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# Incitement in the Mosques: Testing the Limits of Free Speech and Religious Liberty

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# INCITEMENT IN THE MOSQUES: TESTING THE LIMITS OF FREE SPEECH AND RELIGIOUS LIBERTY

KENNETH LASSON\*

Have no mercy on the Jews, no matter where they are, in any country. Fight them, wherever you are. Wherever you meet them, kill them. Wherever you are, kill those Jews and those Americans who are like them - and those who stand by them.<sup>1</sup>

## I. INTRODUCTION

In times of terror and tension, civil liberties are at their greatest peril. Nowadays, no individual rights are more in jeopardy than the freedoms of speech and religion. This is true particularly for followers of Islam, whose leaders have become increasingly radical in both their preaching and practice.

“Kill the Jews!” and “Kill the Americans!” are chants heard regularly in many Middle Eastern mosques, as frightful echoes of the *fatwa* are issued by today’s quintessential terrorist, Osama bin Laden.<sup>2</sup>

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\* Professor of Law, University of Baltimore School of Law. I wish to thank my research assistant Martin Cohen for his diligent work on this article.

1. Sheikh Ahmad Abu Halabiya, Sermon broadcasted over Palestinian Television, *The Palestinians in Their Own Words* [¶ 2] (Gaza mosque, Oct. 13, 2000) (available at <http://www.iris.org.il/quotes/quote50.htm> (accessed Oct. 23, 2005)) (emphasis added); see also Justus Reid Weiner, *The Use of Palestinian Children in the Al-Aqsa Intifada: A Legal and Political Analysis*, 16 Temp. Intl. & Comp. L.J. 43, 65 (2002).

2. See *The Big Story With John Gibson*, “Interview with ‘Preachers of Hate’ Author Kenneth Timmerman” (Fox News Network Nov. 10, 2003) (TV broadcast) (discussing statements made by Abdul Aziz Asway, the main prayer leader at Grand Mosque in Mecca during a sermon); Jane Mayer, *Lost in the Jihad*, The New Yorker [¶

The incitement continues unabated to this day. In April of 2004, for example, a Muslim preacher at the Al-Aqsa Mosque in Jerusalem referred to Jews as “sons of monkeys and pigs,” and as “murderers of prophets.” Loudspeakers boomed across the Old City with his message, in which he condemned Jews to total extinction.<sup>3</sup> In May of 2005, Imam Ibrahim Mudeiris delivered a sermon in which he declared:

With the establishment of the state of Israel, the entire Islamic nation was lost, because Israel is a cancer spreading through the body of the Islamic nation, and because the Jews are a virus resembling AIDS, from which the entire world suffers

The day will come when we will rule America. The day will come when we will rule Britain and the entire world—except for the Jews. The Jews will not enjoy a life of tranquility under our rule, because they are treacherous by nature, as they have been throughout history. . . . Listen to the Prophet Muhammad, who tells you about the evil end that awaits the Jews. The stones and trees will want Muslims to finish off every Jew.<sup>4</sup>

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18, 25] (Mar. 10, 2003); HonestReporting.com, *Oprah's Mag Misses the Mark*, [http://www.honestreporting.com/articles/45884734/critiques/oprahs\\_Mag\\_Misses\\_the\\_Mark.asp](http://www.honestreporting.com/articles/45884734/critiques/oprahs_Mag_Misses_the_Mark.asp) (accessed Oct. 23, 2005).

3. Jenni Frazer, *Hateful Views of Guest Sheikh*, London Jewish Chron. 2 (June 25, 2004); see also Sheldon Kirshner, *Muslim World Swept Up by Anti-Semitism*, Canadian Jewish News 11 (Aug. 8, 2002).

4. The Middle East Media Research Institute (M.E.M.R.I.), *Palestinian Friday Sermon by Sheik Ibrahim Mudeiris: Muslims Will Rule America and Britain, Jews are a Virus Resembling AIDS*, <http://www.memritv.org/Transcript.asp?P1=669> (accessed Oct. 23, 2005) (sermon carried by national Palestinian Television on May 13, 2005). In his sermon in 2003, Mudeiris said, “Allah will drown the little Pharaoh, the dwarf, the Pharaoh of all times, of our time, the American president. Allah will drown America in our seas, in our skies, in our land . . . America will be destroyed.” A year later, referring to America as the “Byzantine dog of our days,” he declared, “you son of a bitch, I have brought an enormous army upon you, that starts here and ends here.” Steven Stalinsky, *Sermons as Political Propaganda*, N.Y. Sun 8 (May 25, 2005). U.S. Secretary of State, Condoleezza Rice, reacted strongly to Mudeiris’ words. “The Palestinian Authority must advance democratic reform and it must dismantle all terrorist networks in its society,” she said at the American Israel Public Affairs Committee’s Annual Policy Conference in May of 2005. “Arab states must end incitement in their media, cut off all support for terrorism and extremist education, and establish normal relations with Israel.” Condoleezza Rice, U.S. Sec. of St., Address, *AIPAC Policy Conference* (D.C., May 23, 2005).

Such speeches are hardly exceptional, and have been well documented.<sup>5</sup>

Moreover, this kind of rhetorical incitement is no longer limited to Arab countries, but occurs regularly around the world, even in America. The painful truth is that the great majority of international terrorists over the past several decades have been Muslims, all of whom have killed in the name of Allah.

“ ‘Our sons, the terrorists,’ ” wrote an outspoken Saudi journalist:

are loose in the world, the natural products of a deformed culture. . . . We [cannot] redeem our youth unless we take on the men of religion who have turned into revolutionaries who send other people’s kids to war while they send their own to European and American schools.

“A cure for [the] malady,” he said, “begins with [acknowledgement of the facts] and the end of denial.”<sup>6</sup>

Such denial is widespread, the silence of the Muslims broken only occasionally by moderate voices or governmental interventions.<sup>7</sup>

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Palestinian Authority (PA) Information Minister Nabil Shaath, who is responsible for PA television broadcasts, said he would ensure that such sermons are never broadcasted again. He called on the Muslim Waqf and Religious Affairs Ministry, who employ the preacher, to suspend him, investigate him and prevent him from delivering further sermons on Friday. Khaled Abu Toameh, *Shaath: Suspend Preachers For Anti-Semitic Sermon. But PA has Taken No Measures Against Him*, Jerusalem Post 6 (May 20, 2005). But in a PA-controlled telecast aired on July 8, 2005, Muslims were exhorted to “ ‘annihilate the infidels [common reference to US and Western countries] . . . God, count them and kill them to the last one, and don’t leave even one.’ ” Arutz Sheva, IsraelNationalNews.com, *PA Gets \$50m from US, Then Calls for Terror Against US Soldiers*, <http://www.israelnn.com/news.php3?id=89454> (Sept. 8, 2005).

5. Many are collected by organizations such as M.E.M.R.I. and Palestinian Media Watch. See generally M.E.M.R.I., <http://www.memri.org> (accessed Oct. 23, 2005); Palestinian Media Watch, <http://www.pmw.org.il/> (accessed Oct. 23, 2005).

6. Abd-al-Rahman al-Rashid, *The Painful Truth is That All Terrorists are Muslims*, Al-Sharq al-Awsat (Sept. 4, 2004) (full text available in BBC Monitoring Intl. Reps. (Sept. 6, 2004)); Fouad Ajami, *Facing Up to Unholy Terror*, U.S. News & World Rep., 31, 31 (Sept. 20, 2004); Yasmin Alibhai-Brown, *The Chechen Cause is Now Poisoned and the World Views Muslims As Monsters: For Now, For Me, This Crime Has No Place Even Within the Farthest Boundaries of Human Behaviour*, The Independent (Sept. 6, 2004) (available at [http://comment.independent.co.uk/columnists\\_a\\_l/yasmin\\_alibhai\\_brown/article40545.ece](http://comment.independent.co.uk/columnists_a_l/yasmin_alibhai_brown/article40545.ece) (accessed Oct. 23, 2005)).

7. In April of 2005, eleven Islamic preachers were arrested in Iraq on charges of incitement to violence in their Friday sermons. See *Eleven Imams Arrested in Baghdad*

Khaleel Mohammed, an American Islamic cleric and scholar, is one of the few to suggest that radical fundamentalism is rapidly becoming mainstream. "Many Muslims," he said, "stand against me for no other reason than I say that Israel has a right to exist." The real problem is that every single mosque in the United States espouses from the pulpit that every single Jew in the world must be annihilated.<sup>8</sup>

It is important, of course, to examine Islamic condemnations of infidels in proper context to understand how the religion is actually practiced, instead of judging the faithful solely on the incendiary sermons of their imams in the mosques. The great majority of American Muslims appear to be peaceful citizens. Indeed, over the course of recorded history, Islam has been relatively more tolerant than many Christian sects; religious minorities have often fared better under Muslim rulers than under Christian ones.<sup>9</sup>

for "Incitement to Violence," BBC Monitoring Intl. Rpts. (Apr. 30, 2005).

8. See Jamie Glazov, *The Koran and the Jews*, FrontPageMagazine.com, (June 3, 2004), <http://www.frontpagemagazine.com/Articles/ReadArticle.asp?ID=13587>.

Because of his views about peaceful co-existence, Dr. Mohammed, a professor of religion at San Diego State University, has received numerous death threats and is regularly booed and driven off the pulpit in the many mosques in which he lectures. He also believes that radical Islam is now going mainstream throughout the world. E-mail forwarded to author from congregant who attended lecture by Dr. Khaleel Mohammed, Prof. of Religion, San Diego St. U. (Nov. 5, 2004); see also *Letters to the Editor*, Poughkeepsie J. A6 (July 1, 2004); see *infra* n. 32 and accompanying text.

Dr. Mohammed's counterpart in England is Imam Abduljalil Sajid, Chair of the Muslim Council for Religious and Racial Harmony, who as of Dec. 2004, had had no fewer than thirteen *fatwas* (death threats) issued against him. Abduljalil Sajid, Comments, (Limmud Conf., U. of Nottingham, Dec. 2004) (author's notes). "In Italy, Sheik Abdul Hadi Palazzi of Rome has emerged as one of the most courageous Muslim leaders in the world today willing to confront the extremists." See Aspen Institute Berlin, *Radical Islamism in Europe*, [http://www.aspenberlin.org/special\\_feature.php?iGedminId=8](http://www.aspenberlin.org/special_feature.php?iGedminId=8) (accessed Oct. 23, 2005).

9. Fareed Zakaria, *The Politics of Rage: Why Do They Hate Us?* Newsweek 22, 24 (Oct. 15, 2001). See also Kirshner, *supra* n. 3. In this regard, historical ironies abound. When Crusaders followed papal instructions to attack the Holy Lands, Christians, Jews, and Muslims were living in peace in various parts of Spain under Muslim rule. The second largest Islamic population today is in India, which is also arguably the largest democracy in the world. James Peterson, *Islamic Extremism Will End Through Democracy*, Iowa St. Daily, (Sept. 21, 2004), <http://www.iowastatedaily.com>.

In May of 2005, in the London Arabic-language daily, *Al-Sharq Al-Awsat*, Saudi columnist Hussein Shubakshi tried to analyze the Arab world's hatred of Jews. He wrote:

The extent of tremendous hatred of the Jews is baffling. . . . Why do we

Today's world, however, is clearly different. Hate speech emanating from the mosques is perceptibly on the rise, as is worldwide anti-Semitism.<sup>10</sup>

hate the Jews?

The immediate answer will be: No, we don't hate the Jews, we hate the Zionists. [But] this is nonsense. We don't hear [preachers saying in their sermons,] Oh Allah, destroy the Zionists, the Zionist enterprise, the offspring of Herzl, and the Basel plan. . . .

There is much evidence proving that in more than one Arab country, [Muslims] lived normally alongside Jews, and that [the Jews] studied and worked like the rest of the residents of that country. . . .

[T]he Prophet Muhammad's relations with the Jews were clear. He made agreements with them, stood [in respect] at the funeral of one of them, maintained relations with them, married a Jewess, and entrusted his armor to his Jewish neighbor and asked about this Jew when he was missing and sick.

Our religion permits us to eat the Jews' food, trade with them, and marry them. So what is the issue? If we know the scope of the problem, and the true reason why the Jews have become this great monster, and [if we understand] how this has spread to the point where they have become the reason for every catastrophe, then we will be able to understand the idea of dividing [human beings] into groups . . .

There are Saudis who studied with Jews, were taught by Jewish teachers, and were treated by Jewish doctors. They tell good and normal stories about relations with the Jews – relations that broke the emotional barrier built long ago regarding relations with the Jews.

It should suffice us to hear a Saudi saying: My son was treated for cancer by a Jewish doctor, nobly and morally, and there is someone who wants me to hold hatred and animosity [against this Jew] in my heart, and to curse him at night. I will never do this. There is a huge difference between the contaminated Zionism that abuses Palestine and its sons and carries out atrocities and crimes, and [this] divine religion and its sons.

Once, the Muslims knew it, and treated the Jews according to [Koranic] verse [7:159]: And of Moses's people there is a party who guided (people) with the truth, and thereby do justice. Jews attained top posts in the Umayyad state – like [Rabbi Moses] Ben Maimon, who attained the post of first minister to the caliph [*sic*].

I know that a subject like this launches a debate – but, with Allah's help, it is a debate whose aims are good. There is great benefit for us in such a reexamination – and an answer to the question of why we hate the other.

M.E.M.R.I., *Saudi Columnist: We Must Discuss Why We Hate the Jews*, <http://memri.org/bin/articles.cgi?Page=archives&ID=SP91305> (accessed Oct. 23, 2005) (internal quotation marks omitted) (providing excerpts from Hussein Shubakshi's article published in the London Arabic-language daily *Al-Sharq Al-Awsat*).

10. The number of global anti-Semitic incidents increased during 2004, according to a report by the Jewish Agency and Israel's Ministry of Diaspora Affairs. Europe led both in the number of incidents and the degree of severity. "In France, 96 incidents were recorded, in Britain about 70 and in Russia 55." The figures in the UK and

To what extent are such calls to genocide protected by the freedoms of speech and religion guaranteed in the First Amendment to the United States Constitution? Are there any distinctions to be made between secular and religious incitement; between the protections afforded by the Free Speech and the Free Exercise Clauses; between peacetime and wartime utterances? How should American courts treat the international declarations of human rights to which the United States is a signatory, when those conventions restrict the liberty of individuals to freedom of expression?

The questions are not new, but in the wake of increasing terrorism around the world, finding the answers has become more urgent.

Part I of this article examines the history of incitement in mosques from ancient times through the contemporary Middle East, Europe, and in the Americas, and discusses the nexus between incendiary rhetoric and subsequent violent acts, as well as how both speech and action are reflected in the media. Part II analyzes various implications of incitement for traditional civil liberties, including the differences between secular and religious speech, between utterances in peacetime and during war, and between the First Amendment and international declarations and conventions. Part III treats the difficulties of preserving liberty while ensuring security, and offers suggestions about how best to balance the alternatives and resolve the dilemmas.

## II. INCITEMENT IN THE MOSQUES

'People see us as extremists because we don't compromise the religion of Allah.'<sup>11</sup>

### A. THE ROOTS OF BIGOTRY

From a Muslim point of view, Jews and Christians possess an earlier version of religion that was once authentic but later corrupted.

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Russia also increased dramatically in 2004. "[T]he majority of attacks against Jews were perpetrated by Islamic fundamentalists," although the report also notes a rise in the activity of Christian far-right groups. *Report Shows Global anti-Semitism on the Rise*, Jerusalem Post, (Jan. 23, 2005), <http://jafi.org.il/papers/2005/jan/jan23jp.htm>.

11. Don Van Natta, Jr. & Lowell Bergman, *The Conflict in Iraq: Foreign Fighters; Militant Imams Under Scrutiny Across Europe; Calls to Back 'Global Jihad' Are Cited*, N.Y. Times A9 (Jan. 25, 2005).

They may have the right to practice their faith, but ultimately must accept the supremacy of Islam and the rule of the Muslim state.<sup>12</sup>

Although during his lifetime the Prophet Muhammad tolerated Christians and Jews, there is little evidence that he had anything conciliatory to say about them. After Muhammad's death, it was decided that neither Jews nor Christians could live in Arabia. They were evicted from all Muslim lands, except for the southeast and southwest (in what are now Oman and Yemen). The Jews and Christians in central and northern Arabia were sent to Syria, Iraq, and Palestine.<sup>13</sup>

The violent, nearly 1400-year relationship between Muslims and non-Muslims can be traced back to two early Islamic concepts *jihad* and *dhimmitude*, both of which were already well established by the eighth century, a full millennium before Wahhabism arose in the eighteenth century.<sup>14</sup>

*Jihad* has long been part of the Muslim culture: The holy war is a religious duty, because of the obligation to convert everyone to Islam either by persuasion or force. Other religious groups did not have such a universal mission, except perhaps for defensive purposes. Islam is under obligation to gain power over other nations.<sup>15</sup>

The regulations pertaining to infidel populations subjugated by *jihad* is the source of *dhimmitude*: The native infidel populations must recognize Islamic ownership of their land and submit to Islamic law. They may not hold arms, nor ring church bells; they are restricted in the building and restoration of churches and synagogues. There is also inequality between Muslims and non-Muslims with regard to taxes and penal law. Dhimmis may not testify in Muslim courts. Jews and Christians must wear special clothes.<sup>16</sup>

The roots of modern terrorism are often traced to the mid-eighteenth century, when a cleric named Muhammad ibn Abdul Wahhab condemned to death all those who did not agree with the

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12. Bernard Lewis, *What Went Wrong*, Princeton Alumni Weekly, (Sept. 11, 2002) [http://www.princeton.edu/~paw/archive\\_new/PAW02-03/01-0912/features.html](http://www.princeton.edu/~paw/archive_new/PAW02-03/01-0912/features.html).

13. *Id.*

14. Andrew G. Bostom, *A Wahhabism Problem: Misleading Historical Negationism*, Natl. Rev. Online (Dec. 6, 2002), <http://nationalreview.com/comment/comment-bostom120602.asp>.

15. Ibn Khaldun, a preeminent Islamic scholar, quoted in Bostom. *Id.*

16. *Id.* (citing al-Mawardi, *The Laws of Islamic Governance*). Al-Mawardi was an 11<sup>th</sup>-century jurist from Baghdad. *Id.*

militant version of Islam; at the time this was departure from the mainstream Islamic tradition. Wahhabism is now the dominant Islamic sect in Saudi Arabia, and has adherents world-wide, including in the United States and Great Britain.<sup>17</sup>

Dhimmis, including those living under enlightened Turkish and Bosnian Muslim domain, suffered at times from slavery, abductions, deportations, and massacres. Between 1894 and 1896, the Ottoman Turks massacred over 200,000 Christian Armenians. The perpetrators were guided by Sharia law, which prescribes that if dhimmi Christians oversteps the limits of privileges allowed them by their Muslim masters and free themselves from their bondage, their lives and property are to be forfeited. The Turks considered it their righteous and religious duty to take both the lives and properties of the Armenians.<sup>18</sup>

One watchful observer was Winston Churchill, who wrote about Islam (or Mohammedanism as it was then called) in *The River War* (1899):

No stronger retrograde force exists in the world. Far from being moribund, Mohammedanism is a militant and proselytizing faith. It has already spread throughout Central Africa, raising fearless warriors at every step, and were it not that Christianity is sheltered in the strong arms of science . . . the civilization of modern Europe might fall, as fell the civilization of ancient Rome.<sup>19</sup>

In 1915 the first genocide of the twentieth century occurred with the slaughter of an additional 600,000 to 800,000 Armenians, perpetrated in the context of a formal *jihad* against the Armenians who had attempted to throw off the yoke of dhimmitude by seeking equal rights and autonomy.<sup>20</sup>

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17. See generally Dore Gold, *Hatred's Kingdom: How Saudi Arabia Supports the New Global Terrorism* (Regnery Publ., Inc. 2003); see also Dore Gold, *Unholy Fire*, *The Am. Spectator* [¶¶ 3, 6] (Mar.- Apr. 2003).

18. See generally Gold, *Hatred's Kingdom*, *supra* n. 17.

19. David Pryce-Jones, *The Islamization of Europe?* 118 *Commentary* 29-30 (Dec. 2004).

20. See Alyssa A. Lappen, *Ford Has A Better Idea: One Nation Under Allah*, *FrontPageMagazine.com* (Dec. 30, 2003), <http://frontpagemag.com/Articles/Printable.asp?ID=11513>.

