

Terroristic Religious Speech: Giving the Devil the Benefit of the First Amendment Free Exercise and Free Speech Clauses

Holly Coates Keehn *

- Roper: So now you'd give the Devil benefit of law!
- Thomas More: Yes. What would you do? Cut a great road through the law to get after the Devil?
- Roper: I'd cut down every law in England to do that!
- Thomas More: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . [I]f you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.¹

The devil we chase today has a slightly different face from Thomas More's devil. In the last decade, Americans have become increasingly aware of the devil wearing the face of "religion." This devil was perhaps most keenly introduced to the American public in the form of the standoff between federal agents and the self-proclaimed "Son of God," David Koresh, at Waco, Texas in 1993.² Concurrently, violence by members of the "religious right" against reproductive rights advocates and providers,³ and

* Assistant Professor of Law, Thomas Jefferson School of Law. B.A., Political Science, Loyola University of New Orleans, 1984; A.M., Political Science, Stanford University, 1986; J.D., Tulane University School of Law, 1989. I wish to thank my colleagues at Thomas Jefferson who reviewed earlier versions of this article, especially Marybeth Herald and Maureen Markey. I am also grateful to Julia Lee Sperling, among others, who provided valuable research assistance.

¹ ROBERT BOLT, *A MAN FOR ALL SEASONS* 66 (1962).

² See Janet Reno, *Koresh Chose Death*, USA TODAY, Aug. 1, 1995, at 11A (detailing events of the standoff between Koresh and government officials).

³ See Karen Dorn Steele, *Planned Parenthood Workers Frightened but Committed*, SPOKESMAN REV., July 18, 1996, at A1. Steele's article discusses the escalation of

the bombing of the World Trade Center by radical Islamic fundamentalists,⁴ have shown Americans that the threat of terrorism in the name of religion is no longer limited to distant lands.

The temptation is enormous to “cut down the laws,”⁵ even those laws that have long held a sacred place in our jurisprudence, in order to get at this devil. The undeniable problems involved in prosecuting domestic and international terrorists increase this temptation. Laws already exist under which most terrorist *action* can be effectively prosecuted.⁶ Prosecuting terrorist *speech*,⁷ however, presents a different and far more constitutionally complex problem. Terroristic speech is, at its heart, political speech—speech aimed at bringing down the governing authority in favor of a new, and supposedly different, regime.⁸ Political speech is exactly what the First Amendment’s Free Speech Clause⁹ was designed to protect.¹⁰ Therefore, some of the most powerful and feared leaders of radical, violent groups can be difficult to stop when their role is limited to verbal encouragement of their followers.

Although the problem of verbal incitement is difficult enough when only secular concerns are involved, it becomes magnified when the speaker is a religious leader. When terrorististic speech is also religious speech—as is often the case with violent anti-choice speech,¹¹ and was certainly the case

violence directed at abortion clinics and states that, since 1982, 176 bombings and arson incidents at abortion clinics have occurred nationwide. *See id.* The first murder of an abortion provider occurred in 1994 when Paul Hill killed a doctor and a clinic escort in Florida. *See id.*

⁴ *See* Eleanor Randolph, *Trade Center Bombers Given 240 Years Each*, WASH. POST, May 25, 1994, at A1.

⁵ BOLT, *supra* note 1, at 66.

⁶ For example, a terrorist who is convicted of willful destruction of an aircraft that results in death shall be subject to the death penalty or life imprisonment. *See* 18 U.S.C. §§ 32, 34 (1984).

⁷ The term terrorististic speech is difficult to define with precision. Indeed, great debate surrounds the definition of terrorism itself and many authors simply formulate their own interpretations. For purposes here, I will follow the example of Brent L. Smith and adopt the FBI’s definition of terrorism: “The unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social goals.” BRENT L. SMITH, *TERRORISM IN AMERICA: PIPE BOMBS AND PIPE DREAMS* 6 (1994) (citing FBI TERRORIST RESEARCH AND ANALYTICAL CENTER, *TERRORISM IN THE UNITED STATES: 1990* (1991)).

⁸ *But see* Note, *Blown Away: The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074, 2081 (1996) (arguing that only certain terrorististic speech should be considered political speech).

⁹ The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

¹⁰ *See* *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222-23 (1989) (explaining that political speech is “at the core . . . of the First Amendment freedoms”) (citing *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

¹¹ For example, defrocked Roman Catholic Priest David Trosch “signed the Defensive Action petition advocating the justifiable homicide of abortion providers.”

in the recent prosecution of Sheik Omar Abdel Rahman¹²—further constitutional concerns are implicated.¹³ Given the dual protection afforded to religious speech by the Free Speech and Free Exercise Clauses, one must ask whether the current level of protection given to religious speech by the Supreme Court is appropriate. If not, what level of protection should religious speech be granted? Should this protection be granted to all religious speech, or only to certain types of religious speech? Should this protection be greater than that given to secular speech?

This Article addresses these questions. Part I discusses the history of laws regulating or infringing upon the free exercise of religion and focuses on those laws that affect religious speech. Part II examines prohibitions on secular speech that arguably affect terroristic speech, including laws prohibiting the advocacy of illegal conduct, “hate speech” laws, and anti-threat laws. Part III analyzes the particular problem of applying current First Amendment tests to terroristic religious speech by examining the case of Sheik Rahman. Finally, Part IV proposes an alternative test applicable to cases involving religious speech, including terroristic religious speech.

I. FREE EXERCISE AND THE PROBLEM OF RELIGIOUS SPEECH

The Free Exercise Clause of the First Amendment provides that Congress shall make no law prohibiting the free exercise of religion.¹⁴ The precise contours of this clause were not explored until approximately ninety years after the passage of the First Amendment. In 1878, the Supreme Court faced its first significant claim under the Free Exercise Clause in the case of *Reynolds v. United States*.¹⁵ In *Reynolds*, the petitioner, a Mormon, challenged a state law forbidding polygamy.¹⁶ The petitioner claimed that his religion required him to have more than one wife.¹⁷ The Court re-

Florida Slayings Pro-Life Violence: Trosch Says Any Means Necessary, ABORTION REP. (American Political Network), Aug. 24, 1994, at 12. Trosch stated that unborn fetuses “must be defended by any means necessary . . . including the death of assailants, which in this case would be the abortionists and their direct accomplices.” *Id.*

¹² See *United States v. Rahman*, No. S393Cr.181, 1994 WL 388927, at *1 (S.D.N.Y. July 22, 1994) (summarizing the indictment of Rahman). The indictment charges that Rahman and others conspired to wage a war of “urban terrorism against the United States,” conspired to bomb buildings, and counseled or commanded others to do the same. See *id.* There are more than 20 opinions from the United States District Court for the Southern District of New York dealing with this trial that are reported on WESTLAW. A jury convicted Rahman and nine others of seditious conspiracy and other charges on October 1, 1995. See also *infra* notes 146-153 and accompanying text.

¹³ The First Amendment also prohibits Congress from making a law abridging the free exercise of religion. See U.S. CONST. amend. I.

¹⁴ See *id.*

¹⁵ 98 U.S. 145 (1878).

¹⁶ See *id.* at 161.

¹⁷ See *id.*

jected his free exercise claim, holding that while religious belief is absolutely protected, religious conduct may be regulated.¹⁸ The Court explained that so long as the petitioner's religious belief in polygamy was not forbidden by the statute, the government was free to regulate his conduct, even if that conduct was religiously motivated.¹⁹

Thus, the Court drew a distinction between belief and conduct. This dichotomy gave the Court only two choices when faced with subsequent free exercise challenges: (1) absolute protection for the religious claim, or (2) no protection at all. Although the Court, for a relatively short period of time, seemed to find some flexibility in this test,²⁰ the restrictive dichotomy still forms the basis of the Court's free exercise jurisprudence.²¹

A. *Treatment of Religious Belief*

The absolute protection afforded religious belief has never been seriously challenged by government legislation or in the courts. Neither the federal government nor the states have attempted to interfere with the purely mental processes of religious beliefs. States have, on rare occasions, attempted to coerce someone to profess a religious belief that he did not hold.²² These attempts have failed, although not on free exercise grounds. For example, two of the four cases most frequently associated with attempts to force religious speech, *West Virginia State Board of Education v. Barnette*²³ and *Wooley v. Maynard*,²⁴ were decided on free speech grounds. The *Barnette* Court ruled that a school could not force a child to salute the flag because such coercion would amount to requiring the student to profess a belief in something that the student did not believe.²⁵ Similarly,

¹⁸ See *id.* at 166.

¹⁹ See *id.*

²⁰ See *infra* notes 28-41 and accompanying text.

²¹ For discussion of the Supreme Court's adherence to this dichotomy, see Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713 (1993).

²² See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (overturning conviction of Jehovah's Witness who refused to display "Live Free or Die" on license plate); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961) (invalidating statute requiring political candidates to declare a belief in God); *United States v. Ballard*, 322 U.S. 78, 88 (1944) (invalidating jury instruction requiring jurors to determine validity of defendants' religious beliefs); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (invalidating statute, challenged by Jehovah's Witnesses, requiring mandatory flag salutes). In each of these cases, states sought to punish religious dissenters for their refusal to speak on religious subjects. The Supreme Court, however, has never addressed a case involving a state's efforts to censor the content of religious speech.

²³ 319 U.S. 624 (1943).

