

## Connecticut Debate Association

October 13, 2012

AITE and Farmington High School

### **Resolved: Inflammatory speech and publications should not be protected under the First Amendment.**

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#### **Cultural Clash Fuels Muslims Raging at Film**

**The New York Times, September 16, 2011, By DAVID D. KIRKPATRICK**

CAIRO — Stepping from the cloud of tear gas in front of the American Embassy here, Khaled Ali repeated the urgent question that he said justified last week's violent protests at United States outposts around the Muslim world.

"We never insult any prophet — not Moses, not Jesus — so why can't we demand that Muhammad be respected?" Mr. Ali, a 39-year-old textile worker said, holding up a handwritten sign in English that read "Shut Up America." "Obama is the president, so he should have to apologize!"

When the protests against an American-made online video mocking the Prophet Muhammad exploded in about 20 countries, the source of the rage was more than just religious sensitivity, political demagoguery or resentment of Washington, protesters and their sympathizers here said. It was also a demand that many of them described with the word "freedom," although in a context very different from the term's use in the individualistic West: the right of a community, whether Muslim, Christian or Jewish, to be free from grave insult to its identity and values.

That demand, in turn, was swept up in the colliding crosscurrents of regional politics. From one side came the gale of anger at America's decade-old war against terrorism, which in the eyes of many Muslims in the region often looks like a war against them. And from the other, the new winds blowing through the region in the aftermath of the Arab Spring, which to many here means most of all a right to demand respect for the popular will.

"We want these countries to understand that they need to take into consideration the people, and not just the governments," said Ismail Mohamed, 42, a religious scholar who once was an imam in Germany. "We don't think that depictions of the prophets are freedom of expression. We think it is an offense against our rights," he said, adding, "The West has to understand the ideology of the people."

Even during the protests, some stone throwers stressed that the clash was not Muslim against Christian. Instead, they suggested that the traditionalism of people of both faiths in the region conflicted with Western individualism and secularism.

Youssef Sidhom, the editor of the Coptic Christian newspaper Watani, said he objected only to the violence of the protests.

Mr. Sidhom approvingly recalled the uproar among Egyptian Christians that greeted the 2006 film "The Da Vinci Code," which was seen as an affront to aspects of traditional Christianity and the persona of Jesus. Egypt, Jordan, Lebanon and other Arab countries banned both the film and the book on which it was based. And in Egypt, where insulting any of the three Abrahamic religions is a crime, the police even arrested the head of a local film company for importing 2,000 copies of the DVD, according to news reports.

"This reaction is expected," Mr. Sidhom said of last week's protests, "and if it had stayed peaceful I would have said I supported it and understood."

In a context where insults to religion are crimes and the state has tightly controlled almost all media, many in Egypt, like other Arab countries, sometimes find it hard to understand that the American government feels limited by its free speech rules from silencing even the most noxious religious bigot.

In his statement after protesters breached the walls of the United States Embassy last Tuesday, the spiritual leader of the Egypt's mainstream Islamist group, the Muslim Brotherhood, declared that "the West" had imposed laws against "those who deny or express dissident views on the Holocaust or question the number of Jews killed by Hitler, a topic which is purely historical, not a sacred doctrine."

In fact, denying the Holocaust is also protected as free speech in the United States, although it is prohibited in Germany and a few other European countries. But the belief that it is illegal in the United States is widespread in Egypt, and the

Brotherhood's spiritual leader, Mohamed Badie, called for the "criminalizing of assaults on the sanctities of all heavenly religions."

"Otherwise, such acts will continue to cause devout Muslims across the world to suspect and even loathe the West, especially the U.S.A., for allowing their citizens to violate the sanctity of what they hold dear and holy," he said. "Certainly, such attacks against sanctities do not fall under the freedom of opinion or thought."

Several protesters said during the heat of last week's battles here that they were astonished that the United States had not punished the filmmakers. "Everyone across all these countries has the same anger, they are rising up for the same reason and with the same demands, and still no action is taken against the people who made that film," said Zakaria Magdy, 23, a printer.

In the West, many may express astonishment that the murder of Muslims in hate crimes does not provoke the same level of global outrage as the video did. But even a day after the clashes in Cairo had subsided, many Egyptians argued that a slur against their faith was a greater offense than any attack on a living person.

"When you hurt someone, you are just hurting one person," said Ahmed Shobaky, 42, a jeweler. "But when you insult a faith like that, you are insulting a whole nation that feels the pain."

Mr. Mohamed, the religious scholar, justified it this way: "Our prophet is more dear to us than our family and our nation."