### B. CONTEMPORARY RHETORIC AND PHYSICAL ACTIONS

Some modern scholars suggest that the root cause of Arab hatred toward the West is less religious in nature than it is pure envy, which would be driven away by a campaign of diplomacy directed at the Muslim world. The young Palestinian suicide bombers are said to yearn for what they cannot have—the lifestyle of the innocent civilians they blow up in buses, restaurants, and marketplaces. Their missions are endorsed as holy martyrdom. Cunning in their reading of the bewildered and the vulnerable, writes Professor Fouad Ajami of the Johns Hopkins School of Advanced International Studies, the preachers and the entrepreneurs of death have given this terrible rage sanctity.<sup>21</sup>

But waging a battle for Muslim minds, one of the recommendations of the 9/11 Commission, can be illusory. Is not this war for Islam one for Muslims themselves to fight? Is it not “for them to recover their faith from the purveyors of terror”?<sup>22</sup>

Whether Islam is at all compatible with democracy remains an open question. Both the religion and the political philosophy have a variety of definitions, about which it is difficult to generalize. By Islam one can mean both a belief system and a civilization of richness and complexity, spanning more than fourteen centuries of history; today it has 1.3 billion adherents in some fifty states. Democracy likewise means different things to different people.<sup>23</sup>

The pre-eminent Islamic historian Bernard Lewis, for one, is ambivalent about the course Islam might take: The same communications revolution (from radio and television to e-mail and the Internet), he observes, that more than any other single factor brought the end of the Soviet system of mind control is now beginning to take hold in the Muslim world. “The cumulative effect of this will be, in the long run, to make the 20th-century European style of dictatorial one-

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21. Ajami, *supra* n. 6, at 31. Following the terrorist attack in Beslan, Russia, in September of 2004, Omar Bakri Mohammad, a Syrian-born preacher living in England, told a newspaper that he would support hostage-taking at British schools if carried out by terrorists with a “‘just cause.’” He said that “‘if an Iraqi Muslim carried out an attack like that in Britain, it would be justified because Britain has carried out acts of terrorism in Iraq.’” *Id.*

22. *Id.*

23. Bernard Lewis, *On Liberty and Faith*, Jerusalem Post [¶¶] 3, 6-9] (Feb. 28, 2003).

party government untenable. . . . But how long will the long run take?"<sup>24</sup>

Other historians suggest that neutralizing Wahhabism would not greatly diminish Islamic terror and injustice. Disputes among Muslim scholars themselves about the theological correctness of *jihad* are meaningless to its millions of non-Muslim victims. What is more important is that Muslims finally acknowledge the suffering that *jihad* has caused, as well as the oppressive governance imposed by the laws of *dhimmitude*. "Thus far this brutal history has been completely denied, and even celebrated, as 'enlightened' conquest and rule."<sup>25</sup>

Osama bin Laden, for his notable part, is both startling and calculated in his bluntness about the differences between Muslims and others: "'We love death,' . . . 'as much as the infidels love life.'"<sup>26</sup>

Many modern Muslim clerics focus on the plight of Palestinians, in the process paying virtually no attention to atrocities committed by Muslims against non-Muslims in other parts of the world. They have had little to say, for example, about the starvation and enslavement of South Sudanese Christians by the Islamist Khartoum government forces, the mass murder of Indonesian Christians by Muslim *jihadists*, the pogroms against the Copts by the Muslim Brotherhood and Egyptian Islamists, the return of such institutions as bonded labor and punishment for blasphemy directed against Pakistani Christians by Pakistani Muslims,<sup>27</sup> or the slaughter of innocent Iraqis by suicide bombers.

Instead, Islamist leaders cite the Jewish global conspiracy as a justification for backwardness in the Moslem world, as a lamentation for Islam's loss of power, and as an explanation for its economic failures vis-à-vis the West.<sup>28</sup> In fact "Jews 'were never free from discrimination' " under Islam. As *dhimmi*s, they were looked upon as infidels. Their battlefield victories over the Arabs, followed by the establishment in 1948, were lasting shocks to Muslims. Over time, however, the anti-Jewish and anti-Zionist cause became the single most

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24. *Id.* at [¶¶] 23-26].

25. Bostom, *supra* n. 14.

26. Ajami, *supra* n. 6, at 31.

27. *Id.*

28. Yosef Yaakov, *The Politics of Racial Virulence*, Jerusalem Post 12B (Nov. 19, 1999) (quoting Bernard Lewis in review of Yossef Bodansky's *Islamic Anti-Semitism as a Political Instrument*).

important motivating factor that unified regimes and the masses, and the radical Islamists.<sup>29</sup>

Various American theologians, as well as a handful of moderate Islamic clerics, have made attempts to differentiate between traditional (peaceful) Islam and radical Wahhabism.<sup>30</sup> In today's world however, their views are largely muted and muffled.

Whether Islam is inherently violent is also open to debate. The Koran itself is contradictory. Some scholars argue that it is intolerant and bloody; others disagree, pointing out that Islam condemns the slaughter of innocents and prohibits suicide. But in a global culture still shocked by the events of September 11, 2001, when many Muslims worldwide danced in the streets upon learning of American losses, it is difficult to get beyond the unfortunate paragraphs scattered through the Koran that call for waging war: To kill them, infidels, wherever you shall find them; and seize them, and "lay in wait for them with every kind of ambush."<sup>31</sup>

29. *Id.* Arab governments fuel virulent grassroots hostility against Jews and Israelis, and then use response as an excuse for not pursuing normalization of relations with the Jewish State. *Id.*

30. See generally John L. Esposito, *Unholy War: Terror in the Name of Islam* (Oxford U. Press 2002); see also Stanley Kurtz, *The Terror of Islam*; John Esposito *Struggles to Sanitize Islamic Thought*, 7 *The Wkly. Stand.* 37 (May 27, 2002). The Islamic community in Hungary condemned views of extremist Muslims and "terrorism disguised behind robe of Islam." "Anti-Jew Bomb Plot Palestinian Led Islamic Extremist—Hungarian Muslim Head (BBC Worldwide Monitoring Apr. 14, 2004) (radio broadcast).

31. Chuck Walheim, *Backing a Candidate Is Just Divine*, Ariz. Republic 4, [¶ 8] (June 25, 2004). See also Laura Hagar Rush, *Is Islam to Blame?* E. Bay Express (Cal.) (Dec. 12, 2001) (providing an interview with political scientist Agha Saeed of American Muslim Alliance); Edward W. Said, *Book Review*, 242 *The Nation* 828 (June 14, 1986) (reviewing *Terrorism: How the West Can Win*).

Professor Yohanan Friedmann of the Hebrew University in Jerusalem takes a more cautious approach with respect to the relevant verses:

"The Koran is a difficult book. It is customary to try to understand it through the various commentators who worked on it during the course of history, and the shelves are laden with books that testify to how many people have tried to do this. But it is necessary to be very careful about using the Koran for current political purposes."

Yoav Stern, *Misfit at the Mosque*, Haaretz, (Dec. 3, 2004) (available at <http://www.campus-watch.org/article/id/1409> (accessed Oct. 23, 2005)).

The outspoken moderates, such as the aforementioned Islamic cleric Khaleel Mohammed, point out that the Koran teaches that any treaty between a Muslim and a non-Muslim country is not binding, but is meant to be broken once the Muslim nation becomes stronger than the non-Muslim nation. The unfortunate fact is that most Muslims do not read the Koran and interpret it on the basis of its own words; rather, they let imams and preachers do that for them.<sup>32</sup>

Critics of Islam are often disarmed by challenges that they have not read the Koran in the original Arabic. The majority of Muslims themselves, however, even the most educated, must rely on translations in order to understand their holy scriptures. Another oft-heard challenge is that the troublesome verses have been taken out of context, either historical or textual. But for Muslims themselves there is no historical context, because they embrace the doctrine of abrogation by which later verses serve to cancel earlier ones, those advocating tolerance are superseded by later verses advocating use of the sword.<sup>33</sup> Abrogation thus becomes a facile way to deal with the Koran's numerous internal contradictions.

The textual-context challenge is similarly faulty. For example, following the events of September 11, 2001, many Muslims cited the following verse to prove that the Koran disapproved of violence and killing: Whoever killed a human being shall be looked upon as though he had killed all mankind.<sup>34</sup> But the entire verse reads as follows:

That was why We laid it down for the Israelites that whoever killed a human being, except as a punishment for murder or other villainy in the land, shall be looked upon as though he had killed all mankind; and that whoever saved a human life shall be

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32. E-mail sent to author 11/05/04, author's files. Dr. Mohammed also points out that Moses is the prophet most mentioned in the Koran; that when the Muslims first entered the land in 638, liberating it from the Byzantines, they knew that it rightfully belonged to the Jews; and that the Koran refutes any Muslim religious claim to Jerusalem. *Letters to the Editor*, *supra* n. 8.

33. Ibn Warraq, *How to Debate Moslems*, 174 Outpost 3 (Jan. 2005), (available at [http://www.afsi.org/OUTPOST/2005/Outpost\\_Jan\\_2005.pdf](http://www.afsi.org/OUTPOST/2005/Outpost_Jan_2005.pdf) (accessed Oct. 23, 2005)) (Ibn Warraq is a pseudonym, used also by the author of *Why I am Not a Muslim*). See generally *The Myth of Islamic Tolerance: How Islamic Law Treats Non-Muslims* (Robert Spencer ed., Prometheus Books 2005).

34. See Michael B. Schub, *That Which Gets Lost in Translation*, 10 Middle East Q. (Fall 2003) (available at <http://www.meforum.org/article/573> (accessed Oct. 23, 2005)).

regarded as though he saved all mankind. Our apostles brought them veritable proofs; yet it was not long before many of them committed great evils in the land. Those that make war against God and His apostle and spread disorder shall be put to death or crucified or have their hands and feet cut off on alternate sides, or be banished from the country.<sup>35</sup>

Thus supposedly noble sentiments are in fact a warning to Jews and others. Far from taking a peaceful approach, the verses declare that anyone opposing the Prophet will be killed, crucified, mutilated, and banished.

The resurgence of Islamic fundamentalism is greatest in Iran, Egypt, Syria, Iraq, Jordan, the Palestinian territories, and the Persian Gulf. With it has developed a virulent and ubiquitous anti-Americanism. Disillusionment with the West may also be caused by failed rulers with failed ideas, and the fact that “modernization takes more than strongmen and oil money.” Importing Western consumer goods is easy; importing the principles of “a free market, political parties, accountability and the rule of law—is difficult and dangerous.”<sup>36</sup>

Professor Ajami argues that fundamentalism has given Arabs who were dissatisfied with their lot a powerful language of opposition. The Arab world has no real democratic parties, no free press, and few pathways for dissent. Fundamentalist organizations like the Muslim Brotherhood, Hamas, and Hizbullah “actively provide social services, medical assistance, counseling and temporary housing. For those who treasure civil society, it is disturbing to see that in the Middle East these illiberal groups *are* civil society.”<sup>37</sup>

### 1. *In the Middle East*

The rhetorical incitement that regularly takes place in Middle Eastern mosques is part and parcel of the inflammatory attacks against the United States and its allies currently fighting in Iraq. Incendiary

35. Institute for Secularisation of Islamic Society, *Islamic Apostates' Tales*, <http://www.secularislam.org/reviews/bostom.htm> (accessed Oct. 25, 2005).

36. Zakaria, *supra* n. 9, at 30.

37. *Id.* at 34 (emphasis added). In 1979, when Ayatollah Ruhollah Khomeini toppled the Shah of Iran, the Iranian revolution demonstrated not only that a powerful ruler could be taken out by groups within society, but also that the highly egalitarian nature of Islam has been a source of empowerment for the otherwise powerless. *Id.*

sermons are particularly intense in territories populated by Palestinians, whose places of worship often serve as a staging area for preaching hatred and violence. Every Friday radical imams speak to audiences of thousands in attendance at the mosques, and their words are broadcasted to the general population over the Voice of Palestine radio network.

It is not difficult to compile a sampling of sermons that incite. The incendiary May 2005 sermon of the aforementioned Imam Ibrahim Mudeiris, in which he blamed Jews for most of the world's ills throughout history, was videotaped and translated by the Middle East Media Research Institute. It showed the young imam preaching before a rapt audience, listening intently and in silence, seemingly mesmerized and giving full credence to his every word.<sup>38</sup>

The virulently anti-Semitic rhetoric goes back at least several decades. In 1990, Sheikh As'ad Tamimi, a former imam at the al-Aksa Mosque in Jerusalem, told his audience that all Jews (not just Israelis or Zionists) were destined to be destroyed by Muslims; he said that the Europeans had started the job but it was the role of Muslims to finish it.<sup>39</sup>

Prior to Mudeiris, perhaps the most prominent of the clerics preaching in the mosques was Sheikh Akram Sabri, the mufti of Jerusalem and the Holy Places and the most senior Islamic figure in the Palestinian Authority (PA). He and others who openly represent religious extremism are appointed by the PA President through the Palestinian Holy Places Ministry.

In June of 1996, Sheikh Sabri advocated resumption of the uprising against Israel and praised suicide bombers. In a Friday sermon he stated that:

There is no one that can deny the Jews act deviously, as the Koran itself shows, and no one knows when they will be stopped. .

..

We must rise up against the occupation with all our might to achieve what we want. It is forbidden for us to sit quietly. If we

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38. *Palestinian Friday Sermon by Sheikh Ibrahim Mudeiris*, (Palestinian Authority TV May 13, 2005) (video) (available at [http://switch5.castup.net/frames/20041020\\_MemriTV\\_Popup/video\\_480x360.asp?ClipMediaID=60227&ak=null](http://switch5.castup.net/frames/20041020_MemriTV_Popup/video_480x360.asp?ClipMediaID=60227&ak=null) (accessed Oct. 24, 2005)).

39. Op-Ed, *The Jordan Connection*, Jerusalem Post (Dec. 4, 1990).

are quiet we will not be victorious. It is the obligation of all Moslems to stand by the Palestinians, for the sake of Jerusalem.<sup>40</sup>

An analysis of the messages appearing in religious lessons and sermons on the Temple Mount during the current *intifada* indicates a systematic campaign of incitement directed towards the United States and its allies for their Operation Iraqi Freedom. The sermons in the Al-Aqsa Mosque near the Temple Mount are of special significance to Palestinians, not only because of the importance of the mosque in Islamic culture and the status of Ikrimah Sabri as the most senior Palestinian cleric in the PA, but the fact that his sermons represent an official Islamic expression to the PA's position (even though his views are more extreme than other PA officials).<sup>41</sup>

Sheikh Sabri is a charismatic orator who practiced his preaching early on as a member of the Muslim Brotherhood, which operated in the West Bank when that area was under Jordanian rule. He has issued religious decrees decreeing the death penalty (*fatwas*) for Arabs selling land to Jews. Many of the messages expressed in the sheikh's previous sermons are similarly blunt: Jerusalem will not be obtained by an agreement but only by armed  *Jihad* ; Palestine is a holy land from the Mediterranean Sea to the Jordan River; the right of return must be absolute; compensation for land taken is forbidden. In the summer of 2001, the sheikh delivered a sermon in which he said:

Alas, fellow worshipers, recently we have seen an increase in the number of criminal assassinations of our fighting sons perpetrated by the Israeli army and special forces, with the help of collaborators and spies. It is not surprising that the Jews carry out assassinations. They have been doing it for hundreds of years. They murdered the prophets and the apostles and even attempted to murder the prophet Muhammad, but Allah guarded him from their plots and evil intents.<sup>42</sup>

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40. Bill Hutman, *PA Mufti: Rise Up Against Occupation*, Jerusalem Post 1 (June 14, 1996).

41. Kenneth R. Timmerman, *Preachers of Hate: Islam and the War on America* 164-68 (Crown Forum 2003).

42. Intelligence and Terrorism Information Center at the Center for Special Studies, *The Temple Mount Mosques as a Focus for Incitement and Inflammation Against The United States and Its Allies*, <http://www.intelligence.org.il/eng/bu/temple/temple.htm> (accessed Oct. 24, 2005) (emphasis omitted) (quoting a Friday Sermon on Temple Mount that aired on "Voice of Palestine" radio on July 27, 2001) [hereinafter *Temple*

More recently, he said that:

Those people planning to attack Iraq are the animals and terrorists of the 20th century, led by Bush the villain who claims he wishes to bring peace to the world . . . I ask Allah to destroy Bush and his army, sink his ships and aircraft and deal with the Moslem leaders collaborating with him.<sup>43</sup>

"The Sheikh claimed that during the first Gulf War a million and a half people were killed as a result of the use of biological weapons by the Satan (the U.S.)."<sup>44</sup>

In April of 2003, Sheikh Sabri delivered a sermon in which he called upon "Arab leaders to fulfill their duty towards Palestine and Jerusalem and to support the Iraqi people." "He warned that on Judgement day Allah would avenge those who did not fulfill their duty. He said: 'The Americans in Iraq are murderers of women, children and the elderly. . . . They are employing weapons of mass destruction against the Iraqis.'"<sup>45</sup>

The sheikh criticized the Muslim regimes which had not supported the Iraqi people, exhorting them to fight for the Iraqis and not to listen to their treacherous leaders. He said that Baghdad did not surrender but was handed over to its American conquerors. He described the "pillage and chaos in Baghdad and claimed that he had seen on TV hospital beds being stolen and patients left on the ground."<sup>46</sup>

In February of 2003, Sheikh Muhammad Jamal gave a religious lesson in which he said:

When the Great Satan [again] [the U.S.] felt that there was an Islamic awakening, he began acting [against the Moslems] under the pretext of a war against terror.

The Americans are robbers and thieves who covet the Moslem resources. Therefore he who demands his rights [a Moslem] is not a terrorist.

The sheikh mentioned the wars that the crusaders waged in the

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*Mount Mosques*].

43. *Id.* at [¶ e(3)] (emphasis omitted).

44. *Id.* at [¶ e(4)] (emphasis omitted).

45. *Id.* at [¶ j] (emphasis omitted).

46. *Id.* at [¶ m(1)–(2)] (emphasis omitted).

name of the Cross and the Messiah. He asked Allah to guard Iraq, to deal with the [United States], to sink its ships and to destroy it.<sup>47</sup>

Later that year the PA broadcast a sermon by Ahmad Abu Halabaya, a member of the PA-appointed Fatwa Council, who called for Israelis to be humiliated, tortured, and butchered.<sup>48</sup>

A common theme of Iraqi sermons is the call for violence against the United States and Britain an exhortation to Allah to burn Bush and Blair as well as against Jews. For example, in February 2003, Sheikh Bakr and Abd Al-Razzaq Al-Samarai, preaching at the Abd al-Qadir al-Qaylani Mosque in Baghdad, brandished a sword while crying out to the crowd, “ ‘[i]f Allah permits us, Oh Nation of Muhammad, even the stone will say, Oh Muslim, A Jew is hiding behind me, come and cut off his head and we shall cut off his head. By Allah, we shall cut it off! Allahu Akbar! Oh Jews, Allahu Akbar!’ ”<sup>49</sup>

In an Al-Aqsa Mosque sermon, the United States-sponsored road map was called by Sheikh Yousef Abu Sneina one of the plots fabricated against the Palestinian people like the Oslo accords and the Camp David summit.<sup>50</sup>

In July of 2003, Israeli Foreign Minister Silvan Shalom addressed the Palestinian authorities’ apparent unwillingness to deal with incitement in its electronic and print media, educational system, and mosques. He commented that the Palestinians may have a problem with controlling Hamas and other terrorists, but that “where incitement is concerned they can take action immediately. All they have to do is

47. *Id.* [¶ f] (emphasis omitted). The Voice of Palestine radio network is monitored by Israeli police, which provides transcripts of sermons delivered in the mosques. A month later, Sheikh Muhammad Jamal said: “ ‘The campaign of the “Great Satan” [the U.S.] will not succeed, and Allah will destroy them [the Americans]. [T]he enemies, send calamities on them, sink their ships and destroy their planes.’ ” *Id.* at [¶ g] (emphasis omitted).

48. *The Palestinians in Their Own Words*, *supra* n. 1, at [¶ 2]; see also Weiner, *supra* n. 1, at 65.

49. Steven Stalinsky, M.E.M.R.I., *Friday Sermons on Iraqi TV: October 2002 - March 2003*, “The Jews,” <http://memri.org/bin/opener.cgi?Page=archives&ID=SR01303> (accessed Oct. 24, 2005). In March 2003, Sheikh Abd al-Razzak Al-Sa’adi, Umm Al-Ma’arek Mosque in Baghdad, referring to Americans and British in Iraq, said “Kill them wherever you find them . . . .” *Id.* at “The Sermons.”

50. *Temple Mount Mosques*, *supra* n. 42, at [¶ n] (from a Friday Sermon that aired on “Voice of Palestine” radio on May 9, 2003).

to summon the directors of radio and television and the director of the education system and give them the order.”<sup>51</sup>

The connection between Saudi Arabia and Wahhabi-inspired terrorism is similarly apparent.<sup>52</sup> Over the past several decades, religious incitement of Saudi youth by the government’s educational system and by preachers in Saudi mosques has focused as much on the Christian world as on Jewish people, and in recent years on Hindus of India as well. Prayers explained that because Christians and Jews had become polytheists, Allah had turned them into “pigs and apes.”<sup>53</sup>

In hindsight it seems clear that oil revenues have enabled the Saudis to spread Wahhabis’ ” fanatical, destructive form of Islam all over the Muslim world.” “Without oil and the creation of the Saudi kingdom, Wahhabism would have remained a lunatic fringe.”<sup>54</sup> The Saudi regime has engaged in a dangerous devil’s bargain: By supporting *madrasas* (religious schools) and mosques, it has been able to deflect attention from its failed domestic programs. “In the past [thirty] years Saudi-funded schools have churned out tens of thousands of half-educated, fanatical Muslims who view the modern world and non-Muslims with great suspicion. America, in this world view, is almost always evil.”<sup>55</sup>

The Saudis also spend seventy billion dollars funding a Wahabbist, anti-Western agenda,<sup>56</sup> as well as terror groups around the world.<sup>57</sup> Nevertheless, although in July 2002 the Pentagon’s Defense Policy Board said “ ‘that Saudi Arabia was an enemy of the United States . . . [and] that the Saudis were active “at every level of the terror

51. Radio interview by Shmuel Tal and Goni Mardor-Biran with Silvan Shalom, Israeli Foreign Minister (July 7, 2003) (available through BBC Worldwide Monitoring).

52. See generally Gold, *Hatred’s Kingdom*, *supra* n. 17, at 2-3; Gold, *Unholy Fire*, *supra* n. 17, at [¶¶ 3, 7].

53. Gold, *Hatred’s Kingdom*, *supra* n. 17, at 175.

54. Gold, *Unholy Fire*, *supra* n. 17 at [¶¶ 19-20] (quoting historian Bernard Lewis).

55. Zakaria, *supra* n. 9, at 34-35.

56. Alex Alexiev, *Book Review*, 115 *Commentary* 70 (May 2003) (reviewing *Hatred’s Kingdom: How Saudi Arabia Supports the New Global Terrorism*).