²⁴ 430 U.S. 705 (1977).

²⁵ See *Barnette*, 319 U.S. at 641-42.

in *Wooley* the Court held that the state could not compel a citizen to display the message "Live Free or Die" because the citizen did not agree with the sentiment.²⁶ Although in both cases the objection to the speech was religiously based, the Court ignored the religious nature of the beliefs, concentrating instead on the free speech aspects of the case.

B. Treatment of Religious Conduct

The privileged position given to religious belief has not prevented the government from regulating religious conduct. The view that religious conduct can be regulated freely by the state prevailed for almost ninety years after *Reynolds*. During that time, the Free Exercise Clause held almost no sway with the Court, although religious practices were sometimes protected under the Free Speech or Free Assembly Clauses.²⁷

1. Limited Protection for Religious Conduct

Beginning in the 1960s, however, the Court began gradually to move past a strict reading of *Reynolds*, while still maintaining the *Reynolds* dichotomy. While continuing to afford absolute protection to religious beliefs, the Court also began to afford a limited protection to religious conduct. In *Sherbert v. Verner*,²⁸ the Court recognized that religious practices must sometimes be accommodated under the Free Exercise Clause. The Court formulated a compelling state interest test to apply to Free Exercise cases. In *Sherbert*, the petitioner was fired from her job because she refused to work on Saturday, the day she observed her Sabbath.²⁹ The unemployment compensation board denied her unemployment benefits because she refused to accept a job that would require her to work on Saturdays.³⁰ Justice Brennan, writing for the Court, first found that the burden on Sherbert's religion was severe; in effect, she was being penalized (denied a government benefit) because she refused to violate a central tenet of her faith.³¹ Next, Justice Brennan asked whether the state could justify this burden with a compelling state interest.³² Justice Brennan concluded that the state could not demonstrate a compelling interest in denying benefits to a Saturday Sabbatarian.³³ Further, the state was not able to show that "no alternative form of regulation" would satisfy the state interest.³⁴

²⁶ See *Wooley*, 430 U.S. at 707, 717.

²⁷ See *supra* notes 22-24 and accompanying text.

²⁸ 374 U.S. 398 (1963).

²⁹ See *id.* at 399.

³⁰ See *id.* at 399-401.

³¹ See *id.* at 404.

³² See *id.* at 406-07.

³³ See *id.* at 408-09.

³⁴ See *Sherbert*, 374 U.S. at 407.

Although *Sherbert* seemed to signal the dawn of a new day for protecting religious rights, in practice the compelling state interest test failed to offer significant protection for religious conduct. Except for the limited exception for unemployment compensation cases³⁵ and the factually unique case of *Wisconsin v. Yoder*,³⁶ the Supreme Court has never used the compelling state interest test to require a religious exception to a neutral, generally applicable law.

In the years between the *Sherbert* decision and the Court's repudiation of the compelling state interest test,³⁷ the Court never looked beyond the belief/conduct dichotomy to classify religious conduct as pure speech, expressive conduct, or conduct. Rather, the Court upheld statutes adversely affecting a wide variety of religious activities: mandatory payment of social security taxes by a religious objector to the social security system;³⁸ denial of tax benefits to a private, religious school that banned interracial dating and marriage pursuant to religious doctrine;³⁹ mandatory acceptance of wages by religious "associates" working in businesses to support the religion;⁴⁰ and a government requirement that a Native American child be provided with a social security number to receive AFDC benefits, despite the family's belief that the provision and use of the social security number would rob the child of her spirit.⁴¹

2. A Return to *Reynolds*: No Protection for Religious Conduct

In 1990 the Court in *Employment Division v. Smith*⁴² expressly abandoned the compelling state interest test. In *Smith*, the Court, by a narrow vote, held that religious exemptions need not be given from neutral laws of general applicability.⁴³ Thus, the government does not need to demonstrate a compelling, or even a reasonable, state interest in order to enforce a law

³⁵ See, e.g., *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981).

³⁶ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, Amish parents challenged a law mandating a high school education for children. See *id.* at 208-09. The Court granted the parents' request for an exemption from this law, citing the uniqueness of the Amish faith and the success of the Amish's own "life training" for Amish teenagers. See *id.* at 234-36.

³⁷ See *Employment Div. v. Smith*, 494 U.S. 872, 885-86 (1990) (discussed *infra* at notes 42-44 and accompanying text).

³⁸ See *United States v. Lee*, 455 U.S. 252, 261 (1982).

³⁹ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983).

⁴⁰ See *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 306 (1985).

⁴¹ See *Bowen v. Roy*, 476 U.S. 693, 696, 712 (1986).

⁴² 494 U.S. 872 (1990).

⁴³ See *id.* at 879.

infringing upon religious conduct, no matter how serious the burden is on a particular religious practice.⁴⁴

In response to this apparent “backtrack” in the area of free exercise rights, Congress took the unusual step of legislating an “override” of *Smith*. In 1994, Congress passed the Religious Freedom Restoration Act (RFRA).⁴⁵ The Act purported to “turn the clock back to the day before *Smith*.”⁴⁶ Congress, in essence, instructed courts to ignore *Smith* and apply the compelling state interest test in cases involving requests for religious exemptions from laws of general applicability.⁴⁷

The Supreme Court, however, declared RFRA unconstitutional as applied to the states in *City of Boerne v. Flores*.⁴⁸ Justice Kennedy, writing for the Court, declared that Congress had exceeded its power to enforce the Due Process and Equal Protection Clauses of the Fourteenth Amendment by attempting “a substantive change in constitutional protections,” proscribing state conduct that the Fourteenth Amendment itself does not prohibit.⁴⁹ The Court stated that the enforcement powers of Congress are only preventative or remedial in nature, not substantive.⁵⁰ Therefore, the Court held that Congress can only specifically target and cure state laws that regulate religion in an unconstitutional manner.⁵¹

In determining whether RFRA could be considered enforcement legislation, the Court first noted that “there must be a congruence between the means used and the ends to be achieved [and that] the appropriateness of remedial measures must be considered in light of the evil presented.”⁵² Justice Kennedy noted the dearth of laws aimed particularly at religion and pointed out Congress’s failure to cite any such laws in the legislative history of the statute.⁵³

Recognizing that the legislative history is not dispositive, Justice Kennedy went on to state that “RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”⁵⁴ The Court explained

⁴⁴ Of course, this does not apply to rules that specifically target certain religious groups or practices. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). The Court did infer an exception for so-called “hybrid” cases. See text accompanying *infra* notes 178-192.

⁴⁵ 42 U.S.C. § 2000bb to 2000bb-4 (1994).

⁴⁶ See H.R. REP. No. 88 (1993).

⁴⁷ See Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to 2000bb-4 (1994).

⁴⁸ 117 S. Ct. 2157 (1997).

⁴⁹ *Id.* at 2170.

⁵⁰ See *id.* at 2164.

⁵¹ See *id.* at 2170.

⁵² *Id.* at 2169.

⁵³ See *id.*

⁵⁴ *Flores*, 117 S. Ct. at 2170.

that unlike other remedial measures passed by Congress, RFRA applied to all government agencies in all areas of government.⁵⁵ All an individual needed to do under RFRA to trigger a heightened level of scrutiny was show a substantial burden on her exercise of religion—a claim that a court is in a poor position to dispute.⁵⁶ Thus, Justice Kennedy noted, RFRA did not target specific state laws that are likely to be unconstitutional.⁵⁷ Instead, RFRA imposed a “least restrictive means” test on all legislation.⁵⁸ The Court held that this broad scope took RFRA out of the legitimate enforcement powers of Congress.⁵⁹

Although, at a minimum, this decision seems to restore the *Smith* standard to free exercise cases brought under state laws, it remains unclear what the applicable standard is and how long it will remain in effect. Some lower courts have attempted to limit *Smith* to cases involving criminal sanctions, stating that the *Sherbert* strict scrutiny test should still apply in civil cases.⁶⁰ Further, only days after the *Flores* decision, some commentators were calling for a constitutional amendment guaranteeing heightened scrutiny in free exercise cases.⁶¹ Another possibility is a change in the Court itself. Justice O’Connor’s dissent in *Flores* called for a reconsideration of *Smith*, stating that “*Smith* adopted an improper standard for deciding free exercise claims . . . supported neither by precedent nor . . . by history.”⁶² The refusal of the Court in *Flores* to overrule *Smith*, however, indicates that despite changes on the Court since *Smith* the demise of *Smith* is not imminent.

C. Treatment of Religious Speech

As the foregoing discussion suggests, religious conduct has not fared well under either the strict scrutiny test of *Sherbert* or the “non-test” of *Smith*. As demonstrated by *Smith* and *Flores*, the Court seems to have retreated to the inflexible dichotomy of *Reynolds*. Thus, if the law impinges upon the purely mental realm of belief, the law will be invalidated. If, however, any conduct is involved, even conduct that is communicative in nature, the Free Exercise Clause will provide absolutely no protection.

The Court’s application of the *Reynolds* belief/conduct dichotomy, however, ignores that religion involves more than mere belief on the one

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.* at 2171.

⁵⁸ *See id.*

⁵⁹ *See id.* at 2172.

⁶⁰ *See American Friends Serv. Comm. Corp. v. Thornburgh*, 961 F.2d 1405, 1407 (9th Cir. 1991); *United States v. Boyll*, 774 F. Supp. 1333, 1341 (D.N.M. 1991).

