Tolerating extremism : to what extent should intolerance be tolerated?

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CHAPTER SIX

What limits should be imposed on free speech?

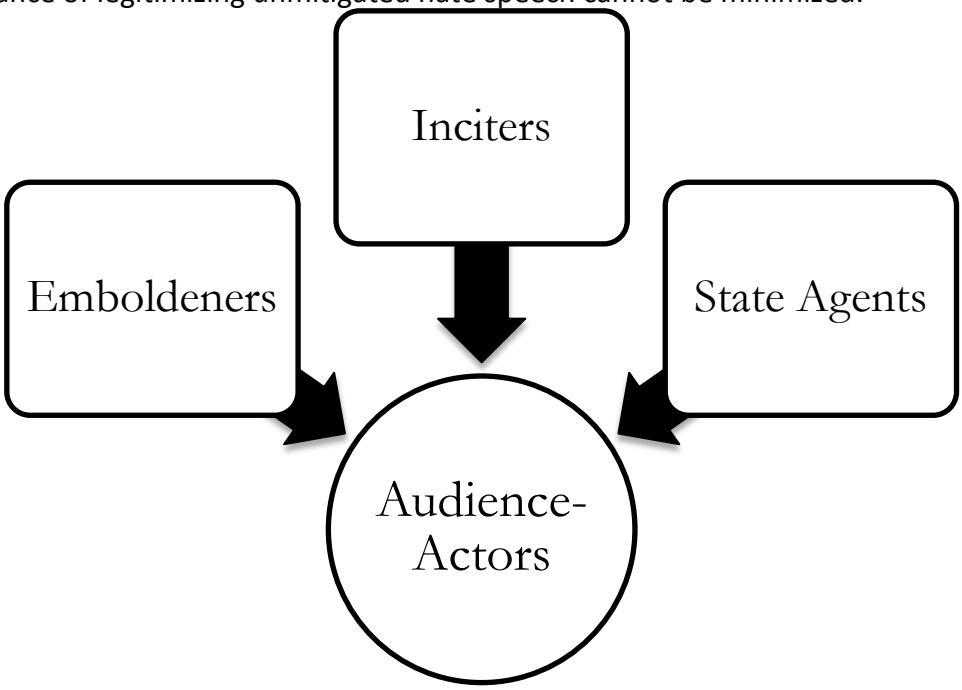
I. Israel

Approaching how to present this chapter to the reader weighed heavily on my mind at three different times: when developing the project proposal, when conducting in-country research and when researching the specific topic of free speech. A word of background is essential to understanding the approach I ultimately chose: my introduction to the extraordinary tension between free speech and incitement was as an Israeli citizen, watching, deeply concerned, as the religious and political right -wing engaged in vitriolic incitement against Prime Minister Rabin.[475] It is for that reason, then, that I have chosen to begin this chapter with a practical discussion regarding the tension between free speech and the price paid for that right. In doing so, I hope to ---starkly---present the reader with the realities of the free speech dilemma; the discussion, with respect to Israel, is not abstract for a terrible price was paid for tolerating incitement and intolerance. That is, both mainstream society and state agents ---acting in accordance with the law but failing to either robustly enforce existing law or legislate laws in response to 'clear and present threats'----respected the rights of those openly, constantly and loudly inciting against Prime Minister Rabin calling him "traitor" and "murderer".

The inciters were, primarily, right wing rabbis deeply opposed to the Oslo Peace Process; their incitement was hate filled, vitriolic and vocal. It was unrelenting and extremely discomforting; it, clearly, was a clarion call for someone to do something. Ultimately, Yigal Amir did something: he assassinated Rabin at the conclusion of an enormous gathering in Tel Aviv in support of Rabin and the peace process.[476] Irony of ironies, the final song at the gathering attended by hundreds of thousands of Israelis was "Song for Peace."[477] The rabbis were inciting with a keen understanding of their audience: right-wing religious nationalists deeply opposed to Rabin and his polices. The incitement against Rabin represents the danger posed when a perfect confluence exists between speaker and audience; the speaker (rabbis) knew his audience (right-wing religious nationalists) extremely well and the audience (Amir) knew what the speakers expected of him. While the rabbis directly incited, politicians emboldened the vitriol against Rabin by participating in hate-filled demonstrations and rallies. While those demonstrations and rallies were not

[475] The incitement against Rabin was directly related to his decision to engage the Palestinian's in a peace process (the Oslo Peace Accords) intended to result in the establishment of a Palestinian state and removal of Israeli settlements from the Gaza Strip and the West Bank.
[476] Jerrold Kessel, *Israeli peace son symbolizes a movement*, CNN (Nov. 13, 1995, 7:05 AM), http:// www.cnn.com/WORLD/9511/rabin/11-14/index.html.
[477] Lyrics can be views at http://www.hebrewsongs.com/song-shirlashalom.htm, (last visited Jan 11, 2013).

illegal they, undoubtedly, directly contributed to the pre-assassination hate-filled environment. The participation by leading members of the opposition party (Likud) was in full accordance with the law. Nevertheless, the presence of highly respected politicians emboldened speakers and audience alike by lending the incitement credibility and legitimacy. In the free speech-incitement dilemma the importance of legitimizing unmitigated hate speech cannot be minimized.[478]



The Rabin assassination, then, represents a paradigm consisting of four actors: inciters (rabbis); audience-actors; emboldeners (politicians) and state agents (charged with legislating and enforcing legislation).

Could the assassination have occurred without the embodiment of politicians and their presence at rallies and demonstrations? The answer is, in all probability, positive; nevertheless, by visibly participating the politicians legitimized the rabbinical incitement. While not a crime in accordance with the Israeli penal code it raises profound questions regarding bearing moral responsibility for the assassination.

There are particular pictures forever embedded in my memory: then Member of Parliament (today Prime Minister) Netanyahu leading a coffin bearing the sign "Yitzhak Rabin—the Murderer of Zionism"[479]; Members of Parliament Hanegbi, Katsav, Netanyahu and Sharon standing on the balcony in Jerusalem's Zion Square on a Saturday night, looking at placards bearing a likeness of Rabin

[478] Rabin's wife, Leah, refused to shake then Member of Parliament Netanyahu's hand at the funeral. *See* Naomi Segal, *Leah Rabin dad at 72*, JTA (Nov. 13, 2000), http://www.jta.org/news/article/2000/11/13/6368/LeahRabindeadat7.

[479] *Leah Rabin Awarded Anwar Sadat Peace Achievement Award*, NAGALIL, http://www.hagalil.com/israel/GuShalom/maamarim/leasadat.htm (last visited Jan. 12, 2013).

dressed in an SS uniform wearing a keffiyeh;[480] and hate-filled bumper stickers and slogans all but calling for violence against Rabin.

Like many Israelis, I will never forget where my family was when we heard the initial breaking news on TV that Rabin had been shot. Rabin's assassination was a transformational moment for Israelis not only individually but also as a society. The assassination dramatically affected the course of Israel's history. In conjunction with the horror associated with the assassination was deep concern at the failure of law enforcement, the state attorney and the judiciary to –in any way---satisfactorily protect Rabin either from the inciters or from his assassin, and subsequently to vigorously prosecute the rabbis who directly contributed to the assassination.

Distinctions are important: to that end, distinguishing between actions of the four politicians listed above and the rabbis who incited against Rabin is important.[481] That distinction is not intended to minimize the actions of the politicians but rather to distinguish between political discourse and words that directly contributed to Rabin's assassination. For two years prior to the assassination, extreme right-wing rabbis issued a variety of proclamations regarding Rabin. Rabbi Shmuel Dvir, a teacher at the Har Etzion Yeshiva, told his students that it was "definitely permissible to kill Rabin under the provision of *din rodef*."[482] *Din rodef* is the duty of a Jew to kill a Jew who imperils the life or property of another Jew.[483] Dvir even boasted to one of his students, "If Rabin comes to visit Gush Etzion, I myself will climb on a roof and shoot him with a rifle."[484]

The International Rabbinical Coalition for Israel, an organization of Orthodox rabbis, declared Rabin a *rodef*, a Jew who deserved to be killed because he imperiled the life or property of another Jew.[485] The ultra-Orthodox weekly paper, *Hashavna,* published a symposium issue addressing not only whether Rabin should be executed, but also the most appropriate method to carry out the killing.[486] These are but a few of the examples of the extremist religious speech that directly encouraged violence against Rabin. In the run-up to Rabin's assassination, *pulsa denura* was issued against him—a call to kill the prime

[480] Traditional Arab headdress worn by men.
[481] *See* Allan C. Brownfeld review of *Murder in the Name of God: Where Religious Extremism Can Lead* by Michael Karpin and Ina Friedman, http://www.acjna.org/acjna/articles_detail.aspx?id=117 last visited Jan. 10, 2013).
[482] Allan C. Brownfeld, *Israel: A Sharply Divided Society on the Brink of a Cultural Civil War*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS, (July/August 1999), *available at* www.wrmea.com/backissues/0799/9907086.html.
[483] Allan C. Brownfeld, *Growth of Religious Extremism in Israel Threatens the Peace Process*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS, (August/September 2000), *available at* http://www.washington-report.org/archives/Aug_Sept_2000/0010072.html.
[484] *Id.*
[485] Brownfeld, *supra* note 524.
[486] HASHAVNA (THE WEEKLY), November 3, 1995.

minister because of his decision to pursue the Oslo peace process.[487] The *pulsa denura*, translated as "lashes of fire," has long been a tradition of Kabbalah, a sect within Judaism. On the eve of Yom Kippur, in 1995, rabbis gathered on the sidewalk in front of Rabin's home after midnight to recite the ancient execration of *pulsa denura.* These 10 rabbis were disciples of the late Rabbi Meir Kahane. Avigdor Eskin,[488] the group's leader, intoned, "I deliver to you, angel of wrath and ire, Yitzhak, the son of Rosa Rabin, that you may smother him and the specter of him, and cast him into bed, and dry up his wealth, and plague his thoughts, and scatter his mind that he may steadily diminish until he reaches his death."[489] As Eskin chanted, the other rabbis joined in, saying, "Put to death the cursed Yitzhak, son of Rosa Rabin, as quickly as possible because of his hatred for the Chosen People."[490] The ceremony came to an end with Eskin shouting, "May you be damned, damned, damned!"[491]

The hatred in the streets culminating in the assassination on November 5, 1995, then, serves as powerful background and introduction to free speech and incitement. While critical of Rabin on occasion, his assassination has served, for me, as the powerful reminder of the 'power of the word'; Rabin's murder dramatically manifests that 'words kill'.

II. Background Information

Given the above, the question is how to best address the question of free speech and incitement. I have chosen the following path: a brief recounting of the dramatic events of September 2012 in the Middle East in the aftermath (not necessarily in response) of the video "Innocence of Muslims" and the cartoon depiction of the Prophet Mohammed in the French magazine, Charlie Hebdo; analysis of the writings of Thomas Hobbes, John Locke, Voltaire, John Stuart Mill, Ronald Dworkin, John Rawls and Jeremy Waldron; an in-depth discussion of the history of free speech in the US; a brief discussion of free speech in the UK, Holland and Norway.

Much of the discussion regarding free speech-hate speech and what limits, if any, should be placed depend on the relationship between the speaker and the audience. While there is nothing particularly original in highlighting this relationship the profound impact of social media and its extraordinary ability to

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[487] The former President (Chief Justice) of the Israeli Supreme Court, Aharon Barak was also threatened with threatened with a *pulsa denura;* a police investigation determined that the threatening phone calls came from a yeshiva in the Haredi neighborhood, in Jerusalem, Mea She'arim; see NACHMAN BEN-YEHUDA, THEOCRATIC DEMOCRACY: THE SOCIAL CONSTRUCTION OF RELIGIOUS AND SECULAR EXTREMISM 78 (Oxford Univ. Press 2010).

[488] Eskin was subsequently convicted for violating Israel's terrorist law for organizing the *pulsa denura* ceremony. *See A Curse Is Ruled Terrorism*, N.Y. TIMES, July 21, 1997, http://www.nytimes.com/1997/07/21/world/a-curse-is-ruled-terrorism.html.

[489] MICHAEL KARPIN AND INA FRIEDMAN, MURDER IN THE NAME OF GOD: THE PLOT TO KILL YITZHAK RABIN 90-91 (Metropolitan Books 1998).

[490] *Id.*

[491] Zion Zohar, *Pulsa De-Nura: The Innovation of Modern Magic and Ritual*, 27 MODERN JUDAISM 1, 72 (2007).

disseminate speech at, literally, the sound of speed. The traditional speech paradigm of major TV networks, newspaper dailies and mainstream radio gave way to cable TV which was largely replaced by the internet, blogs, twitter, Facebook. As repeatedly demonstrated the power of you-tube significantly surpasses the impact of traditional media.

Accordingly, in analyzing the limits of free speech it is essential to appreciate a fundamental shift in the manner in which speech is expressed and received. The events of the Arab Spring[492] demonstrated the ability of social media to impact, if not facilitate, political developments of historic proportions. Decision makers, clearly caught flat-footed, were remarkably disengaged from the challenges posed by this new reality. It is as if the New World had arrived under their noses, much to their total surprise.