Others said that the outpouring of outrage against the video had built up over a long period of perceived denigrations of Muslims and their faith by the United States or its military, which are detailed extensively in the Arab news media: the invasion of Iraq on a discredited pretext; the images of abuse from the Abu Ghraib prison; the burning or desecrations of the Koran by troops in Afghanistan and a pastor in Florida; detentions without trial at Guantánamo Bay; the denials of visas to prominent Muslim intellectuals; the deaths of Muslim civilians as collateral damage in drone strikes; even political campaigns against the specter of Islamic law inside the United States.

"This is not the first time that Muslim beliefs are being insulted or Muslims humiliated," said Emad Shahin, a political scientist at the American University in Cairo.

While he stressed that no one should ever condone violence against diplomats or embassies because of even the most offensive film, Mr. Shahin said it was easy to see why the protesters focused on the United States government's outposts. "There is a war going on here," he said. "This was a straw, if you will, that broke the camel's back."

"The message here is we don't care about your beliefs — that because of our freedom of expression we can demean them and degrade them any time, and we do not care about your feelings."

There are also purely local dynamics that can fan the flames. In Tunis, an American school was set on fire by protesters angry over the video — but then looted of computers and musical instruments by people in the neighborhood.

Here in Cairo, ultraconservative Islamists known as Salafis initially helped drum up outrage against the video and rally their supporters to protest outside the embassy. But by the time darkness fell and a handful of young men climbed the embassy wall, the Salafis were nowhere to be found, and they stayed away the rest of the week.

Egyptian officials said that some non-Salafis involved in the embassy attacks confessed to receiving payments, although no payer had been identified. But after the first afternoon, the next three days of protests were dominated by a relatively small number of teenagers and young men — including die-hard soccer fans known as ultras. They appeared to have been motivated mainly by the opportunity to attack the police, whom they revile.

Some commentators said they regretted that the violence here and around the region had overshadowed the underlying argument against the offensive video. "Our performance came out like that of a failed lawyer in a no-lose case," Wael Kandil, an editor of the newspaper Sharouq, wrote in a column on Sunday. "We served our opponents something that made them drop the main issue and take us to the margins — this is what we accomplished with our bad performance."

Mohamed Sabry, 29, a sculptor and art teacher at a downtown cafe, said he saw a darker picture. "To see the Islamic world in this condition of underdevelopment," he said, "this is a bigger insult to the prophet."

Mai Ayyad contributed reporting.

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## The World Doesn't Love the First Amendment

By Eric Posner, Slate, Posted Tuesday, Sept. 25, 2012, at 4:10 PM ET

The universal response in the United States to the uproar over the anti-Muslim video is that the Muslim world will just have to get used to freedom of expression. President Obama said so himself in a [speech at the United Nations](#) today, which included both a strong defense of the First Amendment and ("in the alternative," as lawyers say) and a plea that

the United States is helpless anyway when it comes to controlling information. In a world linked by YouTube, Twitter, and Facebook, countless videos attacking people's religions, produced by provocateurs, rabble-rousers, and lunatics, will spread to every corner of the world, as fast as the Internet can blast them, and beyond the power of governments to stop them. Muslims need to grow a thick skin, the thinking goes, as believers in the West have done over the centuries. Perhaps they will even learn what it means to live in a free society, and adopt something like the First Amendment in their own countries.

But there is another possible response. This is that Americans need to learn that the rest of the world—and not just Muslims—see no sense in the First Amendment. Even other Western nations take a more circumspect position on freedom of expression than we do, realizing that often free speech must yield to other values and the need for order. Our own history suggests that they might have a point.

Despite its 18<sup>th</sup>-century constitutional provenance, the First Amendment did not play a significant role in U.S. law until the second half of the 20th century. The First Amendment did not protect anarchists, socialists, Communists, pacifists, and various other dissenters when the U.S. government cracked down on them, as it regularly did during times of war and stress.

The First Amendment earned its sacred status only in the 1960s, and then only among liberals and the left, who cheered when the courts ruled that government could not suppress the speech of dissenters, critics, scandalous artistic types, and even pornographers. Conservatives objected that these rulings helped America's enemies while undermining public order and morality at home, but their complaints fell on deaf ears.

A totem that is sacred to one religion can become an object of devotion in another, even as the two theologies vest it with different meanings. That is what happened with the First Amendment. In the last few decades, conservatives have discovered in its uncompromising text—“Congress shall make no law ... abridging the freedom of speech”—support for their own causes. These include unregulated campaign speech, unregulated commercial speech, and limited government. Most of all, conservatives have invoked the First Amendment to oppose efforts to make everyone, in universities and elsewhere, speak “civilly” about women and minorities. I'm talking of course about the “political correctness” movement beginning in the 1980s, which often merged into attempts to enforce a leftist position on race relations and gender politics.