⁶¹ *See generally* Robert Marguand, *High Court Clips Protections for Religious Freedom in U.S.*, CHRISTIAN SCI. MONITOR, June 26, 1997, at 1.

⁶² *Flores*, 117 S. Ct. at 2176-77 (O’Connor, J., dissenting).

hand and completely unprotected conduct on the other. Many, if not most, religions have a communal aspect wherein believers gather to express their beliefs through both pure speech and expressive conduct. Thus, religion is better considered along a continuum, with "pure belief" at one end and "conduct" at the other. Between the two, moving from belief toward conduct, are "pure" speech (verbal prayer, sermons, verbal proselytizing) and "expressive conduct" (Catholic sacraments, distribution of literature, the wearing of religious garments).⁶³ Although religious conduct understandably cannot be given completely free reign in a democratic society, the same is not necessarily true the closer one moves up the continuum toward belief.

The Court has recognized a similar continuum in the free speech area. The *Reynolds* dichotomy, however, has prevented the Court from distinguishing between purely religious speech, expressive conduct, and nonexpressive conduct in the realm of free exercise. The Court has simply failed to recognize that certain religious practices, such as the wearing of a yarmulke, may be expressive conduct because the conduct is intended to convey a message about the wearer's religious beliefs.

Certainly, it is not always easy to determine when religious conduct is meant to be expressive. For example, in *Smith*, the Court noted that the purpose of using peyote is to bring the user to a higher level of religious understanding, not to communicate a message to third parties.⁶⁴ Others have argued, however, that the sacramental use of peyote communicates a message about the user's identity as a member of the religion.⁶⁵ Yet the mere difficulty of determining what conduct is expressive should not excuse the Court from recognizing that religious conduct may be expressive.

The status of even pure religious speech is questionable under the Court's current test. Although the content of pure religious speech arguably has never been the subject of legislative, executive, or judicial interfer-

⁶³ The question of what constitutes "expressive conduct" for purposes of the Free Speech Clause is far from resolved. For purposes of this article, expressive conduct can be considered action that is intended to convey a message and is likely to be understood in context. See *Spence v. Washington*, 418 U.S. 405, 409-10 (1974) (holding that display of flag with peace symbol attached is expressive conduct when considered in context). For example, if someone burns an American flag in order to start a forest fire, the conduct of burning the flag is not expressive. If, on the other hand, a war protester burns an American flag in protest of the United States's involvement in a war, the conduct is expressive. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 418 (1992) (Stevens, J., concurring); see also Valerie L. Brown, *Hate Speech in Colleges and Universities* 34*The Aftermath of R.A.V. v. City of St. Paul*, Minnesota, 79 EDUC. L. REP. 697, 699 (1993).

⁶⁴ See *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990).

⁶⁵ See David B. Salmons, *Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion*, 62 U. CHI. L. REV. 1243, 1256 (1995).

ence, speech is not purely a mental function. As such, religious speech is not entitled to any level of protection under the Free Exercise Clause.

Until recently, this has not been an issue. Although religious speech, qua speech, has never been criminalized,⁶⁶ the conviction of Sheik Rahman appears to have altered the landscape. Rahman has been convicted of a crime seemingly involving pure religious speech—giving religious advice to terrorists.⁶⁷ This conviction could be the first in a series of cases involving religious speech and expressive conduct. Thus, religious speech is likely to become one of the next issues in free exercise jurisprudence.

II. PROHIBITIONS ON SECULAR SPEECH

Unlike religious speech,⁶⁸ secular speech has enjoyed a history of relatively strict protection under the law.⁶⁹ As a general rule, the content of pure secular speech may not be regulated by the state. Several exemptions to this general prohibition, however, do exist.⁷⁰ For example, “low value” speech, such as obscenity and fighting words, is considered “unprotected”

⁶⁶ Courts have analyzed religious speech under the Establishment Clause in “equal access” cases. *See, e.g.,* *Widmar v. Vincent*, 454 U.S. 236 (1981) (religious student group at state university challenged university’s policy of allowing nonreligious student groups to use university facilities for group events, but refusing access to religious student groups). For purposes of deciding whether a church should be allowed to use facilities in a semi-public forum such as a school, religious speech is treated just like secular speech. *See id.* at 270 n.6. The Supreme Court has consistently held that the Establishment Clause cannot be used to exclude religious speech from public and semi-public forums. *See, e.g., id.;* *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (showing of religious film series, after hours on public school property, would not violate the Establishment Clause); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 838-46 (holding that university’s payment of printing costs for Christian newspaper, on equal grounds as other nonreligious student publications, would not violate the Establishment Clause). Thus, for forum purposes, religious speech is treated exactly like secular speech. This does not assist us, however, in determining whether religious speech can be criminalized.

⁶⁷ *See infra* notes 146-152 and accompanying text. Available information on the *Rahman* case supports the conclusion that Rahman’s crime was limited to speech. If, however, the evidence against Rahman include nonspeech crimes, my conclusion about Rahman, although not my analysis, would be different.

⁶⁸ In Establishment Clause cases, religious speech has enjoyed at least the same level of protection as secular speech.

⁶⁹ Of course, the legislature has substantial leeway to make content-neutral regulations limiting speech, such as time, place, and manner restrictions. For a good overview of the scope of permissible content-neutral regulations, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-23, at 977-86 (2d ed. 1988). This Article is concerned only with content-based regulations on speech.

⁷⁰ For example, speech that is obscene is generally afforded less protection under the First Amendment and can be regulated by the legislature. *See, e.g.,* *Miller v. California*, 413 U.S. 15 (1973). Similarly, “fighting words” may be regulated and punished. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

and thus may be freely regulated.⁷¹ Of the categories of unprotected speech, the three most relevant to the issue of terroristic speech are the advocacy of illegal conduct,⁷² hate speech, and threats. Further, even if speech does not fall within one of the narrow categories of unprotected speech, it may be regulated if the regulation is narrowly tailored to address a compelling state interest.⁷³

A. *Advocacy of Illegal Conduct*

The government's first attempt to regulate pure speech based on its content was the Sedition Act of 1798.⁷⁴ The Sedition Act stated

[t]hat if any person shall write, print, utter or publish . . . any false, scandalous, and malicious writing . . . against the government . . . Congress . . . or The President . . . with intent to defame . . . or to excite against them . . . the hatred of the good people . . . or to stir up sedition . . . for opposing or resisting any law . . . or act . . . then such person [shall be convicted].⁷⁵

The Act expired by its own terms on March 3, 1801.⁷⁶

The Sedition Act met with vehement opposition from men such as Thomas Jefferson and James Madison.⁷⁷ Before the Sedition Act's expiration in 1801, however, many men were prosecuted and fined under the Act for a variety of "seditious" conduct aimed at the party in power⁷⁸—conduct that today would undeniably be protected by the First Amendment.⁷⁹ The Supreme Court never had occasion to decide the constitutionality of the Se-

⁷¹ See *Chaplinsky*, 315 U.S. at 572.

⁷² Advocacy of illegal conduct is the most relevant exception for purposes of this Article. First, the major case today, *Rahman*, involves the mixing of religious speech with advocacy of illegal conduct. See *infra* notes 146-168. Second, on a practical level, it is difficult to imagine penalizing religious speech that does not pose some sort of danger to the community.

⁷³ See *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

⁷⁴ See Sedition Act, 1798, ch. 74, 1 Stat. 596.

⁷⁵ *Id.* § 2.

⁷⁶ See *id.* § 4.

⁷⁷ See DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 57-58 (1966).

⁷⁸ See, e.g., *United States v. Haswell*, 26 F. Cas. 218 (C.C.D. Pa. 1800) (No. 15,324) (convicting editor and publisher of newspaper under the Act for publishing advertisement; praising Lyons and discussing his prosecution in critical terms; fining him \$200 and imprisoning him for two months); *United States v. Cooper*, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865) (finding editor of newspaper guilty under the Act; fining him \$400; imprisoning him for six months); *Lyon's Case*, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646) (convicting member of federal legislature of sedition under the Act for publishing material critical of the President; fining him \$1000 and sentencing him to four months in jail).

⁷⁹ As Justice Brennan stated in *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964), "Although the Sedition Act was never tested in this court, the attack upon its validity has carried the day in the court of history." *Id.*

dition Act; Jefferson however was so disgusted with the Act that, upon becoming President, he pardoned everyone convicted under the Act and remitted their fines.⁸⁰

After the expiration of the Sedition Act, little attention apparently was paid to the ideas of sedition and seditious conspiracy until the Civil War era. In July 1861, Congress enacted a criminal statute making it illegal for two or more persons to “conspire to overthrow, or to put down, or to destroy by force, the Government of the United States, or to levy war against them, or to oppose by force the authority [of the government of the United States].”⁸¹ This statute apparently saw little use after the Civil War until it was recently resurrected by federal prosecutors in the *Rahman* case.⁸²

The next statute aimed at sedition was the Espionage Act of 1917.⁸³ The Espionage Act has been used over the years to punish a wide variety of activities. In fact, during World War I alone, more than 2000 prosecutions were initiated under the Espionage Act.⁸⁴

The Espionage Act of 1917 served as the sounding board for determining the constitutionality of statutes addressing sedition. The first test of the constitutionality of the Espionage Act came in 1919 in *Schenck v. United States*.⁸⁵ In that case, a leader of the United States Socialist Party was convicted under the Espionage Act because he distributed anti-war pamphlets to new conscripts.⁸⁶ Writing for the Court, Justice Holmes found that Schenck’s conduct constituted a “clear and present danger” to the United States’s war effort.⁸⁷ In holding the statute constitutional, Justice Holmes stated that “the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”⁸⁸ In essence, *Schenck* put forth a two-pronged test: (1) the law must be aimed at “a substantive evil that Con-

⁸⁰ *See id.*

⁸¹ 18 U.S.C. § 2384 (1956) (formerly Acts 1861, ch. 33; 12 Stat. 284 (1861)). This statute did not require any overt act in furtherance of the conspiracy.

