Falsely Shouting Fire in a Global Theater: Emerging Complexities of Transborder Expression

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INTRODUCTION

Justice Holmes once wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[1] As recent events have demonstrated, the geographic contours of that theater have expanded beyond U.S. territorial borders. Owing to globalization, digitization of expression, and other forces, the world has become increasingly interconnected. The global soapbox the Supreme Court alluded to in 1997, when striking down Congress's first attempt to restrict speech on the Internet, has now materialized in the United States and abroad.[2] Speakers' voices and the physical and psychological effects of domestic expressive activities now frequently traverse or transcend territorial borders.

As Holmes indicated in the same passage quoted above, "[T]he character of every act depends upon the circumstances in which it is done."[3] Consider in that light the circumstances of the following recent events, which highlight some of the First Amendment complexities associated with the emerging global theater:

- A pastor from Gainesville, Florida, threatened to burn copies of the Koran to mark the anniversary of the September 11, 2001, terrorist attacks. As a result, President Obama, among other high-level officials, called on the pastor to desist.[4] Several people in Afghanistan, who had heard of the pastor's plans,

1. Schenck v. United States, 249 U.S. 47, 52 (1919).

2. Reno v. ACLU, 521 U.S. 844, 850, 868, 870, 885 (1997) (describing the Internet as "a unique and wholly new medium of worldwide human communication" and a "new marketplace of ideas" containing "vast democratic forums" from which "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox").

3. *Schenck*, 249 U.S. at 52.

4. Damien Cave & Anne Barnard, *Minister Wavers on Plans to Burn Koran*, N.Y. TIMES, Sept. 10, 2010, at A3; Jack Healy & Steven Erlanger, *Planned Koran Burning Drew International Scorn*, N.Y. TIMES, Sept. 9, 2010, http://www.nytimes.com/2010/09/10/world/10react.html?scp=1&sq=Planned%20Koran%20Burning%20Drew%20International%20Scorn&st=nyt&pagewanted=1.

protested and died during the ensuing riots.[5] When the pastor later followed through and burned a copy of the Koran, several more people died abroad.[6]

- After posting a satirical poster on the web urging readers to participate in "Everybody Draw Mohammed Day," a Seattle-based cartoonist received foreign death threats and was forced into hiding.[7]
- As a result of the Supreme Court ruling in *Holder v. Humanitarian Law Project*, U.S. citizens who file petitions with the United Nations on behalf of, provide legal training to, or even post supportive material on the web about designated "foreign terrorist organizations" may be prosecuted under federal laws prohibiting the provision of "material support" to terrorists.[8] Additionally, individuals undertaking these actions could also be subject to prosecution for treason.[9]
- After a radical Muslim cleric named Anwar Al-Aulaqi, who was a U.S. citizen residing in Yemen, posted several videos and speeches on the Internet that praised and encouraged terrorist attacks in the United States and abroad, YouTube removed some of the cleric's videos from its site and the Obama Administration targeted him for execution. (The cleric was recently killed in a drone strike.)[10]

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5. Rod Nordland, *2 Afghans Are Killed in Protests over Koran*, N.Y. TIMES, Sept. 17, 2010, at A11 (reporting that five people had been killed in Afghanistan during protests of the proposed Koran burning in Florida).

6. Taimoor Shah & Rod Nordland, *Afghans Protest Koran Burning for Third Day*, N.Y. TIMES, Apr. 4, 2011, at A5.

7. Brian Stelter, *Cartoonist in Hiding After Death Threats*, N.Y. TIMES, Sept. 17, 2010, at A14.

8. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

9. *Id.*

10. A federal judge dismissed a lawsuit filed by the cleric's father challenging the targeted killing of his son on standing and other justiciability grounds. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010). Al-Aulaqi was killed on September 30, 2011, as a result of an American drone attack in Yemen. Mark Mazzetti, Eric Schmitt & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

- After Julian Assange, the publisher of the foreign website WikiLeaks, shared classified documents concerning American military operations in Iraq and Afghanistan and American diplomatic cables with several Western news outlets and posted them on the Internet, U.S. officials suggested that he should be treated as a terrorist or prosecuted under the Espionage Act of 1917.[11]

As the proposed Koran-burning episode shows, domestic speech can have instantaneous and even deadly international effects. Further, as the Seattle cartoonist learned, U.S. residents who post messages on the Internet must now consider not only the possibility of domestic hecklers but foreign ones as well.[12] In the emerging global theater, speech and association that originates inside the United States but crosses territorial borders may cause violence in distant locations, upset delicate foreign policy objectives and relationships, and aid foreign enemies. All of this may occur without the speaker ever departing from his location or even leaving his desk. Foreign speakers, including U.S. citizens traveling or residing abroad, may direct enemy-aiding expression to all corners of the globe via the Internet. Finally, as the WikiLeaks episode demonstrates, once confidential state information has leaked across territorial borders, efforts to control its global distribution will prove substantially more difficult, if not futile.

Traditional First Amendment doctrines and jurisprudence did not develop in a global theater. Rather, they developed in a domestic sphere in which expression and its effects stayed largely within territorial borders. The distribution of potentially harmful expression in the global theater raises important and unresolved questions. Can the government prosecute a domestic speaker for inciting a riot half a world away? If the answer depends, as Justice Holmes indicated, on matters of "proximity and degree," how should courts and commentators analyze those characteristics in the twenty-first century's digital age?[13] If hecklers thousands of miles away can chill speakers in the United States, what are the implications for domestic-speech marketplaces and the ability of citizens to communicate via

11. *See* Charlie Savage, *U.S. Weighs Prosecution of WikiLeaks Founder, but Legal Scholars Warn of Steep Hurdles*, N.Y. TIMES, Dec. 2, 2010, at A18 (discussing the possibility that the Justice Department will prosecute Julian Assange).

12. *See* J. David Goodman, *Syrian Activists Abroad Speak of Retaliation*, N.Y. TIMES, Oct. 4, 2011, at A10 (reporting that the State Department is investigating allegations that the Syrian government has intimidated and harassed activists living in the United States).

13. Schenck v. United States, 249 U.S. 47, 52 (1919).

global networks? Are citizens who merely advocate in favor of terrorism or support terrorist organizations by publishing favorable commentary about them on the web subject to criminal prosecution for providing material support to terrorists? Are they subject to criminal prosecution for treason?[14] To what extent will citizens' First Amendment liberties actually be protected when they speak from distant locations? Are foreign publishers subject to U.S. espionage and other national security laws? If so, might the First Amendment's free speech and press guarantees also protect them?

Speakers and officials will have to grapple with these and other questions in the emerging global theater. More broadly, our society will have to pay much closer attention to the First Amendment's relationship to transborder expression. In the emerging global theater, long-standing domestic commitments to marketplace and counterspeech principles, as well as old-fashioned principles of speaker fortitude, will be severely tested by changed expressive conditions and new regulatory challenges. Courts will have to consider legal and constitutional conceptions (e.g., incitement, hostile audiences, treason, and terrorism) in light of, and in some cases adapted to, the unique circumstances of the global theater. Further, regulatory challenges presented by the transborder distribution of potentially harmful expression will test the government's commitments to both the freedoms of speech and press and to the rule of law. As the potential harm from transborder speech and association increases, governments will seek new means of control. New forms of speech regulation, censorship, and civil disobedience will arise in the emerging global theater.

This Article examines some of the constitutional and regulatory complexities that have emerged in the global theater. Part I briefly describes the characteristics of the new expressive environment, with a particular focus on potentially harmful speech in the global theater. Although globalization, interconnectivity, and the compression of space and time will facilitate speech, press, and associational liberties, these global theater characteristics will also produce substantial risks for governments and their citizens.

Part II analyzes some of the free speech, association, and press issues that have already arisen or are likely to arise in the global

14. *See* Tom W. Bell, *Treason, Technology, and Freedom of Expression*, 37 ARIZ. ST. L.J. 999, 1027–28 (2005) (observing that the law of treason has developed such that a broad category of enemy-aiding expression might be deemed treasonous); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1341–42 (2005) (discussing the potential application of treason law to antiwar and other speech that could aid enemies of the United States).

theater. My particular focus will be on expression and association that may lead to harmful transborder effects. I will make four general claims. First, although in rare instances the government could punish domestic incitement despite its distant effects, expression that breaches global peace or order by producing extraterritorial offense and other harmful effects ought generally to remain fully protected in the global theater. Second, the instantaneous transborder flow of offensive speech will place additional burdens on both speakers and authorities. As a result, speakers will have to more carefully assess in advance whether they will risk the possibility of harm from distant threats, and officials ought (in some cases) to be prepared to offer reasonable protection to offensive domestic speakers who are faced with threats from foreign hecklers. Third, it is critical that legislatures and courts define the expanding category of proscribed enemy-aiding expression, which now includes providing "material support" to terrorists in the form of legitimizing and supportive communications as well as cybertreason as narrowly as possible. In general, the United States should draft and enforce national security laws such that intentional enemy-aiding conduct, rather than speech, is proscribed. Fourth, with regard to the transborder exposure of governmental secrets, the United States ought to focus primarily upon improving its processes for protecting secrecy rather than on prosecuting the publishers, whether foreign or domestic, of confidential or secret governmental information.

Part III draws more general First Amendment lessons from recent global theater controversies. In the emerging global theater, it is critical that courts, officials, and commentators begin to think more systematically about transborder speech, association, and press concerns. U.S. policymakers, litigants, and scholars must incorporate the First Amendment's transborder dimension into political, legal, and constitutional discussions regarding global information flow in the twenty-first century. As our society maps the First Amendment's transborder dimension, America's exceptional regard for offensive expression is likely to come under increasing challenges at home and abroad. We will thus have to explain, and likely defend, our long-standing free speech principles and values to both domestic and global audiences. But we need not abandon traditional First Amendment commitments in response to the potential dangers of transborder expression and association. Indeed, recent episodes have confirmed that core First Amendment principles, including marketplace justifications for free speech, remain critically important in the

emerging global theater.[15] There are also various lessons for the press, an institution that is likely to continue its transformation from a domestic information hub to a loosely bound international distribution network. As this transformation occurs, the press will need to be more circumspect in its reporting on matters of global concern. As new sources and publishers, operating on different models and in pursuit of different missions, continue to materialize, they will test the press's commitment to the free flow of information. Finally, new threats to free speech and information flow will arise in the global theater. As recent global theater controversies indicate, we ought to pay more attention to private intermediaries and the extent to which they can disrupt the transborder flow of information. We should also be mindful of the effects that new forms of governmental information control, such as prosecution of information distributors and extrajudicial targeted killing, may have on transborder information flow.

I. THE EMERGING GLOBAL THEATER

Global channels of speech, press, and association have become tightly interconnected.[16] Globalization, digitization, and the proliferation of media outlets blur the lines between domestic- and foreign-speech marketplaces. At home, abroad, and in cyberspace, citizens increasingly participate in global debates and enter relationships with aliens who are located abroad. The full implications of this emerging global theater are beyond the scope of this Article. My more modest goal in Parts I and II is to focus on the basic characteristics and complexities of this emerging global marketplace, particularly as they relate to potentially harmful forms of expression and association. Part III addresses some of the broader lessons that have emerged from early events in the global theater.

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15. The marketplace idea or metaphor is generally thought to have originated in the work of John Stuart Mill. *See* JOHN STUART MILL, ON LIBERTY 16 (Elizabeth Rapaport ed., 1978) (1859). For elaborations of the metaphor, see Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.") and ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 559–66 (1969).

16. *See*, *e.g.*, DAVID G. POST, IN SEARCH OF JEFFERSON'S MOOSE: NOTES ON THE STATE OF CYBERSPACE 90–99 (2009) (discussing Internet and network connectivity); *Usage and Population Statistics*, INTERNET WORLD STATS, http://www.internetworldstats.com/stats.htm (last visited Oct. 21, 2011) (collecting worldwide Internet usage statistics).

A. Interconnectivity

Global interconnectivity is the defining characteristic of free speech, press, and association in the twenty-first century.[17] A speaker who intends to, or appears to, address a small local community may in fact speak to a global audience. Further, people around the globe can feel, sometimes instantaneously, the tangible and psychological effects of domestic speech and association. Of course, cross-border communication flows into the United States as well. In many instances, this occurs with the same relative ease and through the same or similar channels of communication.

Several factors have contributed to an emerging global expressive theater.[18] These include the proliferation of media outlets; expanded access to global communications networks; the characteristics of modern media and news cycles—in particular the penchant for focusing intensely on controversial statements or events to the near-exclusion of all else; the ability to easily and cheaply store, link to, and distribute digitized material and archives; and shared language capabilities.

These forces have significantly blurred traditional lines between domestic- and foreign-speech marketplaces. Owing to transborder communications networks, domestic speakers and foreign audiences are connected as never before. This connectivity is often touted as a positive characteristic of the contemporary marketplace of ideas—and it is. Among other things, global interconnectivity has the potential to expose people to distant cultures; to broaden political, scientific, and cultural fields of inquiry and debate; and to expand opportunities for transborder association and collaboration. In terms of free speech, these connections facilitate self-governance on a global scale. They also contribute to a vigorous exchange of ideas in global forums. As Jack Balkin observed, because interconnectivity expands opportunities for public participation in creative and other endeavors

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17. *See generally* Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2009).

18. To be clear, I am not claiming that a global marketplace of ideas presently exists. Repressive regimes and other limitations obviously prevent such a marketplace from fully forming and functioning. *See* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 92–95 (2006) (discussing Chinese Internet filtering technologies). Rather, my claim is that transborder information flow is creating a global marketplace in which more and more of the world's population may participate. *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 352 (1992) (suggesting that "the new technologies that increasingly knit the globe into one giant electronic village will tend to create an international marketplace for free speech").

it may ultimately lead to the spread of "democratic culture."[19] From a cosmopolitan perspective, these are all positive developments.

However, we must also recognize the potential harms that might attend interconnectivity. One frequently noted adverse effect is the proliferation of hate speech and advocacy of violence, particularly on the Internet.[20] Governments will have a difficult time effectively regulating this sort of potentially harmful expression in the global theater. Nations differ with regard to the extent of protection afforded such expression.[21] Receiving nations that do not provide protection for hate speech, constitutionally or otherwise, cannot always intercept or suppress hateful expression that crosses the border from a nation in which such speech is constitutionally protected.[22] Thus, for example, protected hate speech hosted on a U.S. website may be simultaneously available in France and Germany, countries that prohibit distribution of such material.[23] Moreover, in some cases speakers will be able to hide their locations and identities from authorities. In general, harmful expression will flow freely across borders in the global theater.

