communication to far-reaching places, one could imagine such "evil" to develop even sooner in future cases. Second, Justice Holmes does not clarify what standard should govern the speakers' intent. It is clear that Jones and the Danish cartoonists did not knowingly or purposely cause deadly violence, but it is equally clear that they were reckless in disseminating speech that was likely to produce such a reaction, given recent history and the ongoing tensions between the West and the predominantly Muslim Middle-East.[39]

The Court also recognized that state laws that restrict certain types of speech undermining security fell outside of First Amendment protection.[40] In *Whitney*, the Court upheld the conviction of a woman who helped organize the Communist Labor Party and was prosecuted under a state statute that prohibited teaching of violence against the

denouncing the American form of government in favor of socialism).

[36] The third count on which the defendants were convicted used language directly from the statute and alleged that the charged parties unlawfully published "language 'intended to incite, provoke and encourage resistance to the United States in . . . war.'" *Id.* at 617 (quoting the Espionage Act, Pub. L. No. 104-294, 110 Stat. 3488 (1996) (codified as amended at 18 U.S.C. § 2388).

[37] *Id.* at 628 (Holmes, J., dissenting). Holmes also recognized that the standard reaches more cases in times of war because there is a greater chance that one's words will cause immediate danger. *Id.* at 627–28.

[38] This is a problem unique to the Internet because the potential for evil typically depends on the size of the audience that actively receives the content. Plausibly, the evil in the Jones controversy began when the first militant Afghani heard the speech and began assembling what became a mob of twenty thousand.

[39] *See* Lidsky, *supra* note 18, at 151 ("This violent reaction was completely foreseeable and, indeed, Jones recklessly disregarded the probability of violence engendered by his actions.").

[40] See Whitney v. California, 274 U.S. 357 (1927).

government.[41] In his oft-cited concurrence, Justice Brandeis urged further confinement of the instances in which the government could constitutionally restrict speech, stating, "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. . . . Only an emergency can justify repression."[42] Brandeis justified this perspective by appealing to the Framers' belief that open discussion is the only way to discover and spread political truth.[43]

While this focus on imminence moved the Court toward modern-day free speech doctrine, it also set the stage for one of the difficult issues addressed here. That is, how can free speech be defended on the basis of the American ideal of discussion through an open exchange of thoughts when those being incited to violence against America and its allies are not part of the traditional "marketplace of ideas" that free speech was designed to preserve? More pointedly, how is American society any closer to discovering "truth" by permitting citizens like Terry Jones to engage in acts that they know are likely to spur almost immediate bloodshed of allied forces or peacekeepers abroad?

B. *The Constitutionality of Prohibiting Conduct Containing Mixed Action and Speech*

As World War II gave way to the Cold War, the Court continued to be divided on exactly what speech constituted the type of "clear and present danger" that would permit preventative action on the part of the government. While a majority upheld the conviction of Eugene Dennis for conspiracy to advocate the overthrow of the American government in violation of the Smith Act,[44] Justice Douglas suggested that mere advocacy of illegal action had to be distinguished from acts that *actually* cause injury to the state in order to separate free speech doctrine from criminal conspiracy.[45] For any form of expression, then, to be of the

41 Id.

42 Id. at 377 (Brandeis, J., concurring).

43 Id. at 375 (Brandeis, J., concurring).

44 18 U.S.C. § 2385 (2006). The court considered several provisions of the Act, and deemed each of them constitutional, including those that made it unlawful to "knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States . . . organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States . . . or become a member of . . . such society . . . [and] to attempt to commit, or to conspire to commit any of the acts prohibited." Dennis v. United States, 341 U.S. 494, 496–97 (1951) (citing 18 U.S.C. §§ 10–11 (1946) *amended by* 18 U.S.C. § 2385 (2006)).

45 *Dennis*, 341 U.S. 494 at 585 (Douglas, J., dissenting) ("The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than

type that the government has power to proscribe, "[t]here must be some immediate injury to society that is likely if [the] speech is allowed."[46] Within Douglas's First Amendment interpretation, he used the word "immediately" quite literally to describe the type of impending damage the State must face to permit its prevention of speech, and so Douglas, applying the Clear and Present Danger doctrine of the mid-twentieth century, would likely hold that speech resulting in overseas violence several weeks later is still protected under the Constitution because of a lack of causal link between the speech and an actual, immediate injury to the county.

However, seventeen years after its *Dennis* decision, in *United States v. O'Brien* the Court deemed draft-card burning sufficiently injurious to the state for purposes of the Clear and Present Danger test, and thus decided that outlawing this type of expression was constitutional.[47] This appears to contradict Douglas's "immediate injury" standard because it is highly unlikely that, under the facts of the case, four men who burned their selective service cards in front of a "sizable crowd" were likely to cause immediate injury to the state in the form of a servicemen shortage.[48] *O'Brien* instead articulated a multi-prong test to govern cases involving both pure speech and non-speech conduct, such as burning a symbolic item, even when the actor's purported purpose is to express an idea.[49] Specifically, it determined that a government regulation abridging speech is sufficiently justified, and therefore constitutional, if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First-Amendment freedoms is no greater than is essential to the furtherance of that interest.[50] Thus, under the *O'Brien* test, the government could ban broadcasting live Koran-burning over the Internet only if a court were to say that doing so is within Congress's

a revolted dislike for its contents.").

[46] Id.

[47] United States v. O'Brien, 391 U.S. 367 (1968) (holding that the government has a substantial interest in maintaining availability of selective servicemen to warrant proscribing the non-communicative conduct of card-burning against one's right to symbolic speech).

[48] *Id.* at 369. The crowd actually attacked the defendants in response to their message, which would presumably have deterred onlookers from making copycat speeches that would have eventually hurt the state in the aggregate. *Id.*

[49] *Id.* at 376–77. Finding sufficient intent to damage the state was not at issue here, as O'Brien himself admitted he "burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, 'so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position.'" *Id.* at 370.

[50] Id. at 377.

constitutional war powers,[51] sufficiently furthers the governmental interest in maintaining safety of troops deployed in combat zones abroad, that the interest is unrelated to preventing expression by burning holy scriptures, and the restriction is so narrow that it only restricts free speech to the extent necessary to prevent inciting violence against deployed troops.