⁸² *See infra* notes 146-152 and accompanying text.

⁸³ Pub. L. No. 24, 40 Stat. 217 (1917). The Act was amended in 1940 and again in 1953. It has been incorporated into some 30 different sub-sections of three different titles of the U.S. Code. *See* 18 U.S.C. §§ 11 (1976), 791 (repealed 1961), 792-794 (1994), 2388 (1948), 3241 (1958); 22 U.S.C. §§ 213 (1968), 220-222 (repealed 1948), 401 (1953), 402-405 (repealed 1953), 406 (1917), 407 (repealed 1953), 408 (1917); 50 U.S.C. §§ 191 (1979), 192 (1950), 194 (1950).

⁸⁴ *See* William T. Mayton, *Seditious Libel and the Lost Guarantee of Freedom of Expression*, 84 COLUM. L. REV. 91, 142 n.241 (1989).

⁸⁵ 249 U.S. 47 (1919).

⁸⁶ *See id.* at 49.

⁸⁷ *See id.* at 52; *see also* *Debs v. United States*, 249 U.S. 211, 216 (1919); *Frohwerk v. United States*, 249 U.S. 204, 206-07 (1919) (decided the week after *Schenck*).

⁸⁸ *Schenck*, 249 U.S. at 52.

gress has a right to prevent”⁸⁹ and (2) the danger must be “present” or “proximate.”⁹⁰

The enunciation of the clear and present danger test in *Schenck* was amazingly short-lived. Approximately one week later, Justice Holmes, writing in two cases with very similar facts to *Schenck*, interpreting the same statute, changed his own test.⁹¹ Justice Holmes abandoned use of the term “clear and present danger” and established a slightly different test in *Debs v. United States*.⁹² *Debs* requires the government to show that (1) the speech has a “natural tendency and reasonably probable effect of (2) bringing about a substantive evil that Congress has power to prevent and (3) is uttered with specific intent to cause the substantive evil.”⁹³

In its next term, in *Abrams v. United States*,⁹⁴ the Supreme Court again modified the “unlawful advocacy” test. In that case, the Court essentially abandoned the requirement of a specific intent, stating that “[m]en must be held to have intended, and to be accountable for, the effects which their acts were likely to produce.”⁹⁵

The Court next eliminated the need for a “substantive evil” beyond the speech itself in *Gitlow v. New York*.⁹⁶ That is, the Court gave great deference to the government to determine whether certain speech involves a danger of a substantive evil that the government has a right to prevent; the question of whether the specific speech was likely to bring about the evil need not be considered.⁹⁷ The speech itself may be the evil.

Twenty-six years later, the Court once again changed the parameters of the “clear and present danger” test in *Dennis v. United States*.⁹⁸ In what has been called “a debacle for the First Amendment,”⁹⁹ the Supreme

⁸⁹ Donald L. Beschle, *An Absolutism That Works: Reviving the Original “Clear and Present Danger” Test*, 1983 S. ILL. U. L.J. 127, 132. Since Congress has no right to prevent speech qua speech, the “substantive evil” presumably must be something more than mere speech. *See id.*

⁹⁰ *See id.* at 133.

⁹¹ *See Debs*, 249 U.S. at 216; *Frohwerk*, 249 U.S. at 209.

⁹² 249 U.S. 211 (1919).

⁹³ *See Beschle, supra* note 89, at 133.

⁹⁴ 250 U.S. 616 (1919).

⁹⁵ *Id.* at 621. It is interesting to note that Justice Holmes, the author of *Schenck*, *Debs*, and *Frohwerk*, dissented in *Abrams*. Justice Holmes believed that the government had not sufficiently proved intent, and felt that the leaflets in question did not pose an “imminent danger” to the war effort. *See id.* at 627 (Holmes, J., dissenting).

⁹⁶ 268 U.S. 652, 668 (1925).

⁹⁷ *See id.* Justice Holmes, joined by Justice Brandeis in dissent, argued that the proper test—*Schenck*’s clear and present danger test—required actual danger of an attempt to overthrow the government “at once.” *See id.* at 673 (Holmes, J., dissenting).

⁹⁸ 341 U.S. 494, 510 (1951).

⁹⁹ Bernard Schwartz, *Justice Brennan and the Brandenburg decision—a lawgiver in action*, JUDICATURE, July-Aug. 1995, at 27.

Court upheld the conviction of a leader of the Communist Party in the United States pursuant to the Smith Act.¹⁰⁰ The Court in *Dennis* claimed to be following Justice Holmes's formulation of the clear and present danger test; however, the Court actually adopted a very different version of that test. The Supreme Court in *Dennis* actually adopted a test originally propounded by Judge Learned Hand in the circuit court's opinion in *Dennis*.¹⁰¹ In writing the circuit court's opinion in *Dennis*, Judge Hand had "rephrased" Holmes's rule as follows: "In each case [the court] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."¹⁰² Chief Justice Vinson, writing for the majority in *Dennis*, expressly adopted this formulation.¹⁰³

In essence, this formulation introduced a balancing aspect to the test. Under Justice Holmes's formulation, two distinct elements were needed: (1) a substantial harm within the ambit of Congress to control and (2) imminent danger. Under this test, one element could not offset the other. Conversely, under Judge Hand's formulation, each of these elements was balanced against the other. Thus, for a harm as serious as the overthrow of government, almost any advocacy could be criminalized, no matter how unlikely the possibility that the speaker actually stir anyone to action.¹⁰⁴

The "clear and present danger" doctrine found its most modern expression in *Brandenburg v. Ohio*.¹⁰⁵ In *Brandenburg*, the defendant, a leader of a Ku Klux Klan group, was convicted pursuant to the Ohio Criminal Syndicalism Act.¹⁰⁶ The statute prohibited "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."¹⁰⁷ The United States Supreme Court held the Ohio statute unconstitutional because it punished mere advocacy without reference to incitement of imminent lawless action.¹⁰⁸

The *Brandenburg* decision did not explicitly refer to the clear and present danger test. Rather, it seemed to build upon aspects of each of the

¹⁰⁰ See *Dennis*, 341 U.S. at 516-17. The Smith Act was the first peacetime sedition statute since the Alien and Sedition Acts of 1798. See Smith Act of 1940, ch. 439, §§ 2, 3, 5, 54 Stat. 670, 671 (codified as amended at 18 U.S.C. § 2385 (1994)).

¹⁰¹ See *Dennis*, 341 U.S. at 510.

¹⁰² *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

¹⁰³ See *Dennis*, 341 U.S. at 510.

¹⁰⁴ See *Beschle*, *supra* note 89, at 136.

¹⁰⁵ 395 U.S. 444 (1969).

¹⁰⁶ See *id.* at 444.

¹⁰⁷ *Id.* at 445.

¹⁰⁸ See *id.* at 449.

earlier, competing tests. In its final formulation,¹⁰⁹ the *Brandenburg* test requires three things: “(1) express advocacy of law violation; (2) the advocacy must call for *immediate* law violation; and (3) the immediate law violation must be *likely* to occur.”¹¹⁰

The *Brandenburg* formulation of the test for determining when advocacy of illegal conduct can be punished remains in force today. Although courts have occasionally distinguished cases as not falling within the scope of the *Brandenburg* test,¹¹¹ it remains the modern test for determining when speech advocating illegal conduct can be criminalized.

B. Hate Speech

In recent years, the forum of free speech argument has moved from sedition-type statutes to those seeking to regulate racist speech. Legislatures have attempted to curb instances of racial violence through the enactment of so-called “hate crime” legislation. Initially, a distinction should be drawn between “hate crime” laws and “hate speech” laws.¹¹² Hate crime laws generally criminalize violent acts based on the perpetrator’s negative perception of the victim, usually the victim’s perceived race, creed, color, gender, or religion.¹¹³ Often, the acts specified in these laws are already illegal under other criminal sections, such as assault and homicide laws.¹¹⁴ When these crimes are motivated by racial or other types of enumerated animus, however, the perpetrator may face a greater penalty under the law.¹¹⁵

¹⁰⁹ The original opinion, as drafted by Justice Fortas, was much truer to Justice Holmes’s original formulation of the clear and present danger test than the Court had ever been. See Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 237. Following a recommendation of Justice Harlan, however, Justice Fortas withheld the opinion to coincide with the issuance of other opinions on the same subject. See *id.* In the meantime, Justice Fortas was forced to resign from the Court. See *id.* Justice Brennan wrote the final opinion in *Brandenburg*, which essentially did away with Justice Holmes’s formulation of the “clear and present danger” test in favor of what is more properly called the “imminent lawless action test.” See *id.*

¹¹⁰ *Id.* at 240.