B. The Compression of Space and Time

One particular complexity related to harmful transborder expression is that the elements of communicative space and time are compressed. Speech that originates inside the United States may quickly inflame passions in communities across the globe. Whereas it used to take days, weeks, or even longer for a local event or statement to have any impact beyond U.S. borders, in the emerging global theater worldwide exposure and reaction are sometimes instantaneous. In the digital age, audiences need not be physically present to be instantly aware of, or even psychologically affected or inflamed by, communications originating thousands of miles away. Under these circumstances, it is possible that a domestic speaker

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19. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 2–6, 34–38 (2004).

20. *See*, *e.g.*, Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 818–20 (2001).

21. *See id.* at 858–63 (discussing approaches to Internet hate speech in various western democracies).

22. *See id.* at 858–59 (noting, in particular, that the United States' protection of hateful expression complicates other nations' efforts to regulate it).

23. In such circumstances, it may not even be clear which nation's laws apply to the speech in question. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1217 (9th Cir. 2006) (addressing the enforceability of a French judgment ordering a U.S. website to prevent the display of Nazi memorabilia for sale in France).

could incite a riot or successfully precipitate imminent violence across the globe.

Owing to the compression of space and time, seemingly local and provincial concerns can immediately become topics of global interest. The plan to burn the Koran produced not just a local and national reaction, but an international debate regarding tolerance for hateful speech and the power of governments to proscribe deeply offensive expression. Opposition to the proposed construction of an Islamic center blocks from Ground Zero in Manhattan (the so-called "Ground Zero Mosque") was reported and commented upon by both domestic and international news outlets.[24] In the global theater, with its transborder media amplifier, local events may garner a level of attention that is disproportionate to their actual significance. Although foreigners may have no tangible or political connection to an issue, incendiary local expression may quickly become a matter of concern to a global audience.

Many audiences live in places that do not embrace America's exceptional protection for hateful, offensive, and other harmful forms of expression. The compression of space and time may leave little opportunity for speakers to soberly reflect on the messages they convey. Moreover, although many speakers and audiences in the global theater share a common language, the danger of mistranslation and misunderstanding is unfortunately quite real. Depending to some degree on the nature of national and international media coverage, foreign audiences might mistakenly assume that noisy domestic opposition to something like a proposed Islamic center communicates the sentiments of the public at large or even the U.S. government. Communications via transborder networks will lead to more frequent

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24. *See, e.g.*, Gary Bauer, *Ground Zero Mosque Would Embolden Our Enemy*, HUMAN EVENTS, Aug. 8, 2010, http://www.humanevents.com/article.php?id=38445#; Brian Montopoli, *"Ground Zero Mosque" Developer Sharif El-Gamal: No Money from Iran, Hamas*, CBSNEWS.COM, Aug. 27, 2010, http://www.cbsnews.com/8301-503544_162-20014959-503544.html; Jillian Scharr, *Jewish Leaders Gather to Support Ground Zero Mosque*, NBC N.Y., Aug. 17, 2010, http://www.nbcnewyork.com/news/local-beat/Jewish-Leaders-Gather-to-Support-Ground-Zero-Mosque-100049479.html; Tom Topousis, *Landmark Vote on Ground Zero Mosque*, N.Y. POST, Aug. 3, 2010, http://www.nypost.com/p/news/local/manhattan/landmark_vote_on_ground_zero_mosque_7iWKADGQO0hZKHkpSdxYWN; Erica Werner, *Obama Backs Mosque Near Ground Zero*, THE INDEPENDENT, Aug. 14, 2010, http://www.independent.co.uk/news/world/americas/obama-backs-mosque-near-ground-zero-2052608.html. Reaction in a variety of Arab news outlets is reported in Catherine Dagger, *The Ground Zero Mosque—What the Arab Press is Saying About the Ground Zero Mosque Controversy*, ASSOCIATED CONTENT, Aug. 20, 2010, http://www.associatedcontent.com/article/5706656/the_ground_zero_mosque_what_the_arab.html?cat=54 and in *What the Arab Papers Say*, ECONOMIST ONLINE, Aug. 19, 2010, http://www.economist.com/blogs/newsbook/2010/08/arab _reactions_cordoba_mosque.

global culture clashes. Some of these controversies will result in violent, or even deadly, reactions from foreign audiences.

C. Domestic Expression, National Security, and Foreign Affairs

One of the consequences of interconnectivity and the compression of space and time is the increased potential for domestic expression to affect the Global War on Terror and foreign affairs. Again, this is a product of the blurring of traditional territorial lines between domestic- and foreign-speech marketplaces.

In the United States, political pundits and commentators across the political spectrum often articulate some version of the following argument: "Your speech will embolden our enemies, harm our troops, undermine national interests abroad, or legitimize terrorism."[25] Some commentators and editorialists even press the point further, arguing that some forms of domestic political dissent and protest are themselves treasonous.[26] In the global theater, even the most provincial conflicts can quickly give rise to charges of providing aid to foreign terrorist organizations or even treason. Thus, domestic proponents of the Islamic center in Manhattan charged opponents with aiding terrorists or harming American troops in foreign locations by voicing anti-Islamic sentiments likely to reach foreign audiences.[27] In the global theater, such charges may proliferate.

Of course, most—if not all—claims that such speech is treasonous can be dismissed as pure political rhetoric or hyperbole; overblown and baseless charges of treasonous speech and association are hardly new in American politics. Throughout our history, domestic protest and offensive speech have always posed some indeterminate threat to foreign military operations and foreign relations. In the pre-global-theater era, the claim that domestic political speech would actually provide some concrete or meaningful assistance to foreign enemies seemed in most cases to be farfetched. But, as the examples

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25. *See*, *e.g.*, Bauer, *supra* note 24 (claiming that building the proposed Islamic center in lower Manhattan would "embolden our enemy"); Editorial, *Why President Obama Should Meet with Dick Cheney*, NEWSWEEK, Jan. 4, 2010, http://www.newsweek.com/2010/01/04/why-president-obama-should-meet-with-dick-cheney.html (suggesting that former Vice President Cheney's criticisms of President Obama were harming national security).

26. *See*, *e.g.*, Editorial, *Comfort and the Protesters*, N.Y. SUN, Feb. 6, 2003, http://www.nysun.com/editorials/comfort-and-the-protesters/77452/ (suggesting that antiwar protesters might be guilty of treason).

27. *See*, *e.g.*, Joshua Holland, *Anti-Mosque Organizers Giving Aid and Comfort to the Enemy*, ALTERNET.ORG (Aug. 31, 2010, 9:45 AM), http://blogs.alternet.org/speakeasy/2010/08/31/anti-mosque-organizers-are-giving-aid-and-comfort-to-the-enemy/.

discussed so far suggest, we have entered an era in which domestic political speech and association may be perceived as posing a threat to national security. Such concerns may be more difficult to dismiss in the global-theater era.

As noted, communications in the global theater traverse international borders with relative frequency and ease. They are more likely to reach terrorists and other enemies abroad, in forms that are useful to those individuals. Thus, a video file of a domestic protest in the United States can easily become a hyperlink on a foreign terrorist's website, providing a form of immediate aid in terms of recruitment and communication. In a similar fashion, enemy forces in the field might download a digitized file of confidential information from the Internet. Access to this sort of information could indeed increase the potential for harm to U.S. troops and assets both on distant military battlefields and in other foreign locations. Thus, in an extraordinary (perhaps unprecedented) gesture, President Obama warned that a Florida pastor's plans to burn a Koran would be a "recruitment bonanza for Al Qaeda" and could "greatly endanger our young men and women in uniform who are in Iraq, who are in Afghanistan."[28]

Similarly, robust and heated domestic communications might have an effect on foreign relations. In addition to speaking out publicly about the Florida pastor's plans, President Obama also voiced support for a developer's right to build an Islamic center in Manhattan.[29] President Obama directed his statements not merely to restive domestic audiences, but also to various foreign audiences who were paying close attention to events in lower Manhattan. In the global theater, presidents and other officials will likely feel pressed, as President Obama apparently did, to denounce extremist views in order to assure global audiences, including international leaders, that the United States is committed to universal values of dignity, tolerance, and equality.

Moreover, in the emerging global theater, U.S. citizens will increasingly seek to engage and participate in transborder association and collaboration. Typical transborder contacts will range from commercial ventures, to humanitarian relief projects, to collaborations within established international human rights institutions and communities. These contacts will create opportunities for the transborder sharing of information and viewpoints.

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28. Cave & Barnard, *supra* note 4.

29. Sheryl Gay Stolberg, *Obama Strongly Backs Islam Center Near 9/11 Site*, N.Y. TIMES, Aug. 14, 2010, at A1.

However, there is a potentially dangerous side to these transborder contacts. Some may be criminal enterprises or violent conspiracies. Of course, this is also true of some purely domestic or intraterritorial associations and collaborations. Under a provincial interpretation of the First Amendment, transborder collaboration is treated as presumptively suspect. In part, this relates to the foreign affairs and national security concerns discussed above.[30] In the global theater, the government may seek to rely upon foreign affairs and national security concerns to restrict any domestic speech or association that Congress and/or the State Department believe could negatively affect relationships with U.S. allies.

D. New Regulatory Challenges in the Emerging Global Theater

The emerging global theater will create substantial regulatory challenges insofar as harmful speech and association are concerned. Citizens located within the United States and abroad will have more opportunities to propagandize and otherwise aid foreign enemies through communications distributed on the Internet. The frequency, substance, and potential harmful effects of these communications will challenge a government's commitment to traditional free speech principles in the emerging global theater. In many cases, interconnectivity and digitization will render efforts to suppress harmful expression, including closely guarded government secrets, futile.

In the predigital era, a citizen who wished to effectively propagandize on behalf of a foreign enemy generally had to travel abroad in order to use the enemy's dedicated channels of communication.[31] Today, these citizens can access shared networks from anywhere in the world. In the global theater, citizens do not need to leave the country, or even their living rooms, to actively propagandize on behalf of an enemy or provide material support to a foreign terrorist group. Further, citizens who wish to distribute harmful information to American or international enemies are no longer limited to press conferences, face-to-face meetings, and other methods likely to reach relatively limited domestic and foreign

30. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2726 (2010) (upholding "material-support" laws as applied to transborder collaboration, based in part on foreign affairs and national security concerns).

31. *See* Bell, *supra* note 14, at 1007 (noting that in several World War II-era treason cases, defendants "had to travel overseas and use the radio broadcasting facilities of U.S. enemies to reach the audiences they targeted, whether U.S. armed forces abroad or the masses back home").

audiences.[32] With access to the Internet, citizens at home and abroad can threaten U.S. interests by posting speeches, videos, and other information to global information networks.

One of the most pressing challenges to governmental regulation of transborder information flow in the global theater concerns the publication of government secrets.[33] From his base in Switzerland, WikiLeaks' publisher, Julian Assange, shared diplomatic cables and detailed information regarding U.S. battlefield operations in Iraq and Afghanistan with several western newspapers.[34] Assange, who allegedly obtained the information from a private in the U.S. Army (who himself allegedly procured the information illegally and is being prosecuted by the U.S. government for his actions), posted some of the material on the WikiLeaks website.[35] According to the U.S. Department of Defense, some of this information may have compromised military missions and covert agents working in the field.[36] The White House and State Department decried the release of diplomatic cables, suggesting that the disclosures endangered diplomatic relations and lives.[37] Subsequently, the U.S. Justice Department opened a criminal investigation targeting Assange and WikiLeaks.[38]

As the WikiLeaks episode shows, anyone with an Internet connection and access to secret or confidential information can cheaply and widely distribute this information. Technological channels of communication not subject to direct control by U.S. officials are rapidly replacing traditional transborder information platforms like the U.S. Mail and other heavily regulated telecommunications outlets. This raises additional regulatory complexities, particularly where foreign actors have breached governmental secrecy and information has traversed international borders and appeared on the Internet. In the global theater, damaging information does not simply disappear

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32. *See* Haig v. Agee, 453 U.S. 280, 284–85 (1981) (describing a U.S. citizen's public overseas campaign against the Central Intelligence Agency).

33. *See* Scott Shane, *Keeping Secrets WikiSafe*, N.Y. TIMES, Dec. 12, 2010, at WK1 (discussing government efforts to protect secrets in the modern age).

34. Scott Shane, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. TIMES, Nov. 29, 2010, at A1.

35. Elisabeth Bumiller, *Army Broadens Inquiry Into WikiLeaks Disclosure*, N.Y. TIMES, July 31, 2010, at A4.

36. *See The Defense Department's Response*, N.Y. TIMES, Oct. 23, 2010, at A9.

37. Ginger Thompson, *Officials Assail WikiLeaks and Try to Curb Damage*, N.Y. TIMES, Nov. 29, 2010, http://query.nytimes.com/gst/fullpage.html?res=9C0CE0DA1331F93AA15752C1A9669D8B63&scp=1&sq=Officials%20Assail%20WikiLeaks%20and%20Try%20to%20Curb%20Damage&st=cse.

38. *See* Savage, *supra* note 11.

and often cannot be destroyed. Rather, the information and raw data are likely to survive on mirror sites and in encrypted files that the government cannot access or regulate.[39] Once someone posts information on the web, it may be impossible to prevent others from copying and distributing it. Criminal prosecution may deter future leakers or publishers, but it will not cure the damage from disclosure or ensure that the information is scrubbed from the global record.

In the global theater, it will be more difficult for the government to control or regulate citizens' transborder speech and association activities. Acute regulatory problems may arise when citizens convey potentially harmful messages from beyond U.S. borders. In an appropriate case, the government might revoke a citizen's passport based upon harmful speech or speech activities abroad.[40] However, traditional means of regulation will likely be ineffectual when applied to a citizen dedicated to harming the United States from beyond its borders.

Thus, officials will seek new regulatory methods in an effort to stem the flow of harmful expression, including terrorist expression. For example, federal officials have pressured domestic Internet intermediaries to remove alleged terrorist expression and sensitive government reports from their servers. Federal prosecutors may seek indictments against domestic- or foreign-information distributors. As noted earlier, in at least one instance, President Obama issued an order targeting an American citizen for execution based in part on incendiary Internet posts advocating terrorist violence in the U.S. and abroad.[41] We could now be witnessing the beginning of a transformation from a regulatory model, which is based upon state prosecution and punishment of harmful acts and expression, to a model that relies upon suppression by private intermediaries, punishment of information distributors, and extrajudicial killings.