When examining the constitutionality of prohibiting mixed speech and non-speech conduct, an alternative to the cumbersome test set out in *O'Brien* is to simply make a common-sense assessment about which element is at the forefront among the expression and action, and which element is only incidental.[52] In doing so, one may look at what types of actions are typically subject to government control when the speech element is absent, or any indicators of legislative intent to truncate expression under the guise of a mixed-speech regulation.[53] Yale Law Professor Thomas Emerson finds fault in the Supreme Court's draft-card-burning cases, which were decided with the backdrop of the Vietnam War, for their failure to include this analysis.[54] He concludes that this inadequacy caused the Court to assume that non-speech elements of mixed conduct were prevalent enough to prohibit the overall act, regardless of the indispensable effect on the speech element, as long as some furthering of a substantial government interest could be shown.[55]

A closer look at the *O'Brien* test, however, reveals that in order to pass the first prong, the non-speech conduct must be significant enough to fall within the government's constitutional reach in the first place, meaning the Framers explicitly thought that act was sufficiently dangerous to fall outside of the First Amendment. And, under the fourth prong, the effects a statute has on the speech element may not be limitless, but instead must be curbed to the lowest extent necessary to achieve the legitimate government end.[56] *O'Brien* therefore stood for the proposition that if Congress ever wished to exercise one of its powers to prohibit an action that contained both speech and non-speech elements, it had to do so in conjunction with the limitations placed on it by the First Amendment. With that understanding, Emerson's alleged deficiencies in the Court's analysis are unfounded, and the *O'Brien* test may continue to be useful when thinking about how Congress and the

[51] One of Congress's enumerated powers is he ability to declare war, raise and support armies, and make all laws which shall be necessary and proper for carrying into execution those powers. U.S. CONST. art. I, § 8, cls. 11, 12, 18.

[52] Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 997 (1968).

[53] Id.

[54] Id. at 999–1000.

[55] Id. at 1000.

[56] See United States v. O'Brien, 391 U.S. 367, 377 (1968)

Courts can act in response to potential harms caused by publishing mixed content over the Internet today.

C. The Rationale Behind the Brandenburg *Incitement Test*

Given the requirement that legislatures' powers be exercised within the confines of the First Amendment, it is undisputed that a general prohibition on burning items, even when destruction would cause significant offense, is not within the government's constitutional reach,[57] and so prohibiting Koran-burning would necessarily fail the first prong of the *O'Brien* test. But whether such a ban could be justified on the basis of advancing other individual rights, such as freedoms of religion or association, given the seemingly minimal impact on speech rights, is less clear. Much has been made lately, particularly in light of post-September-Eleventh "Islamophobia," of the conflict between the United States' strict adherence to free speech when compared with other nations that continue to advocate for the abolishment of offensive speech in the name of global freedom of religion.[58] While the U.S. ratified the International Covenant on Civil and Political Rights in 1992, it expressed a reservation to a section of that treaty "prohibiting incitement to discrimination and violence" because it conflicted with the First Amendment.[59] The U.S. government thus determined that there was a gap between its conception of "incitement to violence" as it related to speech, and the views of the other signatories to the Resolution.[60]

The government's reservation underscores the fact that, under *Brandenburg v. Ohio*, incitement controls current American free speech doctrine.[61] "[C]onstitutional 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*."[62] The *Brandenburg* Court explained that under the First Amendment, the government could not restrict "mere advocacy" of

[57] *See* Street v. New York, 394 U.S. 576 (1969) (holding a New York law prohibiting flag burning unconstitutional because it did not serve the government's interest in preventing incitement, nor did it serve to restrict "fighting words" that would cause the average listener to retaliate). "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Id.* at 592.

[58] L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 EMORY INT'L L. REV. 69, 71–72 (2009) ("[The U.S.] brought about the first significant challenge to the resolution on defamation of religions at the U.N. Human Rights Council . . . .").

[59] Id. at 82.

[60] *Id.*

[61] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[62] *Id.* at 447 (emphasis added).

violence, even if it amounted to teaching of a necessity or duty to act violently as a means of achieving a group's goals.[63] Thus, the Court clearly called for a narrow reading of "likely to incite or produce," restricting speech only where it "prepar[es] a group for violent action."[64] And, as a result, any American's Internet speech that conjures violent reaction from our foes abroad would clearly lie outside of constitutional restriction because the speaker would have had no active role in preparing the law-breakers to act, despite the fact that his speech was a proximate cause of the violence. Further, by focusing on advocacy speech, the Court implicitly determined that the speaker must have actual intent to bring about the imminent lawlessness.[65] Thus, a speaker such as Jones who has only knowledge of the likely consequences of his words, as opposed to actual intent to bring about those results, may not have his speech constitutionally unprotected.

The Espionage Act cases, up until the development of the Clear and Present Danger test and the draft-card-burning cases, evidence a greater willingness to permit government discretion to restrict speech, at least insofar as the speech could have an effect on the country's war effort. Whether these decisions were prompted by fear of imposing world superpowers or simply a difference in prevailing ideology, may never be known. What is clear is that with *Brandenburg* as the backbone of our law today, and Congress's adherence to it vis-à-vis more restrictive notions of speech that appear in international treaties, any case attempting to hold Jones accountable for his actions in a U.S. state or federal court would be dismissed under the controlling doctrine. As a result, any workable solution to the cross-border speech problem must regulate not the speech of individuals, but the system by which they communicate.[66]

II. CHALLENGES POSED BY APPLYING THE INCITEMENT STANDARD TO MODERN SPEECH OVER THE INTERNET AND THE IMPRACTICALITY OF ALTERING *BRANDENBURG*

One of the difficulties in applying *Brandenburg* today is that it developed the incitement doctrine during a time when the United States' military engagements were not nearly as extensive as they are today. Interestingly, in advocating for incitement over the Clear and Present

63 *Id.* at 448–49.
64 *Id.* at 447–48.
65 *Id.* at 448.
66 As one legal scholar suggested at the outset of Internet popularity, "the most effective way to regulate behavior in cyberspace will be through the regulation of code—direct regulation either of the code of cyberspace itself, or of the institutions (code writers) that produce that code." Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 514 (1999). A proposal for beginning such regulation is discussed in Part IV, *infra*.