¹¹¹ See, e.g., *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977) (advertising illegal contraceptives cannot be characterized as an attempt to promote imminent lawless action).

¹¹² This distinction is highlighted by Professor Anthony Winer. See Anthony S. Winer, *The R.A.V. Case and the Distinction Between Hate Speech Laws and Hate Crime Laws*, 18 WM. MITCHELL L. REV. 971, 974 (1992); see also Richard J. Williams, Jr., *Burning Crosses and Blazing Words: Hate Speech and the Supreme Court’s Free Speech Clause Jurisprudence*, 5 SETON HALL CONST. L.J. 609, 638-39 (1995) (recognizing a dichotomy between statutes proscribing conduct and statutes purporting to regulate the expression of ideas).

¹¹³ See Winer, *supra* note 112, at 974.

¹¹⁴ See *id.* at 975.

¹¹⁵ See *id.*

Hate speech statutes, on the other hand, criminalize racist speech (or other types of prohibited speech) independent of any accompanying criminal act.¹¹⁶ Thus, the mere act of shouting a racial epithet at a passerby can constitute an actionable criminal act. At least one city has attempted to pass and enforce such a hate speech law.¹¹⁷

The Supreme Court apparently sounded the death knell for hate-speech legislation in *R.A.V. v. City of St. Paul*.¹¹⁸ The City of St. Paul had passed an ordinance that read, in pertinent part:

“Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”¹¹⁹

Defendant R.A.V. was arrested and charged with a violation of this statute after placing a burning cross in the yard of a black family.¹²⁰ The trial court dismissed the charge, believing that the statute was unconstitutional.¹²¹ The Minnesota Supreme Court reversed the dismissal, however, and read the statute to prohibit only “fighting words” as defined in *Chaplinsky v. New Hampshire*.¹²² As such, the court held that this unprotected speech could be freely regulated.¹²³

The United States Supreme Court reversed the Minnesota Supreme Court’s holding and unanimously found that the statute was unconstitutional.¹²⁴ The Court was seriously divided, however, in its reasoning. Justice Scalia, writing for the majority, accepted the Minnesota Supreme Court’s “narrowing” construction of the statute to include only fighting words.¹²⁵ Justice Scalia, however, rejected the idea that fighting words are absolutely unprotected by the First Amendment. Justice Scalia held that, although fighting words may be regulated, they may not be “made the vehicles for content discrimination unrelated to their distinctly proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the gov-

¹¹⁶ See *id.* at 976-77.

¹¹⁷ See, e.g., ST. PAUL, MINN., ORDINANCE § 292.02 (1990).

¹¹⁸ 505 U.S. 377 (1992).

¹¹⁹ *Id.* at 380 (citing ST. PAUL, MINN., ORDINANCE § 292.02 (1990)).

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See *id.* at 380-81 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining fighting words as words inflicting injury or inciting immediate breach of peace by their very utterance)).

¹²³ See *id.*

¹²⁴ See *R.A.V.*, 505 U.S. at 396.

¹²⁵ See *id.* at 381.

ernment.”¹²⁶ The St. Paul statute applied “only to ‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender,’”¹²⁷ but not to other fighting words; as such, the ordinance could not withstand the First Amendment challenge.

In separate concurrences, Justices White and Stevens reasoned that the statute was unconstitutionally overbroad, because it criminalized protected speech as well as fighting words.¹²⁸ Justice White took the majority to task for what he called “its radical revision of First Amendment law.”¹²⁹ He believed that Justice Scalia was abandoning long-established law by restoring First Amendment protection, albeit a limited protection, for categories of speech such as fighting words.¹³⁰

The *R.A.V.* decision has cast a shadow on the future of hate crime and hate speech legislation. Several state courts have relied broadly upon *R.A.V.* to strike down hate crime legislation dealing with expressive conduct.¹³¹ It is worth noting, however, that the Court reached a somewhat contradictory result only one term after *R.A.V.* in *Wisconsin v. Mitchell*.¹³² In *Mitchell*, a unanimous Court upheld a penalty-enhancement statute.¹³³ *Mitchell*’s sentence for aggravated battery was increased when the trial court found that *Mitchell* had intentionally selected his victim based on the victim’s race.¹³⁴ Chief Justice Rehnquist, writing for the Court, held that the penalty-enhancing statute was constitutional because it “is aimed at conduct unprotected by the First Amendment.”¹³⁵ Justice Rehnquist distinguished *R.A.V.*, stating that the statute in *R.A.V.* was aimed at speech, whereas the statute in *Mitchell* was aimed at unprotected conduct—assault.¹³⁶

The present constitutional status of legislation purporting to regulate purely secular speech that is also characterized as hate speech is less than clear. As shown in *R.A.V.*, the Court has been increasingly reluctant to uphold laws criminalizing pure speech. Despite the generally perceived “conservative” nature of the current Court, the decision in *R.A.V.* may be a signal that protection for pure speech is again on the rise.

¹²⁶ *Id.* at 383-84.

¹²⁷ *Id.* at 391.

¹²⁸ *See id.* at 397 (White, J., concurring); *id.* at 417 (Stevens, J., concurring).

¹²⁹ *Id.* at 407 (White, J., concurring).

¹³⁰ *See R.A.V.*, 505 U.S. at 414-15 (White, J., concurring).

¹³¹ *See, e.g.*, *State v. Sheldon*, 629 A.2d 753, 757 (Md. 1993) (hate crime statute was unconstitutional under *R.A.V.* because it regulated the content of speech); *State v. Vawter*, 136 N.J. 56, 64-67, 642 A.2d 349, 353-55 (1994) (same); *State v. Talley*, 858 P.2d 217, 230-31 (Wash. 1993) (same).

¹³² 508 U.S. 476 (1993).

¹³³ *See id.* at 490.

¹³⁴ *See id.* at 479.

¹³⁵ *Id.* at 487.

¹³⁶ *See id.*

C. Threats

A third type of speech may be implicated in an analysis of religiously motivated terrorism—threats. Religiously motivated terroristic speech obviously threatens someone, just like advocacy of unlawful action and hate speech. Unlike the latter types of speech, however, threats have received little First Amendment scrutiny. As one commentator has stated, “For most writers, criminalizing verbal threats of violence is not constitutionally problematic.”¹³⁷

The United States Supreme Court has addressed the First Amendment concerns brought about by anti-threat legislation in only two cases.¹³⁸ In *Watts v. United States*,¹³⁹ the Court, in a per curiam opinion, upheld the constitutionality of a statute criminalizing threats against the President.¹⁴⁰ The Court minimally recognized that the statute had First Amendment implications, but made the assumption that threats are not protected speech: “What is a threat must be distinguished from what is constitutionally protected speech.”¹⁴¹ The Court avoided analyzing this distinction, however, by finding that the defendant in *Watts* was merely engaging in “political hyperbole.”¹⁴² Thus, the constitutionality of anti-threat legislation was merely assumed, not analyzed.

More recently, Justice Scalia’s opinion in *R.A.V.* discussed, in dicta, the constitutional status of threats. Justice Scalia, citing *Watts*, assumed that “threats of violence are outside the First Amendment.”¹⁴³ As discussed above, however, *R.A.V.* was decided as a case involving hate speech, not threats. Thus, once again, the constitutionality of anti-threat legislation received no constitutional scrutiny.

In the absence of a true analysis by the Supreme Court of the First Amendment status of threats, states have enacted a plethora of laws criminalizing pure speech that is considered threatening. Almost every state and the federal government have passed some type of law criminalizing the making of threats.¹⁴⁴ These laws have yet to face a rigorous First Amendment review.

¹³⁷ John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 *BUFF. L. REV.* 653, 661 (1994).

¹³⁸ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Watts v. United States*, 394 U.S. 705 (1969).

¹³⁹ 394 U.S. 705 (1969).

¹⁴⁰ See *id.* at 707.

¹⁴¹ *Id.*

¹⁴² *Id.* at 708.

¹⁴³ *R.A.V.*, 505 U.S. at 388.

¹⁴⁴ See Edward Comitz, *Extinguishing the Burning Crosses: Washington’s Malicious Harassment Statute in Light of the Issues of Overbreadth and Vagueness*, 16 *U. PUGET SOUND L. REV.* 373, 374 (1992).

III. WHEN RELIGIOUS SPEECH IS TERRORISTIC

As noted above, until now pure religious speech apparently has never been considered dangerous enough to criminalize. No reported case prosecuted under any of the sedition laws has directly involved religiously motivated speech. The first constitutional test of the criminalization of pure religious speech is likely to come in the case of Sheik Omar Abdel Rahman.¹⁴⁵

A. *United States v. Rahman*

Sheik Omar Abdel Rahman, a Muslim cleric, was convicted in the United States District Court for the Southern District of New York of seditious conspiracy under a little-used, Civil War-era sedition statute.¹⁴⁶ Several of Rahman's followers were tried with him and convicted of seditious conspiracy involving plots to blow up the Lincoln Tunnel and a variety of government buildings.¹⁴⁷ Although certain documents in the case have been sealed and (as of this writing) remain under seal, indications are that Rahman's role in the "conspiracy" was limited to fiery sermons and dispensing religious advice in the form of interpretations of Islamic law.¹⁴⁸ In short, Rahman's terrorist followers would seek their religious leader's advice about whether certain terrorist plots were sanctioned by the Qu'ran and Islamic law.¹⁴⁹ There is apparently no evidence that Rahman ever came in contact with, let alone touched, an explosive device or otherwise participated in the conspiracy.¹⁵⁰

Rahman's conviction on the seditious conspiracy charge, therefore, seems to be based on pure religious speech. No conduct, even "expressive conduct," was involved.¹⁵¹ Rahman was convicted on several charges and sentenced to a life term for providing religious leadership to terrorists.¹⁵² A

¹⁴⁵ See *supra* note 12 and accompanying text.