II. DANGEROUS EXPRESSION IN THE GLOBAL THEATER

A number of free speech, association, and press issues will arise as foreign and domestic speakers transmit harmful expression in the emerging global theater. This Part considers the application of First Amendment doctrines and principles relating to harmful

39. *See* Ravi Somaiya, *Hundreds of WikiLeaks Mirror Sites Appear*, N.Y. TIMES, Dec. 6, 2010, at A12.

40. *See* Haig v. Agee, 453 U.S. 280, 308 (1981) (upholding the revocation of a citizen's passport based in part on the nature of his overseas expression).

41. *See* Mazzetti, Schmitt & Worth, *supra* note 10 (describing background relating to President Obama's decision to order a targeted killing).

expression in the global theater. Specifically, I will address the following threats to global public order: offensive and incendiary domestic expression; "enemy-aiding" expression; and the global distribution of confidential government information. In most instances, courts can readily adapt existing First Amendment doctrines and principles to new circumstances in order to address some of these issues. In other contexts, however, the fit may not be as seamless. In those instances, courts and other officials will have to consider how to shape and interpret our First Amendment in the global theater. Part III moves from these doctrinal concerns to some broader themes or lessons regarding the development of the global theater.

A. Breaches of Global Peace and Order

In the emerging global theater, there is an increased likelihood that domestic speech, some of which was originally intended solely for domestic audiences, will produce extraterritorial psychological and physical harm. As explained in Part I, local disputes may well be flashpoints for global riots and other conflicts. Courts and commentators have not yet considered how the First Amendment will apply to breaches of global, as opposed to purely local, peace and order. This Section addresses First Amendment doctrines as they relate to transborder offense, hostile foreign audiences, and transborder incitement.

1. Transborder Offense and Hostile Audience Reaction

Under settled First Amendment doctrine, mere offensiveness is not a proper ground for regulating or suppressing a speaker's message.[42] As mentioned earlier, the stakes associated with transborder offense could be substantially higher than those associated with offensive speech confined to localities or domestic territorial boundaries. Foreign audience reactions to offensive domestic expression could include deadly riots and may otherwise implicate foreign affairs and national security concerns. The central question is as follows: Should these circumstances produce some fundamental change regarding the First Amendment's treatment of offensive domestic expression? For a number of reasons, that question ought to be answered in the negative.

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42. *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) (invalidating a breach-of-peace conviction based on the wearing of an offensive jacket in a courthouse corridor).

Consider, for example, the Koran burning that occurred in Gainesville, Florida. In the United States, a speaker can generally convey a message by burning items, such as the national flag, a draft card, or a cross.[43] The government may regulate or prohibit these and other forms of expressive or symbolic conduct in only two relatively narrow circumstances: If the burning of the object conveys an unprotected message of some sort, such as a true threat, then it may be subject to sanction.[44] It would also be appropriate and constitutional for local authorities to require a permit or otherwise insist that the Koran burning comply with content-neutral public order and safety laws.[45] However, governments may not prohibit expressive activity just because the message's content is offensive or otherwise disapproved of.[46] The mere fact that the burning of an item expresses disdain for the United States, disagreement with national policies or leaders, or even the toxic notion of white supremacy is not, without more, a valid ground for prohibiting the expressive act.[47]

These fundamental principles would apply to the burning of sacred religious texts (e.g., the Bible, the Koran, or the Torah).[48] Thus, the government cannot impose a sanction merely because the message was intended to, or would in fact, offend a substantial number of people in the local community, the state, or the nation. Nor would the mere possibility that a local audience might react violently to this form of expression, or suffer psychological discomfort as a result of it, provide any valid ground for suppressing the symbolic act.[49]

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43. *See* Virginia v. Black, 538 U.S. 343 (2003) (cross burning); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (cross burning); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning); United States v. O'Brien, 391 U.S. 367 (1968) (burning of draft card).

44. *See Black*, 538 U.S. at 359–60 (noting that some cross burnings may be punished as true threats).

45. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

46. *See R.A.V.*, 505 U.S. at 385 ("[N]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses . . . .").

47. This conclusion is obviously based upon current First Amendment doctrine. Some commentators might argue that such hateful speech, whether directed at domestic or foreign audiences, ought to be proscribed. *Cf.* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, And Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

48. Although this is long-settled doctrine, some U.S. commentators nevertheless suggested that Pastor Jones might be arrested for his symbolic act. *See, e.g.*, Patrick J. Buchanan, *The Bonfire of the Qurans*, VDARE.COM (Sept. 9, 2010), http://vdare.com/buchanan/100909_qurans.htm (suggesting that President Obama send marshals to arrest Pastor Jones); M.J. Rosenberg, *Can Feds Just Arrest the Quran Burner?*, THE HUFFINGTON POST (Sept. 9, 2010), http://www.huffingtonpost.com/mj-rosenberg/can-feds-just-arrest-the_b_710894.html (asking whether federal authorities could arrest Pastor Jones).

49. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) ("undifferentiated fear or apprehension of disturbance" is not sufficient to overcome the right of

As the Koran burning demonstrates, in the global theater, speakers will frequently convey offensive and incendiary expression across vast distances and to foreign audiences. Some expression that originates in the United States will inevitably deeply offend or even psychologically harm many members of those audiences. Some foreign listeners or viewers will react violently to domestic expression, as many Afghans did when they learned of the planned and later executed Koran burning.[50]

However, the mere fact that some portion of a worldwide audience might experience some offense or psychological discomfort as a result of, or even engage in rioting in response to, an act of domestic expression is not a valid basis for restricting or proscribing the message.[51] The principles of the speech marketplace should apply wherever the speech is distributed. Thus, foreign audiences, like domestic ones, should be encouraged to engage in counterspeech (subject, of course, to their own sovereign's public-order laws and doctrines). Simply put, the negative reaction of an audience—regardless of its location—ought not to be considered a valid basis for restricting domestic expression.

Sometimes, offensive expression that originates in the United States but is conveyed by speakers in the global theater will implicate delicate foreign affairs and national security concerns. However, for a number of reasons, we ought to apply traditional First Amendment principles even when vituperative, bigoted, or otherwise offensive domestic expression may complicate or affect U.S. interests abroad.[52] First, any interference with the federal government's foreign affairs and military functions from this offensive expression is likely to be marginal or minimal, thus falling short of the compelling interest necessary to uphold a content-based restriction on domestic expression.[53] Second, insofar as any putative foreign affairs justification for regulation is based upon offense taken by foreign leaders, allies, or diplomats, U.S. courts cannot deem this justification compelling for the previously stated reason—namely, the justification would still rest squarely upon the negative reaction of some audience.

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free speech); *see also* Cohen v. California, 403 U.S. 15, 23 (1971) (noting the lack of evidence that a courthouse audience was ready to strike Cohen for the offensive words on his jacket).

50. *See supra* notes 5–6.

51. This assumes, of course, that the speaker did not actually intend to incite an imminent riot or other violence abroad—a scenario discussed below. *See infra* notes 56–62 and accompanying text.

52. With regard, in particular, to the enemy-aiding aspects of domestic speech, see *infra* notes 91–95 and accompanying text.

53. *Cf.* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724–25 (2010) (applying demanding scrutiny to content-based restriction expression).

Third, to the extent that domestic expression actually produces international offense or strife, U.S. officials, including the President, are constitutionally and otherwise empowered to clarify the position of the United States and to engage in diplomatic efforts to repair any damage to the nation's reputation. That would be a far less speech-restrictive alternative than punishing the offensive domestic speaker.

In some circumstances, transborder offense may result in hostile foreign audience members threatening domestic speakers with physical harm and violence. In the domestic-speech marketplace, hostile audiences and hecklers sometimes attempt to interfere with lawful First Amendment activities. The Supreme Court has indicated that, in certain circumstances, it may be appropriate for authorities to restrict speech in order to prevent a potentially violent audience from causing imminent harm to the speaker.[54] However, the Court also indicated in several subsequent cases that authorities cannot use the mere existence of a hostile audience as justification for silencing a speaker otherwise engaged in lawful expression.[55] Although the Supreme Court has not said so explicitly, this later precedent could impose some affirmative duty on officials to protect the speaker, at least insofar as circumstances reasonably permit.[56]

Like the incitement cases mentioned above, the so-called hostile-audience cases involved domestic speech conveyed to proximate, local audiences. The immediate concern was that someone or some group of persons in the audience might react violently to the speaker's message. To what extent do these audience-reaction principles apply in the emerging global theater, where expression frequently traverses borders and audiences may be located thousands of miles away?

The fact that the early hostile-audience cases involved physically proximate contention in public places is merely a reflection

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54. Feiner v. New York, 340 U.S. 315, 321 (1951).

55. *See* Bachellar v. Maryland, 397 U.S. 564 (1970) (reversing convictions for disorderly conduct when it was impossible to determine if the grounds for the convictions were actual disorderly conduct or the defendants' advocacy of unpopular ideas); Gregory v. City of Chicago, 394 U.S. 111 (1969) (holding that defendants marching peacefully to protest segregation could not be convicted of disorderly conduct even when individuals watching the march became unruly); Brown v. Louisiana, 383 U.S. 131 (1966) (reversing the convictions of a group of African Americans who refused to leave a public reading room); Cox v. Louisiana, 379 U.S. 536 (1965) (reversing the conviction of a speaker who spoke to a group of students peacefully marching to protest segregation); Edwards v. South Carolina, 372 U.S. 229 (1963) (holding that a group of peacefully marching African Americans could not be convicted of breach of the peace).

56. *See Feiner*, 340 U.S. at 326 (Holmes, J., dissenting) (rejecting "the implication of the Court's opinion that the police had no obligation to protect petitioner's constitutional right to talk" and arguing that "if, in the name of preserving order, [the police] ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him").

of social and historical circumstances. Street-corner speeches and demonstrations were common forms of public expression and dissent in the 1950s and 1960s. As noted, today's speech marketplace includes rapid transborder exchanges and new forms of digital contention. Owing to interconnectivity and compression of space and time, hostile audiences and hecklers are now only a click away. Enemies can now digitally transmit threats across territorial borders in an instant, and there is at least the possibility that accomplices within the United States can carry out such threats. The possibility of some violent reaction to domestic expression from audiences abroad has become a disturbing reality. As noted in the Introduction, federal officials urged an American cartoonist to go into hiding after she received death threats from persons located abroad in response to her Internet posting calling on others to draw the Prophet Muhammad.

As discussed earlier, the mere fact that domestic expression may offend some portion of an international audience is not a valid ground for governmental suppression or restriction of speech. The same principle ought to apply to speech that provokes an interconnected audience to react hostilely toward the speaker.[57] Even if the violent reaction were considered to be an imminent threat to the speaker or to public order more generally, authorities should not order a domestic speaker to desist in the face of foreign threats. In essence, the rules of the global soapbox should be the same for cybercorner speakers as they are for street-corner speakers.

The critical question is how to preserve domestic-speech rights in the face of such distant threats. In the traditional hostile audience situation, speakers are offered at least some assurance that authorities will engage in reasonable efforts to protect them from hostile reactions. In the global theater, those assurances will be much weaker or nonexistent. Authorities will be hampered by geography, distance, resource limitations, and jurisdictional complexities. Obviously, officials cannot police the global theater or protect every domestic speaker from global hostility.

However, in at least some cases, officials will be aware of foreign threats of violence. If authorities are to fully protect domestic speakers in their exercise of speech rights in the global theater, they

57. *See* Cohen v. California, 403 U.S. 15, 20 (1971) ("Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction."); *Feiner*, 340 U.S. at 321 ("It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.").

will have to provide additional security and protection in such cases. The Seattle cartoonist ought not to be forced to remain in hiding under an assumed identity, without any official protection or support, as a result of her exercise of free speech rights. Providing such protection could entail the expenditure of significant governmental resources. Just as such expenses must be paid to ensure robust debate in public places like streets and parks, governments may find that it is necessary to provide some measure of financial and other support to facilitate expression in the global theater. To be clear, my claim is not that authorities have an affirmative constitutional obligation to subsidize offensive speech in the global theater. However, insofar as cybercorner speakers face hostile foreign audiences, they are entitled to the same level or degree of protection as the street-corner antagonist.

Ultimately, however, a substantial portion of the burdens associated with hostile global audiences will fall upon domestic speakers themselves. In traditional speech contexts, a speaker can carefully choose her platform and audience. In real space and time, the speaker is usually able to see and even hear potential hecklers. She is able to gauge audience characteristics and immediate audience reaction. Hence the speaker can decide to either alter or suppress a message in response to circumstances on the ground. In the global theater, speakers will often post messages on the Internet without carefully considering the potential audience or knowing much about audiences' expressive cultures. Contextual cues will be missing. Messages will frequently be conveyed to a global audience of diverse characteristics and viewpoints, with no way for speakers to gauge in the moment how global audiences are receiving their messages.

Speakers who address particularly controversial matters in the global theater will thus face some difficult challenges regarding self-censorship. As the Seattle cartoonist discovered, violent hecklers can be lurking anywhere in the global theater. If the global theater is to be a robust speech marketplace, much will depend on speakers' willingness to face the consequences of an uncertain degree of global hostility. Speakers will have to balance their desire to address controversial matters of global concern with their own psychological comfort and physical safety. Participation in the global theater will require degrees of speaker foresight and fortitude beyond that necessary for participation in more traditional local or domestic theaters.

The current degree of protection afforded to offensive expression under the First Amendment establishes free speech norms and principles for the United States and its communities. However, in

the global theater, we must account for the now-obvious fact that offensive expression will frequently reach global audiences. We should not diminish the protection afforded to offensive domestic expression as a result of foreign-audience reaction or foreign-speech norms. This does not mean that the potential reaction of foreign audiences is wholly irrelevant or of no concern whatsoever to domestic speakers or U.S. officials. In the global theater, speakers must recognize that their utterances are not likely to be confined to familiar territory in which messages and speech norms are well understood. Authorities ought to be aware both that domestic expression can impact national interests abroad and that violent or threatening responses to domestic expression may emanate from distant sources. Most importantly, courts and officials ought not to abandon traditional marketplace principles in the global theater. Rather, as discussed in Part III, we ought to view events like the Koran burning and the hostile reaction to the Seattle cartoonist as opportunities for a more open global dialogue regarding free speech, tolerance, and comparative constitutional values.[58]

2. Transborder Incitement

The preceding discussion focused on the implications of negative and harmful foreign reactions to transborder expression. Suppose, however, that the speaker intends or causes a reaction more serious than distant offense. Suppose instead that she specifically intends through expression to incite violence or unlawful activity beyond U.S. borders. Whether a speaker can be punished for transborder incitement is an unresolved First Amendment question, but one that we will inevitably have to answer in the global theater.