Danger test that the courts used throughout the First and Second World Wars, Justice Douglas commented that "[w]hether the war power—the greatest leveler of them all—is adequate to sustain that doctrine is debatable."[67] Douglas made it clear that the clear and present danger doctrine was "not reconcilable with the First Amendment in days of peace" because it was too easily manipulated by the courts, allowing the government to prohibit the mere advocacy of ideas that it found undesirable, and curbing free citizens' rights to seek a better society through discourse.[68] However, Douglas did not foreclose the possibility of applying a more restrictive test, such as the Clear and Present Danger test, in times of war, which necessarily assumes that the government, through its judiciary, has and may continue to consider national security concerns when rendering free speech decisions.[69]

Given the history of free speech decisions and the holding in *Brandenburg*, the unconstitutionality of limiting any speech on the Internet that may jeopardize national security in some way under our current regime is readily apparent. However, several factors also indicate that moving toward such a system, even if the constitutional issue could be resolved by considering the war power alongside the First Amendment, would be highly impractical. First, in addition to the traditional defenses of free speech such as preserving the marketplace of ideas,[70] the political support for such change simply does not exist. In fact, federal and state legislatures seem poised to strengthen government support for freedom of speech, specifically as it relates to speech that has reached foreign populations and become involved with other legal systems. [71] The new legislative efforts were spurred by a case in which an American citizen was forced to pay a libel judgment in British courts after twenty-three copies of a book in which she accused a foreign man of supporting terrorism were purchased online in England, where the

[67] Brandenburg, 395 U.S. at 451 (Douglas, J., concurring).

[68] *Id.* at 452.

[69] *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.").

[70] See Abrams v. United States, 250 U.S. 616, 630 (1919).

[71] *See* N.Y. C.P.L.R. 5304(b)(8) (MCKINNEY 2008) (allowing courts to refuse to recognize foreign judgments where the "cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions."). *See also* H.R. 1304, 111th Cong. (2009); S. 449, 111th Cong. (2009) (the two making up the proposed Free Speech Protection Act and offering protections similar to New York's version, but including only speech that is disseminated primarily inside the United States).

speech was unprotected.[72] The new American laws, both passed and proposed,[73] show an unwillingness among the public to conform to the free speech notions of other democratic societies. One author even suggests that further legislation should expand protections beyond defamation to preserve one's right to speak out about the conflict between Islam and the West without fearing legal repercussions abroad.[74] This is a shift from the country's apparent willingness to relinquish some personal freedoms in the wake of September Eleventh for increased security, despite the fact that legislation concerning those rights, particularly the Patriot Act,[75] was not without its constitutional concerns.[76]

Second, various commentators suggest that restricting a fundamental right in response to conflicting ideologies abroad would amount to appeasement. One analysis concludes that religious defamation and hate-speech laws enable Islamic extremists and succumb to their intolerance of freedom of expression because speakers become lawbreakers, legitimizing violence against those who attempt to exercise freedom of speech.[77] These arguments fail to consider the government's role in protecting not only the individual freedoms of its citizens, but their fundamental safety as well, which has justified the government in sacrificing First Amendment rights in the United States after September Eleventh.[78] In *Holder*, for example, the Supreme Court relied on this protective role to dismiss the plaintiffs' freedom of speech and freedom of association claims, and concluded by citing the Preamble to the Constitution, which "proclaims that the people of the United States ordained and established that charter of government in part to 'provide for the common defence.'"[79]

Third, it is not clear that restricting Internet communications that (perhaps unintentionally) incite violence from the enemy would actually further a purported legitimate government interest in protecting its citizens from violence due to the deep-seated conflict between Islamic

[72] *See* Ehrenfeld v. Bin Mahfouz, 9 N.Y.3d 501, 504 (2007).
[73] *See* N.Y. C.P.L.R. 5304 (MCKINNEY 2008); H.R. 1304, 111th Cong. (2009); S. 449, 111th Cong. (2009).
[74] Travis S. Weber, The Free Speech Protection Act of 2009: Protection Against Suppression, 22 REGENT U. L. REV. 481, 508 (2009).
[75] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272.
[76] See Surveillance Under the USA PATRIOT Act, ACLU (Dec. 10, 2010), http://www.aclu.org/national-security/surveillance-under-usa-patriot-act.
[77] See generally Pate, supra note 18.
[78] *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2707–08 (2010) (holding that a federal law that prohibits offering material support to any group the Secretary of State designates a foreign terrorist organization, regardless of whether the support was intended for otherwise lawful activity, is constitutional).
[79] Id. at 2731.

and Western cultures. Taking the Danish cartoon events as an example,[80] one could argue that even if publication of the images could have been avoided, fundamental differences in freedom of expression would have still led to violence between the two factions.[81] Indeed, in the Jones controversy, it has been asserted that most of those who joined violent mobs in Afghanistan were not aware of the Koran-burning until its President, Hamid Karzai, publicly described the act as "a crime against the religion and the entire Muslim nation" and demanded a "satisfactory response."[82] Thus, it is not clear that regulating Internet communications to countries where the offending speech would be outlawed if it were produced within its borders is a fruitful battle, as any potentially offensive speech, even if confined to the United States, could still be used to generate anti-West sentiment and incite violence against our troops abroad.

A fourth problem is that the goals served by Internet speech regulation, or a lack thereof, are varied throughout the world and therefore, a comprehensive solution that serves the interests of all Internet-using nations is impossible. The true issue is whether individual sovereigns should maintain their traditional notions of free speech or whether they should develop a compromise in light of global communication technology that makes speech readily available across those nations. "While other countries fear the imposition of American free speech hegemony, America fears that free speech protections for its own citizens will be undermined by global connectivity."[83] As a result, the United States has taken to international forums with proposals to guarantee various forms of worldwide freedom of expression.[84] Meanwhile, Islamic nations see the issue as a question of religious tolerance, and have sought international support for freedom of religion

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80 *See supra* notes 15–17 and accompanying text.

81 See Jerry Birenz, We Are All Danes, 23-WTR COMM. LAW. 2, 5 (2006).

> From all of the circumstances, it appears that the violent controversy over the Mohammed cartoons was manufactured. . . . Muslim religious leaders then traveled through the Arab world to stir up opposition (using, in addition to the twelve published cartoons, three other extremely offensive cartoons, including one of a pig with Mohammed's face, that as far as anyone can tell were never published anywhere and that may have been invented for the cause), and finally succeeded in doing so in February 2006.

Id.

82 Yaroslav Trofimov & Maria Abi-Habib, *Petraeus Says Quran Burning Endangers War Effort*, WALL ST. J. (Apr. 4, 2011, 12:55 PM), http://online.wsj.com/article/SB10001424052748703806304576240643831942006.html.

83 Pate, *supra* note 18, at 435.

84 *See* Zick, *supra* note 14, at 1002 ("[T]he United States was the driving force behind the Universal Declaration of Human Rights provision relating to freedom of information, which provides: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media *regardless of frontiers*.'").

agreements that are tailored toward silencing critics of Islam.[85] Until the global free speech issue is properly framed as one involving diverse concepts of individual freedoms as opposed to group ideologies, it is likely that the two factions will continue exchanging symbolic international proposals to appease their own populations instead of earnestly working toward consensus, or at least toward mutual understanding.