57. Susan Katz Keating, *The Wahhabi Fifth Column*, FrontPageMagazine.com, [¶¶ 1-2] (Dec. 30, 2002), <http://www.frontpagemagazine.com/articles/printable.asp?ID=5270>.

chain," " " various United States administrations have adopted a policy of determined non-confrontation with the House of Saud.<sup>58</sup>

For the Saudis, this open-arms policy is a diplomatic achievement. For other anti-Zionist regimes, it is little different from the pattern of international discrimination against Israel that began in the first half of the twentieth century, and has since come to full flower in the halls of the United Nations (UN).

The story of Jewish refugees from Palestine is illustrative. During the early 1920s Jews and Arabs in Palestine lived in a relatively peaceful relationship. That all changed in late 1928, when disputes arose about the right of Jews to pray at the Western Wall (Kotel) in Jerusalem. In August of 1929 Haj Amin al-Husseini, Mufti of Jerusalem, accused the Jews of endangering the mosques and other sites holy to Islam. He was heard to shout the age-old incantation: *Itback al-Yahud!* (Slaughter the Jews!).<sup>59</sup> On Friday, August 23, riots "erupted throughout the Palestine Mandate, lasting for seven days." In the afternoon, Jerusalem Arabs came to Hebron with reports of Jews murdering thousands of Arabs during the rioting. The reports were untrue. Although Jews and Arabs had lived as good neighbors until then, now:

[A] mass of frenzied Arab rioters formed and proceeded to the Hebron Yeshiva where a lone student was murdered. The next day, the Jewish Sabbath, the killing continued as an Arab mob of hundreds surrounded homes where Jews sought refuge, broke in and murdered scores of Jews in a bloody rampage.<sup>60</sup>

Besides in Hebron, Arab mobs attacked Jews in the Old City of Jerusalem, Motza, Safed, Jaffa, and in other parts of the country. "By the next day, the Haganah was able to mount a defense and further attacks in Jerusalem were repulsed," but the violence there led to fabricated accounts of Jewish attempts to defile Muslim holy places.

58. Rachel Ehrenfeld, *Funding Evil: How Terrorism Is Financed—and How To Stop It* 175 (Bonus Books 2003); Gold, *Hatred's Kingdom*, *supra* n. 17, at 2; see also *Terrorist Hunter* 301-31 (HarperCollins Publishers, Inc. 2003).

59. Avraham Burg, *An Open Letter to My Palestinian Friends: Anger and Faith*, Intl. Herald Trib. 8, [¶ 1] (Oct. 4, 2003). There are many opinions contrary to the view that Islam is inherently violent. See e.g. James North, *All the Rage*, In These Times 25, [¶ 15] (Aug. 19, 2002).

60. See Palestine Facts, *What Happened During the Arab Riots of 1929?* [¶¶ 1-4] [http://www.palestinefacts.org/pf\\_mandate\\_riots\\_1929.php](http://www.palestinefacts.org/pf_mandate_riots_1929.php) (accessed Oct. 24, 2005).

As a result, a number of “[v]illages were plundered and destroyed by Arab mobs.”<sup>61</sup>

By the end of the riots sixty-seven Jews were dead and hundreds wounded. The British police did little to protect the Jewish residents or quell the violence; to the contrary, while they were detained in a police station for three days, the Arabs rampaged through Jewish houses unmolested by the British authorities. At the end of the three days the Jews were exiled from their homes and sent to Jerusalem. Hebron’s ancient Jewish quarter was left empty and destroyed. “For the next 39 years no Jew lived in Hebron, not until after it was liberated by the Israeli military during the Six Day War in 1967.”<sup>62</sup>

In 1948, during Israel’s war for independence, others were killed or forced out of Jerusalem. But none of them nor the close to 800,000 Jews expelled from Arab countries in the second half of the twentieth century were ever referred to as refugees, to be protected by the UN. Neither was the Arab League chastised for rejecting the UN resolution establishing partition in 1947, nor when Arab countries forbade Israelis of any religion from entering (preventing even Muslims from making obligatory pilgrimage to Mecca), nor when Jordan in 1954 offered citizenship to any inhabitant of Palestine except Jews. Palestinian rhetoric has not changed since 1947. Incitement against the country it considers its enemy continues unabated.<sup>63</sup>

Ongoing Arab incitement is accompanied by denial of rights of Jews to the land. Many Arabs believe that, while they should have the right to live in Israel as a separate national minority, no Jew should be able to reside in Arab areas.<sup>64</sup>

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61. *Id.* at [¶ 6].

62. *Id.*

63. Fiamma Nirenstein, ‘*Avoid the Algerian Precedent*,’ *Jerusalem Post*, Features 17 (Mar. 12, 2004); see also Joshua Brilliant, *Likud Rank and File to Vote on Pullback*, *United Press Intl.* (Mar. 30, 2004) (quoting Israeli Prime Minister Ariel Sharon that “[t]he Palestinians did nothing to eradicate terror. They did not detain attackers. They did not collect weapons. They did not even try to stop the rampaging incitement in schools, the media and mosques.”).

64. Daniel Doron, *Addicted to Illusion*, *Jerusalem Post*, Opinion 6 (Mar. 14, 2002) (quoting Yehoshua Porat, founder of Israeli movement Peace Now). For a description of Palestinian’s revisionist history, see Moshe Kohn, *The Boring Truth*, *Jerusalem Post*, Features 26 (Aug. 21, 1998). PA broadcasts of incendiary sermons constitute clear violations of Article 20 of the *International Covenant on Civil and Political Rights*, which bans “advocacy of national, racial or religious hatred that constitutes incitement.” United Nations General Assembly, *International Covenant on Civil and*

## 2. In Europe and Asia

Islamic incitement also takes place beyond the Middle East, in mosques around the world.

“Europeans are facing a stark alternative: ‘Either Islam gets Europeanized, or Europe gets Islamized,’ ” says one modern scholar.<sup>65</sup> The eminent historian Bernard Lewis has speculated that the clash may well be over by the twenty-first century at which time, if present demographic trends continue, Europe will be predominantly Muslim.<sup>66</sup>

In the effort to redress the supremacy of Christian civilization in Europe, contemporary Islam “has followed two separate courses of action:”

adopting the forms of nationalism that have appeared to many Muslims to contain the secret of Western supremacy, or promoting Islam itself as the one force capable of uniting Muslims everywhere and hence ensuring their renewed power . . . . In the hands of today’s Islamists . . . these two approaches have proved mutually reinforcing.<sup>67</sup>

Of Europe’s twenty million Muslims, it is estimated that almost a third live in France, at least three million in Germany, two million in Britain, a million in both Holland and Italy, and a half-million apiece in Spain and Austria. While most Muslim immigrants probably come to Europe simply seeking a better life, a variety of organizations function as Islamist fronts, working to undermine traditional democratic principles and deter the integration of Muslims into mainstream European life.<sup>68</sup>

An early example of this approach was the infamous *fatwa* in 1989, condemning the novelist Salman Rushdie to death for exercising his right to free speech as a British citizen. There has also been an attempt in Britain to establish a Muslim parliament that would recognize only Islamic law as binding. In France, Muslims insist that

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*Political Rights* (entered into force Mar. 23, 1976), 999 U.N.T.S. 171; see also Weiner, *supra* n. 1, at 65.

65. Pryce-Jones, *supra* n. 19, at 29 (quoting Bassam Tibi, an academic of Syrian origins who lives in Germany).

66. Kevin Myers, *Do We Want the Turkish Peasantry Here?*, Sunday Telegraph (London), Features 20 (Dec. 19, 2004).

67. Pryce-Jones, *supra* n. 19, at 30.

68. *Id.* at 31.

girls in public schools wear the *hijab*, a practice that is not an Islamic requirement but clearly contradicts the ideals of French republicanism.<sup>69</sup>

A former head preacher in London's Finsbury Park Mosque, Abu Hamza al-Masri, was indicted for urging his followers to kill non-Muslims and Jews in particular. He was charged under both ordinary British criminal statutes and anti-terror legislation, for using threatening, abusive or insulting behavior to stir up racial hatred, as well as for possessing a document entitled *Encyclopedia of Afgani Jihad*, which is produced by Osama bin Laden's al Qaeda network and provides detailed data on the basic rules of sabotage and terror.<sup>70</sup>

Shortly after the September 11 attacks against the United States, Muslim extremists in Birmingham, England, urged a group of fifty young men and women to travel to Afghanistan in order to give their lives in the defense of Islam. ("Martyrdom operatives will be rewarded in heaven.")<sup>71</sup> At a community hall west of London, Sheikh Omar Bakri Mohammad, a forty-six-year-old Syrian-born cleric, said that "[i]f Europe fails to heed Mr. bin Laden's offer of a truce—provided that all foreign troops are withdrawn from Iraq . . . Muslims will no longer be restrained from attacking the Western countries that play host to them . . . ."<sup>72</sup>

A major concern of British authorities is "that more heated religious rhetoric is encouraging young men to leave home to fight in Iraq." In nightly sermons broadcast on the Internet, for example, Sheikh Omar has "urged young Muslim men all over the world to

69. *Id.*

70. *Al-Masri Charged for Incitement to Murder*, Jerusalem Post (Oct. 19, 2004). (Al-Masri also faces terrorist charges in the United States and Yemen); Daniella Peled, *Jews Salute Trial of Radical Preacher, but Warn that Many Like Him Remain*, Jewish Telegraphic Agency ¶¶ 1-2 (Oct. 26, 2004), [http://www.jta.org/page\\_view\\_story.asp?intarticleid=14663&intcategoryid=2](http://www.jta.org/page_view_story.asp?intarticleid=14663&intcategoryid=2); see also Simon Heffer, *How ID Cards Can Liberate Us*, Spectator 18 (Apr. 10, 2004).

71. Sandra Laville & Gabriel Rozenberg, *British Extremists Urge Young Muslims to Fight against US*, Daily Telegraph (London) 1 (Sept. 17, 2001).

72. Patrick E. Tyler & Don Van Natta, Jr., *Militants in Europe Openly Call for Jihad and the Rule of Islam*, N.Y. Times A1 (Apr. 26, 2004) (Following the invasion of Iraq by U.S. and British forces, a small group of young Muslims in England declared that "they would like to see Prime Minister Tony Blair dead or deposed and an Islamic flag hanging outside No. 10 Downing Street."); Don Van Natta, Jr. & Lowell Bergman, *Militant Imams Under Scrutiny Across Europe; Calls to Back 'Global Jihad' are Cited*, N.Y. Times A9 (Jan. 25, 2005).

support the Iraq insurgency on the front line of 'the global jihad.' ” In another sermon he called al Qaeda the victorious group that Muslims were obliged to join.<sup>73</sup>

The roughly two million Muslims living in Great Britain have succeeded in gaining a good measure of political power. Many of them are organized by the Islamist Muslim Brotherhood and the European Left, which have two political agendas in common: Disaffection with the United States and hatred of Jews and Israel. In August of 2004, Yusuf al-Qaradawi, an extremist Muslim cleric who supports suicide bombing and is banned from traveling to the United States or Canada, appeared as the guest of Kenneth Livingstone, the Mayor of London. He spoke about Jewish iniquity, and mentioned his support of suicide bombing.<sup>74</sup>

As in the United States, however, efforts to control activities at mosques are hampered by laws that protect hate speech and religious expression. For example, although Britain's *Terrorism Act of 2000* allowed prosecutors to charge clerics for using threatening, abusive, or insulting behavior to incite racial hatred, it took almost three years following September 11 for Abu Hamza al-Masri to be charged with soliciting or encouraging others to murder people who did not believe in the Islamic faith.<sup>75</sup>

Besides the increase in incitement in many old working-class towns across England, intelligence officials have discerned a fervor for militancy is intensifying and becoming more open in the Arab enclaves of Germany, France, Switzerland, and other parts of Europe.<sup>76</sup>

In August of 2005, responding to terrorist attacks in London that killed fifty-two people, Prime Minister Tony Blair pledged tough new laws, including deportation, to deal with radical Islamic clerics who

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73. Van Natta & Bergman, *supra* n. 72. Sheikh Omar also “warned that Britain must scale back its antiterrorism laws or it would face a ‘horrendous’ response from angry Muslims.” Now leading the mosque is another radical Muslim, Abu Abdullah, who was quoted as saying that “ ‘[p]eople see us as extremists because we don't compromise the religion of Allah.’ ” *Id.*

74. See Guy Adams, *Pandora*, Independent (London), Features 10 (Aug. 26, 2004); Uwe Siemon-Netto, *Analysis: Muslim TV Star a Radical?* United Press Intl. (Aug. 20, 2004).

75. Van Natta & Bergman, *supra* n. 72 (“Mr. Masri also faces extradition to the United States, where he is charged with 11 terrorist counts, including trying to establish a terrorist training camp in Oregon.”).

76. See Tyler & Van Natta, *supra* n. 72.

incite violence from mosques and elsewhere. He said his government was prepared to amend human-rights legislation if legal challenges arose from the new measures. By year's end, Britain hopes to pass restrictions that would outlaw " 'indirect incitement' of terrorism—targeting extremist Islamic clerics who glorify acts of terrorism and seduce impressionable Muslim youth."<sup>77</sup>

In France, the country's public broadcasting regulator (similar to the United States Federal Communications Commission), was faced with the openly anti-Semitic and anti-Zionist propaganda aired by a new Arab satellite television group called Al Manar. The agency granted Al Manar a license to operate in France as long as it abides by French law. Al Manar had to agree not to incite hate, violence or discrimination on the basis of race, sex, religion, or nationality.<sup>78</sup>

### 3. *In America*

Incitement abroad is a real and growing problem, against both Jews and Americans.

The Arab world's disillusionment with the United States can be traced back to 1948, when the United States supported the creation of Israel, and has grown under successive American administrations during the half-century since. Even Egypt, which receives large amounts of American foreign aid and has denounced religious fundamentalism for some time, allows its controlled media to vilify America and Israel thereby deflecting diatribes against the dictatorships under which Egyptians have long lived.<sup>79</sup>

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77. George Jones, *Blair Pledges Laws to Deport Fanatics—'The Rules Are Changing,'* Daily Telegraph (Sydney, Australia), World 21 (Aug. 6, 2005); Vanora McWalters & Sebastian Rotella, *10 Extremists Arrested in British Crackdown*, L.A. Times A1 (Aug. 12, 2005) (In early August of 2005, Britain arrested ten foreign born Muslim ideologues and announced that they would be deported for posing a threat to national security); see *Blair's Blunderbuss*, Chi. Trib. (Aug. 8, 2005); Geoffrey R. Stone, *What You Can't Say Will Hurt You*, N.Y. Times A17 (Aug. 15, 2005) (The problems with Blair's sweeping approach—the most obvious of which is its failure to make a clear distinction between political comment and advocacy, however indelicate, and incitement to violence or terrorism, which need not and should not be protected—were quickly noted by American commentators).

78. See Elaine Sciolino, *A New French Headache: When Is Hate on TV Illegal?*, N.Y. Times A3 (Dec. 9, 2004); see also Nidra Poller, *Al-Manar Banned, but Hate Speech in France is Tolerated*, N.Y. Sun, Foreign 7 (Jan. 17, 2005).

79. See Mitch McConnell, *No Free Lunch for Egypt*, Wash. Post A17 (July 2, 2001).

Such incendiary rhetoric is even more problematic when it is uttered in the United States, and is complicated by the Nation's passionate adherence to First Amendment freedoms. Here, liberty of thought is virtually inviolable, no matter how offensive its expression and content may be.

Although direct advocacy of immediate violence can be considered a punishable crime, racial and religious hate speech, especially militant Wahhabism, is freely preached in mosques around the country.<sup>80</sup> The growing number of anti-American incidents on American soil and abroad forces one to face the difficult question of the extent to which threatening ideas can remain protected by the Constitution. Where and when can the line be drawn between religious rhetoric and overt violence?

Despite the fact that there is considerable evidence to the contrary, it could well be that the majority of those who lead services in American mosques are moderate clerics who reject the call of their radical brethren abroad to preach incitement against Jews.<sup>81</sup> In recent years there has been an effort to increase other Americans' awareness of the peaceful nature of their religion.<sup>82</sup> Some have advertised in newspapers and on billboards that Muslims are not the other.<sup>83</sup> Others have urged that public schools around the country include in their curricula lessons concerning Muslim culture and tradition,<sup>84</sup> which is a troubling challenge to the principle of church-state separation.

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80. See Adam Liptak, *The Nation: Prisons to Mosques; Hate Speech and the American Way*, N.Y. Times Sec. 4, 3 (Jan. 11, 2004).

81. Jeff Jacoby, *The Courage of Muslim Moderates*, Boston Globe D11 (Feb. 22, 2004); but see Barry Rubin, *The Myth of "Moderate" Islamists*, FrontPageMagazine.com (June 2, 2005), <http://www.frontpagemagazine.com/articles/ReadArticle.asp?ID=18258>.

82. The year following September 11 brought about the largest number of exchanges between mosques in the United States and people or institutions of other faiths in the recent years. Michael Wolfe, *As The Smoke Begins to Clear: Reflections on Islam in America After September 11th*, 7 J. Islamic L. & Culture 165, 175-77 (2002). Many Muslims viewed this outreach behavior as necessary in order to convey that they were on common ground with other faiths. *Id.*

83. Ali S. Asani, *Islam: Enduring Myths and Changing Realities: "So That You May Know One Another"*, 588 Annals Am. Acad. Pol. & Soc. Sci. 40, 48 (2003).

84. See Susan L. Douglass & Ross E. Dunn, *Islam: Enduring Myths and Changing Realities: Interpreting Islam in American Schools*, 588 Annals Am. Acad. Pol. & Soc. Sci. 52, 56 (2003); Daniel Pipes, *Spreading Islam in American Public Schools*, FrontPageMagazine.com (Nov. 24, 2004), <http://www.frontpagemagazine.com/articles/ReadArticle.asp?ID=16094>.

However, difficulties loom ever closer on the horizon. Some of the negative omens derive more from acts of omission. It is perplexingly hard to find, for example, instances where Muslims have publicly stated their outrage at terrorist acts like those perpetrated on September 11, 2001 in the United States, or at atrocities like the beheading of *Wall Street Journal* reporter Danny Pearl in Pakistan in January of 2002, or of the American contractor in Iraq, Nicholas Berg in May of 2003.

Since the 1990s, the number of Muslim mosques in the United States has increased by forty-two percent.<sup>85</sup> Some clerics now openly preach incitement, urging fellow Muslims to follow the path of the *jihad* by destroying Jews, who continue to be vilified as “pigs and monkeys.”<sup>86</sup> Others have refused to cooperate with police investigations or even with surveys trying to determine the number and location of mosques within the United States.<sup>87</sup>

There are currently about seven million American Muslims. Most of them are immigrants, many are converts. One of the few outspoken Islamic moderates in America is Muhammad Hisham Kabbani, chairman of the Islamic Supreme Council of America. In 1999, at a session of the State Department’s Open Forum, he said that extremism had spread to eighty percent of the Muslim population in the United States.<sup>88</sup> Although the majority of American Muslims are moderates, a large and growing number can be classified as fundamentalists, or radical Islamists. The moderates are increasingly intimidated by the radicals.<sup>89</sup>

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85. See Worldwide Faith News, *Muslim Mosques Springing up Across United States* [¶ 7], <http://www.wfn.org/2001/12/msg00122.html> (Dec. 7, 2001).

86. Timmerman, *supra* n. 41, at 257; Mark Rosenblit, *Domestic Incitement: Foundation for Terror* [¶ 3], <http://www.rosenblit.com/TERROR.htm> (accessed Oct. 24, 2005). Most of these comments were made by leaders of the Muslim community within the United States before September 11, although some of the same groups denounced radical Muslims after September 11. *Id.*

87. The surveys are intended to help prevent terrorism. Caroline B. Glick, *US Conservatives Split on Support for Radical Islamists*, Jerusalem Post, News 1 (Feb. 11, 2003).

88. See Timmerman, *supra* n. 41, at 268; see also Steven Emerson, *American Jihad: The Terrorists Living Among Us* 12-18 (The Free Press 2002).

89. Daniel Pipes, *Militant Islam Reaches America* 138 (W.W. Norton & Co., Inc. 2002). Besides Kabbani, moderate Muslims are led by Seifeldin Ashmawy (publisher of *Voice of Peace* magazine) Emerson, *supra* n. 88, at 166-68 (“the heart, if not the soul, of the extremists is in fact largely in the U.S.”) and Khalid Duran. *Id.* at 168-75

While incitement in American mosques is still a relatively new phenomenon, it reflects closely the many exhortations to violence by Middle Eastern clerics noted earlier,<sup>90</sup> and appears to be increasing. Numerous Muslim leaders on American soil have felt no inhibitions about speaking out against both Americans and Jews.

In 1988, for example, Abdullah Azzam (a well-known Palestinian mullah), said: "The Jihad, the fighting, is obligatory on you wherever you can perform it. . . . The word Jihad means fighting only, fighting with the sword."<sup>91</sup>

In 1991, Sheikh Omar Abdel Rahman told followers in Detroit that it was their obligation to wage *jihad* for the sake of Allah and that they must conquer the lands of the infidels and . . . spread Islam . . . and if they stand in our way, then we wage *jihad* for the sake of Allah.<sup>92</sup>

Sheikh Rahman had come to the United States in 1990. His preaching attracted followers at mosques in Jersey City and Brooklyn who, prosecutors charged, were inspired by his sermons to plan for the assassination of Jewish Defense League founder Meir Kahane and the first World Trade Center bombing. He was convicted of seditious conspiracy and other offenses. Rahman's attorney argued that the sheikh was being prosecuted for his religious beliefs, and should have been protected under the First Amendment's free speech guarantees. Rahman's conviction was affirmed by the Second Circuit.<sup>93</sup>

Rahman's conviction is one of the few to date, undoubtedly because his rhetoric was accompanied by voluminous evidence that his followers attempted to carry out his exhortations.