¹⁴⁶ See Mike Dorning, *Muslim Cleric Backed Terror, Lawyers Stress*, CHI. TRIB., Sept. 15, 1995, at A1.

¹⁴⁷ In a separate trial not directly involving Rahman, some of his followers were tried and convicted in the World Trade Center bombing. See Randolph, *supra* note 4, at A1.

¹⁴⁸ See Joseph Grinstein, *Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism*, 105 YALE L.J. 1347, 1352 (1996).

¹⁴⁹ See *id.* at 1351-53.

¹⁵⁰ See *id.*

¹⁵¹ Unlike other criminal conspiracy statutes, the statute used by Rahman's prosecutors does not require any overt act in furtherance of the conspiracy. See *id.* at 1351-53 & n.32. While others involved in the conspiracy certainly engaged in overt nonspeech acts, there seems to be no evidence of any nonspeech overt act by Rahman. See *id.*

¹⁵² See Dorning, *supra* note 146, at A1. Commentators sometimes seemed to ignore that Rahman was also tried and convicted on other charges, including conspiring to murder a foreign official, former Egyptian President Hosni Mubarak. See

notice of appeal to the United States Court of Appeals for the Second Circuit has been filed.¹⁵³

B. *Resolution of the Rahman Appeal*

On appeal, the Second Circuit will have several options available to decide whether Rahman can be punished for his speech. Given the Supreme Court's historic tendency to treat religious speech under the Free Speech Clause of the First Amendment,¹⁵⁴ it is likely that a free speech test will be used. It is most likely that the *Rahman* case will be scrutinized under the *Brandenburg* standard because Rahman was charged with seditious conspiracy—a charge that is generally scrutinized under an “advocacy of illegal conduct” standard.¹⁵⁵

1. Rahman's case under *Brandenburg*

The *Brandenburg* test distinguishes between protected speech and unprotected speech.¹⁵⁶ Rahman's speech is not protected under *Brandenburg* if Rahman (1) expressly advocated violence, (2) called for imminent law violation, and (3) the imminent law violation was likely to occur.¹⁵⁷ In this case, the limited evidence available to the public indicates that Rahman expressly advocated violence and that the violence was likely to occur. The problem, as is often the case in *Brandenburg*-type cases, lies in the interpretation of the word “imminent.”

The definition of “imminence” has not been scrutinized, or even directly considered, by the Supreme Court. In *Hess v. Indiana*,¹⁵⁸ the Court

United States v. Rahman, No. S393Cr.181, 1994 WL 388927, at *2 (S.D.N.Y. July 22, 1994).

¹⁵³ See *Rahman*, 1994 WL 388927, at *2, *appeal docketed*, No. 96-1044 (2d Cir. Jan. 22, 1996) (decision is pending).

¹⁵⁴ See *supra* notes 22-24 and accompanying text.

¹⁵⁵ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Rahman was not charged with making threats nor with any hate speech crime; therefore, those categories of speech are not at issue in his case.

¹⁵⁶ Actually, there is some debate whether *Brandenburg* categorizes seditious speech as “unprotected” or whether *Brandenburg* is merely a specialized formulation of the compelling state interest test. Compare Gerald R. Smith, Note, *Media Liability for Physical Injury Resulting from the Negligent Use of Words*, 72 MINN. L. REV. 1193, 1203 (1988) (noting that *Brandenburg* establishes incitement as a form of unprotected speech) with Karl S. Coplan, Note, *Rethinking Selective Enforcement in the First Amendment Context*, 84 COLUM. L. REV. 144, 169 n.136 (1984) (implying that *Brandenburg*'s “clear and present danger” test is a stricter type of compelling state interest test). Although the latter theory is intellectually tantalizing, it does not seem to be a popular opinion, even among academics. Certainly, courts interpreting *Brandenburg* lean toward the idea that advocacy of unlawful conduct is unprotected speech. For purposes of this Article, I accept the interpretation of *Brandenburg* as a test for determining whether the speech in question is protected.

¹⁵⁷ See *Brandenburg*, 395 U.S. at 447.

¹⁵⁸ 414 U.S. 105 (1973).

overturned the disorderly conduct conviction of an anti-war demonstrator.¹⁵⁹ Hess, while at a demonstration, uttered the words, “We’ll take the fucking street later.”¹⁶⁰ The Court first recognized that the exhortation was not really “advocacy” of anything; therefore, Hess’s speech could not be punished under *Brandenburg*.¹⁶¹ The Court went on to say, however, that “at worst, [Hess’s speech] amounted to nothing more than advocacy of illegal action at some indefinite future time.”¹⁶²

It is not clear, however, that “imminence,” as used in *Brandenburg*, is always interpreted in its normal temporal sense. Indeed, one commentator, David Crump, has argued that courts interpret the “imminence” requirement as a “probability” requirement: if the violent response to the speech is probable, even at some future time, the speech can be regulated.¹⁶³ In support of this argument, Crump cites *People v. Rubin*.¹⁶⁴ In that case, a California appellate court held that an open solicitation to kill Nazi demonstrators at a demonstration five weeks away was sufficiently probable to meet the imminence test of *Brandenburg*, despite the temporal remoteness of the acts.¹⁶⁵

Although some courts have undoubtedly applied a “probability” test, this interpretation of *Brandenburg* is not necessarily accurate or intellectually sound. One of the primary models of free speech jurisprudence is the “marketplace of ideas” model that was first enunciated by Justice Holmes in his *Abrams* dissent.¹⁶⁶ The Supreme Court has used this model to fashion free speech law for several decades.¹⁶⁷ In the marketplace of ideas, all

¹⁵⁹ See *id.* at 109.

¹⁶⁰ *Id.* at 107.

¹⁶¹ See *id.* at 108-09.

¹⁶² *Id.* at 108.

¹⁶³ See David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 59-61 & nn.304-11 (1994).

¹⁶⁴ See *id.* at 59-60 n.350 (citing *People v. Rubin*, 158 Cal. Rptr. 488 (Cal. App. 1979)).

¹⁶⁵ See *Rubin*, 158 Cal. Rptr. at 494. Similarly, in *United States v. Compton*, 428 F.2d 18, 22 (2d Cir. 1970), decided before *Hess*, the United States Court of Appeals for the Second Circuit held that a threat to kill the President two weeks in the future was a punishable threat.

¹⁶⁶ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”). Justice Holmes borrowed the idea from John Milton and John Stuart Mill. See JOHN MILTON, *AREOPAGITICA*, reprinted in 2 COMPLETE PROSE WORKS OF JOHN MILTON 486 (E. Sirluck ed., 1959); JOHN STUART MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 13-48 (R.B. McCallum ed., 1948); Stanley Ingler, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, nn.4, 5.

¹⁶⁷ See *Turner Broad. Sys., Inc. v. Federal Communications Comm’n*, 512 U.S. 622, 660-61 (1994) (invoking the marketplace theory to justify a regulation requiring cable television operators to carry broadcast networks); *Leathers v. Medlock*, 499

speech is free to compete, even “bad speech.” The only justification for curtailing speech is when the circumstances surrounding the speech are such that action may be taken before competing ideas are heard. As Justice Holmes stated: “It is *only* the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion”¹⁶⁸ Thus, probable conduct that is not temporally imminent could be subjected to the marketplace of ideas. Other speakers have the time to attempt to sway the actor. Further, the actor himself has time to reflect upon the speaker’s words and weigh their value, as well as time to consider the illegality of his own acts. Therefore, only speech that threatens a temporally imminent evil should be curtailed.

Further, applying the probability interpretation of *Brandenburg* to the *Rahman* case ignores one important distinction between Rahman’s case and cases such as *United States v. Compton*¹⁶⁹ and *People v. Rubin*.¹⁷⁰ In *Compton* and *Rubin*, the violence may not have been temporally imminent, but it was set for a specific date. In Rahman’s case, the available evidence does not show that Rahman’s sermons “set the date” for the lawless action. Rahman’s sermons were apparently aimed at the indeterminate future.¹⁷¹

2. Rahman’s Case Under the Compelling State Interest Test

In the unlikely event that the *Brandenburg* test is not met, or not applied, the Second Circuit may analyze the case under the compelling state interest test of free speech jurisprudence.¹⁷² Although “strict scrutiny” in an equal protection context almost always means that the statute will not pass muster,¹⁷³ in the free speech context regulations are sometimes held

U.S. 439, 451-53 (1991) (noting that a generally applicable tax on cable television services is not a differential tax that would distort the marketplace of ideas); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (explaining that commercial speech has value in the marketplace of ideas).

¹⁶⁸ *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting) (emphasis added).

¹⁶⁹ 428 F.2d 18 (2d Cir. 1970).

¹⁷⁰ 158 Cal. Rptr. 488 (Cal. App. 1979).