Similarly, while Islamic nations need to consider free speech as distinct from freedom of religion, the West must decide how far its domestic free speech doctrines should extend in the Internet age. Within the United States, the courts have made it clear that our body of free speech law applies equally to all media forms, including the Internet.[86] However, more acute questions, such as whether an American citizen's rights extend to speech disseminated solely to aliens abroad, have not been reconsidered in the Internet age, and therefore require the application of decisions that predate modern communication realities.[87] Even the rare judicial opinion that contemplates the application of free speech to electronic communications abroad has failed to resolve the issue.[88] But, because the courts are content to apply strict free speech principals to any content that may be accessed by an American within the United States[89], as is the case with Terry Jones' broadcast and almost all material transmitted via a web page, any free speech exception to material accessed solely outside of the country would appear to be extremely limited in its application.

Thus, for any solution to have the desired impact of protecting

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[85] *See* Weber, *supra* note 74, at 503–04 (noting that the United Nations Resolution Combating Defamation of Religions, supported predominantly by Muslim-majority countries, mentions only Islam by name and seeks to prohibit speech critical of that religion).

[86] *See* Reno v. ACLU, 521 U.S. 844, 885 (1997) (holding that a federal law prohibiting the indecent transmission of or patently offensive display of material on the Internet unconstitutional under the First Amendment).

[87] *See* Zick, *supra* note 14, at 942–43 ("Under Supreme Court and lower court precedents, most dating from the post-war and Cold War periods, U.S. citizens . . . are understood by some courts not to have any First Amendment right to send communications to audiences abroad consisting solely of aliens.").

[88] *See* Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199, 1217 (2006) ("The extent of First Amendment protection of speech accessible solely by those outside the United States is a difficult and, to some degree, unresolved issue.").

[89] *Id.* at 1222 ("If it were true that their [the foreign judgments'] terms require Yahoo! to block access by users in the United States, this would be a different and much easier case.) (citing Sarl Louis Feraud Int'l v. Viewfinder Inc., No. 04 Civ. 9760, 2005 WL 2420525 (S.D.N.Y. Sept. 29, 2005), which held a French judgment for damages based on photographs posted on the Internet freely accessible to American viewers unenforceable as contrary to the First Amendment)).

See also Robert D. Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 WM. & MARY L. REV. 863, 873 (1985) ("When communication reaches both a domestic and foreign audience, a more direct confrontation arises between government regulation of such communication and recognized first amendment values.").

American citizens from Jones-type speech, it first must be desired by a significant population at home. Then, it must be tailored to work within multiple legal frameworks, and accompanied by wider efforts to prevent ideology-based violence.

III. INTERNATIONAL DIVIDE ON EXISTING FREE SPEECH DOCTRINE IS A BARRIER TO DEVELOPING BUY-IN FOR A NEW, UNIFIED APPROACH TO INTERNET SPEECH.

Western countries are divided on which types of speech are afforded protection under law and the government's ability to proscribe speech that is not. In the Netherlands, an appellate court recently determined that politician Geert Wilders could not be held criminally responsible for his public criticism of Muslims under Dutch law because "an offensive statement about someone's religion [is] not a criminal offence."[90] The decision reversed a lower court's ruling that Wilders could be charged with hate speech and inciting discrimination because prosecution was "in the public interest" and within the Netherlands' "democratic legal system a clear line about hate speech in the public debate need[ed] to be drawn."[91] In a more proactive approach, the Australian government responded to new threats to its citizens and armed forces after September Eleventh by enacting what has been described as a "new law making it a crime to incite violence against the community or against Australian soldiers serving overseas or to support Australia's enemies."[92] These measures have likewise elicited responses from countervailing interests, including the negative impact on free speech protected under international treaties, and the lack of procedural safeguards to protect those fundamental rights.[93]

Without specifically referencing national security, the United Kingdom passed a law in 2006 that "ban[ned] the use of 'threatening words or behavior' that could intentionally stir up 'religious hatred.'"[94]

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90 Gilbert Kreijger & Aaron Gray-Block, *Dutch Populist Geert Wilders Acquitted of Hate Speech*, REUTERS (June 23, 2011, 12:38 PM), http://www.reuters.com/article/2011/06/23/us-dutch-wilders-idUSTRE75M10P20110623.

91 *Geert Wilders Prosecuted for Hate Speech*, NRC HANDELSBLAD (Jan. 21, 2009), http://www.nrc.nl/international/article2126874.ece/Geert_Wilders_prosecuted_for_hate_ speech.

92 Australia to Impose 'Draconian' Anti-Terror Laws, REUTERS (Sept. 27, 2005), http://www.rense.com/general67/auz.htm; see also A Consolidation of the Changes to the Criminal Code Act 1995 (Cth), Crimes Act 1914 (Cth) & Australian Security Intelligence Organisation Act 1979 (Cth) Proposed in the Anti-Terrorism Bill 2005, NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES ct. 16, 2005), http://www.nswccl.org.au/docs/pdf/Anti-Terrorism%20Bill%202005%20(consolidated).pdf.

93 A Human Rights Guide to Australia's Counter-Terrorism Laws, AUSTRALIAN HUMAN RIGHTS COMMISSION (2008), http://www.hreoc.gov.au/legal/publications/counter_terrorism_laws.html.

94 The Racial and Religious Hatred Act, 2006, c. 1 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2006/1/pdfs/ukpga_20060001_en.pdf;

In September 2010, six men who were presumably inspired by Jones were arrested and charged for violating the new law in a town north of London after they uploaded a video of themselves burning Korans on YouTube.[95] The law does not appear to be merely symbolic, as British courts have imposed criminal sentences for violations.[96] And the law, while requiring speakers to have a certain goal in mind before it may be used to prosecute them, diverges from U.S. law in the type of intent speakers must have before they become legally accountable. "In contrast to Britain's incitement laws, which are based on a broad interpretation of intent, the US Supreme court [sic] determined that unless it will cause a 'direct and imminent lawless action' demonstrations such as the Koran-burning are not illegal."[97] But as cases of immediate violent reactions to insensitive religious commentary produced online become more prevalent, and the effect of such speech becomes more certain, American authorities may have a difficult time determining whether such speech approaches that which can be proscribed, even under the intent requirements posed by *Brandenburg*.[98]

In France, authorities have been forced to provide security to media outlets that produce satirical pieces critical of Islam, as such speech is protected under French law.[99] Neither French lawmakers nor publishers were compelled to change course on free speech after the fallout from the Danish cartoon publications, which resulted in a firebomb attack on a satirical magazine's offices in late 2011 after it ran an issue "guest edited" by Muhammad.[100] This is very similar to the unrelenting approach taken by the United States, as embodied by Justice Brandeis's opinion in *Whitney v. California*:

> The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are

95 Theunis Bates, *Six British Men Arrested After Quran Burning*, AOL NEWS (Sept. 23, 2010), http://www.aolnews.com/2010/09/23/six-british-men-arrested-after-youtube-quran-burning.