A Muslim leader based in New York offered a familiar analogy: The head of the snake is in America and the tail in Palestine; it is not

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(some of the worst anti-American rhetoric comes from well-educated engineers, doctors, and scientists). See also Timmerman, *supra* n. 41, at 268-71.

90. See *supra* nn. 1-5 and accompanying text.

91. Emerson, *supra* n. 88, at foreward.

92. *Terrorists Among Us: Jihad in America*, (Steven Emerson Nov. 21, 1994) (WNET TV broadcast) (demonstrating international conspiracy against the West by radical Islamists).

93. *U. S. v. Rahman*, 189 F.3d 88, 104-05, 160 (2d Cir. 1999); see also John Alan Cohan, *Editions Conspiracy, The Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of Government*, 17 St. John's J. Leg. Comment. 199, 223-24 (2003); Emerson, *supra* n. 88, at 48-51.

possible to kill the snake fighting the tail. All Arab leaders should realize that the real battleground is in America, not Palestine.<sup>94</sup>

While such language is clearly inflammatory, does it amount to incitement under the law?<sup>95</sup>

Incitement against American interests appears to be organized and well funded.<sup>96</sup> Islamists control nearly every major American Muslim organization including the American Islamic Group (AIG), the American Muslim Alliance (AMA), the American Muslim Council (AMC), the Council on American-Islamic Relations (CAIR), the Islamic Association for Palestine (IAP), the Islamic Circle of North America (ICNA), the Islamic Committee for Palestine, the Islamic Cultural Workshop (ICW), the Islamic Society for North America (ISNA), the Muslim Arab Youth Association (MAYA), the Muslim Public Affairs Council (MPAC), the Muslim Students Association, and the United Association for Studies and Research (UASR).

Radical Muslims also run the majority of mosques and newspapers.<sup>97</sup> ISNA, the largest Muslim group in the United States, publishes a blatantly anti-Zionist newsletter called *Islamic Horizons*.<sup>98</sup>

Non-Muslims are likewise subject to intimidation. The United States Constitution may guarantee freedoms of religion and speech, but running afoul of Islamists can lead to danger or death.<sup>99</sup> For example, Steven Emerson, an investigative journalist, had his life threatened for producing *Jihad in America*, an award-winning television documentary that drew on the Islamists' own anti-American and anti-Semitic propaganda.<sup>100</sup>

Ample evidence exists that such campaigns of open intimidation, especially by CAIR, are growing in number. A former chief of

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94. *Prepared Statement of Steven Emerson Before the Senate Judiciary Committee's Subcommittee on Terrorism, Technology and Government Information, Foreign Terrorists in America: Five Years After the World Trade Center Bombing*, F. News Serv. (Feb. 24, 1998) [hereinafter *Prepared Statement of Steven Emerson*].

95. See *infra* pt III.

96. Timmerman, *supra* n. 41, at 2.

97. See Emerson, *supra* n. 88, at 183-231; see also Jerusalem Ctr. For Pub. Affairs, *The End of American Jewry's Golden Era: An Interview with Daniel Pipes* (May 2, 2004) (available at <http://www.danielpipes.org/article/1759> (accessed Oct. 24, 2005)).

98. Emerson, *supra* n. 88, at 216.

99. See Pipes, *supra* n. 89, at 173-74.

100. Emerson, *supra* n. 88, at 12-18.

counter-terrorism operations for the Federal Bureau of Investigation (FBI) put it succinctly:

[A]ny objective assessment . . . leads to the conclusion that CAIR, its leaders, and its activities, effectively give aid to international terrorist groups. Unfortunately, CAIR is but one of a new generation of new groups in the United States that hide under a veneer of 'civil rights' or 'academic' status but in fact are tethered to a platform that supports terrorism.<sup>101</sup>

The groups have had a strong impact on their memberships. Increasing numbers of Muslims express hatred and contempt toward the United States, especially toward Americans who are Jewish.<sup>102</sup> Nearly every Muslim organization and publication in the United States deals in blatant anti-Semitism, talking freely about bloody battle with Jews. Both extremists and moderates have issued calls on behalf of Hamas for killing Jews. Nazi-like language, again referring to Jews as sons of monkeys and pigs and worshipers of evil is commonplace. So are calls for the extermination of Jews, such as, " 'O Muslim, servant of God, there is a Jew behind me, come and kill him.' " <sup>103</sup>

The Nation of Islam, a black militant group under the leadership of Louis Farrakhan, likewise engages in virulent anti-Semitism. It sells the notorious forgery the *Protocols of Elders of Zion*. It blames Jews for both capitalism and communism, the two twentieth-century World Wars, and the United States deficit, besides dominating United States politics and media, carrying out a transatlantic slave trade and blocking advancement of blacks.<sup>104</sup> *The Protocols* are also freely available in public libraries.<sup>105</sup>

By the 1980s, such vituperation "often mixed with conspiracy theories and laced with highly charged invective" against Jews had become a regular theme not only in political and street rhetoric, but in

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101. Pipes, *supra* n. 89, at 176-77 (quoting Steve Pomerantz). Pipes himself has been a target of CAIR. *Id.* at 178-79.

102. *Id.* at 203.

103. *Id.* at 205; *Prepared Statement of Steven Emerson, supra* n. 94.

104. Pipes, *supra* n. 89, at 208-10. Besides Farrakhan, one of the leading figures in American Islamic community is convicted murderer Jamil Abdullah Al-Amin (formerly H. Rap Brown). *Id.* at 233-41.

105. See e.g. the main branch of the Enoch Pratt Free Library in Baltimore currently carries at least a half-dozen recently published copies.

many mosque sermons as well.<sup>106</sup> America is regarded as the Great Satan.

At the First Conference of Jihad, which took place at the Al-Farook Mosque in Brooklyn in 1988, Sheikh Azzam instructed his audience to carry out *jihad* no matter where they were, even in America:

Every Moslem on earth should unsheathe his sword and fight to liberate Palestine. . . The jihad is not limited to Afghanistan . . . Jihad means fighting . . . You must fight in any place you can get . . . Whenever jihad is mentioned in the Holy Book, it means the obligation to fight. It does not mean to fight with the pen or to write books or article in the press or to fight by holding lectures. . . ,<sup>107</sup>

The ISNA holds its annual conventions in major American cities, attracting up to 15,000 people. In Kansas City in 1989, cleric Yusuf al Qaradawi told his audience that “ ‘On the hour of judgment, Muslims will fight the Jews and kill them.’ ”<sup>108</sup>

In 1991, another Islamic cleric, Abd al-Aziz Awda, said to the AIG that Jews “ ‘understand only one language: The language of Jihad, and the language of confrontation, and the language of sacrifice.’ ”<sup>109</sup> In 1992, at a conference of the MAYA, a long line of speakers (including the head of Hamas) exhorted the audience to “Kill the Jews and Destroy the West.” At a 1993 Muslim gathering in Detroit, there were open calls for *jihad*.<sup>110</sup>

One of the featured speakers at a 1994 meeting of MAYA in Chicago was Bassam Alamoush, a leading Jordanian Islamist, who related this story: Somebody approached him at a mosque in Amman and asked, “ ‘If I see a Jew in the street, should I kill him?’ ” Alamoush said he paused a moment, then said: “ ‘Don’t ask me. After you kill him, come and tell me. What do you want from me, a *fatwa* [legal ruling]? Really, a good deed does not require one.’ ” The audience laughed. Later in his speech, Alamoush was interrupted by

106. Pipes, *supra* n. 89, at 206.

107. Emerson, *supra* n. 88, at 129-30.

108. *Terrorists Among Us: Jihad in America*, *supra* n. 92; See also Pipes, *supra* n. 89, at 205.

109. Emerson, *supra* n. 88, at 205.

110. Emerson, *supra* n. 88, at 7.

an aid with a note that he read to thunderous applause: “ ‘Good news there has been a suicide bombing in Jerusalem’ killing three people.”<sup>111</sup>

In 1994, the American Arab Anti-Discrimination Committee hosted a Virginia fund-raising dinner for Mohammed Siyyam, a senior Hamas leader, together with a Texas-based Hamas support group, the Islamic Association for Palestine. “The Washington-headquartered American Muslim Council, is funded through a militant Saudi-owned conglomerate and has promoted Hamas, lobbied on behalf of militant Islamic leaders, and hosted visiting radical Islamic leaders.”<sup>112</sup> American Arabs were asked to support *jihad* financially.<sup>113</sup>

Over the past decade there have been many other examples of incendiary rhetoric emanating from these groups that likewise test the limits of the First Amendment.

One of the speakers at a 1997 MAYA conference declared that “ ‘Those young people who explode themselves to kill the Jews were not committing suicide but jihad.’ ” “ ‘They are mujahideen because there is no way to struggle and fight the Jews except that way. Allah bless those martyrs.’ ”<sup>114</sup>

The AMC hosted Dr. Sami al-Arian, who stated:

“Let us damn America. Let us damn Israel, let us damn their allies until death. Why do we stop? . . . Mohammad is leader. The Koran is our constitution. Jihad is our path. Victory to Islam. Death to Israel. Revolution! Revolution! Until Victory! Rolling, rolling to Jerusalem.”<sup>115</sup>

In May of 1998 the AMC and CAIR, which both support terrorist organizations like Hamas and refuse to condemn acts of terror,<sup>116</sup> co-

111. Annual Conference of MAYA, (Ontario, CA Dec. 29, 1997) (Arabic videotape); Emerson, *supra* n. 88, at 189-90; Pipes, *supra* n. 89, at 206.

112. Steven Emerson, *Why Islamic Extremists Were the First Suspects*, Wash. Times A23 (Apr. 27, 1995).

113. *Jihad* means holy struggle. Palestinian Authority officials told Israel they feared that incitement in the mosques would “inevitably lead to a loss of control,” even though it has been reported that Arafat would sign off on all Temple Mount sermons before they were delivered. Alon Pinkas & Jon Immanuel, *Palestinian Police, IDF on Full Alert for Hamas Rally*, Jerusalem Post 1A, [¶] 9 (Nov. 25, 1994).

114. Annual Conference of MAYA, (Ontario, CA Dec. 29, 1997) (Arabic audiotape); Emerson, *supra* n. 88, at 190.

115. Emerson, *supra* n. 88, at 205.

116. *Id.* at 197-207.

sponsored a rally at Brooklyn College featuring radical Islamic cleric Wagdy Ghuneim, who said: “ ‘[H]e who equips a warrior of jihad is like the one [who] makes jihad himself’ ” and led a song that included lyrics, “ ‘No to the Jews, descendants of the apes.’ ”<sup>117</sup>

At a 1999 conference of the AMC at Brooklyn College, the faithful were urged to follow the path of *jihad* by destroying Jews.<sup>118</sup> That same year the AMC convened in Santa Clara, California, where it called for the murder of all Jews.<sup>119</sup>

At its annual conference in Chicago in November of 1999, the IAP presented numerous anti-Zionist speakers. One of them was Salah Sultan, the president of Islamic American University, who said the following in a Friday prayer sermon:

The Zionist regime is a danger to the Jews, a danger to Christians, a danger to Americans.

What does “the Cause” mean to you? And what does it mean to your children? . . . An Israeli soldier opened the womb of a Palestinian mother, took out the embryo, cut off his head, and gave it to [Israeli Prime Minister Yitzchak Shamir] . . . as a present! This is the method of the Jews. . . . Because their motto is, “[t]he gentiles mean nothing to us.” This is what the text of the talmud says: “If you come across a non-Jew, kill him!”<sup>120</sup>

As a witness to this sermon later asked, how far would such believers go if they took Salah Sultan at his word?<sup>121</sup>

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117. *Id.* at 199.

118. H.R. Subcomm. on Immig. & Claims of the Jud. Comm., *International Terrorism and Immigration Policy, Testimony of Steven Emerson*, 106th Cong. (Jan. 26, 2000) (available at Federal Document Clearing House).

119. Sen. Subcomm. on Tech., Terrorism & Govt. Info. of the Jud. Comm., *Foreign Terrorists in America, Testimony of Steven Emerson*, 105th Cong. (Feb. 24, 1998) (available at Federal Document Clearing House).

120. See Contender Ministries, *Did they Really Say That? Quotations From Islamic Conferences in the U.S.*, <http://www.contenderministries.org/articles/islamconferencePF.php> (accessed Oct. 25, 2005); Karl Ericson, *Followup to Creation of Paranoia*, “III Creation of Self-Humiliation and Paranoia to Gain Power and Control,” <http://www.unicorn.phoenixrising-web.net/shelp/muscreateparanoia.htm> (accessed Oct. 25, 2005).

121. Emerson, *supra* n. 88, at 100-01.

At the same conference, Sheikh Ahmed al-Kuhafi said, “ ‘Jews are the enemies of humanity even before they are the enemies of Muslims, therefore it is necessary to remove them from power.’ ”<sup>122</sup>

At another IAP conference, Imam Jamal Said declared:

I appeal to you, on this night that is ushering in the holy month of Ramadan, to be generous and give plenty, to keep the light in the houses of our martyrs burning. We have boxes here that say “Help us, help the Aqsa cause, Islamic Association for Palestine!” We want you to fill those boxes. There is no better charity than to pay for the family of a martyr.<sup>123</sup>

According to Sheikh Tariq Suweidan, Palestine will not be liberated but through *jihad*. Nothing can be achieved without sacrificing blood. The Jews will meet their end at our hands.<sup>124</sup>

In October of 2000, MPAC coordinated a rally in front of the Israeli Embassy in Washington, D.C. at which the crowd was moved to repeat the exhortation of the speaker: “ ‘Al-Aqsa [Mosque] is calling us, let’s all go into jihad, and throw stones at the face of the Jews [*sic*].’ ”<sup>125</sup>

Although whenever anti-Semitic rhetoric or for that matter any incendiary words and literature is closely followed by physical violence, the constitutional guarantees of free speech do not come into play,<sup>126</sup> that principle does not seem to have been recognized on the campuses of many American colleges and universities.

At the University of California, Santa Barbara, “dormitories were defaced with anti-Semitic graffiti including phrases such as ‘God Hates Jews,’ ‘Burn the Torah,’ and ‘Israel=SS.’ ” Fliers at University of California Berkeley and University of California San Diego, distributed by Muslim student groups, claimed Talmudic authority for the propositions that: (a) “ ‘A Jew is permitted to rape, cheat, and perjure himself but he must take care that he is not found out, so that Israel

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122. Annual Conference of IAP, (Chicago Nov. 27, 1999) (Arabic audiotape). See also Emerson, *supra* n. 88, at 100; *Terrorist Hunter*, *supra* n.58, at 137-55.

123. Annual Conference of IAP, (Chicago, Nov. 24, 2000) (Arabic audiotape); Emerson, *supra* n. 88, at 100.

124. See Emerson, *supra* n. 88, at 100.

125. *Id.* at 211.

126. See generally Emerson, *supra* n. 88; Pipes, *supra* n. 89; Timmerman, *supra* n. 41 (For examples of the close relationship between rhetoric/incitement and actual deeds.).

may not suffer' ”; (b) “ ‘A Gentile girl who is three years old can be violated’ ”; and (c) “ ‘The Jews are human beings, but the nations of the world are not human beings but beasts.’ ” Similar vandalism occurred at the George Washington University.<sup>127</sup>

Anti-Semitic statements are not limited to students. A similar litany emanates from faculty members as well, many of them prominent academics at places like Columbia University, Binghamton State University of New York, Kent State, University of Oregon. At University of California Berkeley, an English professor told conservative students to “ ‘seek other sections’ if they didn’t agree with his opinions.”<sup>128</sup> In March of 2003, the late Edward Said of Columbia University alleged that then-White House press secretary Ari Fleischer was an Israeli agent who secretly controlled policy of the United States government.<sup>129</sup>

In terms of skewed curricula, Columbia University deserves special mention. There have been numerous reports of intimidation and hostility by faculty members in the Department of Middle East and Asian Languages and Cultures at least part of whose funding comes from the United Arab Emirates.<sup>130</sup>

In one incident, Professor Joseph Massad demanded of an Israeli student, “ ‘How many Palestinians have you killed?’ ” Massad also told a class that the Palestinian is the new Jew, and the Jew is the new Nazi. Also, he allegedly yelled at a Jewish student: “ ‘I will not have anybody here deny Israeli atrocities.’ ”<sup>131</sup>

More than a third of Columbia’s Middle East Department signed a petition for the university to divest its holdings in companies doing

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127. Timmerman, *supra* n. 41, at 257.

128. The professor was Snehal Shingavi. *Id.* at 258. The same thing has occurred at Towson State University, where history professor Kimberly Katz reportedly told several students they should leave her course on modern Islam if they disliked her views to which she did not permit challenges for lack of time. *See* Author’s files.

129. Timmerman, *supra* n. 41, at 259 (quoting Edward Said); *see generally* Pipes, *supra* n. 89, at 109-25 (discussion of Jihad in the academy).

130. *See* Editorial, *Farrakhan for Columbia?* N.Y. Sun ¶ 1 (Jan. 10, 2005).

131. Uriel Heilman, *Columbia to Check Anti-Israel Bias Charge*, Jerusalem Post, News 2, [¶ 6] (Oct. 31, 2004); *see also* Douglas Feiden, *Vile Words of Hate that Shame Top University*, Daily News (N.Y.), News 4 (Nov. 21, 2004); Daniel Pipes & Jonathan Calt Harris, *Columbia’s Self-Hating Americans*, Jerusalem Post, Opinion 7 (Apr. 2, 2003).

business with Israel. The chairman of the department, Hamid Dabashi, openly talks about Israel's brutal massacres of innocent Palestinians.<sup>132</sup>

The fact is that the Columbia experience is not unique all over the country, students with no prior bias on Israel are taking university courses on the Middle East that present a distorted view of Israel.

#### 4. In Canada

In the past decade, the Muslim population in Canada has increased by more than 130 percent. It is the most recently arrived Muslims who are most likely to be anti-Western. There is also mounting evidence that a growing number of Canadian mosques and Islamic schools have come under the control of Saudi-funded Wahhabis and other radical Islamists. One moderate Muslim university professor recently estimated that ninety percent of the new mosques constructed in Canada since 1990 were dominated by Wahhabis. In April of 2002, a crowd of five hundred plus marched through downtown Calgary chanting, " 'death to the Jews!' " <sup>133</sup>

In October of 2004, Sheikh Younus Kathrada called Jews " 'the brothers of monkeys and swines' " at a meeting of the Dar Al-Madinah Islamic Society in Vancouver, and reminded his listeners that the Prophet Muhammad had urged his followers to kill the Jews.<sup>134</sup>

According to the Canadian Jewish Congress, since the fall of 2000 there have been close to one hundred Middle-East-related anti-Semitic incidents in Canada, including six arsons and twelve vandalizations of synagogues; the evidence suggests that the perpetrators were Muslim.<sup>135</sup>

132. See *A Not So Academic Debate*, New Republic, Notebook 8, [¶¶ 1-2] (Jan. 24, 2005); *The Bollinger Committee*, N.Y. Sun, Editorial & Opinion 14, [¶ 6] (Dec. 10, 2004).

133. Ezra Levant, *New Look, Same Line: Fashionable Suits Can't Cover Up the Hatred*, Calgarysun.com, [¶ 1] (Feb. 3, 2003), [http://www.pcsscaldgary.org/in\\_media/calgary\\_sun\\_-\\_feb\\_3\\_2003.htm](http://www.pcsscaldgary.org/in_media/calgary_sun_-_feb_3_2003.htm).

134. *Muslims, Alone, Must Expel the Intolerance*, Canadian Jewish News [¶¶ 4-5] (Oct. 28, 2004) (available at <http://www.cjnews.com/viewarticle.asp?id=4681&s=1> (accessed Oct. 25, 2005)).

135. Kevin Michael Grace, *Muslim Hatred on Parade: Anti-Jewish Tumult is Spreading from Europe to Canada*, Alberta Rpt. [¶ 3] (May 13, 2002).

## C. MOSQUES AND MEDIA

The conflict in the Middle East today is closely reflected in a war of words.<sup>136</sup>

Those who feel that Israel's case is clearly the more meritorious if not righteous have trouble understanding why others do not see it with equal clarity. The Arab world, on the other hand, views the Western media with deep-seated suspicion.<sup>137</sup>

Whatever happens in the mosques is sometimes, but hardly always, mirrored in the media. Western journalists often turn a blind eye toward the rhetorical incitement that appears to permeate Arab mosques. For example, the notorious sermon by Ahmad Abu Halabiya urging the faithful to kill those Jews and those Americans who are like them, was ignored completely by the *New York Times*, even though it was broadcasted live on Palestinian television following the bloody lynching of two Israeli reservists in Ramallah in October of 2000.<sup>138</sup> More recently, however, a *Times* editorial hailed new Palestinian leadership for doing their part by resisting the urge to deliver unnecessary anti-Israel speeches.<sup>139</sup>

136. See Kenneth Lasson, *War of Words*, 19 IPI Global Journalist 1 (Spring 2004) (available at <http://www.globaljournalist.org/magazine/2004-1/war-of-words.html> (accessed Oct. 25, 2005)); Kenneth Lasson, *Death, Deadlines & the Media*, Balt. Jewish Times 1 (Aug. 15, 2003) (This subsection is derived from this article.). The war of words also takes place by e-mail and the electronic media. Richard Holbrooke, the chief architect of the Dayton peace accords regarding Bosnia, suggests that war in Yugoslavia erupted not because of ancient hatreds, but because Belgrade television in the early 1990s repeatedly fed racist messages to Bosnian Serbs. Gold, *Hatred's Kingdom*, *supra* n. 17, at 227; see also Gold, *Unholy Fire*, *supra* n. 17.