¹⁷¹ From the point of view of law enforcement officials, the threat of violence in the indeterminate future may well be more problematic than that set for a specific date. For constitutional purposes, however, only the imminent threat can be proscribed.

¹⁷² A content-based regulation, such as the seditious conspiracy statute used in Rahman’s case, is unconstitutional unless it either falls within one of the narrow categories of unprotected speech, such as the advocacy of unlawful conduct exception, or is narrowly tailored to meet a compelling state interest. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-8, at 833 (2d ed. 1988).

¹⁷³ The exception to this is *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Court upheld Congress’s use of racial classifications to justify the detention of Japanese Americans during World War II. See *id.* at 223-24. The Court gave great deference to the judgment of Congress and the military that the wholesale exclusion of Japanese Americans from certain West Coast areas was a military

to be valid.¹⁷⁴ In Rahman's case, it would be difficult to argue that preventing terrorism is not a compelling state interest. The only question would be whether the means used—criminalizing speech having a tendency to advocate terrorism—are narrowly tailored to meet this goal. Because the statute purports to regulate only speech that constitutes a conspiracy to overthrow the government,¹⁷⁵ it is difficult to imagine the Supreme Court, especially the current Court, finding that the statute is not narrowly tailored.

This finding would, however, overlook the true import of the strict scrutiny standard. This standard is used when the government tries to curtail admittedly protected speech based on its content—an inherently suspicious activity. A finding that the statute is narrowly tailored would, in essence, introduce a balancing aspect into the strict scrutiny standard. The more compelling the interest, the easier it would be to find that the statute is narrowly tailored. This result is precisely what the Court reached in *Korematsu v. United States*¹⁷⁶—a decision that is widely perceived as wrongly decided and a constitutional aberration.¹⁷⁷ Rahman's case would be different if it fit into the narrow area where the words themselves are the harm, such as in the context of treason by disclosing national security secrets. Here, Rahman's words were not the harm sought to be avoided. The harm sought to be avoided by the statute—the overthrow by force of the United States government—was caused by the volitional acts of Rahman's followers. In a case in which the harm is not caused by the words themselves, it is difficult to believe that a statute criminalizing the utterance of the words is narrowly tailored. Yet it is equally difficult to believe that this Court would decide the issue in Rahman's favor. Under either free speech standard, therefore, it is likely that Rahman's conviction will be upheld, despite the religious aspects of Rahman's speech.

3. Rahman's Case as a Free Exercise Claim under *Smith*

It is also possible, although unlikely, that the Second Circuit will recognize the religious nature of the speech and deal with it under the Free Exercise Clause. Given the less-than-liberal history of the Supreme Court's interpretation of the Free Exercise Clause, however, it is unlikely that freedom of religious speech will carry the day under this analysis.

imperative. *See id.* at 218.

¹⁷⁴ *See, e.g.,* *Burson v. Freeman*, 504 U.S. 191 (1992); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

¹⁷⁵ *See* 18 U.S.C. § 2384 (1988), *amended by* 18 U.S.C.A. § 2384 (West Supp. 1995).

¹⁷⁶ 323 U.S. 214, 223 (1944).

¹⁷⁷ *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (Justice O'Connor, writing for the majority, stated, "*Korematsu* demonstrates vividly that even 'the most rigid scrutiny' can sometimes fail to detect an illegitimate racial classification"); *see also* James M. McGoldrick, Jr., *The Separation of Powers Doctrine: Straining Out Gnats, Swallowing Camels?*, 18 PEPP. L. REV. 95, 114 n.98 (noting that *Korematsu* was wrongly decided).

If the Second Circuit analyzes Rahman's case under *Smith*, there can be no doubt that the Supreme Court would uphold a curtailment of Rahman's free exercise of his right to religious speech. In effect, Rahman would be seeking a religious exemption from a neutral law of general applicability, like the sedition statute. Under *Smith*, the state has no obligation to grant his request for an exemption, or even to give the requested exemption any serious consideration.

4. Rahman's Case as a Hybrid Free Exercise Claim Under *Smith*

Perhaps the most interesting question is what result would be reached by applying the hybrid exception created by Justice Scalia in *Smith*. In *Smith*, Justice Scalia stated:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.¹⁷⁸

Any case involving religious speech must, by definition, involve speech; thus, the hybrid test must come into play.

The parameters of the hybrid test are far from clear. Justice Scalia appeared to be saying that, when a free exercise claim is coupled with another constitutional claim, the claims are entitled to a heightened level of scrutiny, although the Justice did not elaborate on the level of scrutiny that should be applied.¹⁷⁹ The lower courts have not been consistent in their application of the hybrid test. At least one court has refused to apply the *Smith* hybrid standard until after the Supreme Court clarifies the test.¹⁸⁰ Other courts have recognized the viability of the test, but have not applied it because the non-free exercise claims failed on their own merits.¹⁸¹ Thus, after eliminating the non-free exercise claims, the remaining free exercise claim could not be considered a hybrid.

¹⁷⁸ See *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990).

¹⁷⁹ See *id.*

¹⁸⁰ See *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993).

¹⁸¹ See, e.g., *Thiry v. Carlson*, 78 F.3d 1491, 1496 (10th Cir.), *cert. denied*, 117 S. Ct. 78 (1996) (involving claim brought by couple under Free Exercise and Due Process Clauses when the government sought to condemn a parcel of land containing the gravesite of their stillborn child; court declined to apply the hybrid test because substantive due process claim failed on its own merits); *Jane L. v. Bangerter*, 794 F. Supp. 1537, 1546-47 (D. Utah 1992) (holding that challenge to Utah Abortion Act on Free Speech and Free Exercise Clause grounds failed because free speech claim failed; therefore, no hybrid situation was present).

Only two courts seem to have actually applied any version of the hybrid test.¹⁸² In *Alabama & Coushatta Tribes v. Big Sandy Independent School District*,¹⁸³ the court applied heightened scrutiny where the plaintiffs made claims based on free exercise, free speech, due process, and equal protection rights. The court found that the regulation at issue, a school ban against long hair, failed under a free speech analysis and a procedural due process analysis but survived under an equal protection analysis.¹⁸⁴ The free exercise claim was therefore entitled to some type of heightened scrutiny under the *Smith* hybrid exception.¹⁸⁵

In the second case applying the hybrid test, *Society of Separationists, Inc. v. Herman*,¹⁸⁶ the United States Court of Appeals for the Fifth Circuit was faced with a challenge to a juror affirmation by an atheist who claimed that even a "God-free" affirmation was religious in nature.¹⁸⁷ The judge ordered the atheist, Robin Murray-O'Hair, jailed.¹⁸⁸ Murray-O'Hair and the Society of Separationists brought an action against the judge.¹⁸⁹ The Fifth Circuit ruled that the judge's actions violated Murray-O'Hair's free exercise right, noting that the free exercise right was coupled with a free speech right.¹⁹⁰ The court stated, "Thus *Smith* specifically excepts religion-plus-speech cases from the sweep of its holding."¹⁹¹ The Fifth Circuit did not make explicit the level of scrutiny it was applying under the hybrid exception but instead seemed to treat the case as one in which the government was compelling affirmation of a religious belief. The Fifth Circuit, however, held that the judge was immune from suit.¹⁹²

¹⁸² See *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1216 (5th Cir.), *aff'd en banc*, 959 F.2d 1283 (1992); *Alabama & Coushatta Tribes v. Big Sandy Indep. Sch. Dist.*, 817 F. Supp 1319 (E.D. Tex. 1993).

¹⁸³ 817 F. Supp. 1319 (E.D. Tex. 1993).

¹⁸⁴ See *id.* at 1334, 1335, 1336.

¹⁸⁵ The court was apparently unsure exactly what level of scrutiny to apply to a hybrid claim. The court began by noting that more than a mere rational relationship was required. See *id.* at 1332. The court did not, however, apply a *Sherbert*-type compelling state interest test. It explained that the regulation was not a valid means of achieving the school's goal because of the "lack of evidence on less restrictive, alternative means of achieving these goals." *Id.* at 1333. Thus, the court appeared to be applying a wholly new test: The regulation must further a valid state interest and must be the least restrictive means of serving that interest.

¹⁸⁶ 939 F.2d 1207, 1216 (5th Cir.), *aff'd en banc*, 959 F.2d 1283 (5th Cir. 1992).

¹⁸⁷ See *id.* at 1209.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.* at 1216.

¹⁹¹ *Id.*

¹⁹² On rehearing, the United States Court of Appeals for the Fifth Circuit, without reaching the merits of the case, held that Murray-O'Hair had no standing to sue. See *Herman*, 959 F.2d at 1285-86.

Although Justice Scalia's hybrid test *might* produce a result that is protective of religious speech, this test ultimately is not acceptable for several reasons. First, the test is an ex post facto attempt by the Supreme Court to escape precedent. Not one of the cases mentioned by Justice Scalia as being a "hybrid" case relies expressly upon more than one constitutional basis.

Second, aside from its dubious origins, the hybrid test affords religious speech *only* as much protection as secular speech, but no more. A hybrid case is subject only to the same standard as content-based regulations of secular speech. If the free speech issue fails, the case is not a hybrid case and thus the challenged law is valid. If the free speech claim succeeds, the statute is invalid, and no analysis of the free exercise claim is necessary. Thus, the free exercise claim becomes a nullity. There is no recognition of the unique genre of religious speech, nor is the level of protection offered consistent with the special place religious speech occupies in our Constitution.