Meanwhile, some liberals began to have second thoughts. They supported enactment of hate-crime laws that raised criminal penalties for people who commit crimes against minorities because of racist or other invidious motives. They agreed that hate speech directed at women in the workplace could be the basis of sexual harassment claims against employers as well. However, the old First Amendment victories in the Supreme Court continued to play an important role in progressive mythology. For the left, the amendment today is like a dear old uncle who enacted heroic deeds in his youth but on occasion says embarrassing things about taboo subjects in his decline.

We have to remember that our First Amendment values are not universal; they emerged contingently from our own political history, a set of cobbled-together compromises among political and ideological factions responding to localized events. As often happens, what starts out as a grudging political settlement has become, when challenged from abroad, a dogmatic principle to be imposed universally. Suddenly, the disparagement of other people and their beliefs is not an unfortunate fact but a positive good. It contributes to the “marketplace of ideas,” as though we would seriously admit that Nazis or terrorist fanatics might turn out to be right after all. Salman Rushdie recently claimed that bad ideas, “like vampires ... die in the sunlight” rather than persist in a glamorized underground existence. But bad ideas never die: They are zombies, not vampires. Bad ideas like fascism, Communism, and white supremacy have roamed the countryside of many an open society.

So symbolic attachment to uneasy, historically contingent compromises, and a half-century of judicial decisions addressing domestic political dissent and countercultural pressures, prevent the U.S. government from restricting the distribution of a video that causes violence abroad and damages America's reputation. And this is a video that, by the admission of all sides, has no value whatsoever.

Americans have not always been so paralyzed by constitutional symbolism. During the Cold War, the U.S. foreign policy establishment urged civil rights reform in order to counter Soviet propagandists' gleeful reports that Americans fire-hosed black protesters and state police arrested African diplomats who violated Jim Crow laws. Rather than tell the rest of the world to respect states' rights—an ideal as sacred in its day as free speech is now—the national government assured foreigners that it sought to correct a serious but deeply entrenched problem. It is useful if discomfiting to consider that many people around the world may see America's official indifference to Muslim (or any religious) sensibilities as similar to its indifference to racial discrimination before the civil rights era.

The final irony is that while the White House did no more than timidly plead with Google to check if the anti-Muslim video violates its policies (appeasement! shout the critics), Google itself approached the controversy in the spirit of prudence. The company declined to remove the video from YouTube because the video did not attack a group (Muslims) but only attacked a religion (Islam). Yet it also cut off access to the video in countries such as Libya and Egypt where it caused violence or violated domestic law. This may have been a sensible middle ground, or perhaps Google should have done more. What is peculiar is that while reasonable people can disagree about whether a government should be able to curtail speech in order to safeguard its relations with foreign countries, the Google compromise is not one that the U.S. government could have directed. That's because the First Amendment protects verbal attacks on groups as well as speech that causes violence (except direct incitement: the old cry of "Fire!" in a crowded theater). And so combining the liberal view that government should not interfere with political discourse, and the conservative view that government should not interfere with commerce, we end up with the bizarre principle that U.S. foreign policy interests cannot justify any restrictions on speech whatsoever. Instead, only the profit-maximizing interests of a private American corporation can. Try explaining that to the protesters in Cairo or Islamabad.

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## A "Foreign Policy Exception" to the First Amendment?

By [Gabe Rottman](#), Legislative Counsel, ACLU Washington Legislative Office at 2:07pm

At a time when the anger abroad over the [Innocence of Muslims](#) video shows no signs of abating, President Obama gave an [impassioned speech](#) Tuesday at the United Nations that was a full-throated, unqualified defense of the American tradition of free expression.

We [protect speech critical of religion not] because we support hateful speech, but because our founders understood that without such protections, the capacity of each individual to express their own views and practice their own faith may be threatened. We do so because in a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities. We do so because given the power of faith in our lives, and the passion that religious differences can inflame, the strongest weapon against hateful speech is not repression; it is more speech.

Damn straight. That's not in any way equivocal. Although the president did call the video "crude and disgusting," that is irrelevant to the question of its constitutional status.

Unfortunately, many disagree with the president. Some in Congress, the media and academia have suggested that the religious violence overseas somehow justifies what I'm going to call a "foreign policy exception" to the First Amendment. Democratic Senators John D. Rockefeller (W.Va.) and John Kerry (Mass.) have both stated that YouTube should remove the video from its site. University of Chicago Law Professor Eric Posner [argued this](#) week in Slate that the United States "overvalues" free speech. Sarah Chayes—a former NPR reporter who now lives in Afghanistan—[wrote](#) in the Los Angeles Times that the violence sparked by the Innocence video may justify its censorship.