This extraordinary shift in how speech is disseminated is essential to the discussion in the coming pages. While the full implications and ramifications are not sufficiently understood as it is, literally, a "work in progress". Nevertheless, it represents the future and must be understood in that vein. With respect to extremism and the dangers it poses to larger society there is little doubt that social media is essential to extremists; it significantly enhances both the reach of their message and the speed with which target audiences (whether existing or future) receive the message. As has been repeatedly evident, extremists understand this new reality; the question is whether the learning curve of decision makers will reflect dexterity or clumsiness. With that, we turn our attention to the question of free speech and whether and when it should be limited when exercised by extremists.

The discussion in chapter four focused on extremism, religious and secular, in the surveyed countries; chapter five emphasized the importance of educational and employment opportunities in an effort to minimize extremism. The discussion is predicated on the assumption that extremism can, at best, be minimized; to suggest that it can be eradicated ('wiped out') is far-fetched and, largely, devoid of practicality. Emphasizing educational and employment opportunities assumes that an individual with a 'stake' in society will be vested in the larger community and therefore less willing to engage in harmful conduct. Important to recall that extremism, as defined in this book, results in conduct that harms members of internal communities and the larger community alike. While chapter five focused on creating opportunities that counter extremism this chapter focuses on limiting the rights of those who foster, develop and facilitate extremism.

Building off the lengthy discussion in chapter four, the discussion in this chapter focuses on how to limit the rights of those whose conduct---particularly speech------directly contributes to extremism. Focusing on the inciter of extremism is not

[492] For a general history and background on the Arab Spring *see Arab Spring: A Research & Study Guide*, CORNELL UNIV. *available at* http://guides.library.cornell.edu/content.php?pid=259276&sid=2159754 (last visited Jan 11, 2013).

intended to excuse the actor; it is, however, intended to highlight the power of speech and the repercussions of speech that falls on 'willing ears' resulting in harmful conduct.

III. September 2012

Free speech is an inherently complex topic whose intensity is, literally, breathtaking. Intensity both in the abstract given the legal and philosophical nature of the discussion and in the practical given violent responses, world wide, to perceived insults to faith based on videos and cartoons. The events in the Middle East (September, 2012) in, perhaps, response to the video movie "Innocence of Muslims"[493] highlighted the tensions relevant to hate speech and free speech.[494] The caveats are deliberate as it is unclear to what extent the video actually precipitated the demonstrations or whether the events reflected a coordinated terrorist attack. It is an open question whether those demonstrating actually viewed the video or were responding to calls by extremist inciters seizing an opportunity for political and other purposes. [495] As a result of the riots at least 30 people were killed.[496]

Shortly after the video came to public attention the French satire magazine, Charlie Hebdo, published cartoons mocking the Prophet Mohammed. In anticipation of violent responses, the French government ordered the closing of French embassies and schools.[497] Ironically, the same week that the cartoon was published Salman Rushdie's autobiography, Joseph Anton, was published.[498] Rushdie, is, after all the classic victim of the hate speech-free speech debate; while there was no fatal attack on Rushdie (like there was in the case of Van Gogh and on Rushdie's Japanese translator) the fatwa issued by the Ayatollah Khomeini drove Rushdie to living in hiding for decades. As is the case with rioters in the Middle East ostensibly reacting to "Innocence of Muslims" it is highly unlikely that Khomeini read "The Satanic Verses" before condemning Rushdie to death. Nevertheless, what is important---for our purposes—is the combustible confluence between hate speech, free speech and incitement. Enormously

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[493] Sam Bacile, *Innocence of Muslims*, YOUTUBE (Sep. 16, 2012), http://www.youtube.com/watch?v=6ySE-yYeelE.

[494] For discussion regarding the video see Kent Greenfield, *Is the Anti-Muhammad Film Constitutionally Unprotected 'Fighting Words'?*, HUFFINGTON POST (Sep. 18, 2012), (http://www.huffingtonpost.com/kent-greenfield/is-the-antimuhammad-film-_b_1891345.html?utm_hp_ref=politics.

[495] Bounty placed on vide producer by Pakistani Minister of Railroads. *See Pakistan condemns bounty offer on film-maker*, ALJAZEERA (Sep. 23, 2012), http://www.aljazeera.com/news/africa/2012/09/201292216919289217.html.

[496] *French cartoons fuel Prophet film tensions*, DAILY STAR (Sep. 20, 2012, 1:42 AM), http://www.dailystar.com.lb/News/Middle-East/2012/Sep-20/188633-french-cartoons-fuel-prophet-film-tensions.ashx#axzz270UPOWfT.

[497] Kim Willsher, *Paris Magazine's Muhammad cartoons prompt fears for French embassies*, GUARDIAN (Sep. 19, 2012, 6:21 AM), http://www.guardian.co.uk/world/2012/sep/19/paris-magazine-muhammad-cartoons-french.

[498] *Becoming 'Anton,' Or, How Rushdie Survived A Fatwa,* NPR (Sep. 18, 2012, 3:35 AM), http://www.npr.org/2012/09/18/161172489/becoming-anton-or-how-rushdie-survived-a-fatwa.

complicating an already volatile convergence are two additional factors: parties opportunistically seeking to take advantage, in accordance with their respective agenda, of the film/cartoon/book and the "quick to condemn" tone adopted by policy-makers whose instinct, not necessarily based on viewing/reading, is to articulate an over-protectiveness of Islam.[499]

The initial description of the film by Hilary Clinton: ""disgusting and reprehensible"[500] represents classic over-reaction in the context of the 'over-protectiveness' paradigm. The film, amateurish at best, depicts the Prophet Mohammed in an unflattering light but the distance between that and "reprehensible" is broad and dangerous. After all, the principles of free speech suggest that the film, like innumerable other artistic ventures[501], reflect a broad range of opinions, some of them certainly causing "discomfort", if not "anger". However, to describe the video as "reprehensible" casts the video and its maker[502] in a vulnerable light with respect to those seeking to maximize, for their purposes, the repercussions of the video. In other words, Secretary of State fell into the not uncommon trap of articulating excessive mollification.[503] Clinton, undoubtedly unintentionally provided "food for the fodder"; it is for that reason that responses to inflammatory speech must be weighed carefully in the context of how particular audiences will interpret 'mollifying speech'.[504]

IV. Free Speech—from the Perspective of Philosophers

In analyzing the harm in hate speech Professor Jeremy Waldron makes the following cogent observation:

> Hate speech undermines this public good, or it makes the task of sustaining it much more difficult than it would otherwise be. It does this not only by intimating discrimination and violence, but

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[499] For a different approach see, http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=532459&version=1&template_id=39&parent_id=21 last viewed September 21, 2012.

[500] Brett LoGiurato, *HILLARY CLINTON: Anti-Muslim Film Is 'Disgusting And Reprehensible'*, BUS. INSIDER (Sep. 13, 2012, 11:07 AM), http://www.businessinsider.com/hillary-clinton-innocence-of-muslims-disgusting-2012-9.

[501] With respect to the video, the word "artistic" is used generously, at best.

[502] Creator of the video was Nakoula Basseley Nakoula is an Egyptian-born U.S. resident. He is a Coptic Christian with past criminal conviction and a history of using aliases.

[503] For an example, see Brian Williams NBC News reporting on the French cartoon but noting that out of respect the cartoon will not be shown, video can be seen here http://video.msnbc.msn.com/nightly-news/49095025#49095025. Needless to say, one wonders whether Mr. Williams appreciates his use of the word "respect" given the total lack of respect for free speech principles exhibited by the demonstrators. see Matthew Weaver, Haroon Siddique and Tom McCarthy, *Protests over anti-Islam film and Muhammad cartoons-as it happened*, GUARDIAN (Sep. 21 2012, 4:13 PM), http://www.guardian.co.uk/world/middle-east-live/2012/sep/21/tension-anti-islam-film-muhammad-cartoons. It is, obviously, an open question whether they saw the cartoon while attacking Western facilities.

[504] For an example see, http://www.rightsidenews.com/2012092317088/editorial/rsn-pick-of-the-day/muslim-multiculturalism-and-western-post-nationalism.html last viewed September 23, 2012

> by reawakening living nightmares of what this society was like—or what other societies have been like----in the past.[505]

In advocating for restrictions on hate speech Waldron writes:

> …..I want to develop an affirmative characterization of hate speech laws that shows them in a favorable light---a characterization that makes good and interesting sense of the evils that might be averted by such laws and the values and principles that might plausibly motivate them."[506]

Waldron is right to highlight both the need to engage in conversation regarding limiting speech and its inherent difficult and controversy. However, given the power of speech the discussion is essential; the adage 'words kill' is not an ephemeral concept devoid of content and history. Quite the opposite; examples of the harm caused by words are bountiful and tragic. The harm is not only to specific individuals targeted by extremists or individuals who belong to particular ethnic and religious communities but to larger society which tolerates hate speech in the name of free speech. However, as I argued in "Freedom from Religion" religious extremist speech that potentially results in harm must not be granted immunity in the name of free speech. That is, free speech must not be understood to be a holy grail unencumbered by limits, principles of accountability and restrictions imposed by legislators and the courts.

To suggest otherwise is to create, intentionally or unintentionally, a society 'at risk' with respect to incitement. There is, needless to say, great danger in staking out this position for it raises the specter of government regulation of free speech subject to the vagaries of legislators, courts and law enforcement. That concern is legitimate and with merit; many commentators advocate a 'marketplace of the ideas' approach rather than a 'heavy-handed' regulation based approach. Without doubt, the marketplace of ideas is compelling for it minimizes government intervention regarding speech while maximizing what Justice Holmes called "the free trade in ideas.[507]

John Stuart Mill in "On Liberty"[508] advanced a powerful argument favoring a 'marketplace of ideas' paradigm regarding free speech. Mill's argument is predicated on the principle that limits on the power government can exercise over the individual are essential; according to Mill, the state can exercise power the individual only to prevent harm to others. According to Mill the "appropriate region of human liberty comprises…..the inward domain of consciousness; demanding liberty of conscience…..liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects"[509] Mill highlights the two risks

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[505] The Harm in Hate Speech, Jeremy Waldron, Harvard University Press, 2012, pg. 4
[506] JEREMY WALDRON, THE HARM IN HATE SPEECH 15 (Harvard Univ. Press 2012).
[507] *Id*. at 25.
[508] JOHN STUART MILL, ON LIBERTY (Penguin Classics 1982).
[509] *Id*. at 25.

in limiting speech: for the state to suggest the falsity of particular speech implies state infallibility and that the risk in limiting opinion limits others from hearing a particular opinion. In that context, Mill's argument suggests the danger of government excess with respect to restricting both the right to express an opinion and the right to hear an opinion. In that spirit, Mill's notes the danger of narrowing the diversity of opinions and, accordingly, highlights the advantages of the diversity of opinions. There are, according to Mill four principle advantages to freedom of opinion: "if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true; though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; even if the received opinion be not only true, but the whole truth; the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct."[510]

Mill advocates expression of unencumbered free speech conditioned on fair discussion and that the opinion is expressed in temperate manner rather than unmeasured vituperation.[511]To that end, according to Mills human beings must be free to form and express their opinions without reserve but "opinions lose their immunity when circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act".[512] In other words, the limit on liberty that Mill is willing to countenance depends on whether there is a nuisance to others: "The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people".[513]

In that vein, Voltaire's letter, On the Liberty of the Press and of Theatres, to a First Commissioner (20 June 1733) is particularly insightful regarding harms emanating from government censorship.

As you have it in your power, sir, to do some service to letters, I implore you not to clip the wings of our writers so closely, nor to turn into barn-door fowls those who, allowed a start, might become eagles; reasonable liberty permits the mind to soar--slavery makes it creep.[514]

In Leviathan, Thomas Hobbes mentioned four categories of abuses of speech:

> First, when men register their thoughts wrong. ….Secondly, when they use words metaphorically; that is, in other sense than that they are ordained for; and thereby deceiving others. Thirdly, when by words they declare that to be their will; which is not. Fourthly, when they use them to grieve one another…..it is but an abuse of Speech, to grieve him with the tongue, unless it be one who wee

[510] *Id*. at 89.
[511] *Id*. at 92.
[512] *Id*. at 94.
[513] *Id*.
[514] *On the Liberty of the Press and of Theatres, to a First Commissioner*, WHITMAN UNIV., http://www.whitman.edu/VSA/letters/20.6.1733.html (last visited Jan 10, 2013).

> are obliged to govern; and then it is not to grieve, but to correct and amend.[515]

Our concern is with Hobbes' fourth category; in particular speech, whether predicated on religion or secular extremism, that incites to harmful conduct.