Regulation of the category of speech known as "incitement" has long mediated a basic tension between allowing speakers to express unpopular viewpoints and the power of the state to protect citizens—and even the state itself—from violence and unlawful conduct.[59] Under the contemporary incitement standard, speech advocating violence or other criminal action cannot be suppressed unless it is "directed to inciting or producing imminent lawless action and is likely

58. *See* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (observing that "a function of free speech under our system of government is to invite dispute" and that speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

59. *See* Lillian BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 331–42 (1978) (discussing the evolution of the incitement standard).

to incite or produce such action."[60] To borrow Justice Holmes' famous example, a speaker who falsely shouts fire in a public theater, causing a riot or other disturbance, is not entitled to First Amendment protection.[61]

As Holmes recognized early on, incitement is generally a question of "proximity and degree."[62] Proximity, in particular, has been a key consideration in the development of incitement doctrine. As a speaker comes ever closer to steeling an audience to actual violence, the state's interest in regulation becomes correspondingly stronger. As the Supreme Court observed in *Dennis v. United States*, the state is not required to wait for the "putsch" to actually occur.[63] Rather, it may take action to secure its assets, interests, and institutions prior to the first shot being fired or the first act in furtherance of a conspiracy taking place. Nevertheless, the modern requirements of imminence and likelihood of harm impose serious constraints on the use of preemptive governmental power in response to expression that may produce public disorder, violence, and other unlawful activity.[64]

From the early twentieth century to the present, the violence and unlawful activity of greatest concern in the Supreme Court's principal incitement cases were generally close at hand. Speakers and audiences were typically in close proximity to one another. The assets, interests, and institutions potentially affected by domestic expression, such as antiwar and communist propaganda, were typically located inside the United States.[65] Under twentieth century sedition, antiradicalism, and other public-order and security laws, federal and state officials generally sought to control the effects of speech intended to arouse a local and physically proximate audience to unlawful conduct or violence.

This is not to suggest that foreign elements or effects were wholly irrelevant in early incitement cases. In particular, foreign ideological influences, including socialism and communism, were

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

61. Schenck v. United States, 249 U.S. 47, 52 (1919).

62. *Id.*

63. 341 U.S. 494, 509 (1951).

64. *See, e.g.*, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975) (calling the *Brandenburg* formulation "the most speech-protective standard yet evolved by the Supreme Court").

65. *See, e.g.*, Whitney v. California, 274 U.S. 357 (1927) (associating with others to teach and advocate violent overthrow of government); Gitlow v. New York, 268 U.S. 652 (1925) (advocating socialist uprising and overthrow of domestic government); Debs v. United States, 249 U.S. 211 (1919) (giving a public speech with the intent to obstruct the military draft); *Schenck*, 249 U.S. at 49–51 (distributing pamphlets with the intent to interfere with military recruitment and enlistment).

central concerns in some cases.[66] Moreover, the potential for disruption of military operations and threats to execution of U.S. policies and missions abroad were clearly part of the concern in some early incitement cases.[67] However, the overriding concern in the early cases was not with remote deserters, foreign communists, or radical terrorist cells operating in foreign nations. The principal—and, in light of the speech at issue, most likely "imminent"—threats were related to the orderly conduct of the domestic draft, continued production of domestic munitions, and the survival of state and local governments.

Suppose, however, that imminent harm is not likely to occur nearby, in a particular locality, state, or even within the U.S. Rather, suppose it is likely to occur, if at all, only in some distant location thousands of miles from U.S. territorial borders. Does the incitement doctrine apply to expression that is intended to and likely will produce such nonproximate, but still potentially imminent, harmful effects? Could the government prosecute a domestic speaker for inciting violence or unlawful acts halfway around the world?

These questions made little sense in a world in which communication traveled very slowly, if at all, across territorial borders. However, owing to the characteristics of interconnectivity and compression of space and time, whether a speaker might be prosecuted and punished for transborder incitement is a close question.

Although the dynamics of incitement have typically required physical proximity between the speaker and the target audience, digitization renders this factor far less critical.[68] Digitized expression can cover substantial distances in near-real time.[69] Thus, it can often reach audiences located thousands of miles away in little more than an instant. Moreover, digitized expression can include not only text but also images and videos. Digitization and interconnectivity can produce exchanges that are quite similar to face-to-face encounters.

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66. *See, e.g.*, *Whitney*, 274 U.S. at 363–64 (noting influence of Moscow Third International in defendants' teachings).

67. *See, e.g.*, *Schenck*, 249 U.S. at 49–51 (upholding against a First Amendment challenge the conviction of a defendant under the Espionage Act for circulating pamphlets advocating the disruption of the military draft).

68. *See* Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 34–36 (2007) (discussing the effects that technologies, in particular computer networks, may have on the definition and regulation of incitement).

69. This could impact the incitement analysis in cases where the audience is domestic but is located some distance from the speaker. I focus here on the scenario involving audiences located abroad.

This increases the likelihood that audience passions will be inflamed, missions will be efficiently and effectively coordinated, and orders will be rapidly executed. Moreover, compression complicates the drawing of clear lines between purely domestic or proximate threats and foreign or distant threats to public order. Determining whether a particular danger or harmful effect is imminent, proximate, or remote in space or time (or both) may be difficult in the global theater. Seemingly distant threats may be clearer, more vividly and realistically present, despite their nonproximate physical origins, and closer both in terms of space and time than they might otherwise appear.

Owing to these considerations, it is at least plausible to include expression disseminated across interconnected global networks in the incitement category. Assuming both that a speaker intends by express advocacy to incite a foreign audience to unlawful action and the government can indeed show that such action is both imminent and likely to occur, authorities could restrict, prevent, or punish transborder communications in an effort to prevent foreign riots, disturbances, damages, or unlawful acts that are likely to harm U.S. assets, personnel, or interests abroad.[70] To be clear, I am not claiming that the United States could generally proscribe mere advocacy of unlawful action on the Internet. Indeed, I assume that under current First Amendment standards it cannot. Nor am I otherwise questioning the current incitement standard, which does not permit the outright suppression of extremist rhetoric or the mere teaching of violence.[71] The narrower question is whether something we might call transborder incitement could be punished within the existing First Amendment framework. For the reasons stated, the answer is yes.

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70. The fact that the U.S. assets or interests that are potentially imperiled by domestic expression are located abroad ought not to make any difference. The United States can seek to protect its foreign military and other interests from domestic interferences, whether these take the form of tangible aid to enemies, unlawful possession of state secrets, or incitements to unlawful action or violence. If the United States can prosecute foreign speakers based upon the negative effects of their speech inside its territorial borders, surely it may prosecute a domestic speaker who threatens imminent harm to its extraterritorial assets and interests. For discussions of U.S. law and policy regarding extraterritorial application of U.S. laws, particularly on the basis of domestic effects, see Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 125–30 (2010); Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1478–82 (2008); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2525 (2005). Of course, the United States would not have an exclusive global police power under this theory. Foreign riots and other disturbances would remain the concern of the states in which such acts physically occurred. Rather, American power would extend only to restrictions on incitement, whether it originates within the United States or abroad, which threatens U.S. assets and interests located in foreign countries.

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

To be sure, prosecutions for transborder incitement are likely to be exceedingly rare. Among other things, they would require precision surveillance and impeccable timing by authorities. In order to demonstrate imminent harm in a case in which unlawful conduct has not yet occurred, the domestic speaker who intends to incite violence in Afghanistan or Yemen may have to be apprehended at the moment or just before he clicks "send."[72] A perhaps more serious challenge would be for the government to prove that a foreign audience actually stood ready to participate in imminent violence or unlawful activity once the message was communicated. Interconnectivity certainly makes it easier to communicate inciting messages across international borders. The compression of space and time caused by digitized communication will speed the transmission of such messages. However, the requirements of imminence and likelihood of harm will pose serious practical and constitutional obstacles to prosecuting digitally facilitated transborder incitement.

All of this assumes, of course, that the global theater will not fundamentally alter the First Amendment incitement standard and its traditional application. As scholars have noted, some with evident disappointment, the current incitement standard essentially precludes U.S. officials from restricting most of the extremist speech conveyed over the Internet.[73] One question is whether, owing in substantial part to the unique characteristics of the global theater and in particular the emergence of the global threat of terrorism, courts and officials will create a more flexible and less speech-protective incitement standard that allows governments to restrict some extremist rhetoric and advocacy. If a domestic or foreign speaker can incite or facilitate violence against U.S. troops serving in foreign theaters from a desktop in Des Moines, perhaps it is time that we reconsider the imminence and likelihood elements of the current incitement standard.[74]

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72. Of course, this timing element could also affect a case involving a speaker in Brooklyn, New York, who intends to incite violence across the bridge in Manhattan.

73. *See, e.g.*, Tiffany Kamasara, *Planting the Seeds of Hatred: Why Imminence Should No Longer Be Required to Impose Liability on Internet Communications*, 29 CAP. U. L. REV. 835, 837 (2002).

74. *See, e.g.*, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 120–25 (2006) (suggesting that imminence and other requirements under *Brandenburg* may lack the necessary flexibility to address the threat of extremist expression); Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233 (2005) (questioning whether the *Brandenburg* test will ultimately survive new threats to security); Robert S. Tanenbaum, Comment, *Preaching Terror: Free Speech or Wartime Incitement?*, 55 AM. U. L. REV. 785, 790 (2006) (arguing that the incitement standard "should be recast in the context of the War on Terror").

Here, then, is another context in which we will have to decide whether to dilute traditional speech-protective standards in response to the complexities of the global theater. One obvious difficulty is that recalibrating the incitement standard as a counterterrorism measure may ultimately affect a wide swath of currently protected domestic advocacy and rhetoric. That may be a price some are willing to pay in order to suppress potentially dangerous, hateful, and extremist expression. However, we ought to remember that the incitement standard was calibrated to protect criticism of government and advocacy of unpopular viewpoints, particularly during times of global turmoil and unrest.[75] Further, as it was with communism and syndicalism, the root cause of terrorism is ideological. The early incitement cases, as well as subsequent events, demonstrate that suppressing certain "fighting faiths" is fundamentally inconsistent with our First Amendment values and principles.[76]

Interconnectivity and compression will create new regulatory complexities and new risks of transborder violence and unlawful activity. However, these characteristics also create a more globally oriented marketplace of ideas. Altering the incitement standard by eliminating or diluting the imminence standard—a method suggested by many academics—may have substantial speech-restrictive effects in this emerging forum. In any event, even if American incitement standards were changed to outlaw terrorist advocacy, this would not solve the problem of terrorist incitement in the global theater.[77] The Internet is a transnational medium of expression, which means that nothing short of an international treaty or other agreement would be wholly effective in terms of regulating extremist rhetoric.[78] Rather than dilute the incitement standard, the government ought to rely on existing prohibitions on harmful conduct (i.e., federal espionage and other national security laws) and effective law-enforcement strategies that take into account the unique complexities of the global theater.

There is an additional complexity with regard to incitement in the global theater. The foregoing discussion assumes that some legal

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75. Steven G. Gey, *The* Brandenburg *Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971 (2010).

76. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

77. Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5 (2002).

78. *See id.* at 38 ("An extradition treaty offers the best hope for bringing to justice the disseminators of Internet hate speech.").

process will apply to the inciting citizen-speaker, and that his expression will enjoy at least some First Amendment protection. In the global theater, however, these are not certainties. In that theater, a citizen can incite domestic and foreign violence from across the globe. The domestic speaker, located on U.S. soil, will presumptively enjoy basic due process and First Amendment speech protections. But will the foreign citizen-inciter be entitled to similar protections?[79]

Consider the case of Anwar Al-Aulaqi, who had dual Yemeni and U.S. citizenship. The U.S. government accused Al-Aulaqi, who resided in Yemen, of inciting violence against its domestic and foreign interests, in part by posting videos and other materials on the Internet.[80] Although the government claimed that he provided more tangible forms of material aid to terrorists in the United States and abroad, those claims were never established in any judicial process.[81] Nevertheless, the Obama Administration targeted Al-Aulaqi for execution and subsequently killed him in a drone attack in Yemen.[82] Prior to the drone strike, Al-Aulaqi's father brought a lawsuit as next friend, asking the court to rule that, outside the context of armed conflict, the government can carry out the targeted killing of an American citizen only as a last resort to address an imminent threat to life or physical safety.[83] The lawsuit also asked the court to order the government to disclose the legal standard it uses to place U.S. citizens on government kill lists.[84] A district court dismissed the action on justiciability grounds, ruling that the plaintiff's father lacked standing to challenge the targeted-killing order on his behalf.[85]

While Al-Aulaqi's case raises some obvious Fifth Amendment due process concerns, it also raises less commented-upon First Amendment free speech concerns. It is not clear to what extent the order targeted a citizen for extrajudicial killing based upon allegedly inciting communications. Indeed, under the federal government's

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79. The Supreme Court has assumed, but never explicitly held, that U.S. citizens are entitled to some First Amendment free speech protection while abroad. *E.g.*, Haig v. Agee, 453 U.S. 280, 308 (1981) (finding that, even assuming, arguendo, that First Amendment protections reach beyond the boundaries of the United States, Agee's First Amendment claim has no foundation).

80. Eric Lipton, *U.S.-Born Cleric Justifies the Killing of Civilians*, N.Y. TIMES, May 24, 2010, at A10.

81. Charlie Savage, *Lawyers Seeking to Take Up Terror Suspect's Legal Case Sue U.S. for Access*, N.Y. TIMES, Aug. 4, 2010, at A4.

82. Scott Shane, *A Legal Debate as C.I.A. Stalks a U.S. Jihadist*, N.Y. TIMES, May 14, 2010, at A1. With regard to the drone attack, see Mazzetti, Schmitt & Worth, *supra* note 10.

83. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 12 (D.D.C. 2010).