137. See e.g. the Aljazeera web-site, which boasts: "Free from the shackles of censorship and government control Aljazeera has offered its audiences in the Arab world much needed freedom of thought, independence, and room for debate. In the rest of the world, often dominated by the stereotypical thinking of news 'heavyweights', Aljazeera offers a different and a new perspective." Aljazeera.net, *About Aljazeera* [¶ 4], <http://english.aljazeera.net/NR/exeres/5D7F956E-6B52-46D9-8D17-448856D01CDB.htm> (accessed Oct. 25, 2005).

138. Alex Safian, *New York Times Covers Up Call to "Kill the Jews,"* C.A.M.E.R.A. [¶¶ 1-2] (Oct. 25, 2000), [http://www.camera.org/index.asp?x\\_article=118&x\\_context=2](http://www.camera.org/index.asp?x_article=118&x_context=2).

139. A news report in the New York Times subsequently suggested that the new Palestinian leadership is moderate, despite a spate of rocket attacks against Israel. See Greg Myre, *On the Air, Palestinians Soften Tone on Israelis*, N.Y. Times A1, [¶ 7] (Dec. 15, 2004).

The *Times* often suggests that Palestinians and Israelis are equally to blame for incitement, claiming that prominent Jewish clergymen leaders also deliver incendiary messages. For example, in 2001 it reported that Rabbi Ovadia Yosef, spiritual leader of the largest religious party in the Knesset, delivered a sermon in which he was quoted as saying: “ ‘It is forbidden to be merciful to them. You must send missiles to them and annihilate them. They are evil and damnable.’ ” However, Rabbi Yosef has always insisted that the above comments referred only to terrorists who threaten the lives of Israelis, and not innocent Arabs. Unlike the weekly incitement of Palestinian clerics, which is largely ignored by the media, the Israeli rabbi’s isolated comments were widely reported in the world press.<sup>140</sup> Rarely does the media attempt to challenge the suggestion of moral or factual equivalency between Palestinian incitement and Israeli reactions to it.<sup>141</sup>

But incitement extends beyond formal speeches by clerical or political figures. In November of 2004, the official Palestinian Authority daily, *Al Hayat al Jadida*, ran a graphic cartoon showing “an American soldier raping an Iraqi woman, while the Arab world looks on with amusement;” an earlier cartoon had Ariel Sharon eating Palestinian babies. The same paper recently portrayed United States Secretary of State “Condoleez[z]a Rice as an evil ‘exterminator’ of the Arab people.” Official PA television offers a children’s program that glorifies massacres of civilians and suicide bombings, and broadcasts sermons that “continue to encourage terrorist *jihad* against all Jews.”<sup>142</sup>

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140. Ricki Hollander, *The New York Times; Too Little, Too Late on Incitement*, C.A.M.E.R.A. [¶¶ 1- 4] (Dec. 15, 2004), [http://www.camera.org/index.asp?x\\_context=2&x\\_outlet=35&x\\_article=820](http://www.camera.org/index.asp?x_context=2&x_outlet=35&x_article=820).

141. The *Chicago Sun-Times* and *Washington Times* are two of the few American papers to point out the hypocrisy: In June of 2005, the latter noted the failure of the Palestinians to reciprocate various previous and current Israeli concessions in the peace process. Editorial, *A Peace Process in Grave Danger*, Wash. Times A22 [¶ 2, 4] (June 6, 2005). In November of 2004, the *Sun-Times* editorialized that “Palestinians should have taken care of this long ago, if they really want to someday live in peace with their neighbors. It is impossible to negotiate at a diplomatic level while broadcasting hatred toward your partner in peace.” Editorial, *Sharon Has Reasonable Request for Advancing Peace*, Chi. Sun-Times 51, [¶ 4] (Nov. 21, 2004). See also HonestReporting.com, *Ending the Incitement* (Nov. 25, 2004), [http://www.honestreporting.com/articles/45884734/critiques/Ending\\_the\\_Incitement.asp](http://www.honestreporting.com/articles/45884734/critiques/Ending_the_Incitement.asp) [hereinafter *Ending the Incitement*].

142. *Ending the Incitement*, *supra* n. 141 (emphasis added).

### 1. *Foreign Correspondents*

Media coverage of the Middle East often serves to contribute to the incitement-taking place in the mosques. At least part of this phenomenon can be traced to the foreign correspondents themselves, who, as close witnesses to a monumental muddle of murder and high emotions on all sides, emerge as confused as anyone else. Like others, they frequently appear to miss the forest for the trees.

Israelis would argue that few reporters fathom the full historical context of Zionism and the State of Israel, much less the Biblical birthright of the Jewish people. Although they are largely laden with liberal predispositions, can they be faulted for finding that the palpable poverty and hardship in the streets of Gaza may make for a more compelling story than reciting the fears and aspirations of Israelis sipping coffee in Jerusalem cafes?

In so doing, however, it often appears that they ignore the undisguised incitement that takes place daily in Palestinian mosques, not to mention the virulent indoctrination of Arab school children given textbooks permeated with expressions of hatred toward Jews.

Moreover, Mid East journalists are on call seven days a week with an endless press of moving events. They uniformly complain about the difficulties of time management. They have to rely on Hebrew or Arabic translators. Most correspondents acknowledge a degree of intimidation by the PA. They have as much trouble as their audiences in sorting out the logic of suicide attacks and the military responses to them.

Most egregious of all, to many critics of Mid East coverage, is the media's insistence on using judgmental terminology of words that wound, buzzwords that can quickly turn to bombast, endless semantic puzzles: Can Hamas fairly be labeled "militant" instead of "terrorist"? Are extremists on both sides equal contributors to a cycle of violence? What does "occupation" and "Massacre" mean?

Perhaps the single biggest obstacle in Mid East journalism is the choice of words to describe the violence that takes place every day. Particularly nettlesome are "terrorist," "militant," and "extremists" on both sides. All of them are said to contribute to the "cycle of violence;" itself a term that strongly implies equivalency.

At the Associated Press, the BBC, and Reuters, use of the term "terrorist" in Mid East reporting is firmly forbidden. So too is it taboo at the *New York Times* and the *Washington Post*.

According to the BBC's official producer's manual, "[o]ur credibility is severely undermined if international audiences detect a bias for or against those involved. Neutral language is a key: [E]ven the word 'terrorist' can appear judgmental in part of the world where there is no clear consensus about the legitimacy of militant political groups."<sup>143</sup>

But this can lead to absurd results, such as when the Associated Press published a list of countries afflicted by terrorism in 2003 and conspicuously omitted Israel.<sup>144</sup>

National Public Radio (NPR) similarly resists the term "terror" when reporting on homicidal attacks by Palestinians against Israelis although the network regularly uses the word to describe the activities of al Qaeda and other radical Islamic groups around the world. NPR vigorously denies this apparently biased inconsistency, despite thoroughgoing documentation by various watchdog groups, most notably the Committee on Accuracy in Middle East Reporting in America (C.A.M.E.R.A.).<sup>145</sup>

NPR's use of the phrase " 'Israeli-Palestinian violence' " suggests not only that Israel's military responses to terrorism are the same as the terrorism itself, but that the Israelis, if not themselves the protagonists, are equally blameworthy. It is as if NPR used the phrase " 'American-Serbian violence in Kosovo,' " or "American-Iraqi violence." As Lewis Glinert, a Professor of Linguistics at Dartmouth, recently pointed out, "Language wars are messy and laborious. . . . As in all modern conflicts, the entire community is at risk; it must therefore be

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143. Jeffrey A. Dvorkin, *Are They 'Terrorists,' 'Gunmen,' or 'Guerillas'?*, "The BBC Language Guide," <http://www.npr.org/yourturn/ombudsman/020405.html> (accessed Oct. 25, 2005); see also C.A.M.E.R.A. Advertisement, *When Is A Terrorist . . . Not A "terrorist"?* (Oct. 14, 2003) (available at [http://www.camera.org/index.asp?x\\_article=575&x\\_context=2](http://www.camera.org/index.asp?x_article=575&x_context=2) (accessed Oct. 25, 2005)) (This advertisement appeared in the Sunday edition of the *New York Times* on Oct. 12, 2003.).

144. Arutz Sheva, IsraelNationalNews.com., *AP Omits Israel in List of Terror Attacks*, <http://www.israelnationalnews.com/news.php3?id=52630> (Nov. 11, 2003). See also HonestReporting.com, *AP, Reuters Omit Terror in Israel*, [http://www.honestreporting.com/articles/45884734/critiques/AP3\\_Reuters\\_Omit\\_Terror\\_In\\_Israel.asp](http://www.honestreporting.com/articles/45884734/critiques/AP3_Reuters_Omit_Terror_In_Israel.asp) (Nov. 12, 2003).

145. See Andrea Levin, *NPR Critiques Itself*, C.A.M.E.R.A. [¶ 1] (June 11, 2004), [http://www.camera.org/index.asp?x\\_context=4&x\\_outlet=28&x\\_article=690](http://www.camera.org/index.asp?x_context=4&x_outlet=28&x_article=690).

familiarized with the propagandists' arts and trained to protect itself. The stakes, as history has shown, are high."<sup>146</sup>

## 2. *Indelible Images*

No one phrase has created as much of a firestorm as the "massacre at Jenin." In April of 2002, shortly after the Israel defense forces invaded the Palestinian refugee camp, Terje Roed-Larsen, the UN's special envoy in the region, described the scene as "horrific beyond belief."<sup>147</sup> His appalled vision was quoted widely in the world press, and trumpeted by the Palestinians as evidence of Israeli brutality. PA leaders such as Saeb Erekat charged that Israel had massacred five hundred Palestinians.<sup>148</sup> That number made its way from the CNN screens to the UN Security Council, which demanded "immediate access."<sup>149</sup>

The harshest criticism occurred in the British press. The *Guardian*, the *Independent*, the *Telegraph*, and the *Times* all quoted the same lone Arab who said he saw Israeli soldiers heap thirty bodies beneath a half-wrecked house. When the pile was complete, they bulldozed the building, bringing its ruins down on the corpses. Then they flattened the area with a tank. The *Daily Telegraph* reported that "[h]undreds of victims 'were buried by bulldozer in [a] mass grave.' " The *Evening Standard* said, " '[w]e are talking here of massacre, and a cover-up, of genocide.' " The *Guardian* called Israel's actions in Jenin " 'every bit as repellent' as Osama bin Laden's attack on New York on September 11."<sup>150</sup>

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146. Lewis Glinert, *The Language War*, Jerusalem Post [¶¶ 6, 11-13] (Jan. 29, 2004). For examples of distorted reporting in European countries, see *infra* n. 179 and accompanying text.

147. John Kifner, *Annan Picks Team to Examine Camp Attacked by Israel*, N.Y. Times A12 (Apr. 23, 2002).

148. Tracy Wilkinson, *Sharon Rebuffs U.S. as Jenin Camp is Seized*, L.A. Times A1, A13 (Apr. 11, 2002).

149. John Lancaster, *Israel Sets Conditions for Jenin Camp Probe: U.N. Team to Investigate Circumstances of Assault*, Wash. Post A16 [¶¶ 2-3, 15] (Apr. 21, 2002).

150. *The Battle for the Truth: What Really Happened in Jenin Camp?*, Guardian (London) [¶ 1] (Apr. 17, 2002) (available at <http://www.guardian.co.uk/Archive/Article/0,4273,4395504,00.html> (accessed Oct. 25, 2005)); Tom Gross, *Jeningrad: What the British Media Said*, Natl. Rev. Online, [¶¶ 1, 9, 15] (May 13, 2002), <http://www.nationalreview.com/comment/comment-gross051302.asp>.

The truth, though, was that there had been no massacre, no mass grave, no cover-up, no genocide. When the facts emerged, thirteen Israeli soldiers had lost their lives in street-to-street combat, and fifty-four Palestinians had been killed of whom forty-three were armed fighters. These figures were later confirmed by both the UN and, in May of 2002, by the PA itself.<sup>151</sup>

Moreover, the number of Israeli soldiers killed would likely have been lower and the Palestinian civilian death toll much higher had the Israel Defen[s]e Force (IDF) chosen to bombard Jenin from the air.<sup>152</sup>

Yet (according to a search of the various newspaper data bases) virtually no correction was made by the media of its journalistic excesses concerning Jenin. Indeed there has been scant acknowledgment of the truth anywhere. Thus, to many, the vision of a slaughter at the hands of the Israelis remains indelible.

A similar cause for continued incitement is the ineffable image of Muhammad al-Dura, a twelve-year-old Palestinian allegedly shot by Israeli soldiers while cowering in his father's arms. The video of his death was televised around the world, and has become the icon of the Palestinian cause. Postage stamps have been issued in the boy's honor, and streets have been named after him.<sup>153</sup> A popular song played on PA television features al-Dura's father singing about the martyrdom of his son. Also on PA television is a video clip of the boy arriving in heaven, while a soundtrack plays: " 'How pleasant is the smell of martyrs, how pleasant the smell of land, the land enriched by the blood, the blood pouring out of a fresh body.' " <sup>154</sup>

As James Fallows, the highly respected investigative journalist for the *Atlantic Monthly*, reported in June of 2003, the fact that a thorough investigation by the IDF appeared to prove empirically that Muhammad al-Dura could not have been shot by the Israelis a study that has not been challenged or refuted was lost in the rubble of Mid East reporting. Fallows' cover story analyzed the incident in great

151. Matt Rees, *Untangling Jenin's Tale*, Time 40, 43 (May 13, 2002).

152. Jerome Linsner, *Ethical and Humane*, Spectator (U.K.) 30 (Apr. 20, 2002).

153. James Fallows, *Who Shot Mohammed Al-Dura?* A. Mthly. 49 (June 2003).

154. Weiner, *supra* n. 1, at 66. See also *An Arab Speaks Out: A Survivor of Palestinian tyranny defends Israel*, [http://www.aish.com/jewishissues/jewishsociety/An\\_Arab\\_Speaks\\_Out.asp](http://www.aish.com/jewishissues/jewishsociety/An_Arab_Speaks_Out.asp) (accessed Oct. 25, 2005) (providing Brigitte Gabriel's speech delivered at the Duke University Counter Terrorism Speak-Out, held on Oct. 14, 2004).

detail and concluded that al-Dura most likely fell victim to an errant shot from the Palestinians unless (as some Israelis speculate) he did not die at all.<sup>155</sup>

Incitement occurs in various forms and degrees, and is often substantially subtler than open exhortations to kill Jews or Americans. For the most part “the ‘mainstream’ Islamic establishment” (including CAIR, AMC, and ISNA) gives “perfunctory” support to the war against terror.<sup>156</sup> Few American-Muslim newspapers openly criticize the United States. Most appear to recommend tolerance of Jews and other minority groups, while emphasizing Islam’s multi-cultural dimensions. For example, an article in *Islamic Horizons* described a pro-Palestinian rally near the White House, noting that all types of people including Christians and Jews participated.<sup>157</sup>

On the other hand, Muslim-Arab publications like the *Minaret*, the *Muslim Observer*, *Islamic Horizons*, and the *Weekly Mirror International* frequently serve up slanted news reports and anti-American and anti-Jewish editorials. Some of them openly criticize the United States or even Israel or the Jewish people in general. Their anti-American grievances are not easily camouflaged: For example, the *Muslim Observer*, in cataloguing the loss of civil liberties for Muslims in the United States as a result of September 11, also carried an article which suggested that Israelis were responsible for the attacks because Israel wanted the United States to side with them.<sup>158</sup>

Egypt’s fundamentalist Muslim Brotherhood “receives support from a[ll]-Talib (The Student), published at UCLA by the Islamic Center of Southern California, and from Islamic Horizons, based in Plainfield, Indiana.” The Islamic Center also publishes the *Minaret*, which is well known for its anti-Jewish cartoons. In May 2002, its

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155. Fallows, *supra* n.153, at 54. See also *Pallywood* (Richard Landes) (video clip) (available at <http://www.seconddraft.org/streaming/pallywood.wmv> (accessed Oct. 25, 2005)).

156. See Stephen Schwartz, *All the Hate That's Fit to Print: America's Poison-Pen Muslim Press*, 7 Wkly Stand. [¶ 2] (July 22, 2002) (available at <http://www.weeklystandard.com/content/Public/Articles/000/000/001/464ijlvz.asp> (accessed Oct. 25, 2005)).

157. Hodan Hassan, *The National Scene - We are all Palestinians*, <http://www.isna.net/services/horizons/current/WeAreAllPalestinians.html> (accessed Oct. 25, 2005) (depicting a recent march on the White House rallying in support of Palestine). See also *The Myth of Islamic Tolerance*, *supra* n. 33.

158. Schwartz, *supra* n. 156, at [¶¶ 3-4].

editor "accuse[d] Israel of pursuing 'a policy adopted by Henry Kissinger . . . that called for a final solution of the Palestinian problem.' „<sup>159</sup>

The *Weekly Mirror International*, based in Brooklyn, is sympathetic with an extremist Islamic from Pakistan. Osama bin Laden himself has contributed to the *Muslim Observer*, which defended the Taliban for refusing to surrender him to the United States.<sup>160</sup>

In the summer of 2001, the web site of *Islamic Horizons*, maintained by ISNA, promoted a book by former Illinois Congressman Paul Findley, which called bin Laden a "pre-eminent hero[ ]." The *Muslim Observer's* web site published a poll in which it had asked its readers, "[d]o you think our country [the United States] is being manipulated by Israel?" The response: Ninety-five percent said yes.<sup>161</sup>

### 3. *Palestinian Textbooks*

What is preached in the mosques is little more than the rhetorical counterpart of what is printed in Palestinian textbooks. The hate-mongering passages can be found in all public schools controlled by the PA. An eighth-grade text, for example, tells students that:

Everything previously written leads to the conclusion that Zionism constitutes a threat to all Arabs and must be fought by each and every Arab.

Zionism is poised to take over the rest of Jerusalem and its holy sites and, thereafter, to continue, step by step, to complete its control of Palestine. In the third stage, it will invade Jordan, Syria, Lebanon and the rest of the Arab states. This will happen unless the Arabs take serious steps to exterminate the Zionist germ and thrust this evil out of the Arab homeland. If the Arabs ignore the danger that threatens them with destruction and avoid taking the necessary action, they will share the same fate as that of their Palestinian brothers.

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159. *Id.* ("If this is not the language of incitement," says Schwartz, "what is?").

160. *Id.* [¶ 3]

161. *Id.* [¶¶ 5-6]

Another passage says that, “[m]y brother, the oppressor has crossed the line and the time has come for jihad and martyrdom.”<sup>162</sup>

Similarly, a seventh-grade text teaches that, “[t]he year 1948 is known as the year of the ‘Great Crime,’ when the ‘gang state’ was established by means of invasion and conquest of towns and villages and abuse of their residents. Examples of this are the Dir Yassin massacre, the Kibya massacre, the Kafr Kassem massacre and others.”<sup>163</sup>

A 2004 Palestinian textbook for sixth-graders urges them to take active part in military activities.<sup>164</sup> Another contains a photograph of a “jihad-fighter,” a “map of Israeli settlements in the West Bank and the Gaza strip,” and a photo-map entitled “ ‘Geography of Palestine,’ [which contains] (no marked borders); showing cities in the West Bank and Gaza and cities in Israel such as Jaffa, Haifa, Akko and Nazareth, as [if they were] in one unit.”<sup>165</sup>

Jewish holy places are completely ignored in Palestinian textbooks. Israel’s name does not appear on any map. Instead, the land is called Palestine, whose capital city is Jerusalem, which is presented as exclusively Arab. Jihad and martyrdom are prominent subjects in the textbooks.<sup>166</sup>

Tolerance is advocated towards followers of other religions but not towards Jews, who are “mentioned several times . . . in historical contexts,” “mostly unfavorably.” Their national and religious connection with the land is ignored completely. In terms of the present conflict, they are “demonized as . . . oppressors [and] slaughterers . . . who do not hesitate to shoot peaceful travelers on the road.”<sup>167</sup>

162. Jewish Virtual Library, *Incitement, Antisemitism and Hatred of Israel in Palestinian School Textbooks*, <http://www.jewishvirtuallibrary.org/jsource/Peace/patext1.html> (Nov. 2001) (excerpts from *Al-Mutalaa Wa-Al-Nussous Al-Adabia*). See generally Center for Monitoring the Impact of Peace, <http://www.edume.org/reports/11/1.htm> (accessed Oct. 25, 2005) [hereinafter C.M.I.P.]

163. *Incitement, Antisemitism and Hatred of Israel in Palestinian School Textbooks*, *supra* n. 162.

164. *Ending the Incitement*, *supra* n. 141.

165. *Incitement, Antisemitism and Hatred of Israel in Palestinian School Textbooks*, *supra* n. 162 (excerpts from *Altarbia Alwanya*).

166. C.M.I.P., *supra* n. 162.

167. *Id.* See also *The Myth of Islamic Tolerance*, *supra* n. 33 and accompanying text.

Before the current *intifada*, various representatives of the American Jewish community met with the King and Queen of Jordan. In the course of their conversation, the Americans brought up the question of incitement in the textbooks distributed to Palestinian schoolchildren. The king responded with platitudes, but the queen interrupted and said, “[n]o, they are right. And we will do away with that sort of incitement as soon as the Israelis stop doing the same thing.” The American group was flabbergasted that this claim, unsupportable by the facts, had come from the most sophisticated and educated elements of Jordanian society.<sup>168</sup>

What realistic hope could there be for overcoming this distorted perception, or for eradicating this kind of passive incitement?