While this chapter highlights the danger emanating from speech it is worth noting the distinction between religious and secular violence as noted by Hector Avalos:

> Unlike many non-religious sources of conflict, religious conflict relies solely on resources whose scarcity is wholly manufactured by, or reliant on, unverifiable premises. When the truth or falsity of opposing propositions cannot be verified, then violence becomes a common resort in adjudicating disputes. That is the differentia that makes religious violence even more tragic than nonreligious violence.[516]

Whether Avalos' interpretation regarding the primacy of religious violence accurately reflects the reality of religious and secular violence is a matter of discussion and controversy. As this book proposes both religious and secular extremism pose significant danger to society; it is in that context that the proposal to limit free speech is offered. In an important article, "The Rise of Settler Terrorism"[517] Daniel Byman and Dr. Natan Sachs correctly argue: "…..to slow the tide of radicalism, Israeli leaders must denounce extremists and shun their representatives, placing particular pressure on religious leaders who incite violence."[518] Bynam and Sach's analysis regarding rabbis who incite violence is applicable to secular extremists who incite violence; to distinguish between the two categories potentially minimizes the danger posed by both groups. In that vein, limiting the free speech of extremists who incite, whether predicated in religious or non-religious context, is essential to protecting society and members (external and internal communities) potentially at risk from extremist speech. With respect to the free speech discussion the focus is on limiting the impact of extremists who incite; Waldron's concise categories are particularly helpful:

> …..opponents of hate speech legislation go out of their way to denigrate the terms in which claims about harm are phrased……they proceed on the basis that the harm is most likely nonexistent or overblown; and that in any case it is appropriate to denigrate claims of harm in terms that would be quite fatal if they were applied to the vague and airy considerations with which, on the other side of the balance, the principle of free speech is

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[515] THOMAS HOBBES, LEVIATHAN 20-21 (Seven Treasures Pub. 2009).
[516] HECTOR AVALOS, FIGHTING WORDS: THE ORIGINS OF RELIGIOUS VIOLENCE 18 (Prometheus Books, 2005).
[517] Daniel Byman and Natan Sachs, *The Rise of Settler Terrorism, Foreign Affairs*, September/October 2012.
[518] *Id*. at 75.

defended.[519]

That said, Waldron correctly cautions regarding limits on free speech:

> Defenders of hate speech regulation need to face up honestly to the moral costs of their proposals….The restrictions I have been talking about have a direct bearing on freedom to publish, sometimes on freedom of the press, very likely on freedom of the Internet.[520]

It is, then, a complicated cost-benefit analysis that drives this discussion. It is, as Waldron intimates, dangerous and requires honest assessment of the ramifications and price of limiting free speech. In the ideal, the tone and tenor of public debate---whether religious or secular----would not require imposing limits on free speech. However, as the discussion in this book highlights the harm posed by extremist incitement warrants government regulation and restriction. The burden, needless to say, is in careful line-drawing that avoids over-regulation while providing sufficient protection to distinct 'at risk' members of society. Line drawing is essential for it enables creation of a paradigm that facilitates answering whose speech is to be protected. Whose speech do we protect: Salman Rushdie's or those who issued the fatwa in response to publication of the Satanic Verses; Kurt Westergaard[521] or those who incited to riots resulting in numerous deaths?

The answer, from the perspective of Western civil society, is clear: the free speech of Rushdie and Westergaard must be protected and the speech of those who incite to violence in response to their ideas must be restricted. That is the essence of Dean Minow's tolerance/intolerance thesis and the basis for John Locke's 'A Letter Concerning Toleration': "The toleration of those that differ from others in matters of religion is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light."[522]

The speech we are protecting is that of voices engaged in public debate and discussion; the speech that must be subject to regulation and restriction incites extremists to violence whether against specific voices or against particular ethnic, religious and gender groups. The difficulty is two-fold: recognition that speech need be limited and then determining where the line best be drawn. It is, then, a two-step process requiring a linear progression; devoid of step one, there is no step two. Step one poses a double risk: acknowledge that speech need be limited beyond existing parameters raises profound concerns; ignore the threat

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[519] Waldron, *supra* note 549 at 147-148.
[520] *Id*. at 148-149.
[521] Westergaard is the Danish cartoonist who created the controversial cartoon of the Prophet Mohammed depicted with a bomb in his turban; Westergaard hid in his home (along with his granddaughter) when an axe and knife wielding assailant attacked his home.
[522] John Locke, *A Letter Concerning Toleration*, CONSTITUTION.ORG, http://www.constitution.org/jl/tolerati.htm (last visited Jan 10, 2013).

posed by extremists imposes unnecessary risks on innocent individuals, whether belonging to specific group or members of society at large, in harms way. Advocating free speech beyond present parameters is not, naturally, risk free; however, the risk in not placing limits is similarly risky, if not riskier (the over-use of the word "risk" is deliberate). The requisite line drawing poses significant legal, political, cultural and practical obstacles; however, as proposed below in the Brandenburg[523] discussion limits can be both articulated and implemented.

In that context, Ronald Dworkin's comments on the First Amendment are particularly important:

> The First Amendment, like many of the Constitution's most important provisions, is drafted in the abstract language of political morality: it guarantees a "right" of free speech but does not specify the dimensions of that right—whether it includes a right of cigarette manufacturers to advertise their product on television, for instance, or a right of a Ku Klux Klan chapter publicly to insult and defame blacks or Jews, or a right of foreign governments to broadcast political advice in American elections. Decisions on these and a hundred other issues require interpretation and if any justice's interpretation is not to be arbitrary or purely partisan, it must be guided by principle—by some theory of why speech deserves exemption from government regulation in principle. Otherwise the Constitution's language becomes only a meaningless mantra to be incanted whenever a judge wants for any reason to protect some form of communication.[524]

While Dworkin's analysis is correct it does not fully address the question of when can free speech be limited. In noting, correctly, that "freedom of political speech is an essential condition of an effective democracy" left unsaid is the fate of political speech when it nears or crosses the line of incitement. Much like John Stuart Mill (discussed below) and Justice Oliver Wendell Holmes, Dworkin emphasizes the importance of the 'marketplace of ideas'. While, obviously, the 'marketplace of ideas' is an argument widely accepted in the free speech discussion I share Waldron's concern regarding how and when limits are placed on free speech. That is, the effort to protect society from extremism and extremists----whether religious or secular----cannot rely on the 'marketplace' to sufficiently discriminate and distinguish between speech and incitement.

The danger, naturally, is that government will engage in a paradigm of excessive limiting of free speech in an effort to minimize the reach and impact of 'problematic' speakers. That is, of course, a natural and justified concern; nevertheless, that concern must not deter us from inquiring whether individuals and society are sufficiently protected from speakers whose speech dangerously

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[523] Brandenburg, *supra* note 54.

[524] Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y BOOKS (May 13, 2010),

morphs into incitement. In that vein, I suggest Dworkin's assessment, while reflective of case law and widely held opinions, does not satisfactorily protect potential victims of hate speech and incitement.

V. Free Speech in the United States

> ***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.***
>
> *— The First Amendment to the U.S. Constitution*

The First Amendment protects the freedom of speech, press, religion, assembly and petition; it is the great protector of individual rights clearly articulating limits of government power. Despite uniform support for the amorphous term "free speech," Americans vigorously dispute both what it actually means and what it is intended to protect.[525] For example, 73% of Americans say the First Amendment does not go too far in protecting free speech,[526] yet 31% say musicians should NOT be allowed to sing songs with lyrics that others might find offensive, while 35% would support an amendment banning.[527]

Freedom of speech is much revered as a clear symbol of American democracy; nevertheless as the historical survey below indicates it has had clear 'ups and downs'. US Presidents, the Congress and Courts have struggled to define the boundaries of free speech; arguably, nowhere is this struggle more evident than during wartime. While the liberal, democratic ethos advocates maximum rights of and for the individual, dangers posed by extremism requires re-examining that premise. Membership and participation in civil democratic society explicitly demand the citizen understand and respect that the rule of law is supreme. If we follow the logic of Rousseau, as citizens we are all signatories to the grand social contract.[528] In essence, we have given up any truly absolute rights for the safety and comfort that a government and village can provide to the individual and family; simply stated in creating society we have agreed to be subject to laws and regulations.

Beginning with the Sedition Act of 1798 continuing to present day tensions and conflicts successive presidents have struggled to balance civil liberties with national security; line drawing with respect to free speech has been the subject of robust debate.

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[525] First Amendment Center, *State of the First Amendment 2009* (2009) *available at* http://s111617.gridserver.com/madison/wp-content/uploads/2011/03/SOFA2009.analysis.tables.pdf.
[526] *Id.* at 2.
[527] *Id.* at 6.
[528] Bertram, *supra* note 35 at 74-75.

A. Sedition Act of 1798

Shortly after the First Amendment was ratified, Congress enacted the Sedition Act (1798)[529] restricting freedom of speech in response to the possible outbreak of war between the US and France.[530] Acting out of concern that sympathizers to France would 'stir up trouble' Congress passed the Sedition Act imposing criminal penalties for saying or publishing anything "false, scandalous, or malicious" against the federal government, Congress or the president.[531] Twenty-five American citizens were arrested under the Act,[532] including a Congressman who was imprisoned for calling President Adams a man who had "a continual grasp for power."[533] The Act was particularly controversial; Virginia threatened to secede over this issue.[534]

In one of his first official acts as President, Thomas Jefferson, a bitter political opponent of President Adams and the Sedition Act, pardoned all those convicted under this law.[535] The Act was never challenged before the Supreme Court; forty years later, however, Congress repaid all of the fines exacted under the Sedition Act, with interest, to the legal representatives of those who had been convicted.[536] The congressional committee report declared that the Sedition Act had been passed under a "mistaken exercise" of power and was "null and void."[537] In 1964, the Supreme Court echoed this sentiment, stating "although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."[538]

B. Civil War – The Arrest of Clement Vallandigham

Upon taking office, President Lincoln was faced with a difficult choice between the lesser of two evils: permit dissenting voices to exercise their rights and risk losing states like Maryland or suppress dissent in an effort to hold the nation together.

Despite being a strong advocate for civil liberties, President Lincoln was greatly concerned with maintaining the fragile Union. In an effort to suppress pro-secessionist groups in border states like Maryland, Lincoln took several measures, including declaring martial law, suspending the writ of *habeas corpus* and arresting individuals suspected of disloyalty in those areas. Lincoln explained that harsh measures were necessary in the early days of the rebellion

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[529] Sedition Act of 1798, ch. 74, 1 Stat. 596.
[530] Constitutional Rights Foundation, *A Clear and Present Danger*, http://www.crf-usa.org/america-responds-to-terrorism/a-clear-and-present-danger.html (last visited Jan. 11, 2013).
[531] *Id.*
[532] *Id.*
[533] *Id.*
[534] *Id.*
[535] GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, 73 (W. W. Norton & Co. 2004).
[536] *Id.*
[537] *Id.*
[538] *Id.*

because "every department of the Government [had been] paralyzed by treason."[539] He analogized that a limb must sometimes be amputated to save a life, but that a life must never be given to save a limb.[540]

In March 1863, Lincoln appointed General Ambrose Burnside the Union commander of the Department of Ohio, a state where substantial protests regarding the war had been held. After discovering that newspapers in Ohio were openly critical of the President and the war efforts, Burnside issued General Order no. 38, which announced (among other things) that "the habit of declaring sympathies for the enemy will not be allowed in this Department."[541] Burnside, without Lincoln's knowledge, established himself as the ultimate arbiter of such charges.[542]

In May 1863, Burnside arrested an outspoken critic of the war, Clement Vallandigham. Vallandigham was charged and convicted by a military commission, holding that his speeches "could but induce in his hearers a distrust of their own government and sympathy for those in arms against it."[543] Vallandigham argued, to no avail, that his speeches were merely an appeal to the people to change public policy by lawful means.

Vallandigham immediately petitioned for a writ of *habeas corpus* in federal court. In response to his petition, Judge Humphrey Leavitt applied a balancing test between Vallandigham's civil liberty interest and the government's national security interest; as discussed below, this test continues to be applied today. Judge Leavitt held that General Burnside had acted reasonably given the circumstances, reasoning that during wartime, self-preservation was "paramount law," even rising above the Constitution. Leavitt concluded it is not the judiciary's place to overrule the Commander in Chief during wartime as a sufficient check on the President's power already existed in Congress' impeachment power.[544]

In response to pleas for the release of Vallandigham, Lincoln justified the arrest with the following statement:

> It is asserted…that Mr. Vallandigham was…seized and tried "for no other reason than world addressed to a public meeting, in criticism of the… Administration, and in condemnation of the Military orders of the General." Now, if there be no mistake about this; if this assertion is the truth and the whole truth; if there was no other reason for the arrest, then I concede that the arrest was

[539] Executive Order no. 1, Relating to Political Prisoners, Feb. 14, 1862, in 2:2 *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies 222* (Government Printing Office 1902).
[540] *See* SHELBY FOOTE, THE CIVIL WAR: A NARRATIVE 630 (Random House 1963).
[541] STONE, *supra* note 10, at 96.
[542] *Id.* at 97.
[543] STONE, *supra* note 10, at 101.
[544] *Ex Parte Vallandigham*, 28 F Cases 874, 921-24 (Cir. Ct. Ohio 1863)..

wrong…

> But the arrest, as I understand, was made for a very different reason…his arrest was made because he was laboring with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it…[545]

The case raised the question that is as relevant today as it was then: in times of war, should some civil liberties, otherwise protected under the Constitution, be suspended.