96 *See* Al Webb, *British Man Sentenced to 70 days for Burning Quran*, HUFFINGTON POST (June 19, 2011, 6:12 AM), http://www.huffingtonpost.com/2011/04/19/british-man-sentenced-burning-quran_n_851222.html.

97 Alex Spillius, *9/11 Koran Burning: What the Law Says*, TELEGRAPH (Sept. 9, 2010, 5:53 PM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7992411/911-Koran-burning-what-the-law-says.html.

98 See supra notes 61-64 and accompanying text.

99 Giulio Meotti, *Europe's Veil of Fear*, YNETNEWS.COM (Nov. 5, 2011, 9:18 PM), http://www.ynetnews.com/articles/0,7340,L-4144192,00.html.

100 *Id.*

> education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.[101]

This approach is vastly different from Russia's, where a district court found the director of a museum to be in violation of a criminal law for opening an exhibit with forty-five pieces warning viewers against the dangers of organized religion.[102] The defendants there submitted an application to the European Court of Human Rights based on a state violation of an international convention providing for freedom of expression, but the application was held to be inadmissible.[103]

One scholar suggests that there may be greater differences in approaches to free speech within the West than between the West and the Islamic world.[104] In countries like the United States, offensive speech is seen as mere opinion expressed by "puny anonymities" that will inevitably be overpowered by the "test of truth."[105] In countries like France and Germany, however, the same speech is perceived as a threat posed by "totalitarians in waiting."[106] This dichotomy is better understood considering European history and the resulting fear that words could lead to tragedies such as the Holocaust. However, in America, speech has never been associated with such suppression of individual liberties. Terry Jones can legally express his hatred for Islam and his desire to eradicate it because our system protects the ideas he denounces as much as it does his own, as reflected by a 2010 decision prohibiting a ban on the use of Islamic law in a state court.[107]

Undoubtedly, Internet speech is a global issue that must be addressed not only by the Unites States and Islamic nations, but through a system that accounts for the ideals and histories of all societies that use the web as a means of accessing information. Given the varying tolerance for free speech even among Westernized nations, this will require a concerted effort to develop mechanisms that permit speech transmission within certain geographic areas, while also filtering out certain speech that would offend the culture and laws of those located elsewhere.

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101 Whitney v. California, 274 U.S. 357, 378 (Brandeis, J., concurring).

102 *See* Samodurov v. Russia, App. No. 3007/06, Eur. Ct. H. R. 10 (Dec. 15, 2009) at 11 (discussing law that criminalizes acts aimed at "hostility towards" a group based on their sex, race, ethnicity, language, social origin or religion), *available at* http://www.article19.org/data/files/pdfs/analysis/russia-first-decision-yuriy-samodurov.pdf.

103 *Id.* at 12.

104 Robert A. Kahn, *The Danish Cartoon Controversy and the Rhetoric of Libertarian Regret*, 16 U. MIAMI INT'L & COMP. L. REV. 151, 180 (2009).

105 *See* Abrams v. United States, 250 U.S. 616, 629–30 (1919) Holmes, J., dissenting).

106 Kahn, *supra* note104.

107 James C. McKinley Jr., *Judge Blocks Oklahoma's Ban on Using Shariah Law in Court*, N.Y. TIMES (Nov. 29, 2010), http://www.nytimes.com/2010/11/30/us/30oklahoma.html.

IV. ACCEPTING THE INTERNET PROBLEM AND DEVELOPING SOLUTIONS THAT SERVE A GLOBAL COMMUNICATION FORM.

Through an analysis of twentieth-century free speech doctrine, the difficulty in applying *Brandenburg* today and adjusting its rule to reflect the realities of Internet speech and war conditions becomes evident. Further, by comparing how America treats speech in relation to other nations and cultures, the following issues emerge for consideration in developing a solution: (1) how far should the United States go in protecting freedom of expression on the Internet, given its global nature; (2) how far does the marketplace of ideas that the First Amendment was designed to protect extend; (3) given the greater speech protections afforded in the United States, how should it resolve discrepancies in speech standards both within the West and with Sharia law; (4) what choice of law standards should govern complaints that arise; and (5) given the risk of Internet speech inciting populations where American troops are deployed, how, if at all, should our ongoing military obligations figure into a solution?

A. *A Domestic Consideration: Inviting Discussion of the Issues Among Diverse Populations and Ridding the Stigma of Self-Censorship.*

One of the difficulties created by America's historical treatment of free speech is that it may have spurred the overvaluation of some speech, such that any efforts to combat present-day issues like security concerns and global sensitivity may be thwarted by this historical notion of expression as a fundamental, uninfringeable right. This has created a problem in perception and resulted, unfortunately, in a large portion of the American population deeming self-censorship an unacceptable alternative. For example, before the American cartoon series "South Park" was scheduled to televise an episode that depicted Muhammad, a posting appeared on *Revolutionmuslim.com* warning the cartoonists that they might end up like others who had been killed for criticizing Islam.[108] The posting included pictures of the cartoonists and their work addresses, and quoted a religious authority saying, "Harming Allah and his messenger is a reason to encourage Muslims to kill whoever does that."[109] As a result, Comedy Central, the network that airs South Park, inserted visual censors over any images of Muhammad and added audio bleeps.[110] According to one poll, the public response to this censorship

[108] Tim Lister, *Security Brief: Radical Islamic Web Site Takes On 'South Park'*, CNN (Apr. 19, 2010, 12:56 PM), http://news.blogs.cnn.com/2010/04/19/security-brief-radical-islamic-web-site-takes-on-south-park.