#### 4. *Facile Propagandists*

The dissemination of skewed perceptions is not limited to Arab propagandists in Middle Eastern mosques or *madrassas*. The line between indirect and active incitement is growing thinner. Moreover, in an era of increasing Palestinian presence on American campuses from coast to coast, coupled with the liberal-left agenda at many universities and ignorance of historical fact, today’s students are particularly vulnerable to revisionism and denial.<sup>169</sup>

A case in point is that of James Zogby, founder and president of the Arab American Institute and one of the most effective spokesmen for the Palestinian cause. “[H]e is smooth, articulate, and knowledgeable . . . [a confluence of talents] made all the more [persuasive] because his [passionately] reasoned indignation about [American] support for Israel is tempered by a well-modulated academic voice.”<sup>170</sup>

Zogby’s facility with facts and language also serves to twist history, and ultimately turn truth as much on its head as do the radical Islamist clerics in their mosques. “For example, he said that what is

168. Anecdote related to author by Nathan Lewin, Esq.

169. See *supra* nn. 128-32 and accompanying text.

170. The information in this subsection is derived from the author’s notes taken at an appearance by Zogby at the Univ. of Md. Sch. of L. in the fall of 2003. See also Kenneth Lasson, *Zogby Zigzags*, Balt. Jewish Times [¶¶ 1, 3] (Jan. 2, 2004) (available at <http://www.jewishtimes.com/scripts/edition.pl?now=5/25/1999&SubSectionID=33&ID=1975> (accessed Oct. 25, 2005)).

now Israel was systematically stolen from its rightful inhabitants - that indeed early Zionists had strong reservations about displacing Palestinians/Arabs from their homeland. In fact, the first Zionist Congress in 1897 resolved to seek 'to establish a home for the Jewish people in *Eretz Israel*.' Every subsequent Zionist Congress has affirmed the principle."

Since Israel was thrust upon the world in 1948, says Zogby, there has been virtually no serious debate about United States policy in the Middle East. One could argue just as cogently, however, and with ample historical documentation, that over the past half-century there has been more discussion about America's Mid East policy than about any single item on the foreign agenda.<sup>171</sup> Most of it has come from ten consecutive administrations, from Presidents Truman to Bush, and from a like number of duly-elected Congresses, all of which have chosen to see the wisdom in America's defense of Israel. Likewise, the Nation's traditional and apparently popular support for Israel can hardly be traced to a stifling of public discourse on the subject.

On the other hand, there has been virtually no debate among the sovereign united nations concerning the hundreds of UN resolutions condemning Israel, while not a single statement has ever been issued to protest violations of human rights by China, the Soviet Union, and Cambodia, not to mention various Middle Eastern countries like Saudi Arabia, Iran, and Iraq, even though they are all signatories to various international human rights declarations and conventions. Nor was there any negative comment from the United Nations when Kuwait expelled 300,000 Palestinians during and after the Persian Gulf War.<sup>172</sup>

In fact only two countries, the United States and Israel, have ever offered any material relief for Palestinian refugees, contributing more in goods and dollars than all other states—Arab, European, or Third World—combined.<sup>173</sup>

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171. Lasson, *Zogby Zigzags*, *supra* n. 170, at [¶¶ 4-6].

172. *Id.*

173. By now it has been well documented that at least a billion dollars of the aid intended for the welfare of Palestinians had been siphoned into his own coffers by their late leader, Yasser Arafat. Zogby declares that the "famous 'two-state solution' has been systematically sabotaged by the [U.S.] and Israel." Forgotten, it appears, are the two-state solutions "offered by the Palestinian Mandate of 1923, the United Nations Partition Plan of 1947 and - the most recent formula rejected out of hand - the [idea] proposed by Israel at Camp David in 2000." Nor does he countenance the open defiance of groups like Hamas and Hizbollah, which have publicly vowed to fight

Zogby's facile propaganda is protected by the First Amendment. The line between misstatements of fact issued from a bully pulpit, and incitement to action, however, is often blurred. For example, when a Jewish law student asked Zogby "to explain the incitement to hatred that takes place daily in the P.A.-controlled mosques and textbooks, and the continued indoctrination of young Arab children to admire and seek 'martyrdom,' [Zogby's] instant reply was that the same thing happens in 'Torah schools.'"<sup>174</sup>

The facts, however, indicate the contrary: "[N]o Israeli textbook demonizes Arabs[,] [n]o Jewish student is taught to worship death[,] [n]o rabbis call for the expulsion of Palestinians except for a radical few [ ]who are instantly and loudly condemned by both the government and the great majority of the people[ ]."<sup>175</sup>

Zogby's false statements of fact are analogous to those preached in mosques. If such declarations were followed by a violent response from the audience, would the courts find incitement?<sup>176</sup>

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against Israel's very existence. "More than a few Palestinians understand that the P.A. itself utters the same nihilism in Arabic." The mantra that occupation and settlements are the major obstacles to peace likewise withers under factual scrutiny. Between 1948 and 1967 there were no settlements, and thus no occupation, yet terrorist violence against Israelis was rampant. *Id.* [¶¶ 10-11]. As Eric Hoffer, the (non-Jewish) American philosopher wrote in 1968 that other nations drive out millions, Russia, Poland, Algeria, Indonesia and no one says a word. Sweden, which was ready to break off relations with America because of Vietnam, did not protest when Hitler was slaughtering Jews. Instead, Sweden sent Hitler choice iron ore, and ball bearings, and serviced his troop trains to Norway. "Other nations when victorious on the battlefield dictate peace terms. But . . . Israel . . . must sue for peace." Eric Hoffer, *Israel's Peculiar Position*, L.A. Times G7 (May 26, 1968).

174. Lasson, *Zogby Zigzags*, *supra* n. 170, at [¶ 12].

175. *Id.* at [¶ 13].

176. No such violence occurred at the University of Maryland on the day Zogby spoke. But when facile propagandists like him have access to a bully pulpit, where they can control questions from the audience, they are able effectively to avoid challenges to their positions. Zogby would undoubtedly have more difficulty with questions like the following: Why should Israel give up *any* territory that it won in combat especially in view of the fact that the land it now occupies can barely be seen among the dozen and a half Arab countries sitting on huge land masses in the Middle East? "If Jews have no right to the promised land, do they have any claim to their own state?" If Muslims can live peacefully in Haifa, as they do and can, why should not Jews have the right to live peacefully in Hebron? Even if suicide bombings are an understandable response to despair, as those like Zogby suggest, can the murder of civilians worshiping in synagogues, traveling on buses, or eating at restaurants ever be justified? (Shouldn't Israel's response to terrorism in its midst be equally understandable?) Why did Muslims dance in the streets when they heard about the

### 5. Racial Defamation

In June of 2005, “[a] French appeal court [ ] found [that] the editor-in-chief of *Le Monde* and the authors of an opinion piece in the paper [were] guilty of ‘racial defamation’ against Israel and the Jewish people.” A June 2002 article entitled *Israel-Palestine: the Cancer*, contained comments that the court found “ ‘targeted a whole nation, or a religious group in its quasi-globality,’ and [thus] constituted racial defamation.”<sup>177</sup>

The court found that two passages in the article were particularly offensive:

The first passage read: “It is hard to imagine that a nation of fugitives born of a people who have been subjected to the longest persecution in the history of humanity, who have suffered the worst humiliation and the worst contempt, should be capable, in the space of two generations, of transforming themselves into a people sure of themselves and dominating (of others) and, with the exception of an admirable minority, a scornful people that takes satisfaction in humiliating others.”

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deaths of 3000 people at the World Trade Center on 9/11, or the slaying of *Wall Street Journal* correspondent Danny Pearl, or the bombings of synagogues in Turkey, or the execution-style murders of an Israeli mother and her four children? See Kenneth Lasson, *Handling the Truth*, Balt. Jewish Times (July 9, 2004) (available at <http://www.jewishtimes.com/scripts/edition.pl?now=5/25/1999&SubSectionID=48&ID=2348> (accessed Oct. 25, 2005)). In fact for a country that has been threatened with terrorism for virtually its entire existence, Israel exercises a great deal of governmental restraint in protecting the free-speech rights of its citizens even in the absence of a constitution or bill of rights. See David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?* 26 Israel L. Rev. 238 (1992); Asher Maoz, *Defending Civil Liberties Without A Constitution — The Israeli Experience*, 16 Melbourne U. L. Rev. 815 (Dec. 1988); Avi Weitzman, *A Tale of Two Cities: Yitzhak Rabin's Assassination, Free Speech, and Israel's Religious-Secular Kulturkampf*, 15 Emory Intl. L. Rev. 1, 1-3 (2001).

177. Jon Henley, *Le Monde Editor 'Defamed Jews'*, *Guardian* [¶¶ 1, 3] (June 4, 2005) (available at <http://www.guardian.co.uk/france/story/0,,1499139,00.html> (accessed Oct. 25, 2005)). The defamatory article was authored by Edgar Morin (a well-known sociologist), Daniele Sallenave (a senior lecturer at Nanterre University), and Sami Nair (a member of the European parliament). They and *Le Monde's* publisher, Jean-Marie Colombani, “were ordered to pay symbolic damages of one euro to a human-right group and to the Franco-Israeli association.” Tom Gross, *Anti-Semitism at 'Le Monde' and Beyond*, *Wall St. J. Europe* [¶ 2] (June 2, 2005) (available at [http://www.honestreporting.com/articles/45884734/reports/Anti-Semitism\\_at\\_Le\\_Monde\\_and\\_Beyond.asp](http://www.honestreporting.com/articles/45884734/reports/Anti-Semitism_at_Le_Monde_and_Beyond.asp) (accessed Oct. 25, 2005)).

The second continued: "The Jews of Israel, descendants of an apartheid named the ghetto, ghettoise the Palestinians. The Jews who were humiliated, scorned and persecuted humiliate, scorn and persecute the Palestinians. The Jews who were the victims of a pitiless order impose their pitiless order on the Palestinians. The Jews, scapegoats for every wrong, make scapegoats of Arafat and the Palestinian Authority."<sup>178</sup>

Although the ruling by the French court was the first of its kind in all of Europe—the country's most distinguished newspaper found guilty of anti-Semitism—few in France or elsewhere took notice. There was virtually no coverage of the case in the French press. The Associated Press did not run it at all. Instead of triggering the long overdue reassessment of Europe's attitude toward Israel, the media have chosen to ignore it. This should not be especially surprising, in view of the fact that in recent years there have been other anti-Israel news reports, editorials, commentaries, letters, cartoons, and headlines published throughout Europe, in the guise of legitimate and reasoned discussion of Israeli policies.<sup>179</sup>

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178. Henley, *supra* n. 177, at [¶¶ 8-9].

179. Gross, *supra* n. 177. In Great Britain, the *The Guardian* equated Israel and al Qaeda; the *Evening Standard*, Israel and the Taliban. *Id.* at [¶ 8]. The *Independent's* Middle East correspondent, Robert Fisk, "implies that the White House has fallen into the hands of the Jews: 'The Perles and the Wolfowitzes and the Cohens . . . [the] very sinister people hovering around Bush.'" *Id.* Bashing Israel even extends to local papers that don't usually cover foreign affairs, "such as the double-page spread titled '*Jews in jackboots*' in '*Luton on Sunday*.'" (Luton is an industrial town south of Cambridge)." *Id.* at [¶ 17]. "In Spain . . . three days after a Palestinian suicide bomber killed 21 young Israelis at a disco [in June of 2001] . . . the liberal daily *Cambio 16* published a cartoon of Israeli Prime Minister Ariel Sharon . . . sporting a swastika inside a star of David on his chest, and proclaiming: 'At least Hitler taught me how to invade a country and destroy every living insect.'" *Id.* at [¶ 9]. The Catalan daily *La Vanguardia* ran a cartoon showing the Museum of the Jewish Holocaust next to another building under construction, with a large sign reading Future Museum of the Palestinian Holocaust. *Id.* at [¶ 11]. In Greece, in April of 2002, the country's largest daily *Eleftherotypia* depicted on its front cover (under the title Holocaust II) "an Israeli soldier [ ] depicted as a Nazi officer and a Palestinian civilian as a Jewish death camp inmate." *Id.* at [¶ 12]. "In September 2002, another cartoon in *Eleftherotypia* showed an Israeli soldier with a Jewish star telling a Nazi officer next to him 'Arafat is not a person the Reich can talk to anymore.' The Nazi officer responds, 'Why? Is he a Jew?'" *Id.* "In Italy, in October 2001, the Web site of one of the country's most respected newspapers, *La Repubblica*, published the notorious anti-Semitic forgery, 'The Protocols of the Elders of Zion,' in its entirety, without providing any historical explanation." *Id.* at [¶ 13]. "In April 2002, the Italian liberal daily *La Stampa* ran a

## 6. *Propaganda on the Internet*

A similar question arises when violent responses can be traced to propagandists who use the Internet to promote and incite anti-Israel and anti-Jewish activities. For example, the World Islamic Front posted this statement by Osama bin Laden:

The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque . . . from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty Allah, “and fight the pagans all together as they fight you all together,” and “fight them until there is no more tumult or oppression, and there prevail justice and faith in Allah.”<sup>180</sup>

Though prosecutions of incitement via the Internet also raise serious questions for civil libertarians, they are beyond the scope of this article.<sup>181</sup>

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front-page cartoon showing an Israeli tank, emblazoned with a Jewish star, pointing a large gun at the baby Jesus in a manger, while the baby pleads, ‘Surely they don’t want to kill me again, do they?’ ” *Id.* at [¶ 14]. “In *Corriere Della Sera*, another cartoon showed Jesus trapped in his tomb, unable to rise, because Ariel Sharon, rifle in hand, is sitting on the sepulcher.” *Id.* at [¶ 15]. “Sweden’s largest morning paper, *Dagens Nyheter*, ran a caricature of a Hassidic Jew accusing anyone who criticized Israel of anti-Semitism.” *Id.* at [¶ 16]. “Another leading Swedish paper, *Aftonbladet*, used the headline ‘The Crucifixion of Arafat.’ ” *Id.* “[I]n Norway’s leading regional paper, *Stavanger Aftenblad*, equat[ed] Israel’s actions against terrorists in Ramallah with the attacks on the World Trade Center.” *Id.* at [¶ 17]. (emphasis added throughout).

180. Shaykh Usamah Bib-Muhammad Bin-Laden et al., *Jihad Against Jews and Crusaders: World Islamic Front Statement* [¶ 12], <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm> (accessed Oct. 25, 2005).

181. *But see* brief discussion in text accompanying *infra* n. 229. *See also* Thomas E. Crocco, Student Author, *Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites*, 23 St. Louis U. Pub. L. Rev. 451 (2004). Also beyond the scope of this article are cases where mosques are being used to store ammunition and shelter terrorists. *But see* White House Radio, *President’s Radio Address*, (May 15, 2004) <http://www.whitehouse.gov/news/releases/2004/05/20040515.html> (accessed Sept. 27, 2005).

## III. CIVIL LIBERTIES IMPLICATIONS

*Maxim inter arma silent leges*<sup>182</sup>

As this is being written in 2005, many civil libertarians feel that over two centuries of traditional American ideals are genuinely in jeopardy.<sup>183</sup> In times of conflict, civil liberties quickly become subjective. Survival, after all, is still and understandably a nation's strongest instinct even at the cost of individual rights.

The events of September 11, 2001 and their aftermath have indeed presented unique dilemmas. Examining them requires one to recognize the differences between secular and religious speech, to discern where the Free Speech and Free Exercise Clauses of the First Amendment might come into conflict, and to understand the difference between wartime and peacetime utterances. In addition, one must confront both the perceived and inherent tensions between the United States Constitution and various international conventions and declarations to which America is a signatory.

## A. SECULAR SPEECH

The First Amendment to the United States Constitution proclaims that "Congress shall make no law . . . abridging the freedom of speech."<sup>184</sup> Throughout the Nation's history, however, virtually all courts have agreed that this liberty is not absolute, and have labored to define the appropriate parameters to be applied under the Constitution.

To what degree does the First Amendment protect words that might be construed as incitement to violence?<sup>185</sup>

On this question the leading case is *Brandenburg v. Ohio*.<sup>186</sup> There, the defendant was convicted under the state's criminal syndicalism statute for leading an organizing march on behalf of the

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182. Cicero. Translates to "In times of war, the laws are silent."

183. See e.g. American Civil Liberties Union, *National Security*, <http://www.aclu.org/NationalSecurity/NationalSecurityMain.cfm> (accessed Sept. 1, 2005) ("wave of 'anti-terrorist' activity, all in the name of national security, [has] launched one of the most serious civil liberties crises our nation has ever seen").

184. U.S. Const. amend. I.

185. *Black's Law Dictionary* defines incitement simply as the act of provoking, urging on, or stirring up. *Black's Law Dictionary* 762 (Joseph R. Nolan ed., 6th ed., West 1990).

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

Ku Klux Klan. The speech that was delivered during the course of the march included derogatory comments about Blacks and Jews, and vaguely threatened revenge against the government if it continued to suppress the white, Caucasian race.<sup>187</sup>

The Supreme Court reversed the conviction, reasserting the test it had prescribed earlier in *Whitney v. California*: Whether the advocacy of force or violation of law is (1) directed at inciting or producing imminent lawless action, and (2) likely to produce such action.<sup>188</sup> As Justice Douglas pointed out in a concurring opinion, the proper distinction is the line between ideas and overt acts, adding a reference to the classic case where speech is directly connected to action, such as falsely yelling fire in a crowded theater.<sup>189</sup>

Thus, although *Brandenburg* gives broad protection for free speech, all cases still rest essentially on their unique fact situations, which are often open to different interpretations.<sup>190</sup>

To understand the *Brandenburg* standard it is useful to trace the long evolution of the line drawn between provocative speech and actionable incitement.

It is almost axiomatic that the tenor of the times determines the degree of protection of civil liberties, whose abrogation during wartime is hardly a new issue. Indeed suppression of fundamental freedoms during times of real or threatened hostilities began very shortly after the Nation's founding.<sup>191</sup>

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187. *Id.* at 444-46.

188. *Id.* at 447. See *Whitney v. Cal.*, 274 U.S. 357, 371-72 (1927).

189. *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring) (However, a distinct limitation was placed on this exception: The First Amendment does not protect speech that incites imminent or lawless action. The clear and present danger test was further limited to situations that would arise during wartime.). See *Schenck v. U.S.*, 249 U.S. 47, 52 (1919) (discussed *infra* at nn. 199-201 and accompanying text).

190. See e.g. *Hess v. Ind.*, 414 U.S. 105, 107 (1973) (defendant's conviction of disorderly conduct for loudly telling sheriff "[w]e'll take the [f-----] street later," was overturned by the Court). But Justices Rehnquist, Burger, and Blackmun dissented, arguing that speech is "susceptible of characterization as an exhortation, particularly when uttered in a loud voice while facing a crowd." *Id.* at 111 (Rehnquist, J., Burger, C.J. & Blackmun, J., dissenting).

191. For example, about two-dozen people were jailed under the *Sedition Act* for criticizing President John Adams. See Michael Kent Curtis, *Education and The Constitution: Shaping Each Other and The Next Century: Teaching Free Speech from an Incomplete Fossil Record*, 34 Akron L. Rev. 231, 242- 44 (2000).

In 1798, only seven years after the enactment of the Bill of Rights and the United States on the brink of war with France, Congress passed the *Alien and Sedition Acts* making it a crime for an individual or organization to publish criticism of federal officials or the government, and authorizing the president to detain or deport citizens who did.<sup>192</sup>

A few decades later, during the War of 1812, America once again found itself having to balance the protection of individual freedoms against the necessity of national security. General Andrew Jackson declared martial law. Practically all of the military trials of civilians during wartime resulted in convictions.<sup>193</sup>

In the midst of the Civil War, Abraham Lincoln authorized the suspension of the writ of habeas corpus—the right of a suspect to be brought promptly before a judge who could determine the sufficiency of the evidence against him wherever necessary—for the public safety.<sup>194</sup> The President also issued a proclamation providing that persons “ ‘discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels’ should be subject to ‘martial law and liable to trial and punishment by courts-martial or military commissions . . . .’ ” At about the same time, another executive order directed United States marshals and local police chiefs to “arrest and imprison ‘any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States.’ ”<sup>195</sup> In addition,

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192. *Alien Act* 1 Stat. 570-72 (1798) (expired); *Sedition Act* 1 Stat. 596-97 (1798) (expired); see William H. Rehnquist, *All The Laws But One: Civil Liberties In Wartime* 69-70, 209 (Alfred A. Knopf, Inc. 1998) (When Thomas Jefferson was elected President in 1800, he pardoned those convicted under the *Alien and Sedition Acts* but the laws were never repealed, despite strong public opposition. The *Sedition Act* expired under its own terms, and the *Alien Act* remained on the books until the time of World War II).

193. Rehnquist, *supra* n.192, at 69-70; see also Eric L. Muller, *All the Themes But One*, 66 U. Chi. L. Rev. 1395, 1418 (1999) (Although the war officially ended with the signing of the Treaty of Ghent in December of 1814, Jackson felt that continuation of martial law would help maintain order in New Orleans, and he tried to silence reports that the treaty had been signed. A writer named Louis Louailler reported the end of hostilities and called for an end to martial law; Jackson had him arrested and charged with provoking rebellion among the troops. Louailler was tried and acquitted by a military court, but was not released until Jackson lifted his proclamation of martial law, in March of 1815.).