C. WWI – the Espionage Act of 1917

The Espionage Act of 1917 was the first legislation since the Sedition Act (1798) to limit free speech; Passed on June 15, 1917, shortly after the U.S. entered World War I and against the backdrop of fear and uncertainty, it represents a low point for free speech in American history.

The Wilson Administration was deeply concerned about the effect that disloyalty would have on the war effort. To that end, President Wilson asked Congress to give him authority with respect to individuals that might undermine national unity. The President wanted, among other things, the power of censorship of the media, but Congress refused.[546] According to the legislation the following acts were subject to criminal prosecution:

> To convey information with intent to interfere with the operation or success of the armed forces of the United States or to promote the success of its enemies.
>
> To cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or to willfully obstruct the recruiting or enlistment service of the United States.[547]

The Act also gave the Postmaster General authority to refuse to mail or to impound publications that he determined to be in violation of its prohibitions.[548]

In *Schenck v. United States*[549] the Supreme Court considered the constitutionality of the Espionage Act. Charles Schenck, the Secretary of the Socialist Party of America distributed leaflets that advocated opposition to the draft; Schenck was indicted and subsequently convicted for conspiracy to violate the Espionage Act

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[545] Letter from Abraham Lincoln to Erastus Corning and Others, June 12, 1863, in STONE, *supra* note 10, at 110-111.
[546] STONE, *supra* note 10, at 147-49.
[547] Espionage Act of 1917, 40 Stat 217, 219.
[548] *Id.* at 230-31.
[549] *Schenck*, 249 U.S. 47.

for having caused and attempting to cause insubordination in the military and to obstruct the recruiting process. The Supreme Court in a unanimous opinion written by Justice Oliver Wendell Holmes, Jr., ruled Schenck's criminal conviction constitutional.

According to Holmes, the First Amendment did not protect speech encouraging insubordination, since, "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."[550] In other words, the circumstances of wartime permit greater restrictions on free speech than would be allowable during peacetime.

In the opinion's most famous passage, Justice Holmes sets out the "clear and present danger" test:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic… 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.[551]

Holmes was quick to grant deference to the government during wartime; His analysis focuses on more on the government's ability to restrict speech during wartime as apposed to First Amendment protections. Though Holmes used the term "clear and present danger" it is unclear whether the circumstances truly satisfied such a burden. Schenck, after all, was printing and distributing anti-draft materials; whether that is akin to "shouting fire in a crowded theater" is arguable, if not doubtful. The core question is the proximity between the speech and the imminent danger arising from that speech; the facts and circumstances in *Schenck* suggest, from a historical perspective, a greatly removed nexus.

One week after *Schenck*, the Supreme Court decided two additional free speech cases. Jacob Frowherk was a copy editor who helped prepare and publish a series of antiwar articles in the *Missouri Staats Zeitung*, a German-language newspaper. Like Schenck, Frowherk was convicted under the Espionage Act and the Supreme Court, in a unanimous decision upheld his conviction.[552] Again Holmes gave short shrift to the First Amendment issue; though interestingly, he makes no reference in *Frowherk* or *Debs*[553] to the clear and present danger test.

Eugene V. Debs was an American labor and political leader and five-time Socialist Party of America candidate for the American Presidency. On June 16, 1918 Debs

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[550] *Id.* at 52.
[551] *Id.*
[552] *Frowherk v. United States*, 249 U.S. 204 (1919).
[553] *Debs v. United States*, 249 U.S. 211 (1919).

made an anti-war speech in Canton, Ohio, protesting US involvement in World War I; Debs was subsequently arrested under the Espionage Act, convicted and sentenced to ten years in prison and loss of his citizenship. The Supreme Court found Debs had shown the "intention and effect of obstructing the draft and recruitment for the war"[554]; in affirming his conviction the Court cited Debs's praise for those imprisoned for obstructing the draft.

This period marked a low point in free speech in America; the test articulated by Holmes in these three decisions raised great concerns regarding the limits of free speech in the US. However, when the Court reconvened for its next session, Justice Holmes apparently had a change of heart; it has been suggested by some that it was a result of his friendship and correspondence with US District Court Judge Learned Hand. Hand, much revered for his intellect would become one of the most prominent voices in American jurisprudence. Hand, in 1917, was considered a likely nominee for the US Court of Appeals; that (temporarily) changed in the aftermath of his opinion in *Masses Publishing Co. v. Patten*.[555]

At issue in *Masses* was a provision in the Espionage Act granting the Postmaster General authority both to refuse to mail or to impound publications he determined to be in violation of the Act. Hand held the New York postmaster's refusal to allow circulation of an antiwar journal violated the First Amendment. In his opinion Hand held if a citizen "stops short of urging upon others that it is their duty or their interest to resist the law,"[556] then he or she is protected by the First Amendment. Hand's opinion was reversed by the Court of Appeals; in addition, Hand—perhaps in a reflection of the tenor of the times—was not nominated to the Court of Appeals. Hand who would ultimately sit on the Appeals Court reflected that the case "cost me something, at least at the time," but added, "I have been very happy to do what I believe was some service to temperateness and sanity."[557]

Hand, according to many observers, had a profound impact on his friend Justice Holmes. In *U.S. v. Abrams*,[558] Holmes joined Justice Brandeis in dissent, taking a strong pro-speech position. In *Abrams*, the defendants were convicted for printing and subsequently throwing from windows of a New York City building two anti-war leaflets. The Supreme Court ruled 7–2 that the Espionage Act did not violate the freedom of speech protected by the First Amendment. In his dissent, Holmes wrote that although the defendant's pamphlet called for a cease in weapons production, it had not violated the act because the defendants did not have the requisite intent to cripple or hinder the United States in the prosecution of the war.[559] Holmes' dissent set the stage for what would ultimately become the modern-day clear and present danger test.

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[554] *Id.*
[555] *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).
[556] *Id*. at 540.
[557] Letter from Learned Hand to Charles Burlingham, Oct. 6, 1917, excerpted in STONE, *supra* note 10, at 170.
[558] *United States v. Abrams*, 250 U.S. 616 (1919)
[559] *Id.* at 628.

D. Cold War – Communism

In the aftermath of WWII there was grave concern in the US regarding both the rising influence of the Soviet Union and penetration of communism and communists in the US. In 1940, Congress passed the Smith Act,[560] which criminalized the advocating the overthrow of the U.S. government by force or violence. In 1950 Senator Joseph McCarthy (R-WI) began a nationwide witch-hunt to root out communist sympathizers; virtually the entire nation was swept up in anti-communist fever, if not panic. Judge Hand, now sitting on the Second Circuit Court of Appeals, was critical of Senator McCarthy's efforts. In a public address, Hand stated that, "risk for risk," he would rather take chance that some traitors will escape detection" than risk spreading across the land "a spirit of general suspicion and distrust."[561] Now in 1950, would the great mind behind the decision in *Masses*[562] stand up for the First Amendment against the tidal wave of fear?

Eugene Dennis the secretary of the Communist Party of America was an outspoken advocate of communism. Dennis, along with several others party members, was indicted (July 1948) in accordance with the Smith Act for conspiring and organizing the overthrow and destruction of the United States government by force and violence. Smith and his co-defendants upon conviction by the trial court appealed to the Second Circuit. Though Hand was a strong advocate for free speech, as an Appeals Court Judge he was bound by Supreme Court precedent. In analyzing previous Supreme Court holdings Hand concluded that the Court had been applying a version of the clear and present danger test. As he eloquently put it, "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger."[563]

The question before the court, according to Hand, was one of imminence. How long must the government, having discovered such a conspiracy, wait before acting? When does the conspiracy become a "present danger?" According to Hand, "the jury found that the conspirators will 'strike as soon as success seems possible.' "[564] The government is not required to wait till the actual eve of hostilities; rather at the point when the danger becomes clear and present.[565] Hand analysis balances the clear and present danger test with national security concerns; as the level of danger increases, the imminence government must demonstrate before it can act decreases. Essentially, Hand proposed a cost-benefit analysis weighing costs of suppression with the cost of the potential harm was the speech not restricted. The Supreme Court adopted Hands balancing test holding the threat of communism justified a broader

[560] Smith Act, 18 U.S.C. § 2385 (1940).
[561] STONE, *supra* note 10, at 399.
[562] 244 F. 535 (S.D.N.Y. 1917).
[563] *United States v. Dennis*, 183 F2d 201, 212 (1950).
[564] *Id.* at 212-13.
[565] *Id.*

interpretation of imminence. Regarding the defendant's, Judge Hand later stated he would "never have prosecuted those birds;"[566] in his view, the prosecution would do nothing but "encourage the faithful and maybe help the Committee on Propaganda."[567] But, he added, this "has nothing to do with my job"[568] which was to faithfully apply the law. In upholding the convictions, the Supreme Court in *Dennis*[569] appeared to give the 'green light' to government officials to aggressively target communist supporters. Between 1951 and 1957, the government arrested and prosecuted 145 members and leaders of the Communist Party; 108 were convicted, 10 were acquitted, and the rest were awaiting trial when *Yates*[570] was decided (June 1957).[571] In none of the prosecutions was evidence presented suggestive of concrete plans to use force or violence to overthrow the government.

But between *Dennis* and *Yates*, the political climate in America changed significantly: Stalin, the Soviet leader, passed away; an armistice had been declared in Korea; the Senate had condemned Senator McCarthy; and the public attitude toward the 'red scare' had relaxed. In addition, significant changes occurred on the Supreme Court as Justices Harlan, Brennan, Whittaker, and Chief Justice Warren, replaced justices Vinson, Reed, Minton, and Jackson; this change in the Court's make-up led to a significant shift in the Court's judicial philosophy. In *Yates*,[572] the Court drew a distinction between actual advocacy to action and mere advocacy in the abstract. Justice Harlan stated that the Smith Act did not prohibit "advocacy of forcible overthrow of the government as an abstract doctrine" even "if engaged in with the intent to accomplish overthrow." Such advocacy was simply "too remote from concrete action."[573]

While Harlan did not require that the unlawful action be imminent, he did insist that, to be punishable, the advocacy must include a call for specific, concrete action. Thus, a speaker who teaches the general principles of Marxism, even with the intent to promote a revolution, will not cross the line drawn in *Yates*; the Court recognized that actual "advocacy to action" circumstances would be "few and far between."[574] Indeed, following *Yates*, the government filed no further prosecutions under the Smith Act.

E. Incitement – Clear and Present Danger Today

Brandenburg[575] is the seminal speech protection case in American jurisprudence.

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[566] Letter from Learned Hand to Irving Dilliard, Apr. 3, 1952, excerpted in STONE, *supra* note 10, at 401.
[567] *Id.*
[568] *Id.*
[569] *Dennis v. United States*, 341 U.S. 494 (1951).
[570] *Yates v. United States*, 354 U.S. 298 (1957).
[571] STONE, *supra* note 10, at 411.
[572] 354 U.S. 298 (1957).
[573] *Id.* at 318, 321.
[574] *Id.* at 327.
[575] *395 U.S. 444 (1969)* (per curiam).

The U.S. Supreme Court reversed the conviction of a Ku Klux Klan leader who had advocated violence, holding that the government cannot, under the First Amendment, punish the abstract advocacy of violence.[576] Under Brandenburg, the government can only limit speech if: (1) the speech promotes imminent harm; (2) there is a high likelihood that the speech will result in listeners participating in illegal action; and (3) the speaker intended to cause such illegality.[577]

In an age where religious and non-religious violence threaten civil society, should this speech-protective case be re-examined, or even overruled? The question is one of line drawing; the challenge is in clearly, and concisely drawing that line. Not in a "case by case" analysis but, rather, by developing and recommending criteria for limiting freedom of speech that does not unduly trammel on otherwise guaranteed rights. As noted above, the difficulty is compounded as means of communication undergo radical transformation posing extraordinary challenges particularly when balancing broader societal interests while preserving guaranteed individual rights.

In 1964, Clarence Brandenburg, a KKK leader, was charged and convicted for advocating violence under the State of Ohio's criminal syndicalism statute for his participation in a rally and for the speeches he made. In particular, Brandenburg stated at one point "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel."[578] In an additional speech amongst several Klan members who were carrying firearms, Brandenburg claimed, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[579] Brandenburg appealed his conviction to the Supreme Court, claiming the statute violated his First Amendment rights; the Court, in its most speech protective holding, sided with Brandenburg holding the statute violated his First Amendment rights.

However, the question is whether this holding sufficiently protects society; re-articulated: does Brandenburg grant the speaker too much 'wiggle room' thereby posing danger to individuals in particular and society at large. That question, widely asked, has no wrong or right answer. The answer depends on a wide range of circumstances including the respondent's political, economic cultural, social and religious background and milieu. It also depends on 'current events'; that is, the answer cannot be separated from particular developments that directly affect individuals and society alike. For that reason it is essential that discussion regarding limits of free speech be conducted dispassionately, divorced from the hurly-burly of particular events.