[109] *Id.*

[110] Dave Itzkoff, *'South Park' Episode Is Altered After Muslim Group's Warning*, N.Y. TIMES (Apr. 22, 2010, 3:36 PM), http://artsbeat.blogs.nytimes.com/2010/04/22/south-park-episode-is-

was overwhelmingly negative, with seventy-one percent of respondents disagreeing and only nineteen percent agreeing with the decision to censor the cartoons.[111] Columnists wrote that "[t]he terrorists win"[112] and dubbed it "the lowest point in the history of American TV,"[113] while law professor Eugene Volokh suggested that "[t]he consequence of this position is that the thugs win and people have more incentive to be thugs."[114]

This adverse perception of self-censorship, instead of recognizing it as a partial solution to the safety, religious sensitivity, and national doctrinal differences exacerbated by global communications, is highly misguided. As has been noted in the context of religious defamation, the First Amendment does not afford a "right not to be offended."[115] However, for a media company to acknowledge the current state of global affairs, including the connection between religious insults and national identity,[116] seems completely reasonable, especially in light of violent reactions toward other publishers running satirical pieces involving Muhammad.[117]

Further, self-censorship does not necessarily need to be founded in fear, but can be the result of thoughtful planning and open dialogue between representatives of different cultural groups. *Yale University Press* employed this tactic, resulting in a decision not to republish the Danish cartoons in a book discussing those events after the publisher engaged various experts on Islam who advised against it.[118] Only through discussion will there develop mutual respect, or at least a sufficient understanding of, diverse laws, beliefs, and customs. Once this understanding is achieved, more people will be mindful of the

altered-after-muslim-groups-warning.

111 Jennifer Riley, *Majority of Americans Oppose South Park's 'Muhammad' Censor*, CHRISTIAN POST (Apr. 30, 2010, 2:49 PM), http://www.christianpost.com/news/surveymajority-of-americans-oppose-south-park-censor-44966.

112 Michael Cavna, *Jon Stewart Satirizes Own Network's Censorship of 'South Park' Muhammad Episode*, WASH. POST (Apr. 23, 2010, 8:56 AM), http://voices.washingtonpost.com/comic-riffs/2010/04/post_2.html.

113 Margaret Wente, *Jihad Jitters at Comedy Central*, GLOBE & MAIL (Apr. 24, 2010, 5:00 AM), http://www.theglobeandmail.com/news/opinions/jihad-jitters-at-comedy-central/article1545262.

114 Scott Collins & Matea Gold, *Threat Against 'South Park' Creators Highlights Dilemma for Media Companies*, L.A. TIMES (Apr. 23, 2010), http://articles.latimes.com/2010/apr/23/entertainment/la-et-south-park-20100423.

115 Graham, *supra* note 58, at 76.

116 *See Protests Against US Koran-Burning Sweep Afghanistan*, BBC (Sept. 10, 2010, 11:57 AM), http://www.bbc.co.uk/news/world-south-asia-11258739 (quoting Afghan President Hamid Karzai as saying "[i]nsulting the Koran is an insult to nations").

117 *See* David Jolly, *Satirical Magazine Is Firebombed in Paris*, N.Y. TIMES (Nov. 2, 2011), http://www.nytimes.com/2011/11/03/world/europe/charlie-hebdo-magazine-in-paris-is-firebombed.html (reporting a Molotov cocktail was thrown into the headquarters of French magazine Charlie Hebdo after it ran an issue "guest edited" by the Prophet Muhammad).

118 Cohen, *supra* note 16.

widespread consequences of their Internet speech, and will therefore be willing to temper it—not because the law says they must, but because it will save lives in the short term and promote peace in the future. When listeners, too, become aware that censorship can be reasoned and deliberate, rather than the result of an impulse arising from fear of retaliation, they will be more inclined to applaud those efforts, as opposed to criticizing them for not pushing the limits of free speech rights. Media producers, in turn, will have more incentive to act as CNN did when concluding its article on the Danish cartoon violence with the sentence "CNN has chosen to not show the cartoons out of respect for Islam."[119]

B. *An International Solution: Preserving National and Cultural Sovereignty by Imposing Modest Requirements on Communications Providers and Putting Decisions in the Hands of Listeners.*

When content leaves the United States and is directed at audiences in other sovereign nations, jurisdictional issues arise that require their own resolution alongside the free speech discussion. In the South Park case, Comedy Central went further than censoring the original episode in its domestic broadcast, also choosing to omit the two episodes involving Muhammad from the Region 4 DVD release (which includes Europe and the Middle East),[120] refusing to stream uncensored versions on the South Park official website,[121] and preventing original broadcast in several European countries.[122] If the content of the episodes omitted from those DVDs and Comedy Central's international websites is considered outlawed in those jurisdictions, such censorship may be judicially enforceable because it is intended for only non-American audiences.[123]

Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199 (2006) is one of the only decisions to contemplate foreign speech law as it relates to content produced in the United States and transmitted abroad over the Internet. There, French authorities wrote a cease-and-desist letter to Yahoo, which operates a French-language affiliate of its American website, located in and intended for audiences

119 See Embassies Torched in Cartoon Fury, supra note 15.

120 *See* South Parkason 14 [DVD], AMAZON.CO.UK, https://www.amazon.co.uk/South-Park-Season-14-DVD/dp/B0052WHLGM (last visited Feb. 4, 2012) (at the time of this writing, there were twenty one-star reviews in the comments section criticizing the omission of the two episodes).

121 Itzkoff, *supra* note 110.

122 Peter Vinthagen Simpson, *South Park Muhammad Joke Won't Air in Sweden*, LOCAL (Apr. 29, 2010), http://www.thelocal.se/26366/20100429/.

123 *See* Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199, 1219 (2006).

in France, to remove access to images of Nazi symbols and websites selling Nazi memorabilia because under French law, any speech constituting an apology for Nazism or denying the Holocaust is illegal.[124] As a result of Yahoo's failed compliance, a French court ordered it to "*take all necessary measures to dissuade and render impossible* any access [from French territory] via Yahoo.com to the Nazi artifact auction service" and to post a warning on Yahoo's French site that anyone who accessed such prohibited material through Yahoo's English site would be subject to penalties under law, among other requirements.[125] Thereafter, Yahoo claimed that it could not devise a technical solution that would put it in full compliance with the French order, and sought declaratory relief in an American federal court.[126]

The issue in *Yahoo!* was whether the French orders requiring restricted access to Internet content only in a foreign jurisdiction were enforceable in the United States.[127] The court stated that the proper standard under the Uniform Foreign Money-Judgments Recognition Act is whether the cause of action on which the order is based is repugnant to the public policy of the state considering enforcement, and, as such, rephrased the issue into "whether California public policy and the First Amendment require unrestricted access by Internet users *in France*."[128] While the court acknowledged that the existence "of such an extraterritorial right under the First Amendment is uncertain," it failed to resolve the issue because Yahoo had not yet complied with the French order, and therefore its restrictive effects on Americans attempting to access the content (the plaintiff's "injury") were unknown and the case was not ripe.[129] However, it appears from the court's discussion that those responsible for transmitting speech to foreign jurisdictions may be restrained in the type of content they can provide to those localities based on the law of the nation where the broadcast is intended to take place, as long as whatever means used to restrict the content do not simultaneously abridge Americans' ability to access the speech.[130]