194. See Rehnquist, *supra* n. 192, at 60.

195. *Id.*

the postal service put restrictions on what it deemed treasonable correspondence.<sup>196</sup> As a result, more than thirteen thousand Americans were jailed without trial.<sup>197</sup>

During the course of the Civil War, in response to what he saw as a wave of northern merchants (many of them who happened to be Jewish) flocking to the south and were undermining his military goals, Union General Ulysses S. Grant issued his now-famous General Order Number 11: "The Jews, as a class violating every regulation of trade established by the Treasury Department and also department orders, are hereby expelled. . . ." (The order was later rescinded by Lincoln.)<sup>198</sup>

In *Schenck v. United States*, which arose during World War I, the defendant was charged with attempting to cause insubordination in the military and obstruction of enlistment, arising from his distribution of pamphlets that urged citizens to exercise their right to oppose the draft, denounced conscription, and impugned the motives of those backing the war effort.<sup>199</sup> The Court ruled that the defendant's actions were not protected by the First Amendment because they advocated ideals that were unsound and dangerous.<sup>200</sup>

In 1919 the Court upheld the conviction of Eugene Debs, a Socialist Party presidential candidate, for giving an antiwar speech praising socialism. The Court found that the jury had been correctly

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196. See Harold L. Nelson, *Freedom of the Press: From Hamilton to the Warren Court* 221-47 (Harold L. Nelson, ed., The Bobbs-Merrill Co., Inc. 1966); J.G. Randall, *Constitutional Problems Under Lincoln* (rev. ed. 1951); Dean Sprague, *Freedom under Lincoln: Federal Power and Personal Liberty Under the Strain of Civil War* (Houghton Mifflin 1965); see also Thomas I. Emerson & David Haber, *Political and Civil Rights in the United States* vol. 1, 279-81 (2d ed., Little, Dennis & Co., Inc. 1952).

197. Emerson & Haber, *supra* n. 196, at 281.

198. See Jewish Virtual Library, *Judaic Treasures of the Library of Congress: Order No. 11*, <http://www.jewishvirtuallibrary.org/jsource/loc/abe2.html> (accessed Oct. 25, 2005) (quoting General Ulysses S. Grant's General Order No. 11 of Dec. 17, 1862).

199. *Schenck v. United States*, 249 U.S. 47, 48-49 (1919).

200. *Id.* at 52 (But the Court ignored the fact that Schenck's utterances were matters of opinion that could not be proven false, and did not address the complete absence of any record that he advocated illegal conduct). See David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 Ga. L. Rev. 1 (1994); see also *Frohwerk v. U.S.* 249 U.S. 204, 209 (1919) (Court unanimously upheld convictions of defendants for writing an anti-draft editorial that could have kindled a flame of draft evasion); Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*, 34 Ariz. L. Rev. 231 (1992).

instructed that they had to find the defendant's speech would have a probable effect of obstructing recruitment to military service.<sup>201</sup>

That same year, in *Abrams v. United States*, the Court affirmed a conviction for distribution of Socialist leaflets, on the ground that "men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."<sup>202</sup>

During World War II, the United States interned 110,000 Japanese-Americans solely on the basis of their ancestry, not because of individual determinations that they were threats to national security.<sup>203</sup>

From these cases one may clearly discern that the Supreme Court adopts a principle of self-preservation, which directly reflects the tension of the times.<sup>204</sup>

This approach was articulated in *Whitney*. Although the Court supported a conviction for criminal syndicalism where the defendant was a member of the Communist Party, it suggested that speech need not be afforded protection where immediate serious violence was to be expected or was advocated.<sup>205</sup>

In *Dennis v. United States*, the Court affirmed a conviction under the *Smith Act* of Communist Party organizers for advocating the necessity of forcibly overthrowing the government. The Justices found that there is a sliding scale whereby the courts can determine whether First Amendment protection is warranted on the basis of the magnitude of the evil reduced by the probability that it is likely to occur. The test the Court announced: "Whether the gravity of the 'evil,' [here, the

201. *Debs v. U.S.*, 249 U.S. 211, 216-17 (1919).

202. *Abrams v. U.S.*, 250 U.S. 616, 621 (1919); see also *Gitlow v. N.Y.*, 268 U.S. 652, 671-72 (1925) (Upholding the conviction of one who helped publish a manifesto for the Socialist Party. In so doing the Court for the first time specifically applied the First Amendment's freedoms of speech and press to the states through the Fourteenth Amendment.).

203. See George C. Harris, *Book Review*, 36 Cornell Intl. L.J. 135, 137 (2003) (reviewing *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*).

204. See *supra* nn. 198-202 and accompanying text.

205. *Whitney v. Cal.*, 274 U.S. 357, 376 (1927) (*Whitney* was subsequently superseded by *Brandenburg*. A similar test was applied to determine the imminence of a threat against an individual.); *Feiner v. N.Y.*, 340 U.S. 315, 320 (1951) (The Court upheld a conviction based upon the clear and present danger that listeners might act violently toward speaker the so-called heckler's veto.).

violent overthrow of government] discounted by its improbability justifies such invasion of free speech as to avoid danger.' ”<sup>206</sup>

In 1957, in *Yates v. United States*, the Court drew a line between advocacy of action and of ideas, requiring that the trial judge distinguish between abstract doctrine and advocacy of action.<sup>207</sup> The mere hope of advocating incitement was not enough to render the speech unprotected by the First Amendment.<sup>208</sup> Recognizing this distinction, government prosecutors virtually stopped bringing actions based merely on advocacy of ideas.

In 1961, in *Communist Party of the United States v. Subversive Activities Control Board*, the Court questioned whether the American Communist Party's surreptitious activities in furtherance of its goal to overthrow the government deserved First Amendment protection.<sup>209</sup>

The Court ruled that the secretive nature of the group meeting behind closed doors, and protecting members' identities by using legitimate corporations as fronts was enough to remove it from the purview of the First Amendment.<sup>210</sup> Unlike *Yates*, this case turned on the fact that the party's choice to act outside of the public eye went beyond merely providing citizens with information.

That same year the Supreme Court decided *Scales v. United States*, where the defendant, a member of the Communist Party, distributed pamphlets that advocated the overthrow of the government.<sup>211</sup> The Court held that this activity was preparation for incitement, which the government had a right to restrict.<sup>212</sup>

In another wartime case, *Watts v. United States*, the Court found that a man's threats to take L.B.J. (President Lyndon Baines Johnson) into his sights with a rifle if he were ever drafted to be protected under the First Amendment.<sup>213</sup> This language did not satisfy the imminent or lawless action test, said the Court, because the man was not stating a

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206. *Dennis v. U.S.*, 341 U.S. 494, 510 (1951).

207. *Yates v. U.S.*, 354 U.S. 298, 320 (1957); see also *Noto v. U.S.*, 367 U.S. 290 (1961).

208. *Yates*, 354 U.S. at 321-22.

209. *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 6-7 (1961).

210. *Id.* at 7-8.

211. *Scales v. U.S.*, 367 U.S. 203, 256, 259 (1961).

212. *Id.* at 259 (Black, J., dissenting (writing a strong dissent)).

213. *Watts v. U.S.*, 394 U.S. 705, 707 (1969).

threat that actually amounted to a danger to the life of the President of the United States. Although the majority stopped short of providing a precise definition of a true threat, it did address incidents when a threat would not be protected by the free speech provision of the First Amendment, including cases where the intimidating speech was deemed credible enough to believe that the speaker intended to carry it through.<sup>214</sup>

In *Texas v. Johnson*, the defendant had burned an American flag during the 1984 Republican National Convention. A number of bystanders were disturbed by the act, but no one was physically injured. The Court held that this was protected speech by the First Amendment because it was expressive activity, which Texas had no specific interest in limiting because it did not constitute incitement to imminent or lawless action. The Court went on to define incitement as needing to be more than a serious offense or a breach of peace. That is, the speech would have to be accompanied by action.<sup>215</sup>

In *Stewart v. McCoy*, the Court considered the conviction of a man said to have intended to promote criminal activities.<sup>216</sup> The defendant had moved from California, where he belonged to a gang, to Arizona; once there he gave advice to street gangs concerning proper gang dress and types of conduct.<sup>217</sup> The Supreme Court agreed with the lower court's finding, that this type of activity went beyond mere advocacy and was thus not protected by the First Amendment.<sup>218</sup>

The most recent case to decide that speech intended to intimidate is not protected was *Virginia v. Black*.<sup>219</sup> There, the Supreme Court of Virginia overturned a conviction for cross-burning, finding that the

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214. *Id.* at 707-08.

215. *Tex. v. Johnson*, 491 U.S. 397, 397-98 (1989). The Convention was held in Dallas, Tex. A number of protestors gathered to show their support against the Convention. The Court found that an audience's mere dislike or disgust of a certain activity is not enough to render it outside of constitutional protection. *Id.*

216. *Stewart v. McCoy*, 537 U.S. 993 (2002).

217. *Id.* at 994.

218. *Id.* at 995. In dicta, the Court stated that it has never directly addressed whether instructional speech that serves to incite is protected under the First Amendment. *Id.*

219. *Va. v. Black*, 538 U.S. 343 (2003); see also Chris L. Brannon, *Constitutional Law—Hate Speech—First Amendment Permits Ban on Cross Burning When Done with Intent to Intimidate*, 73 Miss. L.J. 323 (2003) (discussing *Va. v. Black*); Amanda J. Congdon, Student Author, *Burned Out: The Supreme Court Strikes Down Virginia's Cross Burning Statute in Virginia v. Black*, 35 Loy. U. Chi. L.J. 1049 (2004) (discussing *Va. v. Black*).

state law prohibiting such an act was unconstitutional because it discriminated on the basis of content and was overly broad.<sup>220</sup> The Supreme Court held that a state may regulate a particularly virulent kind of intimidation (such as cross-burning), as well as other categories of speech that have too little social value to merit First Amendment protection (such as obscenity, defamation, and fighting words).<sup>221</sup> Likewise, true threats (e.g., on the life of the President) can be controlled, and speech intended to incite can be regarded as a true threat.<sup>222</sup>

It is not difficult to draw an analogy between the symbolic speech in *Virginia v. Black* and sermons promoting terror between the recent history of violence in Muslim society and the sermons related to *jihad*.<sup>223</sup>

Nevertheless, *Brandenburg v. Ohio* remains the modern standard for protection of utterances that may have a tendency to lead to violence. Advocacy is protected speech except where it is found to be directed at inciting and likely to produce imminent lawless action.<sup>224</sup> But the *Brandenburg* test is not easily applicable in cases where the speech was reckless, negligent, or intentionally promulgated so as to cause actual harm, which is nowadays increasingly the case with religious speech. Various scholars have grappled with *Brandenburg*'s ability to deal with speech that incites to violence. It may be time for

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220. *Black*, 538 U.S. at 351.

221. *Id.* at 344.

222. *Id.*

223. In recent years, various lower courts have also been faced with challenges to the Free Speech Clause during peacetime. In *Challis v. Katz*, a group of men were arrested for wearing certain colors that represented membership in a gang. The court found that such a prohibition was constitutionally suspect under the First Amendment, although it did not directly decide the question because the case was dismissed on other grounds. *Challis v. Katz*, 2001 WL 34043763 (D. Or. July 13, 2001). A test to ascertain the kind of language that could constitute an actionable threat was announced in *United States v. Fulmer*: Whether the speaker should have reasonably foreseen that his listeners would have perceived his words as threatening. Again, it was held that such a determination was a question of fact to be determined by the jury. *U.S. v. Fulmer*, 108 F.3d 1486, 1490, 1493 (1st Cir. 1997). See also G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. Rev. 829, 940.

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

the Supreme Court to announce new criteria where injuries have arisen from dangerous, erroneous, or incendiary utterances.<sup>225</sup>

Calls to violence that are unprotected by the First Amendment have come to be known as "camouflaged incitement."<sup>226</sup> Under this rubric, language that can be considered coded speech, guns for hire, inducement by simulation or supplying how-to plans are all suspect.<sup>227</sup>

In cases of camouflaged incitement, the *Brandenburg* test is satisfactory where there is a clear distinction between protected speech and unprotected incitement to crime. But a case-by-case approach lacks predictability giving the speaker little definitive guidance. A categorical approach might be preferable, one in which a number of evidentiary factors could be weighed. Those factors might include the words expressly uttered, the context in which they were spoken, the

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225. See e.g. Arielle D. Kane, *Sticks and Stones: How Words Can Hurt*, 43 B.C. L. Rev. 159 (2001).

226. This useful term was apparently invented by Prof. Crump, *supra* n. 200, at 2.

227. See Crump, *supra* n. 200, at 3-47. Prof. Crump supplies the following examples: (1) Instructions with double-meanings, or coded speech (e.g., "I don't like Tony Bananas. Why don't you go [pay a visit] with him?" )\*) Ambiguous advertisements (e.g., "GUN FOR HIRE: 37-year-old professional mercenary desires jobs. Vietnam veteran. Discre[te] and very private. Body guard, courier and other special skills. All jobs considered." ). This was the advertisement that appeared in *Soldier of Fortune* magazine. See *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1112 (11th Cir. 1992) (magazine liable for advertisement when murder ensued). But see *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 831, 838 (5th Cir. 1989) (reversing a conviction in a similar case and finding wording ambiguous in advertisement placed by two ex-Marines seeking high-risk assignments, which ultimately led to contract murder). (2) Violence simulated on television or in motion pictures which is alleged to have incited an actual violent act. Most courts have rejected this theory. See *Video Software Dealers Assn. v. Webster*, 773 F. Supp. 1275, 1276, 1283 (W.D. Mo. 1991). (3) Recipes for violence (e.g., how to make a bomb). See *U. S. v. Progressive, Inc.*, 467 F. Supp. 990, 991 (W.D. Wis. 1979), the so-called Hydrogen Bomb Recipe case, where the court enjoined publication of an article detailing how to make a hydrogen bomb. (4) Gangsta rap, advocating revenge against law-enforcement officers e.g., the rap group Ice-T's "Cop Killer" ("FUCK THE POLICE, don't be a pussy.") See also *Vance v. Judas Priest*, 16 Media L. Rep. 2241 (D. Nev. 1989), which denied civil action versus a rapper whose lyrics arguably resulted in a suicide pact, because survivors failed to prove that defendants intentionally placed subliminal messages on the album and that those messages were a cause of the suicide and attempted suicide involved. (5) Language leading to unintended but foreseeable results. See e.g., *Weirum v. RKO General Inc.*, 539 P.2d 36, 37, 51 (Cal. 1975), in which a radio station was held liable for foreseeable results of its negligence after it challenged listeners, while driving, to find one of its disc jockeys on the road resulting in the death of a driver run off the road by a listener.

probability that unlawful actions would ensue, the speaker's knowledge or reckless disregard of the likelihood of violent results, the inclusion of disclaimers or warnings, and a determination of whether the utterance had any redeeming value.<sup>228</sup>

Similarly, whether postings on the Internet constitute true and serious threats depends upon a determination that they amount to serious advocacy which, pursuant to *Brandenburg*, is not mere abstract teaching of offensive ideas or an exhortation to violence. Advocacy of terrorism cannot be rebutted by more speech, nor would the marketplace of ideas benefit from extended discourse.<sup>229</sup>

Other commentators suggest that cases involving false speech causing physical harm should be subjected to standard libel-law jurisprudence rather than to the *Brandenburg* test, using tools of fault, falsity, and limited damages.<sup>230</sup> Still others argue that a better approach would be to broaden the true threat standard to allow for penalizing or regulating incitement.<sup>231</sup>

In truth, though, each case is inherently different. The Supreme Court is very much result-oriented. It looks first to the goal it desires to reach, then crafts language/law to achieve that end. The Justices invoke precedent if it happens to fit the result they wish to see. If it does not, they distinguish the facts on the basis of their views. In relatively rare cases, where the facts cannot be distinguished, the Court expressly overrules or reverses prior decisions. (Perhaps the most notable examples have occurred in the areas of school integration and advocacy to overthrow the government.)<sup>232</sup> Readers of Supreme Court decisions (including law professors) often fail to recognize that the language justifying the result in one case is essentially malleable, and not written in stone.

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228. Crump, *supra* n. 200, at 45-67.

229. See Crocco, *supra* n. 181, at 455-56.

230. See Susan M. Gilles, "Poisonous" Publications and Other False Speech Physical Harm Cases, 37 Wake Forest L. Rev. 1073, 1074-75 (2002).

231. John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement that Threatens*, 8 Tex. J. Women & L. 207, 207-08 (1999). Prof. Rothchild also notes that Internet incitement can be more dangerous than speech before a limited audience. *Id.* at 242.

232. See *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Whitney v. Cal.*, 274 U.S. 357 (1927), overruled, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The result-oriented approach is itself largely based on the tenor of times. Results are decidedly different during wartime and peacetime.<sup>233</sup> There have also been 180-degree evolutions in the areas of fighting words,<sup>234</sup> aid to education in sectarian schools,<sup>235</sup> and standards of obscenity.<sup>236</sup>

Different perceptions of common sense likewise enter into the decision-making process, reflecting the different political and personal dispositions of the Justices. In the end, any of the standards described above seek to determine if there is a causal connection between unlawful action and the speech that preceded it. Where such a nexus can be established, both the speaker and the perpetrators should be held accountable.

The time has arrived for a different *denouement* as well in the area of hate speech and incitement.

### B. RELIGIOUS SPEECH

Sermons in all religions are by their nature not mere speeches that advocate ideas in the abstract, but exhortations designed to encourage action. Congregants do not listen to these teachings solely out of academic interest or for entertainment. Religion moves followers to act on their beliefs.<sup>237</sup>

Several recent cases heard in United States district and federal appellate courts serve further to clarify the definition of incitement to imminent and lawless action. One was the aforementioned conviction of Sheikh Omar Abdul Rahman, whose followers in Jersey City and Brooklyn were inspired by his sermons to plan for the assassination of Jewish Defense League founder Meir Kahane and carry out the first

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233. Compare e.g. *Schenck v. U.S.*, 249 U.S. 47 (1919) (wartime) with e.g. *Yates v. U.S.*, 354 U.S. 298 (1957) (peacetime).

234. Broad definition of fighting words in *Chaplinsky v. N.H.*, 315 U.S. 568, 573 (1942). Narrow definition of fighting words in *Hustler Mag. v. Falwell*, 485 U.S. 46 (1988); *Edwards v. S.C.*, 372 U.S. 229 (1963); *Terminiello v. Chi.*, 337 U.S. 1, 4 (1949).

235. No aid to sectarian schools: *Flast v. Cohen*, 392 U.S. 83, 88 (1968). Aid to sectarian schools acceptable: *Valley Forge Christian College v. Ams. United for Separation of Church & St., Inc.*, 454 U.S. 464, 470 (1982).

236. Strict obscenity ruling: *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973); *Miller v. Cal.*, 413 U.S. 15, 36-37 (1973); *Roth v. U.S.*, 354 U.S. 476, 493-94 (1957). Liberal obscenity ruling: *Cohen v. Cal.*, 403 U.S. 15, 26 (1971).

237. See Cohan, *supra* n. 93, at 204.

bombing of the World Trade Center in February of 1993.<sup>238</sup> Rahman's conviction on the seditious conspiracy charge seemed to be based on pure religious speech.<sup>239</sup>

In *Bynum v. United States Capitol Police Board*, the court was concerned with prayer in a non-public forum.<sup>240</sup> The plaintiff was a Christian pastor who led a tour of the Capitol building in Washington, D.C., ostensibly to inspire participants to pray for the United States.<sup>241</sup> The court allowed the tour to continue uninterrupted, after applying a three-part test to determine whether: (1) The activity was threatened or affected by the governmental action; (2) the forum is public or private; and (3) the justifications for the exclusions from the relevant forum satisfy the requisite standard.<sup>242</sup> In dicta, the court said that the federal government cannot restrict non-disruptive behavior, which includes praying in a non-public forum.

Civil libertarians sometimes claim that "counter-terrorism would be more effective[,] as well as more compatible with civil liberties[,] if suspects [we]re identified by their conduct and not by their political views."<sup>243</sup> "Federal agents are now permitted to infiltrate religious groups without any particularized suspicion of criminal activity—perhaps simply based on a hunch that people in a certain religious group warrant closer scrutiny."<sup>244</sup>

One problem with this approach is that religious speech is often substantially more powerful than the types of speech the FBI has tried to restrain and monitor in the past. Religious speech is not simple political rhetoric, but sometimes advocates the destruction of people and property. It is not the overthrow of the government that is feared, but the violence that could ensue from incitement to terror. Thus, the speech is not merely religious in nature, but a true threat as well.

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238. *U.S. v. Rahman*, 189 F.3d 88, 104-11 (2d Cir. 1999). See *supra* nn. 92-93 and accompanying text.

239. *Cohan*, *supra* n. 93, at 202.

240. *Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50 (D.D.C. 2000).

241. *Id.* at 53.

242. *Id.* at 54-55.

243. Barry Kellman, *Book Review*, 94 Am. J. Intl. L. 434, 438 (2000) (reviewing *Clashing Perspectives on Terrorism: The New Terrorism, Fanaticism and the Arms of Mass Destruction*).

244. Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 Iowa L. Rev. 1201, 1203 (2004).

The arguments against identifying suspects based on their political views do not work where religion is involved. The communist parties of yesteryear that urged the violent overthrow of the government did not engage in the kind of clear incitement as the radical religious movements of today. There is a compelling governmental interest to deter terrorism. But the government can no longer afford to regulate religious groups based solely on their conduct. To prevent future terrorist attacks may require that religious speech be monitored and radical groups infiltrated.

In some cases, unfortunately, broadening police power may outweigh First Amendment rights. Moreover, unlike secular speech, current free-exercise jurisprudence provides little, if any, protection for religious exercises that transcend the realm of pure belief. For those who support broad religious liberty, this lack of protection is troubling particularly for certain religious speech that is viewed as threatening to the social order.<sup>245</sup>

Although the Supreme Court has long deemed religious liberty to be a paramount principle of constitutional jurisprudence, its individualistic definition of belief stops short of providing full protection to spiritual thought and action. Even peaceful organized religions are subject to regulation by the state when it judges them subversive. Nevertheless, courts can defend the interests of organized religions without handcuffing the government in addressing genuine national security threats, by adding an overt act requirement to the clear and present danger test they apply to religious speech. Whatever the overt act, it need only confirm that certain religious teachings were actually seditious.<sup>246</sup>

### C. THE FIRST AMENDMENT AND INTERNATIONAL CONVENTIONS

For various reasons, the United States has been hesitant to ratify a number of international human rights conventions specifically declining to abide by any provisions which deviate from practices sanctioned by existing American law. Nor will it comply with

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245. See Holly Coates Keehn, *Terroristic Religious Speech: Giving the Devil the Benefit of the First Amendment Free Exercise and Free Speech Clauses*, 28 Seton Hall L. Rev. 1230, 1261 (1998).