While the Supreme Court articulated a three-part test in Brandenburg the

[576] *Id. at 448.*
[577] See *id. at 447-48.*
[578] Brandenburg, *supra* note 54.
[579] *Id.* at 446.

question is its efficacy in protecting individuals and society. In asking this question the intent is to not only protect the speaker's rights, but also to ensure that potential targets are sufficiently protected. Herein lies the rub: how do we satisfactorily determine there is a potential target rather than casting too broad a net thereby, unjustifiably and unnecessarily, limiting speech that does not meet the incitement test. To that end, I propose the following standard of determining whether the relevant speech morphs into incitement. My proposal is based on an analysis of Brandenburg that suggests its test is overly protective of freedom of speech and does not, for instance, adequately address the *potential* danger posed by a pastor who weekly preaches fire and brimstone against abortion- performing physicians.

How, after all, is a police officer supposed to know that such a sermon is meant only rhetorically and therefore fails the third element? How is a police officer to know whether there is a high likelihood that a congregant will act in the spirit of such a sermon? Furthermore, as the sermons are given weekly, does that mean the harm they promote is "imminent?" Audiences and commentators alike expressed repeated concern regarding these dilemmas; question and answer sessions resulted in little agreement, perhaps because this where the proverbial "rubber hits the road." These questions caused discomfort among many; "operationalizing" limits on free speech, after all, challenges the essence of democratic values. Needless to say, the question is one of line drawing; the challenge is to clearly draw that line.

If *Brandenburg* is to be rearticulated, an alternative clear, workable test must be established. States cannot engage in case-by-case—rather than principled—approach in determining whether religious liberties can be limited. Amorphous criteria both invite government excess and create significant due process concerns whereby speaker, potential and law enforcement will not be equipped to consistently predict whether the speech conforms to the law. Therefore, I propose three possibilities:

1. Unprotected Speech

Categorizing religious extremist speech that promotes hatred or violence of others as wholly unprotected incitement, without the need for determining intent or for ascertaining whether the speech likely resulted in illegality. In other words, this approach would apply only the first element of the *Brandenburg* test and remove the last two;

2. Lower Intent

Lowering the bar for the intent element of the *Brandenburg* test whenever the speaker in question is a figure of religious authority; or

3. Intermediate Scrutiny

Leaving the three *Brandenburg* elements as they are, but lowering the standard

from traditional strict scrutiny to intermediate scrutiny in the case of extremist religious speech.

F. Prior Restraint – Pentagon papers

The First Amendment was intended to protect against prior restraints on speech; Blackstone declared that ''the liberty of the press is, indeed, essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published.''[580] A prior restraint prevents speech from occurring, as opposed to punishing it after the fact. It typically takes the form of a license or injunction; it has been said, that although a criminal statute "chills," an injunction "freezes."[581]

As the Supreme Court held in the Pentagon Papers case ''[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[582] This is because ''prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.''[583]

The Supreme Court's initial foray into prior restraint was *Near v. Minnesota*[584]; the Court held prior restraints to be unconstitutional, except in extremely limited circumstances such as national security issues. That was not the case in Near; quite the opposite for the ruling was in reaction to a prior restraint order issued against a newspaper (owned by Near) after it published exposés of Minneapolis's elected officials' alleged illicit activities. The Court held that the state had no power to enjoin publication of the paper as this was prior restraint reflective of censorship.

The most famous prior restraint case is known as the Pentagon Papers; in 1967, Secretary of Defense McNamara commissioned compilation of a "History of U.S. Decision-Making Process on Vietnam Policy, 1945–1967," otherwise known as the Pentagon Papers. The Papers took two years to complete and resulted in over 7000 pages of classified documents; McNamara later commented, "[Y]ou know, they could hang people for what's in there."[585]

In 1971, Daniel Ellsburg, a one-time consultant and supporter of U.S. policy in Vietnam, turned anti-war activist leaked the papers to the New York Times (NYT). The Justice Department immediately sought an injunction in federal court, claiming both that publication was a violation of the Espionage Act of 1917 and presented a serious threat to national security because the papers contained critical intelligence information relevant to the ongoing war effort. Pending the

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[580] William Blackstone, Commentaries, 151-152 (1769).
[581] *See* Alexander M. Bickel, *The Morality of Consent* 61 (Yale 1975), referenced in STONE, *supra* note 10, at 506.
[582] *New York Times v. United States*, 403 U.S. 713, 714 (1971).
[583] *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976).
[584] *Near v Minnesota,* 283 U.S. 697 (1931).
[585] *See* DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST 663 (Random House 1972).

District Court's decision, Ellsburg released the papers to the Washington Post; the Justice Department similarly sought an injunction against the Post. Judge Gesell of the Federal District Court in Washington, DC ruled the government failed to present evidence that the Papers posed a serious danger to the nation. Thereafter, Judge Gurfein of the Southern District of New York also denied the government's request for an injunction against the NYT; the government immediately appealed both rulings to the Supreme Court.

The government based its appeal on the "national security" exception discussed in *Near*;[586] however, in a brief *per curiam* decision the Supreme Court agreed with the lower court, holding the government had not met its "heavy burden" of showing a justification for a prior restraint and ordered the injunction be lifted immediately.[587]

Several of the Justices wrote their own opinions in this critical free speech case. Justice Hugo Black wrote "every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."[588] Justice Brennan insisted that even in wartime a prior restraint on the press could be constitutional *only* if the government proved that "publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea."[589]

G. Fighting words

Fighting words, like incitement, are not protected by the First Amendment and can be punishable. The difference between incitement and fighting words is subtle, focusing on the intent of the speaker. Inciting speech is characterized by the speaker's intent to make someone else the instrument of her unlawful will whereas fighting words, by contrast, are intended to cause the hearer to react to the speaker.

The Supreme Court first developed the fighting words doctrine in *Chaplinsky*[590] in 1942. Chaplinsky was arrested for disturbing the peace after uttering to the local marshal: "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[591] The Supreme Court upheld the conviction in a unanimous opinion, holding:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include. . ."fighting" words — those, which by their very utterance inflict

[586] 283 U.S. 697 (1931).
[587] *New York Times*, 403 U.S. at 714.
[588] *Id.* at 715.
[589] *Id.* at 726-27.
[590] *Chaplinsky*, 315 U.S. at 568.
[591] *Id.* at 569.

injury or tend to incite an immediate breach of the peace.[592]

Since *Chaplinsky*, the Court has continued to uphold the doctrine but also steadily narrowed the grounds on which the fighting words test applies. In *Street v. New York*[593] the court overturned a statute prohibiting flag burning, holding that mere offensiveness does not qualify as "fighting words". Consistent with *Street*, in *Cohen v. California*,[594] the Court held that Cohen's jacket with the words "fuck the draft" did not constitute fighting words because the words on the jacket were not a "direct personal insult" and no one had reacted violently to the jacket. This ruling established that fighting words should be confined to direct personal insults.

In 1992, in *R.A.V. v. City of St. Paul*[595] the Supreme Court overturned a city ordinance that made it a crime to burn a cross on public or private property with the intent to arouse anger, alarm or resentment in other based on race, color creed, etc. According to the Court:

> The ordinance, even as narrowly construed by the State Supreme Court, is facially unconstitutional, because it imposes special prohibitions on those speakers who express views on the disfavored subjects of 'race, color, creed, religion or gender...' Moreover, in its practical operation, the ordinance goes beyond mere content, to actual viewpoint, discrimination... St. Paul's desire to communicate to minority groups that it does not condone the 'group hatred' of bias-motivated speech does not justify selectively silencing speech on the basis of its content...

In addition, the ordinance's content discrimination is not justified on the ground that the ordinance is narrowly tailored to serve a compelling state interest in ensuring the basic human rights of groups historically discriminated against, since an ordinance not limited to the favored topics would have precisely the same beneficial effect."[596]

H. True threats

Similar to "incitement" and "fighting words," a "true threat" is another area of speech that is not protected by the First Amendment. A true threat exists where a speaker directs a threat to a person or group of persons with the *intent* of placing the victim in fear of bodily harm or death. Yet the line between protected expression and an unprotected true threat is often hazy and uncertain often turning on the determination of intent.

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[592] *Id.* at 571-72.
[593] *Street v. New York*, 394 U.S. 576 (1969).
[594] *Cohen v. California*, 403 U.S. 15 (1971).
[595] *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).
[596] *Id.* at 393-96.

For example, in *Watts v. United States*[597], Watts, a young African-American man, was arrested for saying the following during an anti-war protest in Washington D.C., "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers." In overturning his conviction, the Supreme Court ruled that Watts' statement was political hyperbole rather than a true threat. "We agree with [Watts] that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President' . . ."[598]

In *Virginia v. Black*[599], the Supreme Court decided a case similar to *R.A.V.*[600] under the true threats doctrine. The Court held that cross burning could constitute a true threat and thereby be proscribed by law, *if* it is done with the intent to intimidate or place the victim in fear of bodily harm or death. It may not, however, be used as *prima facie* evidence of intent to intimidate, because cross burning may serve other intentions, such as a show of solidarity.

I. Hate speech

Hate speech is a hotly contested area of First Amendment debate. Unlike fighting words, or true threats, hate speech is a broad category of speech that encompasses both protected and unprotected speech. To the extent that hate speech constitutes a true threat or fighting words, it is unprotected; to the extent it does not reach the level of a true threat or fighting words it is protected.

During the 1980s and early '90s more than 350 public colleges and universities sought to combat discrimination and harassment on campuses through the use of so-called speech codes.[601] Proponents of the codes contend that existing First Amendment jurisprudence must be changed because the marketplace of ideas does not adequately protect minorities. They charge that hate speech subjugates minority voices and prevents them from exercising their First Amendment rights. Similarly, proponents posit that hate speech is akin to fighting words, a category of expression that should not receive First Amendment protection, because as the Court held in *Chaplinsky* they "are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[602]

However, speech codes that have been challenged in court have not fared well; though no case has been brought before the Supreme Court on this question, lower courts have struck these policies down as either overbroad or vague. The

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[597] *Watts v. Untied States*, 394 U.S. 705 (1969)
[598] *Id.* at 707-08.
[599] *Virginia v. Black et al.*, 538 U.S. 343 (2003).
[600] 505 U.S. 377 (1992).
[601] David L. Hudson Jr., *Hate Speech and Campus Speech Codes*, FIRST AMEND. CENTER (Sep. 13, 2002), http://www.firstamendmentcenter.org/hate-speech-campus-speech-codes.
[602] *Chaplinsky*, 315 U.S. at 572.

District Court for the Eastern District of Wisconsin in the University of Wisconsin school code case articulated the reasoning behind the codes' lack of constitutional muster:

> This commitment to free expression must be unwavering, because there exist many situations where, in the short run, it appears advantageous to limit speech to solve pressing social problems, such as discriminatory harassment. If a balancing approach is applied, these pressing and tangible short run concerns are likely to outweigh the more amorphous and long run benefits of free speech. However, the suppression of speech, even where the speech's content appears to have little value and great costs, amounts to governmental thought control.[603]

VI. Recent Cases

The American public has been confronted with a number of significant free speech issues in the past few years; I shall examine four: religious extremism incitement (see previous section); a Koran burning pastor; Christian extremists demonstrating at funerals of US military personnel; an Assistant Attorney General (Michigan) who specifically (ruthlessly) targeted a University of Michigan student who was student body President and a homosexual. In examining these four examples the question is whether the test articulated by the Supreme Court in *Brandenburg* sufficiently protects the speaker, his audience, the larger public and the intended target of the speech.

Pastor Terry Jones, of Florida, leads a small but vocal congregation. On March 20, 2011, Jones held a Qu'ran burning that resulted in anti-American violence in Afghanistan, killing at least 12 people. Jones was urged not to do it by virtually every national leader including President Obama, Secretary of State Clinton and perhaps most importantly, General Petraeus, the commander of U.S. forces in Afghanistan who argued that Pastor Jones' conduct would endanger US military personnel in Afghanistan. Jones eventually did go forward with his threat, however, his possible actions present a significant First Amendment dilemma: is speech protected even though harm *may* result both domestically and internationally.

In that vein, Jones was arrested for attempting to protest outside a Mosque in Dearborn, Michigan. After a brief trial, a jury upheld the city's injunction, claiming that Jones' protest would disturb the peace; ultimately, Jones was held on $1 bail and then released.[604] While Jones' conduct is considered, by many (never say all), to be reprehensible (at best) numerous constitutional law experts claim the court's action was a gross miscarriage of justice and a violation of Jones' First Amendment rights. The same concerns are relevant with respect to a

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[603] *UWM*, 774 F.Supp. at 1174.

[604] *Pastor Who Planned Mosque Protest Out of Jail*, CBS NEWS (Apr. 22, 2011, 10:35 PM), http://www.cbsnews.com/stories/2011/04/22/national/main20056660.shtml.

pastor who, along with his tiny but vocal community, shouts degrading comments at family and friends of fallen soldiers as they gather to bury their loved one who died while serving the U.S.