As evidenced by recent debate over the Stop Online Privacy Act, imposing any significant duties on Internet service providers (ISPs) or other Internet intermediaries to monitor the content they disseminate would breed criticism.[131] The fear is that tech companies would be

124 *Id.* at 1202–03.
125 Id.
126 *Id.* at 1203–04.
127 *Id.* at 1212.
128 *Id.* at 1213, 1217.
129 *Id.* at 1221, 1223–24.
130 *Id.* at 1223-24.
131 Edward J. Black, *Internet Users, Free Speech Experts, Petition Against SOPA*, HUFFINGTON

forced to do away with user-generated content because they cannot control the legality of such content, or alternatively, the companies would need to hire droves of monitors to constantly remove the content as it is detected.[132] However, one of the approaches taken in *Yahoo!* (hereinafter the "*Yahoo!* solution") produces a result that is both fair to the ISPs and in accordance with constitutional law. That solution involves placing a requirement on ISPs to post warnings about local law as it pertains to content and speech that one may be about to access from another jurisdiction, as well as the possible consequences of doing so. This approach may prevent speech from reaching audiences whose legislatures have decided the content has no place in their society, while also allowing those sovereigns to apply their own laws once the speech transcends their borders.[133]

For example, if an individual using a localized site in a Middle Eastern country typed "Koran burning" into a search engine and a result directed them to an American version of a site such as YouTube, before connecting the user to the content provider, the ISP would have to display a clear disclaimer of local speech law and the risks that accessing foreign-generated content poses. Instituting such a requirement provides a form of censorship only where such censorship has deemed appropriate under local law. Placing on those proving access to information the burden to provide disclaimers and on end-users the burden to comply with local law is not unprecedented. Viewers of Budweiser's web site, for instance, must first affirm that they are twenty-one years of age and agree to terms of use including, "If you use this site from other locations you are responsible for compliance with any and all applicable local laws."[134]

The *Yahoo!* solution, while not a panacea, is a modest proposal that would address several of problems created by strictly applying

POST (Dec. 13, 2011, 5:05 PM), http://www.huffingtonpost.com/edward-j-black/stop-online-piracy-act-vote_b_1145949.html. *See also* Jacqueline D. Lipton, *Law of the Intermediated Information Exchange*, 64 FLA. L. REV. 1337, 1356 (2012) (reciting the argument that such regulation would "negatively impact the online marketplace of information and ideas").

132 See Black, supra note 131.

133 This suggestion is offered with an understanding that cyberlaw largely presents a question of extending or limiting liability to Internet intermediaries, which some say "are the most effective 'choke points' for enforcing desired norms of behavior online through their own policies, through the enforcement of legal rules, or through a combination of both." Lipton, *supra* note 131, at 1345.

134 *Terms & Conditions—Your Guide to Great Times*, BUDWEISER, http://budweiser.com/public/terms-conditions.aspx#/public/terms-conditions (last visited Feb. 4, 2012). Similarly, YouTube's terms of service contain the provision "YouTube makes no representations that the Service is appropriate or available for use in other locations. Those who access or use the Service from other jurisdictions do so at their own volition and are responsible for compliance with local law." *Terms of Service*, YOUTUBE ¶ 10, http://www.youtube.com/t/terms (last visited Feb. 11, 2012).

Brandenburg to current Internet communication, discussed in Part III. First and most importantly, imposing a mere informational requirement on a US-based intermediary that connects foreign sites to those generated in the Unites States does not affect one's First Amendment right to communicate freely with fellow Americans. The minimal interference would be to U.S. recipients of the speech who use foreign ISPs for language preferences or otherwise. These individuals would merely have to affirm that local law permits them to access the content.

Second, the solution would clarify jurisdictional issues by separating dissemination from possession. Essentially, Internet users in foreign jurisdictions who access the content would concede that the speech occurred lawfully in the United States and assume responsibility for carrying it into their present jurisdiction. By equating access to web content to possession of a tangible object, these cases become more like those that have relevant precedent, such as illegal possession of drugs that were shipped from a jurisdiction that permits the drugs. The main difference in the Internet cases is that those who venture across borders and access content generated in their home jurisdictions may have to be considered "stepping back home" through the Internet to comply with the Supreme Court's assumption that "First Amendment protections reach beyond . . . national boundaries."[135] This is not to say, however, that an American citizen accessing speech from an American site in France that would be illegal under French law could then republish that speech on a French site while resting on U.S. First Amendment freedoms.[136]

Third, a solution that recognizes the rights established by foreign governments for their citizens while simultaneously encouraging compliance with local laws will strengthen international relations. The *Yahoo!* court synthesized the typical international tensions created by Internet communication by noting that "as to the French users, Yahoo! is necessarily arguing that it has a First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others."[137] By definitively answering that this is not how the free speech doctrine will be applied to the web, our courts can give a much-needed modern interpretation of the First Amendment without alienating our allies.

To be effective, any domestic solution to these issues must

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135 Haig v. Agee, 453 U.S. 280, 308 (1981).

136 *See* Desai v. Hersh, 719 F.Supp. 670, 676 (N.D. Ill. 1989) (concluding that "[F]irst [A]mendment protections do not apply to all extraterritorial publications by persons under the protections of the Constitution" and in some of these cases "foreign law could be applied . . . without offending the Constitution").

137 Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199, 1220 (2006).

recognize that the marketplace of ideas is no longer confined to U.S. borders. "In the emerging global theater, a domestic speaker can easily reach a worldwide audience."[138] However, each sovereign should have the right to decide the extent to which its citizens may engage in that marketplace, as well as the legality of replicating certain items taken from the foreign market within its local market.

Professor Balkin, in advocating for an expanded Internet application of American free speech notions premised on participation and truth seeking, suggests that doing so would "greatly expand[] the possibilities for the realization of a truly democratic culture."[139] However, not everyone with Internet access is in a country that has the capacity to support a properly functioning democracy and to preserve all of the freedoms associated with it. It is easy for our courts to eliminate the threat of a heckler's veto and state that "the general First Amendment principle that when speech is of such a nature as to arouse violent reaction on the part of the lawless, the first obligation of government is to maintain the peace and enforce the law, and not to silence or punish the speaker."[140] But clearly Afghanistan did not have the law enforcement capacity to "maintain the peace" following Jones' actions,[141] and therefore, it may very well be reasonable for Afghanistan to restrict the free flow of such speech within its borders.