Most of these arguments boil down to something along the lines of: the video is sufficiently inflammatory that it qualifies as "incitement," which is one of the narrow categories of expression (like fraud) that do not technically receive First Amendment protection. These narrow categories of speech can be restricted by the government without it jumping through too many hoops

In truth, that's not a crazy argument. It is wrong, though. Here's why.

The example that keeps coming up is the famous "falsely shouting fire in a crowded theater" line from a World War I Supreme Court case called [Schenck](#). There, Justice Oliver Wendell Holmes upheld a conviction under the 1917 Espionage Act (the actual passage is "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing a panic").

It's crucial to note exactly what was being prosecuted in [Schenck](#). The defendant—a member of the Socialist Party—was being prosecuted for a *pamphlet* urging opposition to the draft. It did not call for violence. It did not even call for civil disobedience. Nevertheless, despite the offense being *nothing like* shouting fire in a crowded theater, Holmes used the analogy to justify this now roundly derided decision. The "crowded theater" example is worse than useless in defining the boundaries of constitutional speech. When used metaphorically, it can be deployed against *any* unpopular speech.

[Schenck](#) isn't the law anymore, for precisely that reason. If you really want to talk incitement, look at [Brandenburg](#), the case from the late '60s that currently governs. There, a Ku Klux Klan leader was convicted in state court for incitement after giving a speech at a cross-burning rally. The defendant made reference to "revengeance" (sic) against the federal government for "suppressing the white . . . race," and called for a July 4 march on Washington. The Supreme Court reversed his conviction and effectively repudiated [Schenck](#). The court held that, to be unprotected "incitement," speech

must meet three requirements. The speaker must intend to cause violence. The violence must be the likely result of the speech. And the violence must be imminent.

As applied to the Innocence of Muslims video, an incitement argument is a tall order. First, there was a significant delay between release of the video and the riots overseas. Many would argue the YouTube release isn't where you start the "imminence" clock; the key is how long it takes between when the video goes viral and the ensuing violence. But that would completely eviscerate the imminence requirement. Otherwise, I could go back, find a speech from a dozen years ago, use it to whip up a mob, and thus render the speech unprotected under the First Amendment.

Second, there's just a basic "causation" problem here. The *Brandenburg* concept of incitement actually goes back all the way to John Stuart Mill, who argued it's perfectly acceptable to say in print that corn dealers starve the poor, but not to say it in front of an angry mob gathered, pitchfork-ready, outside the house of the corn dealer. Although the former may rouse the passions of the rabble if handed out by a rabble-rouser, it cannot be the direct cause of harm to the corn dealer. Accordingly, posting the video on YouTube (and even sending it to folks who would distribute it to a mob) isn't the same as using it to whip up the pitchfork-wielding mob into violence. Rather, as soon as you need an intermediary to help get the violence going, even if using the inflammatory speech as the "spark," the *intermediary* becomes the individual guilty of incitement—not the initial speaker.

But that's all well-trod ground. Posner raises a more fundamental question. In justifying restrictions on the Innocence video, he says, "[t]his is a video that, by the admission of all sides, has no value whatsoever." Well, no. I'm not sure all sides concede that. It's virtually incomprehensible, but it does criticize a major religion, which is a classic exercise of the First Amendment. Even if it is valueless, the danger the First Amendment is meant to address is that when the government becomes the arbiter of the value of speech, it will use that power to its own parochial benefit.

In any event, say what you will about the Innocence video—and folks should say lots—but it is clearly constitutionally protected speech. President Obama took a firm stand on the right side of the First Amendment this week, and may have reminded many overseas that American-style freedom of speech isn't their enemy, and may even be their friend. He deserves much credit for this.

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## Does 'Innocence of Muslims' meet the free-speech test?

Op-Ed LATIMES.COM, September 18, 2012|By Sarah Chayes

**U.S. 1st Amendment rights distinguish between speech that is simply offensive and speech deliberately tailored to put lives and property at immediate risk.**

In one of the most famous 1st Amendment cases in U.S. history, *Schenck vs. United States*, Supreme Court Justice Oliver Wendell Holmes Jr. established that the right to free speech in the United States is not unlimited. "The most stringent protection," he wrote on behalf of a unanimous court, "would not protect a man in falsely shouting fire in a theater and causing a panic."

Holmes' test — that words are not protected if their nature and circumstances create a "clear and present danger" of harm — has since been tightened. But even under the more restrictive current standard, "Innocence of Muslims," the film whose video trailer indirectly led to the death of U.S. Ambassador J. Christopher Stevens among others, is not, arguably, free speech protected under the U.S. Constitution and the values it enshrines.

According to initial media investigations, the clip whose most egregious lines were apparently dubbed in after it was shot, was first posted to YouTube in July by someone with the user name "Sam Bacile." The Associated Press reported tracing a cellphone number given as Bacile's to the address of a Californian of Egyptian Coptic origin named Nakoula Basseley Nakoula. Nakoula has identified himself as coordinating logistics on the production but denies being Bacile.