The basis for the pastor's conduct: the soldier died because God hates the United States for its tolerance of homosexuality, particularly in America's military**.** The Supreme Court addressed this issue in *Snyder v. Phelps*[605], where members of a small but extremely vocal Westboro Baptist Church, protested the funeral of a U.S. Marine who had been killed in Iraq. The protesters carried signs, as they have done at nearly 600 funerals throughout the country over the past 20 years, displaying placards such as "America is doomed", "You're going to hell", "God hates you", "Fags doom nations", and "Thank God for dead soldiers." [606]

Dissenting Justice Samuel Alito likened the protests of the Westboro Baptist Church members to fighting words and of a personal character, and thus not protected speech. However, the majority disagreed, stating that the protester's speech was not personal but public, and that local laws, which can shield funeral attendees from protesters, are adequate in the context of protection from emotional distress.

Andrew Shrivell, a former Assistant Attorney General for Michigan who has been sued for stalking Chris Armstrong, the first openly gay University of Michigan student body president. Armstrong claims that Shrivell has been showing up everywhere he goes, including school and home. Shrivell apparently started a blog campaign against Armstrong and his "radical homosexual agenda." Shrivell claims that the stalking charges are moot because he has never actually spoken to Armstrong, and that he is simply exercising his First Amendment rights.[607] Should Shrivell be allowed to exercise his free speech rights in this manner? How does the doctrine of hate speech apply?

VII. Analysis of American Free Speech Jurisprudence

While a literal interpretation of the First Amendment forbids any law abridging speech in any form, the Supreme Court has taken a more nuanced approach recognizing legitimate competing interests that must be considered. For example, while free speech is a guaranteed right according to the First Amendment the executive branch is similarly charged with protecting the safety and security of the nation's citizens. As Justice Holmes articulated, "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic…"[608]

This statement, which has been endorsed by every Court since, reflects an

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[605] *Phelps*, 131 S.Ct. 1207.
[606] *Id.* at 1213.
[607] David Jesse, *Shirvell Fires Back, Claims He's Victim of Gay Agenda*, DETROIT FREE PRESS, May 10, 2011, *available at* http://www.freep.com/article/20110510/NEWS05/110510041/Shirvell-fires-back-claims-he-s-victim-gay-agenda?odyssey=mod|mostcom.
[608] Schenck, 249 U.S. at 52.

understanding that with free speech—as with other constitutionally guaranteed protections—there is no absolutism. Powerful competing interests must be balanced against other competing interests; the question is whether the balancing reflects a rights minimization or rights maximization paradigm. Free speech jurisdiction has travelled a long road in American jurisprudence, arguably in concert with society, which superficially—at least—is more tolerant of dissent than in the past. The caveat is pertinent because one must never forget the rigid, Puritan roots of the American culture; a casual perusal of public discussion regarding same sex marriage, children of same sex parents and abortion highlights a constant strain of ideological rigidity, largely premised on a literalist interpretation of religious scripture. While the assumption that freedom of speech is 'safer' today than 100 years ago is largely correct—as evidenced by recent Court decisions—to assume it is a 'lock' is, arguably, to wade into dangerous waters.

This, of course, cuts both ways: should, in the name of free speech, Senator McCarthy have been allowed to run wild, ruining careers and causing extraordinary devastation while the executive branch consistently failed to confront him directly. President Eisenhower's pusillanimous conduct was shameful; in that 'spirit' McCarthy has an extraordinary 'run' unabated by the Court, Congress or the executive. Is that in concert with the free speech protection articulated in the First Amendment?

While some would argue that the 'marketplace of ideas' should take precedence over efforts to limit free speech protections the reality is, arguably, more complicated. As I have argued elsewhere,[609] the danger posed by religious extremist incitement should give serious pause as incitement occurring in Houses of Worship meets the tests articulated by the Supreme Court discussed in section one above. In that vein, while the Supreme Court begins its analysis of free speech questions with the presumption that ALL speech is protected, unless it falls within one of two exceptions, it is not an absolute right.

The analysis must determine whether the proposed restriction is content-based or content-neutral; the former refers to restrictions that apply to particular viewpoints then the proposed restriction carries a heavy presumption that it violates the First Amendment. In such a paradigm, the Court applies a strict scrutiny standard in evaluating its lawfulness; to survive strict scrutiny, the restriction must be *narrowly tailored* to achieve *an important governmental interest*. That means that it cannot be, among other things, over-inclusive, under-inclusive, or vague. This standard effectively places a heavy burden on the government in defending the restriction.

However, if the restriction is content-neutral, whereby the concern is not with the speech itself but rather pertains to the details surrounding the speech, then the government is allowed to set certain parameters involving time, place, and manner. Content-neutral restrictions on speech are reviewed under

[609] GUIORA, *supra* note 9.

intermediate scrutiny rather than strict scrutiny because the speech is restricted solely in the manner in which the information is communicated rather than content itself.

In *U.S. v. O'Brien*[610], the Supreme Court established a four-part test to determine whether a content-neutral restriction on speech is constitutional: (1) Is the restriction within the constitutional power of government, (2) Does the restriction further important or substantial governmental interest, (3) Is the governmental interest unrelated to the suppression of free expression, (4) Is the restriction narrowly tailored, i.e., no greater than necessary. Subsequently, a fifth factor was added in *City of Ladue v. Gilleo*[611] inquiring whether the restriction leaves open ample opportunities of communication.

Finally, there is an exception to the content-based rule that requires an analysis of the value of the speech in question. Certain forms of speech, such as political speech, are thought to be at the very core of the First Amendment's protection, and therefore, merit the greatest protection under the law. The freedom to openly challenge the government is essential to a democracy. However, that principle has been 'fungible'; witness Supreme Court holdings particularly during WWI and somewhat in the aftermath of WWII.

The First Amendment has travelled an extraordinary journey; from clear limits imposed on free speech to an understanding that protecting free speech is important to a vital and vibrant democracy. Needless to say, the road taken has been full of pitfalls and pratfalls reflective both of the extraordinary importance of this protection and the dangers that free speech, arguably, pose. The rocky road directly reflects this tension; to suggest that the tension has been resolved and that limitations will not be posed in the future would be to mis-read American history.

After all, American history is replete with 'roll backs' of rights in times of crisis, whether real or imagined. This unfortunate tendency, in the speech context, is compounded by the ever-changing nature of speech and the media. Rearticulated: given the extraordinary power of social media, and the speed with which information can be transmitted, it is not unforeseeable this will force both government and the Courts to increasingly consider imposing limits on free speech when public safety is arguably endangered. While the Supreme Court's holding in *Snyder*[612] suggests an expansive articulation of free speech American history suggests the possibility of a "roll back"—particularly in the context of national security and public order---cannot be easily dismissed.

Though American society has significantly matured over the past 200 years the response when 'under threat' are surprisingly uniform and consistent in

[610] *O'Brien*, 391 U.S. 367.
[611] *Gilleo*, 512 U.S. 43.
[612] *Phelps*, 131 S.Ct. 1207.

accepting a rights minimization paradigm imposed by government and upheld by the Court. A careful reading of American history, executive decision-making and judicial holdings suggest this possibility must not be discounted in the free speech discussion. The question, in a nutshell, is whether national security and public order justify minimizing free speech. In some ways, American history has demonstrated a ready willingness to answer in the affirmative. The costs, as repeatedly demonstrated, are significant both with respect to the principles articulated in the First Amendment and on a human, individual basis. A quick perusal of the WWI and post WWII prosecutions offers ready proof. The dilemma is determining how serious is the threat to national security and public order and whether limiting free speech will mitigate that threat and at what cost to individual liberty.

VIII. UK

The UK, historically, has practiced extraordinary tolerance for free speech. In the context of the freedom of religious speech, that tolerance is based in part on the historically limited influence of the Anglican Church[613] in English life. Great Britain's commitment to freedom of speech predates modern international conventions. British writer and philosopher John Milton was one of the earliest proponents of freedom of expression, and Sir Thomas More helped establish the parliamentary privilege of free speech during the 1500s.[614] In the 1600s, Milton argued that censorship acts to the detriment of a nation's progress, since truth will always defeat falsehood; but a single individual cannot be trusted to tell the two apart, and therefore no individual can be trusted to act as censor for all individuals.[615] John Stuart Mill furthered Milton's arguments in the 1800s by promoting the principle of the *marketplace of ideas,* where objectionable speech has a place since truth will prevail, and even hateful speech has a value in that it provides an opportunity for others to confront opposition, examine their assumptions, and ultimately refine their own thoughts and arguments.[616]

In recent years, homegrown Islamic terrorist attacks, influenced by al Qaeda but ultimately separate from the organization, have rocked the social fabric in Great Britain. On July 7, 2005, 56 people were killed in a series of bombings in the London subway.[617] In August 2006, a plot to simultaneously destroy U.S.-bound

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[613] *See* U.S. Department of State, http://www.state.gov/g/drl/rls/irf/2006/71416.htm. *See generally* Peter Cumper, *The United Kingdom and the UN Declaration on the Elimination of Intolerance,* 21 EMORY INTL L. REV. 13.

[614] *The Life of Sir Thomas More*, *available at* http://www.luminarium.org/renlit/morebio.htm. *See also Parliamentary Privilege and Free Speech: MPs' privileges and citizens' freedom from oppression*, March 9, 2006, available at www.adls.org.nz/filedownload?id=b3e74fd4-6cb8-4276-9029-a15a59247246.

[615] JOHN MILTON, AREOPAGITICA (Harlan Davidson 1643).

[616] MILL, *supra* note 551.

[617] CNN, Bombers Target London, at http://www.cnn.com/SPECIALS/2005/london.bombing/ (last visited Jul 7, 2012).

commercial airlines departing from London was uncovered;[618] on June 30, 2007, Glasgow Airport was attacked;[619]and, in December 2010, 12 men with links to Pakistan and Bangladesh were arrested in London on suspicion of plotting large-scale terror attacks in the UK.[620] In the aftermath of the attacks, the British Parliament passed counterterrorism-related legislation.

Under the Serious Crime Act 2007, the common law offence of inciting the commission of another offence was abolished and replaced by three statutory inchoate offences under ss.44-46. The three offences are:

(A) Intentionally encouraging or assisting an offence;
(B) Encouraging or assisting an offence believing it will be committed; and
(C) Encouraging or assisting offences believing one or more will be committed.

(A) A person commits an offence under s.44 if:
  (1) He does an act capable of encouraging or assisting the commission of an offence2; and
  (2) He intends to encourage or assist its commission.

  But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act. But it is sufficient to prove that he intended to encourage or assist the doing of an act which would amount to the commission of that offence. There is a defence of acting reasonably.

[618] Statement by Homeland Security Secretary Michael Chertoff announcing a change to the Nation's Threat Level for the Aviation Sector at http://www.dhs.gov/xnews/releases/pr_1158349923199.shtm (last visited July 9, 2013).
[619] *Flaming SUV rams U.K. Airport; 2 Arrests,* Associated Press (June 30, 2007), *available at* http://archive.newsmax.com/archives/articles/2007/6/30/144208.shtml.
[620] *12 men arrested in suspected UK terrorism plot*, FOXNEWS (Dec. 20, 2010), http://www.foxnews.com/world/2010/12/20/men-arrested-suspected-uk-terrorism-plot/.

(B) A person commits an offence under s.45 if:
  (1) He does an act capable of encouraging or assisting the commission of an offence; and
  (2) He believes: (a) that the offence will be committed; and (b) that his act will encourage or assist its commission

  Where it is alleged that a person believed that an offence would be committed and that his act would encourage or assist its commission, it is sufficient to prove that he believed that an act would be done which would amount to the commission of that offence and that his act would encourage or assist in the doing of that act. A defence of acting reasonably is provided.

(C) A person commits an offence under s.46 if:
  (1) He does an act capable of encouraging or assisting the commission of one or more of a number of offences; and
  (2) He believes: (a) that one or more of those offences will be committed (but has no belief as to which); and (b) that his act will encourage or assist the commission of one or more of them.

  A defence of acting reasonably is provided.

  As regards whether an act is one which if done would amount to the commission of an offence, if the offence requires proof of fault it must be proved the defendant believed or was reckless as to whether it would be done with that fault or his state of mind was such that were he to do it, it would be done with that fault. If the offence requires proof of particular circumstances and or consequences, it must be proved that the defendant intended or believed or was reckless that, were the act to be done, it would be done in those circumstances or with those consequences.

The question is "where to draw the line" *and* whether the line is to be drawn differently if the speech is religious. Although England has traditionally not imposed restrictions on free speech, does the reality of a specific threat to society require Parliament, the courts, and the police to reconsider how to effectively respond to religiously inspired terrorism? The cases of Samina Malik and Mohammed Siddique potentially suggest that the UK has abandoned its historical roots of respecting free speech—particularly religious speech—in the wake of Islamic based terrorist attacks. In 2007, 23-year-old Samina Malik was convicted of "possessing records likely to be used for terrorist purposes" under

the 2006 Terrorism Act. In June 2008, her conviction was overturned on appeal, and the Crown Prosecution Service decided not to seek a retrial.[621]

In high school, Malik began writing love poems and other poetry inspired by the rap music of Americans 50 Cent and Tupac Shakur. At age 20, she became more religious and began wearing a *hijab* and calling herself the "Lyrical Terrorist," later claiming that she picked the name because it "sounded cool." The documents Malik possessed included a library of books on firearms, poisons, hand-to-hand combat, and terrorism techniques. Malik was convicted for possessing documents that included her poetry, in which she expressed a desire to be a martyr, an approval of beheadings, respect for Osama bin Laden, and contempt for non-Muslims. Malik has claimed that the poetry was meaningless and taken out of context, insisting that she was not a terrorist.[622] The judge termed her a "complete enigma."[623]

Mohammed Siddique was arrested on April 13, 2006, after accompanying his uncle to the Glasgow Airport. There, the two were told they would not be allowed to fly, and Siddique's cellphone and laptop were confiscated. Siddique was charged with collecting information that would "likely be useful" to a terrorist under Section 58 (1b) of the Terrorism Act 2000. He was found guilty of "collecting terrorist-related information, setting up websites . . . and circulating inflammatory terrorist publications." Siddique was sentenced to eight years imprisonment. His defense has consistently been that he was a merely a 20-year-old "looking for answers," a model student who still lived with his parents.