84. *Id.*

85. *Id.* at 35.

approach, it is not clear that a speaker must be engaged in violent or terrorist-supporting *conduct* in order to be the subject of an extraterritorial execution order. In light of the Supreme Court's decision in *Humanitarian Law Project*, discussed below, the government might claim that speech alone, if coordinated in some fashion with terrorists, constitutes adequate grounds for targeted execution.[86]

Obviously, without some form of judicial review, we cannot know whether the speech in question meets the incitement, material support, or any other legal standard. Although the Obama Administration claims that the order was based, at least in part, on tangible support that Al-Aulaqi provided to terrorists, neither that claim nor any other will ever be subject to any standard of proof in a judicial proceeding. It thus remains possible that the U.S. government may issue an order directing the killing of a U.S. citizen living abroad for inciting violence through rhetoric posted on the Internet or through emails sent to domestic audiences advocating violence against the United States. However, such an order would be inconsistent with the First Amendment's broad protection for mere advocacy of unlawful action. In the global theater, we must ensure that extrajudicial punishments are consistent with free speech protections. Those citizens who take up arms and otherwise fight on behalf of U.S. enemies are subject to detention and perhaps other punishments. However, the First Amendment protects those who utter incendiary remarks on the Internet or engage in the mere advocacy of violent action.

Interconnectivity and compression will facilitate the transmission of transborder, incendiary rhetoric and incitement in the global theater. In rare cases, the government may prosecute domestic speakers for incitement under traditional First Amendment standards. As the global theater develops, there will likely be continued calls for dilution of First Amendment standards relating to incitement. Government officials may also resort to extrajudicial measures to combat the threat from transborder incitement. The challenge will be to fashion an approach that protects the nation's domestic and foreign interests from harm, while simultaneously preserving the civil liberties of U.S. citizens—regardless of where they happen to be located. As the Al-Aulaqi case shows, the United States is still seeking that balance.

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86. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723 (2010) (noting that the material support law covers only speech communicated "to, under the direction of, or in coordination with" foreign terrorist organizations)*; see also* discussion *infra* Part II.B.3.

B. Enemy-Aiding Expression

In the global theater, a potentially expansive category of transborder, enemy-aiding expression may assist, support, or lend legitimacy to terrorists and other enemies of the nation. This expression will pose unique challenges to national security and foreign diplomacy. This Section applies First Amendment doctrines and principles to three types of enemy-aiding expression, as defined below—digitally distributed domestic dissent, expressive activity involving designated foreign terrorist organizations, and cybertreason.[87]

1. A Basic Definition

A basic definition of enemy-aiding expression will facilitate the analysis. We might broadly define enemy-aiding expression as follows: any expression or association that aids or furthers the causes of enemies of the state.[88] This support or facilitation can be demonstrated by (1) lending legitimacy to enemy causes or organizations; (2) materially assisting enemies of the state in carrying out their objectives; or (3) providing enemies of the state with treasonous "Aid and Comfort."[89]

I am not contending that, either together or separately, these elements define a currently proscribed or unprotected category of expression.[90] Indeed, I argue below that criminalizing speech on many of these grounds, including that it merely legitimizes enemies of the state, is fundamentally inconsistent with the First Amendment.[91] However, as a descriptive matter, these are the basic elements of a general category of expression that has already begun to pose unique

87. *See* discussion of cybertreason *infra* Part II.B.4.

88. "Enemies of the state" include persons formally designated as enemy combatants and persons or groups designated as terrorist threats by U.S. officials, as well as persons or groups not formally aligned with designated enemies who are nevertheless committed to taking or encouraging hostile action against the United States.

89. *Cf.* U.S. CONST. art. III, § 3, cl. 1 (setting forth the elements of the crime of treason).

90. Thus, the listed elements do not comprise an unprotected category of expression like incitement or obscenity. Rather, the task is to define and describe the sort of expression that may be subject to regulation or prosecution owing to the aid or assistance it provides to enemies of the state. Whether expression that falls within this category is protected or unprotected depends on the context. Thus, speech that provides "material support" to terrorists is within the ambit of the First Amendment, while treasonous expression would be unprotected.

91. *See* discussion *infra* Part II.B.3. Moreover, as explained below, the definition is obviously overbroad in the sense that it would cover clearly protected expression such as domestic political dissent.

challenges to traditional First Amendment doctrines and principles in the global theater.

Note that the definition of enemy-aiding expression excludes pure conduct, including the provision of weapons, funds, or other materials to national enemies. Application of national security and other laws to these forms of conduct does not give rise to serious First Amendment concerns. As discussed earlier, some inciting expression could be enemy aiding under the above definition. However, as courts already treat incitement as a distinct unprotected category of expression, it will not be specifically addressed in this section.[92] Finally, while the definition of enemy-aiding expression might have included the publication of confidential or secret government information, such publication raises distinct First Amendment free speech and press concerns and is therefore discussed separately below.[93]

2. Domestic Rhetoric, Symbolism, and Dissent

Particularly during wartime or other national emergencies, a range of domestic dissent, incendiary rhetoric, symbolic acts, and direct praise for the nation's enemies and their causes could assist U.S. enemies at home and abroad. A substantial amount of domestic dissent and political advocacy might assist, embolden, or legitimize the nation's enemies. This will become a more acute concern in the global theater. As explained in Part I, as a result of interconnectivity and compression, purely domestic dissent and contention will often quickly become matters of global concern and notoriety. These characteristics will increase the global salience of otherwise local statements and communications.

In the global theater, almost any statement critical of the government, the nation, or its ideals can be broadcast rapidly and widely in a manner that could effectively aid, embolden, or legitimize national enemies. Thus, for example, bigoted statements by people vocally opposed to building an Islamic center in Manhattan might well anger and embolden foreign terrorists and foreign leaders. Sharp criticisms of President Obama, particularly during wartime, might be of immediate use to U.S. enemies both at home and on foreign battlefields. The same might be true of domestic war protests, flag burnings, speeches favoring the election of antiwar candidates, statements of religious bigotry that cast Muslims and other religious

92. *See* discussion of incitement in the emerging global theater *supra* Part II.A.2.

93. *See* discussion *infra* Part II.C.

adherents as evildoers or murderers, and even editorials that defend the basic rights of enemy combatants or foreign terrorist groups. Even the previously described Koran-burning event has been characterized as enemy-aiding expression. According to President Obama and other high-level cabinet and military officials, the Florida pastor's plan to burn a copy of the Koran not only threatened the safety of U.S. troops abroad, but it was also likely to serve as a "recruitment bonanza" for al-Qaeda and other enemies.[94]

As discussed below, the government might argue that some of this speech is punishable because it is coordinated in some fashion with designated enemies of the state.[95] Putting that situation aside for the moment, however, the government lacks the authority to suppress independent, domestic political expression solely because its content might somehow aid the enemy.[96] This ought to be the case whether or not the domestic speaker intends by his rhetoric or symbolic act to undermine American foreign or domestic interests.[97] As Eugene Volokh has observed, under traditional First Amendment doctrines and principles "much speech that does help the enemy must remain constitutionally protected."[98]

In the global theater, including during wartime, it is imperative that Americans retain the right to evaluate their government and to engage in political debate. This is true even if the transborder expression might appreciably weaken U.S. citizens' resolve or assist enemies by emboldening or legitimizing them to some extent. A contrary rule would imperil a vast amount of public political debate in the United States. Punishing or restricting domestic rhetoric and dissent on the ground that it might aid the nation's foreign enemies would curb citizen self-government by limiting participation in debates of global concern.

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94. Cave & Barnard, *supra* note 4.

95. *See infra* notes 96–99 and accompanying text.

96. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 904 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (stating that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (quoting Roth v. United States, 354 U.S. 476, 484 (1957))); *see also* Volokh, *supra* note 14, at 1342 (arguing that domestic antiwar speech should "probably" be protected, since it may "contribute valuable arguments to an important public debate").

97. *See* Volokh, *supra* note 14, at 1342 (noting the dangers of reliance upon an intent standard in this and other contexts).

98. *Id.* at 1341.

3. Providing "Material Support" to Foreign Terrorists

As noted in Part I, in the global theater U.S. citizens will increasingly interact with aliens beyond our borders in a variety of political, humanitarian, cultural, and other endeavors. Some of these transborder relationships will involve persons or groups that the federal government has officially designated as terrorists. In various online forums, speakers will also have opportunities to disseminate favorable messages and information regarding both designated and unofficial national enemies. Insofar as these and similar forms of speech and association might aid, embolden, or legitimize these enemies, will they be protected under the First Amendment?

In *Holder v. Humanitarian Law Project*, the Supreme Court held that federal laws barring the provision of "material support" to groups the State Department has labeled "foreign terrorist organizations" do not violate the First Amendment's freedom of speech and freedom of association guarantees, either facially or as applied to citizens' lawful speech that is "coordinated" with such groups.[99] The expression at issue in *Humanitarian Law Project* consisted of advising and training foreign groups such as the Kurdistan Workers' Party and the Liberation Tigers of Tamil Eelam on peaceful and lawful means of resolving their political grievances.[100] Among other things, U.S. citizens wished to work with these groups to teach them how to file petitions with the United Nations.[101] According to the Court, so long as this sort of expression is "coordinated" with the disfavored groups, the government may constitutionally proscribe it under the material support provisions—even if the speakers did not specifically intend to further the organizations' illegal and violent enterprises.[102]

Depending in part upon how it is interpreted and applied, *Humanitarian Law Project* may set a very bad precedent for the treatment of transborder expression and association. The majority opinion is arguably inconsistent with several fundamental First Amendment principles.[103] At a broad level, the Court's decision is in

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99. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712–13, 2730–31 (2010).

100. *Id.* at 2713–14.

101. *Id.* at 2729–30.

102. *Id.* at 2717–18, 2726. Under the relevant provisions, it is enough that the speakers provide material support knowing that the recipient is a foreign terrorist organization. The law does not require a specific intent to aid violent or other terrorist causes. *Id.* at 2717.

103. For criticisms of the decision, see DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERROR 60–62 (2003) (comparing "material support" prohibitions in the context of "cutting off funds for terrorism" with association with the Communist Party during the Cold War era and noting that the Supreme Court "has repeatedly ruled that that the Constitution prohibits punishment for association absent proof that an

deep tension with traditional interpretations of the First Amendment, which emphasize a commitment to protecting political speech and truth seeking through deliberation while also expressly rejecting the imposition of guilt by association.[104] As Justice Breyer argued in dissent, a long line of precedent precludes governments from imposing content-based restrictions on citizens' relations with officially disfavored persons or groups or criminalizing mere association with them.[105] Indeed, transformative twentieth-century free speech battles, which often centered on ideological restrictions on radical, socialist, and communist speech and association, teach that foreign ideologies ought to be met with robust counterspeech rather than governmental suppression.[106] Yet, *Humanitarian Law Project* places no burden whatsoever on the government to demonstrate that citizens are actively and intentionally engaged in a joint venture with enemies of the state whose purpose is to inflict harm or engage in violence. Instead, the decision effectively allows Congress to criminalize peaceful, political expression and association in part on the ground

individual specifically intended to further the *unlawful* ends of the group"); Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 588–92 (2011) (arguing that credibly linking charitable contributions to terrorist violence for § 2339B prosecutions sets the stage for "an extended discussion of foreign policy in the courtroom" for which courts are ill-equipped to handle); Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1579 (2010) (arguing that material support prohibitions, as interpreted by the government, appear to prohibit U.S. residents from engaging in "pure political speech" that promotes "lawful and nonviolent activity"). For a general defense of the law's constitutionality and application, see generally Peter Margulies, *Advising Terrorism: Hybrid Scrutiny, Safe Harbors, and Freedom of Speech* (Roger Williams Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 101), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1777371 (arguing that the decision in *Humanitarian Law Project* has "roots in the Framers' concerns about foreign influence" and has "parallels with constitutional justifications for professional regulation").

104. *See* sources cited *supra* note 96. *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 908 (1982) ("The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."); Scales v. United States, 367 U.S. 203, 229 (1961) ("If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired . . . ."); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (stating that the State may not "seize[ ] upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge," in lieu of prosecuting individuals for "violations of valid laws").

105. *Humanitarian Law Project*, 130 S. Ct. at 2732–34 (Breyer, J., dissenting).

106. *See id.* at 2738 ("To apply [the majority's argument] to the teaching of a subject such as international human rights law is to adopt a rule of law that, contrary to the Constitution's text and First Amendment precedent, would automatically forbid the teaching of any subject in a case where national security interests conflict with the First Amendment.").

that it might lend some aid or legitimacy to designated foreign terrorist organizations.[107]

Although the Court sought to carve out a safe haven for speech that is not coordinated with foreign terrorist organizations, its decision rests on principles of fungibility, legitimacy, and diplomacy that might also apply to at least some "independent" political expression transmitted in the global theater. The Court reasoned that words and more tangible forms of support, including cash, are essentially "fungible" resources insofar as terrorist organizations are concerned.[108] Specifically, it equated words and weapons in two distinct respects. First, the Court claimed that speakers who provide assistance in the form of legal instruction or petition-filing activities will enable the benefited groups to channel organizational resources to more violent activities.[109] The Court reasoned that since terrorist organizations do not segregate their funds, teaching the leaders of such organizations how to navigate international law and processes is essentially the same thing as contributing to the organizations' violent-activities funds.[110] Second, the Court concluded that foreign terrorist organizations might engage in tactical and opportunistic behavior.[111] For example, such groups might participate in speech and associational activities intended to advance their lawful causes at the United Nations "as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for new attacks."[112]

Even if it's true that some designated foreign terrorist organizations engage in this sort of behavior, the broad proposition that words can be equated to weaponry remains antithetical to the First Amendment. Indeed, accepting this proposition might require that we revisit the First Amendment's broad protection for a range of potentially harmful expression and expressive associations.

In general, under the First Amendment, advocacy, training, and collaboration are properly viewed as means of persuasion, instruction, or pursuit of common causes, rather than as potentially dangerous commodities one might use to further violent ends. However, the Court's approach in *Humanitarian Law Project*

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107. *But see* Margulies, *supra* note 103, at 32–40 (arguing that the *Humanitarian Law Project* decision preserves "safe harbors" for independent advocacy, scholarship, journalism, human rights monitoring, and legal representation).

108. *Humanitarian Law Project*, 130 S. Ct. at 2725.

109. *Id.*

110. *Id.*

111. *Id.* at 2729–30.