Because not all populations are prepared for, or even desirous of, an international "democratic culture," we cannot rely on dated, pre-Internet covenants championing individual freedoms to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice"[142] to guide our assessment of issues created by the web today. It is well settled that there are exceptions to both this covenant and the First Amendment, particularly where there is a sufficient government interest in preventing obstruction of its intelligence or military engagements.[143] When discussing the existence

138 Zick, *supra* note 14, at 990.

139 Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 6 (2004).

140 Bill v. Superior Court, 137 Cal. App. 3d. 1002, 1008 (Cal. Ct. App. 1982).

141 See Quran Burning Issue: Terry Jones vs World, YOUTUBE (Sept. 8, 2010), http://www.youtube.com/watch?v=MfPPtHtUfmQ.

142 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 art. 19 ¶¶ 1–2 (Dec. 16, 1966).

143 Haig v. Agee, 453 U.S. 280, 308–09 (1981) *See also* Lessig, *supra* note 66, at 518 ("No case has ever held that a speaker has a right not to be subject to any burden at all, if the burden is necessary to advance a compelling state need."); Matthew Hay Brown, *Bradley Manning to Return to Fort Meade for WikiLeaks Case*, BALT. SUN (Feb. 9, 2012), http://articles.baltimoresun.com/2012-02-09/news/bs-md-manning-arraignment-20120209_1_wikileaks-case-bradley-manning-collateral-murder (discussing prosecution for speech that revealed military intelligence).

of free speech rights abroad, our courts have consistently qualified such a right when it involves national security concerns.[144] Therefore, any international solution must be compatible with national laws and realities.

The *Yahoo!* solution would force each country to analyze those realities, codify its free speech philosophy, and then split the burden between individual citizens to refrain from intentionally violating local law, and international ISPs and large content providers to decrease the likelihood of violations by posting warnings based on a particular site's intended audience. The service and content providers would have to see to it that its foreign subsidiaries comply with local law, but speech on the American version would be unaffected. Thus, this solution would not run the same risks as a filter, which "may not be narrowly tailored and thus could incidentally block access to American users,"[145] but instead gives each user a chance to make an informed choice about what content to access.

By way of comparison to other forms of Internet censorship, this proposal would certainly be less restrictive of free speech than a statute requiring all public libraries receiving government funding to install filters on computers to restrict content that may be harmful to underage users, which the Supreme Court deemed constitutionally sound in *United States v. American Library Association*.[146] Although adults who asked a library attendant to remove the filter could access the protected content, Justice Stevens dissented because he assumed that some might be reluctant to make such a request, which would abridge an author's interest in reaching the largest possible audience.[147] Here, there is no such restraint, as one must simply acknowledge that she understands the laws that apply to her and assumes the risk of violation by accessing the content she has requested from a site that is not generated or operated within the jurisdiction in which she sits.

Nor is the *Yahoo!* solution explicitly counter to current U.S. legislation. Critics of similar "filtering" plans, which require ISPs to actually restrict content within individual jurisdictions that have outlawed it, note that such treatment undermines 47 U.S.C. § 230(c)(1),[148] which provides that "[n]o provider or user of an interactive

144 Bullfrog Films, Inc. v. Wick, 646 F.Supp. 492, 502 (C.D. Cal. 1986) ("[T]he Court concludes there can be no question that, in the absence of some overriding governmental interest such as national security, the First Amendment protects communications with foreign audiences to the same extent as communications within our borders.").

145 Aaron D. White, Comment, *Crossing the Electronic Border: Free Speech Protection for the International Internet*, 58 DEPAUL L. REV. 491, 508 (2009).

146 United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

147 *Id.* at 224–25 (Stevens, J., dissenting).

148 White, *supra* note 145, at 515–16.

computer service shall be treated as the publisher or speaker of any information provided by another information content provider"[149] and essentially frees ISPs from liability relating to any speech contained on its sites not produced by them. However, ISPs are not without obligations, as the very same statute requires ISPs to inform their users about content controlling devices that "may assist the customer in limiting access to material that is harmful to minors."[150] The solution that has been advanced throughout Part IV.B would provide a similar requirement that ISPs inform users how to voluntarily restrict content that would result in access to undesirable or unlawful speech.

CONCLUSION

"Only the emergency that makes it immediately dangerous to leave the correction of evil . . . warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"[151] Whether we are currently in such an emergency, given unprecedented governmental action such as the passage of the Authorization for Use of Military Force,[152] is debatable. What is undeniable is the fact that stubborn differences in free speech notions have resulted in bloodshed in several instances over the last decade. In reviewing free speech doctrine during wartime, it is unclear whether the war power can be invoked to restrict speech that would otherwise be protected under the First Amendment, as the two constitutional provisions must be considered in conjunction under *O'Brien*.[153] Considering the magnitude of this issue and the tensions involved, however, the solution should be applicable at all times. As a result, a departure from the *Brandenburg* incitement standard is probably unworkable given historical interpretations of individual free speech rights accorded to American citizens under our Constitution. However, by recognizing that exchanges reaching various cultures over the Internet may allow someone to "incit[e] or produc[e] imminent lawless action" and be "likely to incite or produce such action," despite her lack of actual advocacy of violence,[154] we can start developing a

149 47 U.S.C. § 230(c)(1) (2006).

150 47 U.S.C. § 230(d) (2006).

151 Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

152 Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat 224 (2001) (Providing that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.").

153 See supra notes 51, 57, 67–69 and accompanying text.

154 For an analysis of factors that make speech on the Internet and social media more susceptible to violent reaction than speech given in real space, see Lidsky, *supra* note 18, at 153 (quoting

system that relieves our free speech doctrine of some of its undesirable consequences that were not considered during its formation. These tempered solutions serve both individual freedom of expression rights and our international cohorts' goals of limiting speech where they deem it necessary due to their history, ideology, or lack of systems to control the externalities of strict free speech.

One improvement would be to require those who enable instantaneous communication across the globe to provide a warning when one seeks to access a site containing content produced outside the jurisdiction that may be considered illegal under local law, thus putting the choice of access squarely in the hands of an informed user. This, combined with educating the public as Internet speakers of global speech perspectives, and a presentation of self-censorship as an appropriate means of preventing offense to diverse cultures, rather than as a sign of weakness or submission to threats from intolerant fundamentalists, will serve to foster an international relationship whereby further solutions can be developed.

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

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