His attorneys have pointed out that there was never any evidence to support the allegation that Siddique intended to join a terrorist group. An analyst who summarized the images, documents, and videos that Siddique had downloaded said, after the conviction that Siddique "lacked the skills, sophistication, lengthy credentials and cold-blooded professionalism" associated with actual terrorists, describing him as "undoubtedly naïve."[624] The danger posed by these prosecutions is obvious. Neither Malik nor Siddique killed, much less attacked anyone, nor is there evidence that they attempted to commit such acts. Yet both were convicted of serious crimes. Suppose Malik and Siddique are both telling the truth—that they were simply exploring the concepts of terrorism intellectually; however, juries convicted both.

Great Britain is obligated to respect freedom of speech under Article 19 of the

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[621] *CPS Response to Samina Malika appeal, Crown Prosecution Service* (June 17, 2008), http://www.cps.gov.uk/news/pressreleases/143_08.html.
[622] *Lyrical Terrorist Found Guilty*, BBCNEWS (Nov. 8, 2007), http://news.bbc.co.uk/2/hi/uk_news/7084801.stm.
[623] *Id.*
[624] *Man convicted of Terror Offenses*, BBCNEWS (Sep. 17, 2007), http://news.bbc.co.uk/2/hi/uk_news/scotland/tayside_and_central/6997830.stm; *Terror Trial Hears Al-Qaeda Praise Claim,* STV, http://www.stv.tv/content/news/main/display.html?id=opencms:/news/Terror_trial_hears_AlQuaeda_praise_clai.

Universal Declaration of Human Rights, Article 19 of the ICCPR, and Article 10 of the ECHR. Furthermore, Great Britain has gone so far as to expressly incorporate the ECHR into domestic law. Article 10 states, "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."[625] This article does, however, impose some limitations on the right:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[626]

Going beyond the enumerated limitations of Article 10, the UK imposes a number of additional limitations on freedom of speech for it recognizes incitement to racial hatred and incitement to religious hatred as crimes.[627] The UK's laws on defamation are also extremely strict, imposing a high burden of proof on the defendant—one reason why many public figures who would never sue a publication in the United States regularly file suit in the UK.

IX. The Netherlands

Theo van Gogh was a filmmaker, actor, and columnist well known for his open criticism of Islam, and murdered after the release of his anti-Islam film, *Submission*. The two most striking descriptions are that he was a provocateur and gadfly. There is little doubt that van Gogh irritated, enraged, and offended a wide array of people from different ethnic and religious groups, particularly Muslims. It is also fair to say, based on interviews with people who knew him, that he was unconcerned by the fact that he offended others. Though clearly offensive to many and irritating to others, van Gogh represented an important aspect of liberal democracy—the right to speak, the right to create, and the right to express opinions, even opinions considered outrageous. It was this quality that led to his brutal murder.

On November 2, 2004, Mohammed Bouyeri shot van Gogh eight times, slit his throat, nearly decapitating him, and stabbed him in the chest. Two knives were left in van Gogh's corpse, one attaching a five-page "open letter to Hirshi [*sic*]

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[625] Charter of Fundamental Rights, Article 10, available at http://ec.europa.eu/justice_home/unit/charte/en/charter-freedoms.html.
[626] Human Rights Act, Article 8, available at http://news.bbc.co.uk/1/low/uk/946400.stm.
[627] §§ 17–29 of the Public Order Act 1986. The Criminal Justice and Public Order Act 1994 made publication of material that incited racial hatred, a criminal offense.

Ali" to his body that threatened Western governments, Jews, and van Gogh's collaborator, Ayaan Hirsi Ali. Bouyeri was convicted and sentenced to life in prison with no chance of parole. Bouyeri was a member of the Hofstad Network, which the Dutch government characterizes as a terrorist organization.[628] The Hofstad Network is influenced by the ideology of Takfir wal-Hijra, a Muslim extremist group that advocates armed battle against Jews, Christians, and apostate Muslims in order to restore an Islamic world order. Takfir wal-Hijra's ideology instructs that the ends justify the means; group members adopt non-Islamic appearances and practices (shaving their beards, wearing ties, drinking alcohol, eating pork) in order to blend in with non-Muslims.[629] The Hofstad Network has been suspected of planning to kill several members of the Dutch government and parliament.

What differentiates the Hofstad Network from Theo van Gogh, who openly espoused highly controversial views in the media? If both Hofstad and van Gogh have the potential to incite, if they both have the potential to persuade people to act on their behalf, should not they both be subject to similar limitations? After all, it is a matter of perspective in determining whose ideas are more offensive when in theoretical form only. The difference is that extremist religious speech more readily instigates violence than secular speech does. Theo van Gogh was a powerful voice to some, a gadfly to others, dismissed in some quarters as a racist not to be taken seriously and considered by some to be an unrepentant Islam basher who needed to be silenced.

But, if the ultimate strength of liberal democracy is the voice that makes us uncomfortable—right or left, religious or secular—then van Gogh manifests that strength. Was he extreme in his views? According to many with whom I met, the answer is *yes*. But, those views, in the context of the right to free speech, did not fall into the category of words that need to be silenced. The right to free speech was, in some ways, designed for a Theo van Gogh. He was not a spiritual leader; he had no army of followers who were going to endanger either national security or public order. Though offensive to some, he was not a danger to society at large or to specific elements of society.

That is why limits on free speech do not pertain to a Theo van Gogh, but do apply to rabbis, pastors, and imams who espouse extreme views that threaten specific individuals (internal communities) and larger (external) communities alike. Important to recall van Gogh did not advocate violence.

X. Norway

Conversations with Norwegian subject matter experts regarding free speech dilemmas in Norway highlighted how distinct the Norwegian paradigm and

[628] On January 23, 2008, a Dutch appeals court ruled that the government did not meet its burden of proving that the Hofstad Network is a terrorist organization as defined by Dutch law.
[629] Transcript, *Al Qaeda's New Front,* produced and directed by Neil Docherty, FRONTLINE, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/front/etc/script.html.

experience from the other surveyed countries. The lack of significant free speech cases in Norway, reflects, according to Norwegian academics, law enforcement officials and public policy commentators a culture that has, largely, not been confronted with free speech dilemmas. As one thoughtful commentator noted: "we are largely a homogenous country, comprised of traditional Norwegians[630], and therefore have never had free speech challenges and debates."[631] That homogeneity largely ensured a consensus amongst the 'traditional' population that, seemingly, contributed to a conflict free culture and dialogue amongst those who roots of deep commonality.

That is not, however, to suggest that Norwegians have inherently agreed on critical issues confronting Norwegian society. The sharp, and painful, divide between those who collaborated with Nazi Germany and those who did not reflects a homogenous culture choosing two distinct sides. While this reflects a profound lack of consensus on an issue of extraordinary national importance the core homogeneity that defines Norway was, ultimately, not impacted. Therefore, the tensions that define other societies and nations regarding philosophical, legal and practical free speech dilemmas has, in the main, not been a part of Norwegian culture.

A homogenous population sharing deep cultural, religious and societal values and roots is, in the main, an unchallenged society from within. That is, threats to individuals and society described in previous chapters are, largely, missing from the Norwegian experience. While that is not intended to minimize the horror of Breivik's murderous attack on July 22, 2011 it does highlight an important reality of Norwegian culture and history: profound shared values amongst the traditional Norwegian population. The challenges posed to the other countries are, largely, not faced by Norway either practically or existentially. The caveat, obviously, is Breivik and whether his act is an aberration in the Norwegian ethos or indicative of deeper trends and sentiments shared by others, also capable of action. In that vein, the Norwegian free speech discussion is different from the countries previously surveyed: a homogenous population rarely challenged internally presently forced to confront uncomfortable questions in the face of a terrible domestic terrorist attack.

Conversations with Norwegian subject matter experts reflect a general consensus that Breivik was the action of a lone individual, whose actions were motivated by the blogger Fjordman but not the result of deliberate, consistent incitement reflective of the Rabin assassination. In that context, the distinction between Yigal Amir and Breivik are significant; what is, obviously, unclear is the possibility of an additional Breivik motivated by the July 22, 2011 attack. As previously referenced interviews with Norwegian security and law enforcement officials reflect a powerful 'wake-up' call occurred on two distinct fronts: the

[630] A term that implies white Norwegians; however, it is important to note that immigration to Norway is not only from North Africa, Turkey and Pakistan (as is, largely, currently the case with Holland, the UK).
[631] Phone conversation; notes in author's records.

presence in their midst of a Norwegian right-wing extremist whose targets are fellow, traditional Norwegians and the need to address both intelligence and security failures.

The second 'lesson learned' is directly related to the larger theme this book addresses: the willingness of Western societies to engage in honest discussion and reflection regarding the presence of extremists in their midst. Much like the "conception" amongst Israeli security officials that an Israeli Jew was incapable of assassinating a Prime Minister, Norwegian security officials were overwhelmingly surprised by the actions of a traditional Norwegian. That 'surprise' is very much relevant to the free speech discussion: the pre-assassination incitement in Israel was vitriolic and hate-filled and tested the outer limits of free speech. In direct contrast, prior to July 22, 2011 Norwegian public debate, under no circumstances, reflected or mirrored the pre November 4, 1995 Israeli atmosphere. The question is whether the public and decision makers recognize the clear dangers posed by extremist actors and more importantly by extremist inciters. That is, what are the lessons learned from Amir and Breivik and whether applying those lessons results in minimizing individual rights and liberties, particularly with respect to free speech. As made clear by Israeli Ministry of Justice officials with whom I met the answer is, largely, "free speech privileges" and the "marketplace of ideas". With respect to Norway, the response reflected a conviction that Breivik was a 'lone wolf' and belief (perhaps hope is better term) that another Breivik is all but unlikely. Perhaps, perhaps not; the question is whether---and to what extent---Norwegian society will engage in a free speech discussion should extremist inciters (religious and secular alike) push the limits of tolerable speech.

On that note, important to recall---as previously discussed---that the homogenous, traditional Norwegian population essential to understanding the 'consensus' culture is undergoing change. How that impacts the extremist-incitement-free speech discussion remains to be seen; nevertheless as noted by an Oslo cab driver "the Norway of tomorrow is not the Norway of yesterday". With that comment as a springboard we turn our attention to Norwegian legislation and constitution and two cases that directly address free speech.

According to Article 100 of the Norwegian constitution (May 17, 1814 and subsequently amended):

> There shall be freedom of expression.
>
> No person may be held liable in law for having imparted or received information, ideas or messages unless this can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual's freedom to form opinions. Such legal liability shall be prescribed by law.

> Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression.
>
> Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions.[632]

According to Article 135 (A) of the Norwegian General Civil Penal Code:

> Section 135 a. Any person who willfully or through gross negligence publicly utters a discriminatory or hateful expression shall be a liable to fines or imprisonment for a term not exceeding three years. An expression that is uttered in such a way that is likely to reach a large number of persons shall be deemed equivalent to a publicly uttered expression. An person who aids and abets such an offence shall be liable to the same penalty.
>
> A discriminatory or hateful expression here means threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone because of his or her
>
> a) skin colour or national or ethnic origin,
> b) religion or life stance, or
> c) homosexuality, lifestyle or orientation
>
> Section 140. Any person who publicity urges or instigates the commission of a criminal act or extols such an act or offers to commit or to assist in the commission of it, or who aids and abets such urging, instigation, extolling, or offer, shall be liable to fines or to detention or imprisonment for a term no exceeding eight ears, but in no case to a custodial penalty exceeding two-thirds of the maximum applicable to the act itself.[633]

While Norway is a 'dualist' country[634] the Human Rights Act of 1999[635]

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[632] *See The Constitution*, STORTINGET, *available at* http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/ (last visited Jan 11, 2013); while a number of amendments have been enacted since the constitution was originally drafted, Article 100 was not amended until 2004; for a brief description (English) of the Freedom of Speech Commission conclusion that lead up to the constitutional amendment of 2004 - including the text of the new provision see http://www.regjeringen.no/nb/dep/jd/dok/nouer/1999/nou-1999-27/13.html?id=142132 (last visited Jan. 11, 2013).

[633] See the General Civil Penal Code, Act of May 22, 1902 *available at* www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf.