112. *Id.* at 2729.

presumes that citizens who wish to engage in training and other associative endeavors with disfavored foreign organizations are always dupes, and that no good can come from such transborder relationships.[113] The Court's logic is also inconsistent with the principle that speech may not be restricted or suppressed solely on the ground that an audience might use it for some improper purpose—including, presumably, for obfuscation or delay.[114] Finally, although the Court concluded that the material support provisions regulated speech, by treating words as a form of material support the Court blurred the distinction between conduct and expression.[115] Under that distinction, while the government may freely regulate the tangible effects of harmful conduct, it must tread more carefully insofar as words and other expressive forms are concerned.[116]

As noted, the Court stated that the material support laws did not apply to "independent" political speech.[117] However, the majority's fungibility reasoning would appear to apply with full force to much of the ordinary domestic enemy-aiding expression discussed above. If words alone may constitute a form of material support, then it is not clear why even "independent" expression by U.S. citizens on behalf of or in support of terrorists could not be criminalized.

Indeed, as noted earlier, a substantial amount of domestic dissent and contention may be useful to national enemies. A video file of an American citizen burning the Koran could prove far more useful to al-Qaeda than a brief filed on its behalf in a U.S. court or a petition filed on its behalf at the United Nations. Moreover, a speaker or journalist who independently posts the musings of a radical al-Qaeda cleric denouncing the United States and advocating violence against its people would arguably allow the organization to channel its resources to more violent purposes. It might also facilitate the group's ability to attract "funds," "financing," and "goods" from other sources.[118] Under the Court's fungibility principle, the government

113. *See* Margulies, *supra* note 103, at 4 (observing that some foreign terrorist organizations "use truces as tactical devices" and capitalize on "information asymmetries").

114. *See, e.g.*, Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 97 (1977) (invalidating a municipal ban on posting of "for sale" or "sold" signs on homeowners' properties, which was designed to prevent "the flight of white homeowners from a racially integrated community").

115. *See Humanitarian Law Project*, 130 S. Ct. at 2724 (differentiating speech that conveys a "specific skill" from speech that imparts "general or unspecialized knowledge").

116. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (providing limited circumstances in which government can regulate free expression).

117. *Humanitarian Law Project*, 130 S. Ct. at 2726, 2730.

118. *Id.* at 2726 n.6 (quoting McKune Affidavit).

could criminalize much of the domestic dissent and political contention discussed in the previous section.

The Court sought to deflect such concerns by noting that the material support provisions only apply to speech and association that are "coordinated" with designated foreign terrorist organizations.[119] By contrast, independent expression, such as that described above, would presumably enjoy a safe harbor. However, the Court did not clarify why "coordination" was constitutionally dispositive and, more importantly, failed to actually define the distinction between "coordinated" and "independent" expression.[120] If, as the Court expressly stated, it is legal for citizens to join foreign terrorist organizations as members, then what level of "coordination" would run afoul of the material support provisions?[121] What sort of relationship between a speaker and a designated foreign terrorist organization would subject the speaker to liability for peaceful expression and association?[122]

The *Humanitarian Law Project* Court also concluded that peaceful and lawful political expression, when coordinated with a foreign terrorist organization, may be criminalized on the ground that it might lend "legitimacy" to terrorist causes.[123] Again, especially without some clear idea of what "coordination" entails, it is difficult to compare this type of legitimating expression to other forms of domestic speech that might also legitimize the nation's enemies. In the emerging global theater, any digital soapbox orator may lend credibility or "legitimacy" to terrorists or their causes simply by posting flattering or laudatory videos and other information on the Internet. Legitimacy and its attendant benefits would presumably flow to the enemy regardless of whether the expression was "independent" from or was "coordinated" with the beneficiary.[124] Thus,

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119. *Id.* at 2726.

120. *See id.* at 2732–33, 2737 (Breyer, J., dissenting) (criticizing the majority's reliance upon coordination and its failure to provide a workable definition distinguishing "coordinated" from "independent" expression).

121. *Id.* at 2723.

122. One commentator claims that the Court was concerned only with "speech related to agency." Margulies, *supra* note 103, at 19. However, the majority in *Humanitarian Law Project* did not rely expressly upon agency principles or doctrines in fashioning the coordinated/independent distinction. *See Humanitarian Law Project*, 130 S. Ct. at 2721–23 (analyzing the statute in question using statutory interpretive methods apart from agency principles).

123. *Humanitarian Law Project*, 130 S. Ct. at 2725.

124. *See id.* at 2736 (Breyer, J., dissenting) (noting the difficulty with the legitimacy principle in general and with the government's apparent claim that even some forms of "independent" expression, including the filing of amicus briefs on behalf of enemies of the state, might be covered by the material support provisions).

like the fungibility principle, the legitimacy principle threatens to sweep in a large swath of otherwise protected political expression.[125]

Finally, the Court relied on foreign-affairs concerns in upholding the material support provisions.[126] Specifically, it noted that United States allies might "react sharply" if the government were to permit citizens to collaborate in even peaceful endeavors with common enemies.[127] As explained earlier, foreign offense is not an adequate basis upon which to restrict or suppress domestic symbolic acts like Koran-burning or incendiary communications made in the heat of domestic political debates.[128] This is true even in cases where such speech might complicate U.S. diplomacy. The fact that domestic speech may alienate foreign allies is not a valid ground for restricting lawful, peaceful speech between citizens and foreign organizations—even those organizations designated as "terrorists" by the federal government.

Depending on how the decision is interpreted and applied, *Humanitarian Law Project* may undercut the central conclusion in the previous section—namely, that domestic political expression cannot be criminalized on the ground that it might aid the nation's enemies. In the emerging global theater, citizens' expression and association will more frequently intersect with foreign affairs and national security concerns. Under the Court's gauzy "coordination" standard, citizens who collaborate with designated foreign terrorist organizations on foreign humanitarian projects, lawyers who file amicus briefs in U.S. courts on behalf of designated enemies of the state, individuals who post speeches and videos on the Internet that praise the nation's enemies, and domestic newspapers that provide editorial space to targeted enemies may all be engaging in felonious enemy-aiding expression.[129]

If that is so, the chances that political, humanitarian, national security, and other critical transborder dialogues will be chilled or suppressed in the global theater will increase substantially. Whatever political and diplomatic decisions officials might take with regard to engagement with hostile foreigners and regimes, it is critically important that the First Amendment be interpreted and understood

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125. *But see* Margulies, *supra* note 103, at 30 (attempting to draw a distinction between "functional and ideational senses" of "legitimacy," and arguing that the majority in *Humanitarian Law Project* was actually only concerned with the functional sense of the term).

126. *See supra* notes 96–99 and accompanying text.

127. *Humanitarian Law Project*, 130 S. Ct. at 2726.

128. *See supra* notes 49–53 and accompanying text.

129. *But see* Margulies, *supra* note 103, at 32–40 (interpreting *Humanitarian Law Project* as placing such independent speech activities in statutory "safe harbors").

such that channels of communication between citizens and aliens, including even hostile aliens, remain as open as possible. This does not mean, of course, that restrictions on such contacts are never appropriate. However, any restrictions ought to be narrowly tailored to prevent intentional efforts to further violent ends, rather than broad measures designed to cut off all contact with certain disfavored aliens or groups of aliens. Our First Amendment will have to be more protective of foreign contacts and collaborations than this if it is to retain its usefulness and vigor in the twenty-first century.[130]

The Court has made its ruling. It has chosen not to force the government to demonstrate that citizens' speech to and association with designated foreign terrorist organizations meet the exacting standards for incitement to unlawful action.[131] However, there are at least two things Congress can do that would narrow the scope of the material support laws and would thereby help to preserve opportunities for cross-border engagement and association.

First, Congress could codify a standard with respect to "coordinated" expression that requires prosecutors to prove that a close agency relationship or a similar working relationship exists between citizens and designated foreign terrorist groups. This would serve to clarify which types of relationships or associations are being criminalized, narrow the scope of the prohibition to the most dangerous and harmful joint enterprises, target a form of conduct rather than pure speech, and ensure that "independent" domestic political expression cannot be the object of prosecution. Second, Congress could codify an intent standard that would criminalize otherwise protected speech and association only when "the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions."[132] These amendments would bring the "material support" provisions closer to affinity with long-standing First Amendment principles, and they would ensure that the transborder channels of communication between citizens and aliens remain as open as possible in the global theater.

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130. *See generally* Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941 (2011) (supporting a more cosmopolitan First Amendment approach that embraces cross-border information flow and protects speech and other First Amendment interests domestically and abroad).

131. *See* Owen Fiss, *The World We Live In*, 83 TEMPLE L. REV. 295, 306 (2011) (arguing that material support provisions must meet incitement standards set forth in *Brandenburg v. Ohio*).

132. *Humanitarian Law Project*, 130 S. Ct. at 2740 (Breyer, J., dissenting).

4. Cybertreason

Treasonous expression is perhaps the most dangerous form of enemy-aiding communication. Under the Constitution and federal law, any person owing allegiance to the United States who "adheres" to the enemy and through some "overt act" provides it with "[a]id and [c]omfort" may be found guilty of treason.[133] In addition to perhaps constituting the provision of material support (as discussed above), certain forms of speech or association favoring the nation's enemies may constitute treasonous adherence and the provision of aid and comfort.[134]

In the global theater, application of the Treason Clause and related federal criminal laws to enemy-aiding expression could give rise to significant First Amendment concerns.[135] Treasonous expression could take many forms, including pure speech and symbolic acts. A citizen speaker who reveals state secrets to foreign enemies might be found guilty of treason.[136] Citizens who travel abroad and meet with foreign enemies or principals in an effort to undermine U.S. policies could also be liable under the strict letter of federal treason laws.[137] The same fate might befall citizens who travel abroad to demonstrate as "human shields" against U.S. military campaigns.[138]

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133. U.S. CONST. art. III, § 3, cl. 1. The clause reads, in full, "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." *Id.* The federal treason statute provides:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.

18 U.S.C. § 2381 (2006).

134. *See generally* Bell, *supra* note 14, at, 1005–06 (identifying a "treacherous gap" between clearly treasonous behavior established by courts and protected criticism of government action).

135. *See id.*

136. *Cf.* United States v. Aguilar, 515 U.S. 593, 606 (1995) (upholding criminal punishment for publishing confidential information in violation of governmental restrictions).

137. *See* Bell, *supra* note 14, at 1004 (citing as a possible example Jane Fonda's activities in Vietnam).

138. *See* Gabriel H. Teninbaum, *American Volunteer Human Shields in Iraq: Free Speech or Treason?*, 28 SUFFOLK TRANSNAT'L L. REV. 139, 158 (2004) (arguing that "human shields" may have acted treasonously, but that for several reasons likelihood of prosecution for treason was low). Thus far, courts have rejected free speech arguments in human shield cases. *See* Clancy v. Office of Foreign Assets Control, 559 F.3d 595, 605 (7th Cir. 2009) (holding that sanctions imposed for travel to Iraq in violation of executive order restricted conduct rather than speech); Karpova v. Snow, 402 F. Supp. 2d 459, 473–74 (S.D.N.Y. 2005) (holding that enforcement of regulations restricting travel to Iraq did not give rise to any First Amendment claim and, that

However, the greatest potential threat to free speech in the global theater could arise from the application of treason laws to modern forms of propagandizing on behalf of the nation's enemies. This would include posting or linking to speeches by terrorist groups and their leaders, distributing messages or information that support enemies' violent or nonviolent causes, and defending national enemies from criticism online.[139] No court has ever addressed whether a speaker may be convicted of cybertreason for posting enemy propaganda or other forms of enemy-aiding expression on the Internet.

The notion that the government might pursue such a treason prosecution in such circumstances is not as far-fetched as it may sound.[140] Indeed, during the World War II era, several courts held or strongly suggested that propaganda and other expression conveyed on behalf of the nation's enemies might be sufficient grounds for a treason conviction.[141] As commentators have noted, under these precedents a defendant's expression or expressive acts alone might demonstrate "adherence" to the enemy and the requisite "overt act" providing unlawful "aid and comfort."[142]

In the global theater, a much wider range of expression and expressive acts might fall within the potential domain of the treason laws. In the World War II-era cases, citizens had to travel abroad in order to use the enemy's communications networks and were engaged in close employment relationships or other agency relationships with enemy agents or governments.[143] With the advent of the Internet,

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insofar as a traveler's actions as a human shield were expressive conduct, the travel regulations satisfied First Amendment standards).

139. *See* Bell, *supra* note 14, at 1006–09 (positing a hypothetical "al-Qaeda Al," who posts messages to his own blog that could benefit global terrorist networks).

140. *See id.* at 1010–26 (discussing elements of treason law, as interpreted and applied by courts, in the context of Internet postings).

141. *See* D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951) (affirming the conviction of Imperial Japanese propagandist, alias "Ann" or "Orphan Ann"); Burgman v. United States, 188 F.2d 637 (D.C. Cir. 1951) (affirming the treason conviction of a Nazi propagandist); Best v. United States, 184 F.2d 131 (1st Cir. 1950) (affirming the treason conviction of another Nazi propagandist); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950) (affirming the treason prosecution of yet another Nazi propagandist); Chandler v. United States 171 F.2d 921 (1st Cir. 1948) (affirming the treason conviction of Nazi propagandist, alias "Paul Revere").

142. *See* Bell, *supra* note 14, at 1012–26 (addressing application of treason requirements to instances of pure speech); Volokh, *supra* note 14, at 1341–42 (addressing whether a speaker could be punished for treason merely for making antiwar statements).

143. *See Best*, 184 F.2d at 135 (describing defendant's preparation of propaganda broadcasts to the United States via shortwave radio); *Gillars*, 182 F.2d at 966 (noting that defendant helped in preparation of German propaganda broadcasts to the United States); United States v. Burgman, 87 F. Supp. 568, 569 (D.D.C. 1949) (observing that defendant was employed by the

physical relocation is not required in order to propagandize effectively. Further, owing to the fact that terrorist networks do not operate on a strict bureaucratic basis, it may be difficult to determine who is aligned with them or who is adhering to them.[144] If "adherence" roughly equates to the "coordination" standard discussed in *Humanitarian Law Project*, and speech alone can constitute an "overt act," then a wide swath of cyber-rhetoric and other expression may fall within the ambit of the treason laws.