IV. AN ALTERNATIVE TEST FOR RELIGIOUS SPEECH

Any judicial test that is properly protective of religious speech will necessarily involve a departure from precedent. The test I propose is premised on the idea that the Free Exercise Clause of the Constitution is an independent source of a right—that the clause conveys rights different from those conveyed by the Free Speech Clause.¹⁹³ If the Free Exercise Clause is to be considered as an independent source of a right, it follows that the protection given to religious speech need not merely be coextensive with that protection given to secular speech. In fact, under any interpretation of the current status of the law, religious speech receives only that protection afforded to secular speech.

The test I propose will afford religious speech the level of protection its dual constitutional status deserves, while affording society the protection it needs. The test requires two inquiries: (1) determining whether the claim is a religious claim and (2) if so, determining the appropriate level of scrutiny.

When a statute attempts to criminalize speech, the first inquiry must be whether the speech sought to be regulated is religious. Indeed, the classifying of speech as religious is the heart of the test and is likely to prove the most difficult part to apply. The Supreme Court has often shown a reluc-

¹⁹³ While it seems to be widely accepted that the Free Exercise Clause does provide an independent, substantive right, this is not without debate. Michael Ariens and Robert Destro, for example, suggest that *Smith* stands for the proposition that the Free Exercise Clause alone does not provide a constitutional basis for protecting religious action. See MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 948 (1996).

tance to adopt an explicit definition of religion.¹⁹⁴ Some commentators argue that the mere attempt to define religion is, in and of itself, unconstitutional.¹⁹⁵ Despite this, however, the Court does currently, if quietly, have a working definition of religion that is the backdrop for free exercise cases.

That definition was originally set forth in *Seeger v. United States*.¹⁹⁶ In this conscientious objector case, the Court, ignoring a theistic definition of religion set forth by Congress in the conscientious objector statute, created its own, highly expansive definition of religion. The Court looked to whether the beliefs in question were sincere and meaningful and whether the beliefs "occup[y] a place in the belief of its possessor parallel to that filled by an orthodox belief in God."¹⁹⁷ The Court also asked whether the belief is of ultimate concern to an individual.¹⁹⁸

The definition is, of course, highly malleable. What is of ultimate concern to an individual is an intensely personal matter that may not be easily understood or interpreted by a court. Adopting the *Seeger* formulation as a working definition of religion, however, would hardly be more malleable than many other standards under which the Court operates.

Even if the *Seeger* formulation is not considered viable, there is a plethora of other options available to the Court.¹⁹⁹ Defining religion has tantalized commentators and frustrated lower courts for many years. The point is simply that a definition could and should be formulated by the Court that would allow it to determine whether speech is religiously motivated.

If the speech in question is determined to be religious, the second step is to determine the appropriate level of scrutiny to be applied.²⁰⁰ Under this test, the level of scrutiny depends upon whether the speech itself is a substantive evil, or whether the speech merely advocates an evil. If the speech

¹⁹⁴ For a discussion of the Supreme Court's history of defining religion, see Steven D. Collier, *Beyond Seeger/Welsh: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973, 977-82 (1982).

¹⁹⁵ See Francis J. Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252, 277 (1963).

¹⁹⁶ 380 U.S. 163 (1965). Although both *Seeger* and *Welsh* dealt with statutory definitions of religion, commentators generally agree that the definition is constitutional. See Collier, *supra* note 194, at 982.

¹⁹⁷ *Id.* at 166.

¹⁹⁸ See *id.*

¹⁹⁹ See, e.g., Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1 (1991); Collier, *supra* note 194; James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 SETON HALL CONST. L.J. 23 (1995); Richard O. Frame, *Belief in a Nonmaterial Reality: 34A Proposed First Amendment Definition of Religion*, 1992 U. ILL. L. REV. 819; Timothy L. Hall, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982). These articles are but a few among many addressing the issue of defining religion for constitutional purposes.

²⁰⁰ If the speech is not found to be religious it would, of course, be subject to review under the applicable free speech standard.

itself causes the harm, as in the case of treason by disclosing military secrets to an enemy of the United States, the speech should be regulated under the free exercise/compelling state interest test, regardless of its religious nature. If, however, the words merely advocate a substantive evil, the speech should not be criminalized.

In essence, this test requires a return to the pre-*Gitlow*²⁰¹ era for religious speech. Prior to *Gitlow*, speech itself generally was not deemed to be a substantive evil. In *Gitlow*, however, the Court accepted the idea that advocacy of illegal conduct was a harm in and of itself, independent of the harm of the illegal conduct.²⁰²

Actually, the successful application of this test lies in the understanding that very few types of speech are inherently “evil.” Disclosure of national secrets is one of those few areas. In that scenario, disclosure of the secret *is* the harm. No illegal act of a third party is necessary in order for harm to result. Similarly, in defamation cases, the lie told *is* the harm—no further evil is anticipated. Conversely, advocacy of illegal conduct and solicitation envision a harm beyond the speech—the commission of the crime advocated or solicited is the real evil.²⁰³ In these cases, the religiously motivated speaker should be afforded full First Amendment protection.

Although this result may seem extreme in the case of someone like Rahman, it is necessary to preserve the free and unfettered exercise of religious rights. If Rahman can be punished, so can a Protestant minister who, on April 14, advises a member of her congregation that it is morally wrong to pay income taxes to support federally-funded hospitals that perform abortions. The minister is advocating illegal action by complying with a tenet of her faith. To allow the criminalization of religious speech such as this is to allow the state to control the dissemination of religious beliefs and thus, practically, the beliefs themselves.

Critics will say that this test affords religious speech a higher degree of protection than secular speech. It does. This “preferred” status for religious speech, however, is merely a reflection of the preferred status given

²⁰¹ See generally *Gitlow v. New York*, 268 U.S. 652 (1925).

²⁰² See *id.* at 668-70; see also Beschle, *supra* note 89, at 135-37.

²⁰³ Even in areas such as hate speech, it can be convincingly argued that the words themselves do not cause the harm. The harm, to the extent that these words do cause a harm, is not caused by the words themselves, but by the painful knowledge these words can convey—knowledge that another views your race, gender, ethnicity, or other characteristic as inferior to her own. The speech is merely evidence of these feelings and opinions. See, e.g., Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMMENTARY 71 (1996). Whatever the merits of banning speech in other contexts, this Article is concerned with religious speech. Thus, when I recommend a return to a pre-*Gitlow* view of speech, I am aware that this conflicts with certain secular restraints on speech that are currently politically popular. The “correctness” of such laws in a secular context is, however, a subject for another Article and another author.

to religious speech by the First Amendment. Secular speech is protected by only one clause of the First Amendment. Religious speech is doubly protected and as such deserves a higher level of judicial deference.²⁰⁴

Another probable criticism is that the test will allow religious radicals to escape criminal liability merely by keeping their own hands clean and allowing their followers to do the "dirty work." The clever religious leader will exert her influence verbally to prod others to commit crimes and will use the protection of the First Amendment to escape punishment.²⁰⁵ The problem of camouflaged incitement, however, is not limited to this test; it is also a problem under the established *Brandenburg* test.²⁰⁶ If we accept this criticism as a reason to throw out the test, we must also be prepared to throw out *Brandenburg*.

V. CONCLUSION

Current free exercise jurisprudence provides little, if any, protection for religious exercises that transcend the realm of pure belief. Certain religious speech today is viewed as threatening to secular order; consequently, the lack of protection is particularly troubling for those supporting broad religious liberty. It is important to remember that most mainstream religions can point to leaders who were once considered radicals threatening the secular authority. Given the fluctuations of religious beliefs, "devils" such as Rahman must be given the benefit of the law so that the rest of us will have refuge from the storms of changing political and religious norms to pursue and testify to our own particular beliefs.

²⁰⁴ In addition to the special constitutional status of religion, there are other reasons to give religious speech higher constitutional scrutiny. For example, religious speech is often full of imagery and metaphor that may be difficult, if not impossible, to interpret in any temporal sense. For several examples of such imagery in various sacred texts, see Grinstein, *supra* note 148, at 1370-74. Further, international law recognizes a concept of natural law, or *jus cogens*, under which persons may be permitted to deviate from state laws that violate principles of a higher, natural law. Although this principle is not without debate in international law circles, such discussion is outside the scope of this article. For further information on the sources of international law and the various schools of thought on the origins of international law, see WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 8-9 (2d ed. 1995).

²⁰⁵ Some religious "leaders" already use this strategy. For example, David Trosch, a defrocked Catholic priest, has publicly supported the killing of abortion providers. Along with Paul Hill, Trosch has signed a declaration praising the murder of abortion providers as "justifiable homicide." One week before Paul Hill killed a doctor and an escort in Florida, Trosch sent a letter to 1000 followers, stating that the time would come when "we will see the beginning of massive killings of abortionists and their staffs." *National Editorial Round-Up: Death Penalty Would Make Hill a Martyr*, *ABORTION REP.* (American Political Network), Nov. 11, 1994. Despite Trosch's "fiery sermons," Trosch, unlike Rahman, has not been prosecuted for his advocacy of illegal acts.

²⁰⁶ See generally Crump, *supra* note 163.

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