According to the Wall Street Journal, when the video failed to attract much attention, another Coptic Christian, known for his anti-Islamic activism, sent a link to reporters in the U.S., Egypt and elsewhere on Sept. 6. His email message promoted a Sept. 11 event by anti-Islamic pastor Terry Jones and included a link to the trailer.

The current standard for restricting speech — or punishing it after it has in fact caused violence — was laid out in the 1969 case *Brandenburg vs. Ohio*. Under the narrower guidelines, only speech that has the intent and the likelihood of inciting imminent violence or lawbreaking can be limited.

Likelihood is the easiest test. In Afghanistan, where I have lived for most of the past decade, frustrations at an abusive government and at the apparent role of international forces in propping it up have been growing for years. But those frustrations are often vented in religious, not political, terms, because religion is a more socially acceptable, and safer, rationale for public outcry.

In the summer of 2010, Jones announced his intent to publicly burn a copy of the Muslim holy scripture, the Koran, that Sept. 11. He was eventually dissuaded by a number of religious and government officials, including Secretary of Defense Robert Gates, who called him to say his actions would put the lives of U.S. soldiers in Iraq and Afghanistan at risk. On the Joint Chiefs of Staff, where I worked at the time, consensus was that the likelihood of violence was high.

When Jones did in fact stage a public Koran burning on March 20, 2011, riots broke out in Afghanistan, killing nearly a dozen people and injuring 90 in the beautiful, cosmopolitan northern city of Mazar-i-Sharif. Seven of the dead were United Nations employees; the rest were Afghans.

In Afghanistan, and in all of the Arab nations in transition, an extremist fringe is brawling for power with a more pluralistic majority. Radicals pounce on any pretext to play on religious feeling. I could pick out the signs of manipulation in Afghanistan — riots that started on university campuses where radicalized Pakistani students abound, simultaneous outbreaks in far-flung places, the sudden appearance of weapons. By providing extremists in Libya and elsewhere such an opportunity, the makers of "Innocence of Muslims" were playing into their hands.

As for imminence, the timeline of similar events after recent burnings of religious materials indicates that reactions typically come within two weeks. Nakoula's video was deliberately publicized just before the sensitive date of Sept. 11, and could be expected to spark violence on that anniversary.

While many 1st Amendment scholars defend the right of the filmmakers to produce this film, arguing that the ensuing violence was not sufficiently imminent, I spoke to several experts who said the trailer may well fall outside constitutional guarantees of free speech. "Based on my understanding of the events," 1st Amendment authority Anthony Lewis said in an interview Thursday, "I think this meets the imminence standard."

Finally, much 1st Amendment jurisprudence concerns speech explicitly advocating violence, such as calls to resist arrest, or videos explaining bomb-making techniques. But words don't have to urge people to commit violence in order to be subject to limits, says Lewis. "If the result is violence, and that violence was intended, then it meets the standard."

Indeed, Justice Holmes' original example, shouting "fire" in a theater, is not a call to arms. Steve Klein, an outspoken anti-Islamic activist who said he helped with the film, told Al Jazeera television that it was "supposed to be provocative." The egregiousness of its smears, the apparent deception of cast and crew as to its contents and the deliberate effort to raise its profile in the Arab world a week before 9/11 all suggest intentionality.

The point here is not to excuse the terrible acts perpetrated by committed extremists and others around the world in reaction to the video, or to condone physical violence as a response to words — any kind of words. The point is to emphasize that U.S. law makes a distinction between speech that is simply offensive and speech that is deliberately tailored to put lives and property at immediate risk. Especially in the heightened volatility of today's Middle East, such provocation is certainly irresponsible — and reveals an ironic alliance of convenience between Christian extremists and the Islamist extremists they claim to hate.

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## Held Dear In U.S., Free Speech Perplexing Abroad

by NPR Staff September 19, 2012

The French government announced Wednesday that it will prohibit demonstrations planned for Saturday to protest the anti-Muslim video that has sparked violence in Muslim countries around the world.

The decision came after a French satirical magazine published cartoons depicting the Prophet Muhammad.

Most Americans consider freedom of expression universal and self-evident. But France's decision to ban Saturday's demonstration underscores how U.S. notions of free speech are actually quite unique, even among democratic countries.

While even racially and religiously offensive material is protected in the United States, hate speech or speech that incites racial hatred is illegal in Britain, France, the Netherlands, Germany, Denmark, Belgium and other European countries. In much of Europe, Holocaust denial is specifically criminalized.

Noah Feldman, professor of international law at Harvard Law School, talks with *All Things Considered* host Robert Siegel about what constitutes protected speech in the U.S., and how those views are understood — and misunderstood — around the world.