[634] International law and treaties require a particular act to become internal law directly

incorporated the European Convention of Human Rights (ECHR), the International Covenant of Civil and Political Rights (ICCPR) and other international Human Rights instruments into Norwegian law. In doing so, - and stated they should have preference where in conflict with internal, Norwegian law therby giving both the ECHR and ICCPR "semi-constitutional effect".[636] According to Article 10 of the ECHR:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[637]

An analysis of the Norwegian and constitution reflects a culture deeply respectful of the individual's right to free speech and expression; the ECHR is in full accordance with that principle and right. While Norwegian law and ECHR articulate limits on the freedom of speech the provisions are in accordance with free speech traditions and values of Western civil political culture and society. In addition, the traditional Norwegian culture of homogeneity and consensus imply a deep tolerance of free speech precisely because of the paucity of internal challenges to culture and society. That is, the traditional culture of consensus largely minimized dangers posed by free speech; in a society defined as "traditional Norwegian" limits on free speech, beyond the provisions of Article 100 (Constitution) and Article 135 A (Penal Code), would be deemed superfluous and not reflective of societal concerns given the paucity of domestic threats and risks.

As discussed below the question with respect to free speech is when and how should limits be placed. In accordance with across the board advice generously and graciously provided by Norwegian subject matter experts (both in face-face

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applicable.

[635] *See generally* http://www.gender.no/Topics/19/sub_topics?path=5/964 which discusses the Human Rights Act of 1999.

[636] Email in author's private records.

[637] *The European Convention on Human Rights*, COUN. OF EUROPE, *available at* http://www.hri.org/docs/ECHR50.html.

interviews and numerous, subsequent email and telephone conversations) two cases stand out as particularly helpful in understanding the practical ramifications of Norwegian free speech provisions. In analyzing and considering both cases important to recall the previous discussion regarding both the core tradition of Norwegian society and the terrible events of July 22, 2011.

A. Mullah Krekar[638]

"Krekar has voiced support for Islamic terrorists, encourages holy war and, after years of controversy, was ultimately declared a threat to national security in Norway. Local authorities have been unable to deport him, however, because they lack guarantees he won't be executed back home in Iraq."[639] To that end, Krekar was protected by Norwegian respect for international law obligations regarding harm that may befall an individual post-deportation. While Krekar 'pushed the limits' of free speech—with full confidence that international law provided him extraordinary protections--- a valid argument suggests his support for Islamic terrorists falls within the definition of protected speech.

While his support for Islamic terrorists can be described as troubling and possibly incendiary it does not morph in the realm of violating the Norwegian penal code. In the same vein that the range of opinions expressed daily in the public sphere represent a wide range of perspectives Krekar's comments reflected his position. The wide gulf between "support for terrorists" and incitement to violence suggests that statements of support fall within free speech protections premised on an extreme tenuousness between his words and the actions of Islam terrorists. However, were terrorists to claim that Krekar's words of encouragement were the basis for an attack then a direct link could be drawn between the words and resulting conduct.

However, the basis for his trial and conviction were his comments made to members of the foreign press (in Norway) regarding harm that would befall Norwegian officials were he to be deported or harmed: "After claiming that it's "Norway's responsibility" to find him a secure country in which to live, he said that if he dies, whoever is responsible for his death will suffer the same fate. "Norway will pay a price," he told the foreign journalists assembled. "My death will cost the Norwegian society. If a leader like Erna Solberg (a former government minister now in opposition as leader of the Conservative Party) sends me out, and I die, she will suffer the same fate." Remarks like that led to police protection around Solberg a few years ago. Krekar stated firmly that he

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[638] *See You Deserve a Brick Today,* GATES OF VIENNA (Kar. 28, 2012), http://gatesofvienna.blogspot.com/2012/03/you-deserve-brick-today.html#more, last viewed September 26, 2012

[639] *Judges sentences Mullah Krekar to five years in prison for making threats*, VIEWS AND NEWS FROM NORWAY (Mar. 26, 2012), http://www.newsinenglish.no/2012/03/26/judge-sentences-mullah-krekar-to-five-years-in-prison/.

hasn't "laid a plan" to carry out any assassination, "but my followers will."[640]

Krekar was convicted in accordance with Articles 140, 147 (a-2) and 227 (1) in the General Penal Code which address the content of his speech, in particular direct threats made against Norwegian officials in positions of authority, particularly Conservative Party chair Erna Solberg.

> Article 140. Any person who publicly urges or instigates the commission of a criminal act or extols such an act or offers to commit or to assist in the commission of it, or who aids and abets such urging, instigation, extolling, or offer, shall be liable to fines or to detention or imprisonment for a term not exceeding eight years, but in no case to a custodial penalty exceeding two-thirds of the maximum applicable to the act itself. Criminal acts shall here include acts the commission of which it is criminal to induce or instigate.[641]
>
> Article 147 a. A criminal act…is considered to be a terrorist act and is punishable by imprisonment for a term not exceeding 21 years when such act has been committed with the intention of… (2) seriously intimidating a population…[642]
>
> Article 227. Any person who by word or deed threatens to commit a criminal act that is subject to a more severe penalty than detention for one year or imprisonment for six months, under such circumstances that the threat is likely to cause serious fear, or who aids and abets such threat, shall be liable to fines or imprisonment for a term not exceeding three years…[643]

That is, Krekar was not prosecuted/convicted because of the support expressed for Islamic terrorists rather for direct threats against specific individuals; rather than perceiving the speech as hate or racist speech the emphasis was on incitement with respect to officials in positions of authority. To that end, Krekar's conviction does not fall within free speech rather reflects the incitement to personal harm to specific individuals.[644] As suggested by a subject matter expert, the "Norwegian legal tradition reflects a pragmatic legal approach rather than formalistic which implies a test of context; conviction is possible only if threats

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[640] *Mullah Krekar meets the press*, VIEWS AND NEWS FROM NORWAY (June 10, 2010), http://www.newsinenglish.no/2010/06/10/mullah-krekar-meets-the-press/.
[641] *See General Civil Penal Code*, UN, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf (last visited Jan 11, 2013).
[642] *Id*.
[643] *Id*.
[644] *Norway: Cleric Sentenced for Threats*, N.Y. TIMES, Mar. 27, 2012, http://www.nytimes.com/2012/03/27/world/europe/norway-cleric-sentenced-for-threats.html?_r=3&scp=8&sq=Norwegian&s.

and words are viable"[645]

Important for our purposes is the decision to prosecute Krekar in accordance with Article 147 rather than Article 135; the decision reflects a position that supporting Islamic terrorism does not run afoul of the law whereas incitement to harm specific individuals violates Norwegian law. The prosecutorial decision suggests both enormous respect for the right to express an opinion and little tolerance for speech that potentially harms a specific individual. In the Krekar case, then, the line drawing is, indeed, reflective of a pragmatic (as suggested by a subject matter expert) rather than a formalistic approach. In that context, a pragmatic approach emphasizes potential harm to a specific individual rather than potential harm for which Krekar may bear no responsibility. That analysis, needless to say, would require re-articulation were an Islamic terrorist to state Krekar's comments motivated and propelled a specific terrorist attack.

B. Summary of Decisions

Norwegian Review

The speaker charged with violation of § 135a of the Norwegian Penal Code (NPC) was acquitted by the Norwegian Supreme Court**….**Justice Stabel for the majority underlined that the hate speech prohibition had to be interpreted in light of the protection of free speech in NC (Norwegian constitution, ANG) § 100, and that it only covered manifestly offensive speech.

Although finding the speech in question to be "fundamentally derogatory and offensive",[646] the majority held that it was not offensive enough to constitute a breach of § 135a. In reaching this conclusion, Justice Stabel considered the statement "every day our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts" to be "absurd" and "spurning rational interpretation".

Justice Stabel, to support her conclusion that they were nevertheless to be regarded as protected speech, emphasized that no actual threats were made, and that the speech did not amount to any encouragement to carry out particular actions.

Justice Flock for the dissent agreed to the majority construction of the legal foundations found in NPC § 135a read in light of NC § 100 and the international obligations. He underlined, however, that the speech could neither be interpreted purely linguistically, but rather with the aim of establishing how it might reasonably be seen to have been perceived by the people present. To do this, he maintained that in addition to the speech, the situation and the actions

[645] Email in author's records.
[646] *Id*.

of the speaker and his crowd had to be taken into consideration.[647]

International Review

Following the NSCt acquittal, a communication was filed before the U.N. Committee on the Elimination of Racial Discrimination.[648] The Committee reaffirmed that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression and concluded that the statements in question, given that they were of exceptionally/manifestly offensive character, were not protected by the due regard clause.

Employing much the same interpretative approach as the NSCt minority, the Committee found the statement of Norway being "plundered and destroyed by Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts" in conjunction with the reference to Rudolf Hess and Adolf Hitler and their principles and that the Boot Boys 'follow in their footsteps and fight for what (we) believe in" to express racial superiority or hatred; "the deference to Hitler and his principles and 'footsteps' to be taken as incitement at least to racial discrimination, if not to violence."[649]

The Committee underlined that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. It emphasized that the "due regard"-clause relates generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech, and that as all international instruments that guarantee free speech also provide for the possibility, under certain circumstances, of limiting the exercise of this right. It thus concluded that the "due regard"-clause did not protect the manifestly offensive speech by the Boot Boys leader.

XI. Final Word

This is a long chapter, covering a wide swath of territory; its length was dictated by the need to incorporate significant amounts of material in order to fully address the question that is, in many ways, at this books' core. In inquiring whether free speech should be limited it is necessary to include the writings of philosophers and to engage in country specific discussion. Otherwise, the question remains in the realm of the abstract, devoid of concreteness and practicality. While the ephemeral is intellectually interesting and important it does not facilitate achieving what this book seeks to do: engage in robust discussion regarding free speech in the context of free speech. To that end, analyzing case law, legislation and constitutional provisions of the surveyed

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[647] *Id*.
[648] *See generally the International Convention on Elimination of all Forms of Racial Discrimination*, UN http://www.regjeringen.no/upload/kilde/jd/prm/2005/0059/ddd/pdfv/255370-cerd_communication_30_2003.pdf (last visited Jan 12, 2013).
[649] CERD/C/67/D/30/2003, 10.4

countries is intended to enhance the concreteness of the discussion.

The question whether to limit free speech in the face of extremist incitement is not posed casually. It is an issue that cuts to the heart of western democracy both because of the danger in limiting speech and the commensurate risk in not limiting speech when the speaker poses a threat. The dilemma is visceral and complicated for it forces the public and decision makers alike to determine the extent to which society can tolerate intolerant speech. The theme brilliantly articulated by Prof (today Dean) Minow articulates the tension; in many ways, it "sets the table" for the limits of free speech dilemma.

The question, as highlighted in the Israeli paradigm and relevant to the other surveyed countries, is whether advocacy should be restricted when –in the Rawls analysis----"people and institutions are simply overwhelmed" not from the outside but as discussed in this chapter, from the inside. There are, naturally, dangers in advocating limiting of free speech; however, as the discussion in previous chapters suggests there are enormous risks in not addressing this complicated question. In many ways, the dilemma confronting liberal society is whether "risks" are inherent to democracies and, to that end, intolerance is a legitimate price to pay. Conversely, the "counter" question is similarly legitimate: does the government's duty to protect not outweigh otherwise guaranteed rights. Whether the question is "binary"—rather than subject to "shades of gray"---is legitimate; perhaps, it offers a reasonable way forward that effectively protects vulnerable members of society while minimizing the impact on those who endanger society and individuals alike.

In the introduction I referenced a major judicial matter in which I am presently involved; the timing is fortuitous (in the context of this project) for it highlights many of the issues that are at the core of this discussion. The over-arching question is to whom does government owe a duty: to those at risk or to broader interests, ranging from political to societal to an instinctual response that otherwise guaranteed rights are sacrosanct. My involvement in this matter has, more than anything else, sharpened my conviction that protecting the "at risk" individual outweighs other considerations, regardless of the cost in the context of protected rights. Intensive engagement and interaction with individuals whose rights have been violated by a powerful, and disturbing, combination of religious extremism and government acquiescence have powerfully instilled in me a deep conviction that the state's primary duty is to protect the vulnerable. Innumerable hours spent interviewing women and children who have been directly harmed, in some cases irreversibly, by this disturbing confluence is the cornerstone for the discussion that follows in chapter seven.

My thesis, then, is predicated both on recognition of the human cost associated with extremism based in large part on my involvement in this case and significant interaction with a wide range of subject matter experts and thought leaders in the US, Europe and Israel. Those two interactions are significantly bolstered by my understanding both of contemporary social realities and circumstances in

conjunction with my analysis of free speech and the rights and obligations it implies. Re-stated: the right to free speech is not an absolute and implies responsibilities and obligations. In the face of religious and secular extremism that twin-headed reality is deserving of our fullest attention even if it suggests minimizing rights. As we turn to the Moving Forward discussion important to recall that the “to whom does the state owe a duty” discussion has, largely, taken a back seat to the “protecting otherwise guaranteed rights” paradigm. The question is whether society, in general and in specific, can continue to espouse this perspective.