246. See Joseph Grinstein, *Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism*, 105 Yale L.J. 1347, 1365, 1377 (1996).

international human rights constraints on judicial scrutiny, such as to the jurisdiction of the International Court of Justice.<sup>247</sup>

Some critics feel that such reluctance diminishes a solemn pledge, as a member state of the UN, to promote universal human rights and fundamental freedoms. On the other hand, the United States has nevertheless assumed the right to judge and take action against others who are deemed to "violate its own perceptions of the principles of human rights."<sup>248</sup>

American recalcitrance has dissipated in recent years, however. In 1986 the United States ratified the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948); in 1992, the *International Covenant on Civil and Political Rights* (ICCPR, 1966); and in 1994, both the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984); and the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965).<sup>249</sup>

Ratification of these international human rights treaties have nevertheless been accompanied by a litany of reservations, understandings, and declarations (R.U.D.'s); most of which amount to a refusal to endorse any provision not considered in harmony with existing American law.

Unlike the First Amendment, which impedes restrictions on publication of words (both written and spoken), even some that may

247. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Intl. L. 341, 341 (1995); see also Elisa Massimino, *Holding America Accountable: Why the United States Should Take Human-Rights Obligations Seriously*, Am. Prospect [¶¶ 2-4], (Oct. 2004), <http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=8557>.

248. Johan D. van der Vyver, *International Human Rights: American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 Emory L.J. 775, 777 (2001); see also Symposium, *Bringing Human Rights Home: Why Universal Rights Protect America*, Am. Prospect (Oct. 2004) (available at [http://www.movingideas.org/content/en/report\\_content/us\\_human\\_rights.htm](http://www.movingideas.org/content/en/report_content/us_human_rights.htm) (accessed Oct. 25, 2005)).

249. The *Convention on the Rights of the Child* (1989) has been ratified by all but two countries in the world: Somalia and the U.S. Likewise, the U.S. is in no apparent hurry to ratify the *International Covenant on Economic, Social and Cultural Rights* (1966), nor the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979). van der Vyver, *supra* n. 248, at 778-79.

incite the *ICCPR* allows limitations on freedom of expression where they are deemed necessary for protection of public order or morals. The *ICCPR* also requires that signatories prohibit any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.<sup>250</sup>

As a ratifying nation of the *ICCPR*, the United States should immediately endorse all attempts to bring the international community within generally recognized compliance standards. Indeed American courts increasingly recognize the difference between advocacy of ideas and incitement to violence, but the law remains in a state of flux. The courts should establish and adhere to clearly delineated guidelines as they come to understand that we live in an age of true threats. Wartime experiences with terrorists should be approached with the same reservations as wartime situations with conventional enemies.

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250. United Nations General Assembly, *International Covenant on Civil and Political Rights* (entered into force Mar. 23, 1976), 999 U.N.T.S. 171. It is all the more ironic that the U.S. is not a signatory to the *ICCPR*. The reasons most often given for this apparent anomaly relate to the supervening liberties guaranteed by the U.S. Constitution. As to free speech, for example, Article 20 of the *ICCPR* does not authorize or require legislation or other action by the U.S. that would restrict the right of free speech and association protected by the Constitution. On the other hand, the U.S. reserves the right, subject to its constitutional constraints, to impose capital punishment on any person, including those under 18 years of age. See *The UN International Covenant on Civil and Political Rights: U.S. Reservations, Understandings, and Declarations* [¶ 2], [http://www.gwu.edu/~jaysmith/USres\\_ICCPR.html](http://www.gwu.edu/~jaysmith/USres_ICCPR.html) (accessed Oct. 26, 2005). Likewise, the U.S. considers itself bound by Article 7 to the extent that cruel, inhuman, or degrading treatment or punishment means that prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution. Similarly, because American criminal law generally applies to an offender under the penalty in force at the time the offense was committed, the U.S. does not adhere to the third clause of paragraph 1 of Article 15. It should also be noted that international law permits the assassination of terrorist leaders, if for no other reason than that they are illegal combatants. Terrorists themselves do not observe the laws of war, raising questions about the degree to which they are to benefit from the protections of such law. Indeed, despite a 1981 executive order by President Reagan forbidding assassinations, the U.S. continues to target various leaders. See Council on Foreign Relations, *Terrorism: Q & A* [¶ 2], [http://www.terrorismanswers.org/policy/assassination\\_print.html](http://www.terrorismanswers.org/policy/assassination_print.html) (accessed Sept. 10, 2005). In September 2001, the UN Security Council adopted Resolution 1373, which made any support for international terrorism a violation of international law. UN Sec. Council Res. 1373 (Sept. 28, 2001) (available at [http://www.unodc.org/pdf/crime/terrorism/res\\_1373\\_english.pdf](http://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf) (accessed Oct. 26, 2005)).

Hatred, however, cannot be eradicated by international treaty or UN resolution. A religious movement, which systematically disseminates hate literature, and incites adherents to take militant action against those of other faiths, must be confronted in both theory and fact.<sup>251</sup> Racially defamatory speech, which in turn encourages racial hatred and discriminatory acts, should not be considered protected by the Constitution.

Such speech, which has been aptly, characterized as “ ‘rotten fruit in the marketplace of ideas;’ ”<sup>252</sup> should not be pandered under the purview of the First Amendment.

#### IV. RESOLVING THE DILEMMAS

After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.<sup>253</sup>

The First Amendment is not absolute. Early on in its jurisprudential history, Justice Holmes pointed out that one may not invoke the freedom of speech to defend against a charge of falsely yelling fire in a crowded theater.<sup>254</sup> Nor may one defame another, utter fighting words, or publish troop movements during wartime. Learned arguments have likewise been made that the First Amendment should not shelter latter-day Nazis preaching genocide or denying that the Holocaust ever occurred.<sup>255</sup>

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251. See generally Gold, *Hatred's Kingdom*, *supra* n. 17; Gold, *Unholy Fire*, *supra* n. 17.

252. Thomas David Jones, *Article 4 of the and the First Amendment*, 23 How. L.J. 429, 433 (1980) (quoting Harvard Prof. Milton Katz).

253. William J. Brennan, Jr., Address, *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises* (Jerusalem, Israel, Dec. 22, 1987) (available at <http://www.capaa.wa.gov/pdf/brennan.pdf> (accessed Oct. 26, 2005)).

254. Justice Holmes also said, “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

255. See e.g. Kenneth Lasson, *Controversial Speakers on Campus: Liberties, Limitations, and Common-Sense Guidelines*, 12 St. Thomas International Convention on the Elimination of All Forms of Racial Discrimination L. Rev. 39 (1999); Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 Geo. Mason L. Rev. 35 (1997); Kenneth Lasson, *To Stimulate, Provoke, or*

Nevertheless, we must recognize the dangers of limiting liberty while contemplating the necessity of ensuring security. We should also understand that, in responding to acts of terror or incitement, law and official policy have their shortcomings: Neither alone cannot impose conformity of belief and behavior on the people.<sup>256</sup>

#### A. THE DANGERS OF LIMITING LIBERTY

Hindsight enables us to recognize that the Nation's fears may have been overestimated in the past. Similarly, we are slowly coming to understand what some scholars perceive to be an over-reaction by the government to the fateful terrorist attacks of September 11, 2001. Almost immediately after those acts, the Bush administration proposed and Congress enacted the *Patriot Act*, which enables secret arrests, detentions, trials and deportations of terrorist suspects; ethnic profiling; the Terrorist Information Prevention System; and new surveillance techniques. Policy-makers then and now believe that curtailing privacy and certain civil liberties can help prevent terrorism. To the administration and its advisors, unprecedented risks warrant unprecedented responses.<sup>257</sup>

That principle was equally apt during earlier conflicts. It is hard to dispute that the world grows more dangerous every day, with the terrorist's capabilities for random mass destruction much greater today than ever before. Before September 11, perhaps the most notable example of an over-reaction came during World War II, when thousands of Japanese-Americans were interned soon after another

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*Incite? Speech and the First Amendment*, 3 St. Thomas L. Rev. 49 (1991); Kenneth Lasson, *Racism in Great Britain: Drawing the Line on Free Speech*, 7 B.C. Third World L.J. 161 (1987); Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, Colum. Hum. Rights L. Rev. 11 (1986); Kenneth Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 Duq. L. Rev. 77 (1984).

256. Susan Gellman, *The First Amendment in a Time That Tries Men's Souls*, 65 L. & Contemp. Probs. 87, 89 (2002) (Private societal pressure is often more effective than government in doing so.).

257. See Timothy Lynch, *Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism*, (June 26, 2002) (available at <http://www.cato.org/pubs/pas/pa-443es.html> (accessed Oct. 26, 2005)); see also Roger Pilon, *Two Kinds of Rights*, Reason 39 (Dec. 2001); cf. Comments of Christopher Whitcomb, Debate with Nadine Strossen, Milton S. Eisenhower Symposium at Johns Hopkins U. (Nov. 7, 2002) (available at <http://www.epistolar.org/1838.html> (accessed Oct. 26, 2005)).

surprise attack on American soil (at Pearl Harbor). There was also a substantial element of fear during the cold war with the former Soviet Union, armed as that nation was with huge stockpiles of nuclear, chemical, and biological weaponry.

The *Patriot Act* has been rightfully criticized across the political spectrum not only for its quick-trigger application upon the mere assertion of the possibility of a connection to terrorist activity, but also for permitting the government to search for and seize previously private records. While information sharing among various agencies of the federal government (in particular between the CIA and FBI) may be eminently sensible, the *Patriot Act* probably goes too far in expanding information-gathering capabilities in order to prosecute suspected terrorists.<sup>258</sup> In so doing it violates everyone's civil liberties.<sup>259</sup>

As a matter of constitutional law, basic First Amendment, due process, and equal-protection rights "are not limited to citizens but apply to all 'persons' within the United States or subject to [United States] authority. . . . These are human rights, not privileges of citizenship."<sup>260</sup> So too are the procedural protections afforded by the Fifth and Sixth Amendments which, arguably at least, could be extended to individuals subjected to trial in military tribunals.

Perhaps the most egregious aspect of the *Patriot Act* is its extensive use of secrecy as a prosecutorial tool. As one federal judge recently put it: "Democracies die behind closed doors."<sup>261</sup> Government policies that rely on deception and dogma to conceal failures often collapse in failure. Though it is obviously unreasonable to expect the military to disclose every aspect of its operations, the public should at least have knowledge of what its fighting forces are trying to accomplish in the name of the United States. Actions taken

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258. See e.g. Ralph Grunewald, *The Presidential Candidates on Criminal Justice Issues*, Champion 6, 9 (Jan.-Feb. 2004); Editorial, *Government Doesn't Need to Know What We're Reading*, Chi. Sun Times 39 (July 12, 2004); Jeffrey Rosen, *John Ashcroft's Permanent Campaign*, A. Mthly. 68, 68 (Apr. 2004).

259. While the Bush Administration may arguably be justified in seeking to replace rogue regimes that flout international law or threaten to develop and use weapons of mass destruction, it has yet fully "to make the case that these threats justify compromising our fundamental principles of liberty and justice." See David Cole, *Enemy Aliens and American Freedoms*, Nation 20, 26 (Sept. 23, 2002).

260. *Id.* at 22.

261. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

today will likely have a long-lasting effect upon the country's foreign relations.

The government should still have to bear a heavy burden of proof that its restrictions on our civil liberties are absolutely necessary. We should hold people accountable for their own actions, not blame them based on their ethnic, political, or religious identities. No one should be imprisoned without a public accounting, subject to review in court.<sup>262</sup>

The farther we stray from our hard-won freedoms in order to vanquish those who would destroy our way of life, the more we become like them and the more hollow our ultimate victory. The question remains fundamental and eternal: To what extent can we go to ensure security without abandoning the constitutional principles we have fought so long to preserve?

We must take cognizance of the fact that the perilous quest to preserve civil liberties in uncivil times is not an easy one. The dictum of Benjamin Franklin remains a beacon: Societies that trade liberty for security end often with neither.

#### B. THE NECESSITY OF ENSURING SECURITY

Our traditional First Amendment standards for protecting both free speech and free exercise of religion make it all the more difficult to learn about incendiary rhetoric in the mosques that amounts to incitement causing acts of terror.

No one (layman or clergyman) should be permitted to promote such a true threat as *jihad* or terrorism under the masquerade of free speech. Religious sermons can have great power over listeners, thereby creating an atmosphere of imminent danger. The current threat is perhaps more imminent than any other that we have ever had to deal with. The threshold of imminence is lower than ever before.

Thus, may surveillance and content regulation of religious speech be necessary measures to fight the war on terror? Although this may be disconcerting to traditional civil libertarians, it is a fact of life with which we must deal.

In 1951 the Supreme Court concluded that a danger need not be so clear and present if the ultimate harm was very grave.<sup>263</sup> For most

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262. Cole, *supra* n. 259 at 22, 23.

263. *Dennis v. U.S.*, 341 U.S. 494, 510-11 (1951).

of American history, the courts have held that no one has a right to advocate illegal acts. Even the early great defenders of free speech, such as Judge Learned Hand and Justices Oliver Wendell Holmes, Jr. and Louis Brandeis, conceded that the government could limit any speaker who would counsel an individual or a group to commit an unlawful act.<sup>264</sup>

Both the federal government and the states have enacted statutes to combat terrorism by attempting to cut off its sources of funding.<sup>265</sup> Similar steps have been taken internationally.<sup>266</sup> Many of these laws seek to penetrate the charitable shell under which terrorist funding often operates; they also serve to “protect individuals or groups who unwittingly provide support for an organization that has engaged in terrorist activities.”<sup>267</sup>

### C. THE COMMON SENSE OF BALANCING ALTERNATIVES

Benjamin Franklin’s good common sense would likely have allowed him to conclude that the preservation of liberty is no more important than the preservation of life itself.

National security and individual liberty, after all, are two sides of the same coin. Counter-terrorism measures must be the least restrictive means by which security can be enhanced. For historians hindsight

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264. See *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) (Hand, J., opinion), *overruled*, 246 F. 24 (2d Cir. 1917).

265. In October of 2000, Congress approved funding of the Foreign Terrorist Asset Tracking Center. In addition, the USA *Patriot Act* expands the power of the federal government to identify money-laundering schemes used by known and suspected terrorist organizations. See Sireesha Chenumolu, Student Author, *Revamping International Securities Laws to Break the Financial Infrastructure of Global Terrorism*, 31 Ga. J. Intl. & Comp. L. 385, 400 (2003). The states have followed suit. For example, in Illinois it is now a felony to solicit or contribute material support with the intent to fund an act of international terrorism. See Victoria Meyerov, *The Buck Stops Here: Illinois Criminalizes Support for International Terrorism*, 30 John Marshall L. Rev. 871, 872 (1997).

266. See e.g. United Nations General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, art. 2, (adopted Dec. 9, 1999) (available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/251/28/PDF/N0025128.pdf?OpenElement> (accessed Oct. 26, 2005)).

267. William Patton, *Preventing Terrorist Fundraising in the United States*, 30 Geo. Wash. J. Intl. L. & Econ. 127, 151 (1996); see also Lawrence Auster, *Islam and the Liberal West: A Fatal Complementarity*, *FrontPageMagazine.com* (June 2, 2005), <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=18240>.

does and should provide lessons. Though fear of the unknown will always be a factor in fighting a determined enemy, Americans must be careful not to tread on hard-won individual rights without a reasonable degree of certainty that preventive and investigative measures are temporary and necessary. We do not wish what has been called the government's insatiable appetite for control to get out of control.<sup>268</sup>

In these perilous times, however, the urge to use whatever means necessary to defeat our enemies is both understandable and justifiable. Perhaps this war on terrorism is so potentially cataclysmic that we must lock people up indefinitely, without formally charging them, in order to prevent them from perpetrating acts of mass destruction, or merely to find out what they know. Perhaps the war on terror is fundamentally different from all that have been waged in the past. Perhaps we have no choice but to trust the government and its intelligence agencies when they demand secrecy.

The difficult truth is that it may not be possible to adhere to traditional American civil liberties during times of real and perceived terror. Twenty-first-century America does not yet know the parameters of terrorism. Individual liberty should be protected to the greatest extent possible, but not at the sacrifice of national security.

Muslim citizens enjoy the same freedoms guaranteed by the Constitution to all other Americans. They rightfully protest any discrimination they feel coming their way by virtue of their ethnicity. They want and deserve the same kind of governmental protection against terrorists that we all do.

But citizens have responsibilities as well. Muslims should thus condemn any acts of terrorism done in their name as well as the blatantly incendiary rhetoric that fills their places of worship. Their silence on such matters is troubling, because it suggests that they are either afraid to speak out or that they condone or that they support incitement of terror against their non-Muslim countrymen. Where, one might ask, are their letters to the editor, calls to talk shows, newspaper advertisements, or parades demonstrating against terrorism? Where are their public statements against the one-sided anti-Israel hate-conferences that take place regularly on American college campuses? Where are their expressions of outrage at suicide bombings?

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268. Comments of Nadine Strossen, *supra* n. 257.

While the *Patriot Act* and its progeny may be overreaching and in many ways unnecessary, their intent and purpose reflect sound public policy: There are some things we can and must do to secure national liberty, instead of merely parroting its ideals or paying lip-service to its principles. Principle among these is to recognize that incitement to violence should not and cannot be tolerated in a free society.

Although the Supreme Court's 1969 decision in *Brandenburg v. Ohio* gave broad protections to speech, the test it announced could well be interpreted to enable regulation and punishment of incitement emanating from mosques.<sup>269</sup> In *Brandenburg* the speaker did not explicitly advocate illegal acts or violence.<sup>270</sup> But the Court ruled that the government could limit speech that is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>271</sup>

Terrorism creates a kind of permanent imminence. When messages advocating murderous violence are heard by large numbers of people, the government should have the authority to stop the speakers. There is no democratic value in protecting clerics who exhort their listeners to kill Jews and Americans wherever you can find them. If the Court has cast no doubt on the constitutionality of a law making it a crime to threaten the president, it should have no compunctions about criminalizing credible threats of violence, and the express advocacy of unlawful killing against common citizens.<sup>272</sup>

Likewise, in the more recent case of *Virginia v. Black* standard, the Supreme Court recognized that a state may regulate speech that has too little social value to merit First Amendment protection.<sup>273</sup> It should go without saying that there are many similarities between the symbolic speech (cross burning) in *Black* and sermons promoting terror between the recent history of violence in Muslim society and the sermons related to *jihad*.

Calls to violence from mosque pulpits need not even be tested under the rubric of camouflaged incitement, because they are overt, specific, and spoken with intentional malice aforethought. They are

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

270. *Id.* at 445-46.

271. *Id.* at 447.

272. Cass Sunstein, *Is Violent Speech A Right?* Am. Prospect 34, (June 23, 1995), <http://www.prospect.org/web/printfriendly-view.ww?id=5018>.

273. *Virginia v. Black*, 538 U.S. 343, 358-59 (2003).

not protected by the First Amendment. Nor is speech intended to incite, which can be regarded as a true threat.

Thus, federal statutory requirements that exclude from the United States “any alien who has ‘used his position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support’ ” a terrorist organization should be applied strictly. Such an exclusion occurred recently when a moderate Islamic professor named Tariq Ramadan was denied a visa he sought to assume a faculty position at Notre Dame University. A French court had found that preachers like Ramadan “ ‘can exert an influence on young Islamists and therefore constitute an incitement that can lead them to join violent groups.’ ”<sup>274</sup>

Despite their strong mutual animosity, radical Wahhabism has had a revolutionary influence over the Muslim world, supplying support and encouragement to local extremists even in the face of long-standing traditions of moderation.<sup>275</sup> Western attention to this phenomenon has in the past been intermittent, but in light of recent events is now coming into sharper focus.<sup>276</sup>

## V. CONCLUSION

This article has sought to expose the growing danger of incitement emanating from mosques, even in America. Incitement to violence should not and cannot be tolerated in a free society, even one that pays sacred homage to the principles of expressive liberty: The freedoms of speech, press, religion, and assembly.

Lawyers are trained to try to see both sides of any dispute, and to seek justice. Where one side seeks the destruction of another for ideological or religious reasons, is there any justice in protecting its right to do so?

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274. Steven Emerson, *Islam's Grand Wizard of Deception*, WorldNetDaily.com (Apr. 2, 2005), [http://worldnetdaily.com/news/print-friendly.asp?ARTICLE\\_ID=43607](http://worldnetdaily.com/news/print-friendly.asp?ARTICLE_ID=43607) (Emerson suggests that the moral reason for keeping Ramadan out of the U.S. is the same that has for years denied visas to neo-Nazi proponents from Western Europe. Ramadan has been called “ ‘the intellectual champion of all kinds of double-talk’ with a ‘racist vision of the world.’ ”). See also Elaine Sciolino, *A Muslim Scholar Raises Hackles in France*, N.Y. Times 13 (Nov. 16, 2003).

275. Paul Marshall, *The Islamists' Other Weapon*, 119 Commentary 60, 62 (Apr. 2005).

276. *Id.* at 63.

Confronting speech that is ill tempered or ill mannered understandably makes true and traditional libertarians uncomfortable, but challenging incitement to violence even, if not especially, done in the name of religion is absolutely necessary, if we are to ensure that free and democratic societies remain that way.