### On what kinds of speech are *not* protected under U.S. law

"You might think that an American standing in front of a crowd should be free to say whatever he wishes. And yet, the courts have always said that if it's probable and immediate and imminent that there will be violence, the police can come and shut that person down ...

"We've developed standards for the prohibition of inciting speech that require a high degree of proximity, and a high degree of confidence, that there will be violence that emerges."

### **On how many people abroad are perplexed by U.S. protections for freedom of expression**

"I had conversations with highly educated Tunisians — people high in the government — who were genuinely astonished to discover that, under U.S. law, we couldn't ban speech like that precisely because any incitement that might occur is distant in time, distant in place and not at all certain to occur. ...

"And it's actually a problem when people elsewhere actually think, including reasonable people, that the United States government must be complicit in something like the anti-Muslim film because we haven't prohibited it."

### **On how U.S. notions of protected speech differ from those of other countries**

"In the U.S., we value the liberty of the speaker much more highly than either the dignity of the person who feels insulted or the state's interest in trying to avoid violent protest. ...

"What's most distinctive from our perspective is that we think that if your feelings are hurt, then that's your problem. We don't believe that you ought to be protected from the hurly-burly of political insult. And that's a very deeply ingrained American notion. ...

"And because we're concerned not to allow what's called the heckler's veto, where the fact that one particular group or person will make a fuss, means that we will prohibit the speech, we've tended to be extremely permissive, and that does make us very different from other countries."

### **On the cultural disconnect between the U.S. and other countries on the issue of free speech**

"It is a deep cycle of misunderstanding, and it should be possible both for us to say these are our values, we believe in free speech while we condemn the substance; it should also be possible for them, of course, to protest in a peaceful fashion. It doesn't forgive the violence by any stretch of the imagination."

### **On whether an increasingly connected world requires rethinking the "immediate" threat of violence**

"And so the question is whether the physical distance [between the speech and the potential violence abroad] really matters. I think probability [of violence] would have to be just as high as if you're *facing* a crowd, and that would be difficult to obtain in practice.

"But the idea that under some conditions we *do* want to limit speech because of what's about to happen — and is very likely to happen — is familiar to our law. And one could imagine that, under some circumstances, that might apply here, especially as technology brings such conversations closer and closer ...

"[Supreme Court Justice Stephen] Breyer, a couple of years ago, said publicly that perhaps we needed to think twice about that in an increasingly globalized world, and he was roundly criticized. But one might think that he was, in some sense, prescient. We may have to actually reconsider what counts as incitement in this day and age."

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## **One Man's Case For Regulating Hate Speech**

by NPR Staff June 3, 2012

In the late '70s, Skokie, Ill., became the epicenter of the debate over free speech in the U.S. The town was home to many Holocaust survivors, along with their families, and that made it a target for the National Socialist Party of America — a neo-Nazi group from nearby Chicago.

The group planned to march through the heart of Skokie carrying anti-Semitic signs and proclaiming "white power." At first, Skokie banned the rally, but the Nazis fought the town in court. With help from the American Civil Liberties Union, the Nazis brought their case all the way to the Supreme Court, which affirmed that, under the First Amendment, they had a right to march.

The case became a landmark, proving that even speech that many Americans find reprehensible is legally protected in the U.S. But a few voices still say the Skokie decision was wrong.

According to New York University law professor Jeremy Waldron, "In terms of the defacing of that social environment, the impact on the people concerned, the sense of terror reawakened by the nightmares that this sort of speech evoked — those concerns, it seemed to me, would have justified very serious restriction."

In his new book, *The Harm in Hate Speech*, Waldron calls attention to the fact that the U.S. is the only liberal democracy in the world without some version of hate speech regulation — the kind of regulation that would have stopped the Nazis from marching in Skokie.

"Many of the things that people have a right to do in the United States are wrong," Waldron tells NPR's Rachel Martin. "They don't have a right to do everything that's wrong and I'm arguing that the category of things that they shouldn't have a right to do should be somewhat expanded."

### **On legal definitions of hate speech**

"It's usually defined first of all in terms of its intention, that it's speech which is intended to cause the stirring of hatred and hostility towards a particular group. That's not enough on most definitions; they also insist that it must be *likely* to generate such hatred and hostility. Thirdly, the speech must be offered in a threatening, abusive and insulting way. And fourthly, these statutes tend to define safe havens or places where such speech can be engaged in without incurring liability, for example a conversation in one's home. Many of these laws bend over backwards to try to narrow down a particular range of damaging speech to the most egregious cases."

### **On how hate speech legislation would apply to the Westboro Baptist Church, which stages anti-gay demonstrations at military funerals and Holocaust memorials**

"There are two important issues here. One is the content of the speech itself. Forgive me if I use bad words, but people are saying, 'Fags must die,' or that sort of thing on their posters, and certainly under the laws that I propose and the laws that exist in other regimes, that sort of talk would land people with a prosecution. There's further the question of time, place and manner, having to do not just with the abusive manner in which the speech is performed, but also with the intrusiveness on public funerals. And I believe that raises other important issues that would not be dealt with under a hate speech [law]."

### **On how hate speech legislation would apply to Terry Jones, the Florida pastor who became infamous for organizing an 'International Burn a Quran Day'**

"I think that's in a different category all together. One of the things that I try to do in the book — and [I] try to do it at length — is to distinguish the protection of human dignity from something quite different, which is protecting people from offense, even egregious offense. And I don't believe it's the role of law to protect people from being offended."

"I think there shouldn't have been legal repercussions under this sort of legislation. Of course it was a stupid, ill-judged, and dangerous thing to have done, but sometimes we have to swallow hard. And I think it's really, really important when we think about these issues to maintain this distinction between dignity and offense and to maintain the distinction between insulting and defaming the believers, and deriding or ridiculing or abusing the religion itself. The first is what hate speech legislation is aimed at, not the second."

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## **On Web, a Fine Line on Free Speech Across the Globe**

### **New York Times, September 16, 2012, By SOMINI SENGUPTA**

SAN FRANCISCO — For Google last week, the decision was clear. An anti-Islamic video that provoked violence worldwide was not hate speech under its rules because it did not specifically incite violence against Muslims, even if it mocked their faith.

The White House was not so sure, and it asked Google to reconsider the determination, a request the company rebuffed. Although the administration's request was unusual, for Google, it represented the kind of delicate balancing act that Internet companies confront every day.

These companies, which include communications media like Facebook and Twitter, write their own edicts about what kind of expression is allowed, things as diverse as pointed political criticism, nudity and notions as murky as hate speech. And their employees work around the clock to check when users run afoul of their rules.

Google is not the only Internet company to grapple in recent days with questions involving the anti-Islamic video, which appeared on YouTube, which Google owns. Facebook on Friday confirmed that it had blocked links to the video in Pakistan, where it violates the country's blasphemy law. A spokeswoman said Facebook had also removed a post that contained a threat to a United States ambassador, after receiving a report from the State Department; Facebook has declined to say in which country the ambassador worked.

"Because these speech platforms are so important, the decisions they take become jurisprudence," said Andrew McLaughlin, who has worked for both Google and the White House. Most vexing among those decisions are ones that involve whether a form of expression is hate speech. Hate speech has no universally accepted definition, legal experts say. And countries, including democratic ones, have widely divergent legal approaches to regulating speech they consider to be offensive or inflammatory.

Europe bans neo-Nazi speech, for instance, but courts there have also banned material that offends the religious sensibilities of one group or another. Indian law frowns on speech that could threaten public order. Turkey can shut down a Web site that insults its founding president, Kemal Ataturk. Like the countries, the Internet companies have their own positions, which give them wide latitude on how to interpret expression in different countries.

Although Google says the anti-Islamic video, “Innocence of Muslims,” was not hate speech, it restricted access to the video in Libya and Egypt because of the extraordinarily delicate situation on the ground and out of respect for cultural norms.

Google has not yet explained why its cultural norms edict applied to only two countries and not others, where Muslim sensitivities have been demonstrably offended.

Free speech absolutists say all expression, no matter how despicable, should be allowed online. Others say Internet companies, like governments, should be flexible enough to exercise restraint under exceptional circumstances, especially when lives are at stake.

At any rate, as Mark L. Movsesian, a law professor at St. John’s University, pointed out, any effort to ban hateful or offensive speech worldwide would be virtually impossible, if not counterproductive.

“The regimes are so different, it’s very, very difficult to come up with one answer — unless you ban everything,” he said.

Google’s fine parsing led to a debate in the blogosphere about whether the video constituted hateful or offensive speech.

Peter J. Spiro, a law professor at Temple University, said Google was justified in restricting access to the video in certain places, if for no other reason than to stanch the violence.

“Maybe the hate speech/offensive speech distinction can be elided by the smart folks in Google’s foreign ministry,” Mr. Spiro wrote on the blog *Opinio Juris*. “If material is literally setting off global firestorms through its dissemination online, Google will strategically pull the plug.”

Every company, in order to do business globally, makes a point of obeying the laws of every country in which it operates. Google has already said that it took down links to the incendiary video in India and Indonesia, because it violates local statutes.

But even as a company sets its own rules, capriciously sometimes and without the due process that binds most countries, legal experts say they must be flexible to strike the right balance between democratic values and law.

“Companies are benevolent rulers trying to approximate the kinds of decisions they think would be respectful of free speech as a value and also human safety,” said Jonathan Zittrain, a law professor at Harvard.

Unlike Google, Twitter does not explicitly address hate speech, but it says in its rule book that “users are allowed to post content, including potentially inflammatory content, provided they do not violate the Twitter Terms of Service and Rules.” Those include a prohibition against “direct, specific threats of violence against others.”

That wide margin for speech sometimes lands Twitter in feuds with governments and lobbyists. Twitter was pressed this summer to take down several accounts the Indian government considered offensive. Company officials agreed to remove only those that blatantly impersonated others; impersonation violates company rules, unless the user makes it clear that it is satirical.

Facebook has some of the industry’s strictest rules. Terrorist organizations are not permitted on the social network, according to the company’s terms of service. In recent years, the company has repeatedly shut down fan pages set up by Hezbollah.

In a statement after the killings of United States Embassy employees in Libya, the company said, “Facebook’s policy prohibits content that threatens or organizes violence, or praises violent organizations.”

Facebook also explicitly prohibits what it calls “hate speech,” which it defines as attacking a person. In addition, it allows users to report content they find objectionable, which Facebook employees then vet. Facebook’s algorithms also pick up certain words that are then sent to human inspectors to review; the company declined to provide details on what kinds of words set off that kind of review.

Nudity is forbidden on Facebook, too. This year, that policy enmeshed the social network in a controversy over photographs of breast-feeding women. Facebook pages were set up by groups that objected to the company’s ban on pictures of exposed breasts, and “nurse-ins” were organized, calling on women to breast-feed outside Facebook offices worldwide.

The company said sharing breast-feeding photos was fine, but “photos that show a fully exposed breast where the child is not actively engaged in nursing do violate Facebook’s Statement of Rights and Responsibilities.”

Just this month, a New Yorker cartoon tripped over Facebook's rules on exposed breasts. On its Facebook page, the magazine displayed a cartoon that contained the topless figures of a man and women. The illustration was removed for violating Facebook's naked breast decree.

Facebook soon corrected itself. With "hundreds of thousands" of reported complaints each week, the company said, sometimes it makes a mistake.

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## Prior restraint

From Wikipedia, the free encyclopedia

**Prior restraint** (also referred to as **prior censorship** or **pre-publication censorship**) is  censorship imposed, usually by a government, on expression before the expression actually takes place. An alternative is to allow the expression to take place and to take appropriate action afterward, if the expression is found to violate the law, regulations, or other rules.

Prior restraint prevents the censored material from being heard or distributed at all; other measures provide sanctions only after the offending material has been communicated, such as suits for slander or libel. In some countries (e.g., United States, Argentina) prior restraint by the government is forbidden, subject to certain exceptions, by a constitution.

### Exceptions to restrictions on prior restraint

Not all restrictions on free speech are a breach of the prior restraint doctrine. It is widely accepted that publication of information affecting national security, particularly in wartime, may be restricted, even when there are laws that protect freedom of expression. In many cases invocation of national security is controversial, with opponents of suppression arguing that government errors and embarrassment are being covered up...

### Blackstone and early views

In William Blackstone's Commentaries "Freedom of the Press" is defined as the right to be free from prior restraints. In addition, he held that a person should not be punished for speaking or writing the truth, with good motives and for justifiable ends. Truth alone, however, was not considered a sufficient justification, if published with bad motives.

*The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity. (4 Bl. Com. 151, 152.)*

This view was the common legal understanding at the time the US constitution was adopted. Only later have the concepts of freedom of speech and the press been extended (in the United States, the United Kingdom, and other countries sharing their legal tradition) to protect honest error, or truth even if published for questionable reasons.

### Judicial view

Prior restraint is often considered a particularly oppressive form of censorship in Anglo-American jurisprudence because it prevents the restricted material from being heard or distributed at all. Other forms of restrictions on expression (such as actions for libel or criminal libel, slander, defamation, and contempt of court) implement criminal or civil sanctions only after the offending material has been published. While such sanctions might lead to a chilling effect, legal commentators argue that at least such actions do not *directly* impoverish the marketplace of ideas. Prior restraint, on the other hand, takes an idea or material completely out of the marketplace. Thus it is often considered to be the most extreme form of censorship...

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## Freedom of Speech: General

[www.billofrightsinstitute.org](http://www.billofrightsinstitute.org)

### Schenck v. United States (1919)

Freedom of speech can be limited during wartime. The government can restrict expressions that "would create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

### Brandenburg v. Ohio (1969)

The Supreme Court held that the First and Fourteenth Amendments protected speech advocating violence at a Ku Klux Klan rally because the speech did not call for "imminent lawless action."