Humanitarian Law Project recently confirmed that even pure speech, if somehow coordinated with the nation's enemies, might be subject to criminal prosecution consistent with the First Amendment.[145] However, consideration of the Treason Clause's original meaning, postwar developments in First Amendment doctrine, and concerns regarding the chilling potential of prosecutions for cybertreason all weigh heavily against recognition of the global-theater crime of cybertreason.

As other commentators have noted, punishing pure speech or association as treason is inconsistent with the original understanding of the Treason Clause, which the framers of the Constitution viewed as a shield against prosecution for political expression.[146] Further, as I argued earlier in the context of prosecution for "material support," the contemporary scope of the treason laws ought to be measured against the lessons of twentieth-century free speech debates.[147] In particular, we need to account for post-World War II developments with respect to First Amendment doctrine. A far more speech-protective standard has replaced the comparatively speech-restrictive "clear and present danger" standard applied in World War II-era treason cases.[148] That

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German government to prepare propaganda broadcasts to the U.S.), *aff'd*, 188 F.2d 637 (D.C. Cir. 1951).

144. *See* Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT'L L. 297, 302–03 (2003) (describing the functional structure of contemporary terrorist organizations).

145. *See supra* notes 114–122 and accompanying text.

146. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, at 298–99 (1990) ("[S]trong arguments have been made that the Framers did mean to forbid punishment of mere 'treasonable' words under any label; otherwise their central goal of eliminating punishment for acts earlier viewed as 'constructive' treason would not have been achieved.") (emphasis omitted); JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES 143 (Greenwood Publ'g. Corp. 1971) (1945) (discussing framers' views that Treason Clause would prevent "the suppression of political opposition or the legitimate expression of views on the conduct of public policy"); Bell, *supra* note 14, at 1027–28 (arguing that prosecution of pure speech subverts the original meaning of the Treason Clause).

147. *See supra* notes 102–103 and accompanying text.

148. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (setting forth the modern incitement standard); Gunther, *supra* note 64, at 755 (referring to the *Brandenburg* formulation as "the most speech-protective standard yet evolved by the Supreme Court").

standard, which demands a showing by the government of likely and imminent harm from potentially dangerous expression,[149] counsels against prosecution for treason (resulting in a possible death sentence) based solely upon expression that exhibits support for, adherence to, or comfort for enemies of the state.

Moreover, from the postwar period to the present, the Supreme Court has consistently expressed strong support for citizens' freedom to criticize government and engage in political debate.[150] While it is true that speech during wartime has at times been less robustly protected than in peaceful eras, this historical fact does not counsel in favor of the application of the treason laws to cyberpropaganda.[151] So long as we are in a state of perpetual war (broadly defined), a substantial amount of domestic political expression could come under the formal letter of the nation's treason laws. As noted earlier, owing to the characteristics of the global theater, liability for cybertreason will cast a much wider net than treason's traditional domain.[152] If we are to have robust political discussion in the global theater, application of the treason laws, like application of the material support laws, must be based upon something more than a speaker's expression of sympathy for enemies or the possibility that speech might aid their causes.

As in the material support context, speakers may combine or conspire with enemies in a manner that threatens compelling national security interests. Nothing said thus far would preclude prosecution for the provision of tangible forms of aid, the receipt of funds for services rendered to terrorists or other enemies, or otherwise participating in joint criminal enterprises.

However, with regard to purer forms of speech or symbolic conduct, prosecutions for cybertreason must be subject to narrow constraints. Should courts have occasion to revisit the World War II-era treason decisions in global theater contexts, they should reject the major premise of some of those cases that expression and expressive association alone can support a treason conviction.[153] Instead, courts should require that the government demonstrate some close

149. *Brandenburg*, 395 U.S. at 447.

150. *E.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 904 (2010); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 908 (1982); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

151. *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004).

152. *See* Bell, *supra* note 14, at 1032–34 (discussing overbreadth problems under current treason law).

153. *See generally id.*

relationship between the speaker and the enemy in order to sustain a treason indictment.

Commentators have disagreed regarding the specific extent to which a speaker must be affiliated with an enemy of the state such that prosecution for treason would satisfy the First Amendment.[154] In order to protect the widest possible range of expression in the global theater, Congress and the courts ought to require close employment and agency relationships, which demonstrate a sufficient connection and adherence to the enemy.[155] The relationships in some of the World War II era cases involved traveling to foreign countries, using enemy broadcast equipment, and taking specific instructions from enemies.[156] Travel abroad need not be a requirement; as noted, speakers can participate in joint enterprises today without ever leaving their desks. However, prosecutors should have to prove an overt act other than the posting of enemy-aiding videos or other speech on the Internet, independent translation of enemy messages, or the communication of statements that advocate terrorism or praise terrorist methods or results.

For example, the requisite relationship might be present where the speaker establishes a dedicated website at the request of an enemy person or organization, provides technical support for enemy propaganda efforts, or posts messages as instructed by the enemy organization. These acts, which more closely resemble the provision of tangible assistance and material resources than pure speech, may be used to establish the requisite collaboration between the speaker and enemy. Speech in furtherance of the relationship, including the transmission of operational plans and technological and other information concerning bomb making, could also be considered evidence of treasonous intent. In no circumstance, however, would speech that merely favors, praises, legitimizes, or offers ideological support for enemy causes come within the domain of the nation's treason laws.

In the global theater, potentially treasonous expression will proliferate along with the communications networks that carry it to far-flung global audiences. As a general matter, the crime of

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154. *Compare id.* at 1040–41 (suggesting that an employment standard should be used to demonstrate "adherence" to the enemy), *with* Volokh, *supra* note 14, at 1342 (suggesting that the proper test might be whether speaker was being paid by the enemy or otherwise coordinated his activities with the enemy).

155. *See, e.g.*, Best v. United States, 184 F.2d 131, 135 (1st Cir. 1950); Gillars v. United States 182 F.2d 962, 966 (D.C. Cir. 1950); United States v. Burgman, 87 F. Supp. 568, 569–70 (D.D.C. 1949), *aff'd*, 188 F.2d 637 (D.C. Cir. 1951).

156. *See, e.g.*, *Best*, 184 F.2d at 135; *Gillars*, 182 F.2d at 966; *Burgman*, 87 F. Supp. at 569.

cybertreason ought to be rejected as inconsistent with the original meaning of the Treason Clause and the postwar development of First Amendment doctrine relating to political expression. Courts should limit the scope of the treason laws to cases in which the government demonstrates a close agency-like relationship between the domestic speaker and the enemy. Narrowing the interpretation of the Treason Clause in this manner will ensure that both our domestic and transborder marketplaces of ideas remain robust, while also allowing officials to pursue those engaged in unlawful and dangerous enemy-aiding joint enterprises.

C. The Distribution of Government Secrets in the Global Theater

As the WikiLeaks episode shows, the emergence of the global theater will significantly complicate the government's ability to control and maintain even its own secrets. Governments will of course not be powerless to protect state secrets and other confidential information in the global theater. Officials can prosecute leakers under espionage, confidentiality, and other national security laws. Thus, individuals like Private Bradley Manning, who allegedly leaked war and diplomatic information to the website WikiLeaks, will not avoid prosecution and potential punishment.[157] However, governments all over the world will have a much more difficult time maintaining control over the publication and dissemination of confidential and secret information, particularly once it is in the hands of foreign recipients.

One of the unique problems in the global theater is the ease with which an American leaker can quickly deliver confidential information to a foreign distributor, who then disseminates the information on the Internet. There are a number of legal and practical obstacles to U.S. prosecutions of what is shaping up to be a new kind of global press.

First, there are jurisdictional concerns and issues relating to the extraterritorial application of U.S. national security and other laws. It seems reasonably clear that the Espionage Act of 1917, the statute that has most often been discussed in connection with Julian Assange's possible prosecution, applies to extraterritorial dissemination of government secrets (by both citizens and aliens).[158]

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157. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36–37 (1984); Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169 (1984); *see also* Haig v. Agee, 453 U.S. 280, 309 (1981); Snepp v. United States, 444 U.S. 507, 511–12 (1980).

158. *See* Blackmer v. United States, 284 U.S. 421, 438–39 (1932) (U.S. criminal laws generally extend to citizens residing abroad); United States v. Bowman, 260 U.S. 94, 98 (1922)

Second, even if the United States were to indict Assange, it is not clear that the foreign government holding him would deliver him to American authorities.[159] Third, in contemplating prosecution, the government must at least consider the possibility that Assange will follow through on his stated threat to disclose additional troves of confidential information in his possession should the United States pursue legal action against him.[160] Fourth, even if Assange is extradited to the United States and successfully prosecuted, the leaked cables and other information cannot now be retrieved and cordoned off from public view. Thus, U.S. officials must ask whether any prosecution of Assange would ultimately be worth the effort.

Assuming that the United States is able to overcome these various obstacles and proceed to prosecute Assange, serious First Amendment issues will arise. The first issue is whether Assange, as a foreign national, could claim any protection under the First Amendment's Free Speech and Free Press Clauses. If he was in U.S. custody and on U.S. soil, Assange might be able to invoke the protections of the First Amendment.[161] I say "might" because the Supreme Court has never decided whether a defendant who is involuntarily in the United States may invoke the First Amendment in a proceeding related to information distribution or other speech activities abroad.[162] Assuming that the First Amendment does apply,

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(fraud against a government corporation); United States v. Zehe, 601 F. Supp. 196, 197 (D. Mass. 1985) (stating that the Espionage Act applies to acts of foreign nationals abroad); United States v. Helmich, 521 F. Supp. 1246, 1252 (M.D. Fla. 1981) ("[I]t is clear that the legislative intent behind repeal of section 791 was to extend application of the Espionage Act to cover acts committed anywhere in the world."). I am focusing here only on the Espionage Act. It is possible that the government might also seek to prosecute under computer fraud or other laws.

159. *See* John F. Burns & Ravi Somaiya, *British Court Denies Bail to Assange*, N.Y. TIMES, Dec. 7, 2010, http://www.nytimes.com/2010/12/08/world/europe/08assange.html (noting that both Sweden and Britain, where Assange was being held at the time of this writing, have extradition treaties with the U.S., but that extradition rulings may be appealed to the European Court of Human Rights).

160. *Id.*

161. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 109 (1996) (noting that under a "mutuality of obligation" approach to constitutional domain, "aliens are within the sphere either when they are within the nation's territory or on specific occasions when the nation attempts to exact obedience to its laws").

162. *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 271–72 (1990) (refusing to apply the Fourth Amendment to the search of an alien's home abroad, even though the alien had been brought to the United States and was subject to its laws there, because the alien had no other connection to the United States); *id.* at 276–78 (Kennedy, J., concurring) (noting that the defendant was entitled to at least some constitutional protections by virtue of his involuntary presence in the United States); *id.* at 279 (Stevens, J., concurring) (arguing that the defendant was entitled to Fourth Amendment protections even though he was involuntarily within the United States); *id.* at 284 (Brennan, J., dissenting) ("If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and

the question would be whether the government could prosecute Assange and WikiLeaks for possessing and/or disseminating confidential government materials.

Such a prosecution would be unprecedented. The United States has never prosecuted anyone other than a government employee, under the Espionage Act or other law, for merely receiving or disseminating confidential information. It is true that in *New York Times v. United States* ("*Pentagon Papers Case*"),[163] which focused primarily on whether the government could impose a prior restraint on the publication of potentially harmful information, some of the Justices noted that Congress appeared to have authorized prosecution of recipients and disseminators.[164] However, neither in that case, nor in any since, has the government actually prosecuted a journalist or other recipient of confidential information.

It is questionable whether such a prosecution would be consistent with the First Amendment's free speech and free press guarantees. Indeed, the Supreme Court has strongly suggested that in the absence of some form of active participation in informational theft or other wrongdoing, the recipient of information of public concern cannot be prosecuted for publishing it "absent a need of the highest order."[165] The Court has reasoned that if the legal sanctions applicable to leaking do not provide sufficient deterrence, then "perhaps those sanctions should be made more severe."[166] The Court has also observed that "it would be quite remarkable to hold" that an

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punish them."). Perhaps a key distinction between *Verdugo-Urquidez* and Assange's potential prosecution might be the fact that, in *Verdugo-Urquidez*, the alleged Fourth Amendment violation took place abroad, while any First Amendment violation would occur at the moment of Assange's indictment and prosecution within the United States. *See id.* at 264 ("For purposes of this case, therefore, if there were a constitutional violation, it occurred solely in Mexico.").

163. New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

164. *Id.* at 730 (Stewart, J., concurring); *id.* at 736–39 (White, J., concurring); *id.* at 745 (Marshall, J., concurring).

165. Bartnicki v. Vopper, 532 U.S. 514, 528 (2001). The government might argue that as a matter of statutory interpretation, the Espionage Act makes knowing dissemination of confidential materials a criminal offense and that Assange's sharing of information with the press was a criminal offense. *See* United States v. Morrison, 604 F. Supp. 655, 660 (D. Md. 1985) (holding that 18 U.S.C. § 793(d)–(e) applies to individuals who leak classified material to the press, because the recipients are "not entitled to receive [the classified material]"); *see also* POSNER, *supra* note 74, at 109 ("[S]ince the Espionage Act does punish the *communication* of material relating to national defense . . . that could be used to injure the nation . . . publication of such material . . . would seem . . . to violate the act . . . .") (emphasis added). As noted below, however, that theory would seem to apply with equal measure to press outlets such as *The New York Times* and *The Washington Post*. The government might also argue that Assange entered a conspiracy with Private Manning, who allegedly stole the government information, by providing him with certain forms of assistance in disseminating the files. Prosecution for this sort of criminal conduct would not raise serious First Amendment questions.

166. *Bartnicki*, 532 U.S. at 529.

individual can be constitutionally punished for merely disseminating information because the government failed to "deter conduct by a non-law-abiding third party."[167]

These sentiments are clearly premised on the idea that prosecution of information distributors will stifle or restrict the free flow of information of public concern. Of course, the First Amendment's protection of information distribution is not absolute. For example, the government can restrain certain harmful or deadly disclosures in advance of publication.[168] Some might argue that Assange and WikiLeaks are not entitled to any First Amendment protection owing to the potential harm that they caused by disseminating wartime logs and diplomatic cables. However, thus far the logs and cables do not appear to constitute the kind of "crime-facilitating" speech that lies outside of the First Amendment's domain.[169] Nor is it clear that the disclosures will, as Justice Stewart stated in the *Pentagon Papers Case*, "surely result in direct, immediate, and irreparable damage to our Nation or its people."[170] Further, whatever one might think of the tactics Assange and WikiLeaks used, the information thus far disclosed has shed invaluable light on important matters of global public concern.[171] The mere fact that the disclosures might harm the national interest is itself not a sufficient ground for prosecution, particularly where the disclosures relate to matters of such clear public concern.[172]

Even if the United States could obtain custody of Assange and overcome these strong First Amendment objections to prosecution, there are several reasons why the government should not pursue this

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167. *Id.* at 529–30; *see also New York Times*, 403 U.S. at 729–30 (Stewart, J., concurring) (arguing that the responsibility for ensuring confidentiality rests with the executive).

168. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.").

169. Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1217–18 (2005).

170. *New York Times*, 403 U.S. at 728, 730 (Stewart, J., concurring); *see* Geoffrey R. Stone, *Government Secrecy v. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 203–04 (2007) (arguing that to justify punishing the press for publishing confidential information, the government must prove that the publisher knew that the information was confidential, that publication would result in imminent and serious harm, and that publication would not meaningfully contribute to public debate). The government has largely downplayed the significance of the disclosures. *See The Defense Department's Response*, *supra* note 36 (noting that the period covered in certain reports "has been well chronicled in news stories, books and films . . . .").

171. The information regarding foreign diplomacy has shed light on pressing domestic and international concerns. *See*, *e.g.*, Michael R. Gordon & Andrew W. Lehren, *Leaked Reports Detail Iran's Aid for Iraqi Militias*, N.Y. TIMES, Oct. 22, 2010, http://www.nytimes.com/2010/10/23/world/middleeast/23iran.html.

172. *New York Times*, 403 U.S. at 718–20; *id.* at 723–24 (Douglas, J., concurring).

route. Insofar as any prosecution would be based primarily upon knowing receipt and publication of confidential information, there would be little to distinguish the *New York Times* from WikiLeaks. Thus, the damage to the functioning of the domestic press from the threat of prosecution for mere dissemination of confidential information could be substantial. Newspapers and other media might be reluctant to report government secrets, even if they had no original role in obtaining the information. If Assange is prosecuted as a criminal conspirator, then members of the domestic press will have to consider whether that theory applies to them as well. Government whistleblowers might also be reluctant to come forward under these circumstances. In sum, any short-term gain in terms of retribution or deterrence could have long-term negative consequences for governmental transparency and the free flow of information on significant matters of public concern.

The prosecution of Assange and WikiLeaks could also make the U.S. government look ineffectual and weak in the eyes of foreign regimes and international audiences. Worse, it may send conflicting signals regarding the government's regard for the free flow of information on the Internet. Secretary of State Hillary Clinton has announced an "Internet Freedom" initiative, which touts the use of new technologies to facilitate information sharing and democracy across the globe.[173] At the same time that the United States is praising hackers who resist repressive regimes abroad, its government would be seeking to prosecute an alien who used new technologies to expose government secrets. If the Department of Justice pursues this course of action in the WikiLeaks case or in some similar case, U.S. credibility on Internet freedom, governmental transparency, and the free transborder flow of information could be significantly compromised.

Of course, the United States may well lose the case. Win or lose, however, none of this effort and expense will change the fact that the war logs and cables have been distributed and discussed across the globe and now cannot be fully retrieved. This does not leave the United States defenseless against a rogue publisher operating thousands of miles away. Rather than pursue the recipients and publishers, the government ought to ensure that its own controls and safeguards respecting confidential information are substantively adequate and are actually being enforced.

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173. *Internet Freedom*, U.S. DEP'T OF STATE, http://www.state.gov/e/eeb/cip/netfreedom/index.htm#hr (last visited Sept. 16, 2011) (describing the State Department's Internet Freedom initiative).

III. THE FIRST AMENDMENT IN THE GLOBAL THEATER

As Part II showed, in the global theater, potentially harmful expression will pose some unique First Amendment concerns. Recent episodes involving the Koran-burning pastor, the cartoonist-in-hiding, the cross-border associate of foreign terrorists, the rogue citizen-cleric living abroad, and the foreign-information distributor also reveal some broader lessons regarding freedom of speech, association, and press in the global theater.

First, as the global theater continues to develop, we will need to pay more attention to, and develop a more coherent sense of, the First Amendment's important transborder dimension. Second, as the examples discussed in Part II showed, certain traditional First Amendment justifications, including marketplace of ideas and self-governance principles, will retain their importance and ought to continue to operate in the emerging global theater. However, as the global theater develops and expands, Americans will be called upon to explain and defend some of our exceptional free speech protections. Third, freedom of the press, broadly defined, will play a critical role in the emerging global theater. Changes with respect to the identity, functions, and ethics of the press will significantly affect global information flow. Finally, speakers and distributors of information will face a new set of threats to transborder information flow in the global theater, including softer forms of governmental persuasion and regulatory power, restrictions by private intermediaries, and extrajudicial (or, perhaps, extralegal) forms of punishment for potentially harmful expression.

A. The First Amendment's Transborder Dimension

In the global theater, a narrowly territorial or provincial orientation with respect to the First Amendment will not help us identify and resolve the most pressing twentieth-century problems concerning global information flow.[174] Today, expression, association, and information routinely cross and transcend territorial borders. As noted earlier, traditional concepts such as proximity and incitement must be adapted to a global theater shaped by characteristics of interconnectivity and compression.[175]

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174. *See generally* Zick, *supra* note 130, at 949–98 (describing and critiquing provincial conceptions of the First Amendment).

175. *See* Bell, *supra* note 14, at 1027–28; Volokh, *supra* note 14, at 1341–42; Zick, *supra* note 68, at 34–36.

In this environment, we can no longer view the First Amendment as constituting a narrow set of restrictions on domestic governance. This is especially true when the effects of incendiary domestic communication may be felt half a world away; when foreign hecklers can chill speech in domestic marketplaces; when speakers can engage in real-time interactions with audiences without regard to location; and when publishers can disseminate potentially harmful information, including government secrets, from places well beyond the practical and perhaps even the legal domain of the affected government. In the global theater, we will need to expand the focus regarding the First Amendment beyond its domestic aspects and effects. To do so, we will need a conceptual and constitutional framework for analyzing disputes that fall within the First Amendment's transborder dimension.

This critical dimension will implicate a number of free speech and association rights relating to transborder information flow. These include the rights of citizens to (1) receive information from foreign sources;[176] (2) engage in expressive activities beyond U.S. territorial borders;[177] (3) forge lawful relationships with aliens located abroad;[178] (4) collaborate with alien persons or groups in lawful and peaceful endeavors, including information dissemination;[179] and (5) engage in robust cross-border exchange and dialogue.[180]

The Supreme Court has not embraced these First Amendment liberties to nearly the same extent as their domestic counterparts, and policymakers have historically discounted their importance.[181] However, these are the foundational liberties supporting twenty-first century, transborder information flow. As such, they will play an important role in shaping the application of First Amendment doctrines in the global theater.

As Jack Balkin has argued, federal regulatory policies and decisions will be critical to the future development of digitally interconnected global-communication networks.[182] Thus, much of the work to be done in developing the global theater's infrastructure will

176. Lamont v. Postmaster Gen., 381 U.S. 301, 305–07 (1965).

177. Haig v. Agee, 453 U.S. 280, 308–09 (1981).

178. Kleindienst v. Mandel, 408 U.S. 753, 760, 768–69 (1972).

179. Meese v. Keene, 481 U.S. 465, 480 (1987).

180. *See Kleindienst*, 408 U.S. at 765 (recognizing a First Amendment right to meet face-to-face with aliens).

181. *See* Zick, *supra* note 130, at 982–87 (discussing judicial "quasi-recognition" of various transborder liberties).

182. Balkin, *supra* note 19, at 428 (claiming that with regard to freedom of expression in the digital age, "knowledge and information policy" concerns will displace constitutional ones).

take place in the political branches and through the work of federal regulatory agencies. In certain respects, government officials and regulators have already begun to embrace the core precepts of a more globally oriented First Amendment. For example, the State Department recently touted Internet freedom and global information flow as explicit U.S. foreign affairs policies.[183] However, transborder issues will ultimately come to the courts as well. Thus, it will be critically important for judges to recognize and incorporate the First Amendment's transborder dimension into their analyses of global-theater free speech, association, and press issues.

For example, although the expressive and associational activity in *Humanitarian Law Project* crossed international borders, none of the Justices even mentioned any of the precedents relating to transborder First Amendment liberties. It is true that much of the speech at issue in *Humanitarian Law Project* was purely domestic in nature—namely, legal training in the United States, filing petitions at the United Nations, and petitioning Congress. Further, the speakers were all U.S. citizens who possessed First Amendment rights of their own. However, the fact that their audiences and associates were foreign individuals and entities appears to have substantially influenced the Court's analysis and the outcome of the case. Indeed, the majority made clear that its analysis with respect to speech directed to foreign terrorist organizations did not necessarily apply to *domestic* terrorist organizations.[184]

But why should this necessarily be the case? It is not clear why the Court's fungibility and legitimacy rationales would not apply with full force to speech directed to potentially dangerous domestic groups, audiences, and associates.[185] Providing material support to homegrown terrorist organizations would seem to be equally, if not more, troubling given the proximity of the potential wrongdoers to American citizens, assets, and institutions. Perhaps the Court was signaling that there is something akin to a foreign affairs exception to the First Amendment's free speech and association protections. However, such an exception would be flatly inconsistent with the transborder liberties that the Court has already recognized. Other than positing a possible distinction between foreign and domestic organizations, the Court never acknowledged that the citizens' First Amendment claims had any transborder element or dimension at all.

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183. *See Internet Freedom*, *supra* note 173.

184. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730 (2010).

185. *See supra* notes 108–25 and accompanying text (discussing fungibility and legitimacy rationales as applied to speech coordinated with foreign terrorist organizations).

Similarly, the dissenters failed to note that the dispute implicated fundamental First Amendment rights to enter relationships with foreign persons and entities. As a result, in *Humanitarian Law Project*, the Court missed an important opportunity to discuss and clarify the First Amendment's transborder dimension. Specifically, it failed to fully acknowledge the importance of the speech and association at issue to the transborder flow of information and transborder expressive association.

The First Amendment's transborder dimension will be much more difficult to ignore in any prosecution of WikiLeaks or other foreign-information distributors. Whether or not Julian Assange possesses speech or press rights, it is clear that his substantial American audience does. Thus, the First Amendment issues in such a case are much broader than whether a foreign national can invoke the speech or press protections of the First Amendment, or whether some fine distinction can be drawn between WikiLeaks and *The New York Times*. Any prosecution would directly implicate the developing transborder marketplace of ideas. Regardless of the outcome, such a case would likely have a profound effect on transborder information flow and the development of the First Amendment's transborder dimension.

In sum, courts and executive officials must act with awareness that the right to distribute information has a transborder dimension. In the global theater, transborder speech, association, and press claims will likely proliferate. In this environment, the provincial or narrowly democratic conception of the First Amendment, which is defined exclusively with reference to U.S. territorial borders, will be increasingly anachronistic.[186] In the years to come, courts and officials will face important decisions regarding the contours of the First Amendment's transborder dimension. As I have argued elsewhere, U.S. officials ought to adopt a more outward-looking, cosmopolitan orientation with respect to First Amendment liberties.[187]

B. Fundamental First Amendment Values in the Global Theater

Despite the extraordinary changes in our expressive environment, we must not lose sight of certain core, traditional First Amendment principles. In the global theater, we ought to maintain our fundamental commitments to counterspeech, speaker autonomy,

186. *See* Zick, *supra* note 130, at 949–82 (describing precedents which adopt a provincial orientation regarding the First Amendment).

187. *Id.* at 998–1022.

and self-governance. However, we may have to reconsider the scope, geographically and conceptually, of those commitments. In light of interconnectivity and compression, we will have many opportunities to consider, explain, and defend First Amendment free speech values to diverse global audiences.

One of the principal lessons from early conflicts in the global theater is that reliance upon traditional First Amendment principles will be critical to preserving domestic speech rights as well as encouraging and facilitating robust cross-border exchange. As *Humanitarian Law Project* demonstrates, the First Amendment values and principles that support limits on prosecutions for incitement and treason remain important in the emerging global theater. Traditional marketplace principles, including preferences for counterspeech and social control over government regulation, must retain their vitality in the global theater.

As we have seen, the need for tolerance regarding offensive and intentionally provocative speech will take on global significance.[188] Moreover, as explained earlier, First Amendment doctrine does not currently allow officials to suppress offensive speech merely because it might have some indeterminate psychological or other negative impact on some audience—wherever that audience happens to be located.[189] That does not render officials powerless to respond to offensive and potentially incendiary transborder speech. Officials can and should continue to use new technologies to counter extremist speech in the global theater.[190] In an era in which speech and association frequently traverse or transcend territorial borders, justifications for expressive freedom ought to take into account broader concerns regarding global information flow, cross-border collaboration, and the global spread of "democratic culture."[191] Granting robust protection to transborder speech, association, and information distribution would serve a number of traditional free speech values, including the facilitation of citizen self-governance, truth seeking, speaker autonomy, and checking governmental abuses of power wherever they occur.[192]

188. *See generally* LEE C. BOLLINGER, THE TOLERANT SOCIETY 10–11 (1988) (positing a tolerance justification for freedom of speech).

189. *See supra* notes 42–57 and accompanying text (discussing free speech principles relating to offensive expression).

190. *See* Thom Shanker & Eric Schmitt, *U.S. Uses Cyberspace to Rebut Messages Posted by Extremists*, N.Y. TIMES, Nov. 18, 2011, at A8.

191. *See* Balkin, *supra* note 19, at 2–6, 34–38 (explaining how transborder expressive activity furthers democratic values).

192. *See* Zick, *supra* note 130, at 999–1004 (discussing First Amendment values in the emerging global theater).

Further, transborder expression and association expose citizens to persons, information, problems, and debates beyond their local communities; expand opportunities for citizens' engagement and participation in global affairs and humanitarian projects; foster diverse channels of communication, which may generate mutual understanding and respect; and create processes which may foster worldwide respect for First Amendment values. These values are rarely, if ever, discussed in judicial precedents or academic commentary concerning transborder First Amendment issues.

Adopting this more expansive orientation with regard to the First Amendment places the expressive activities of the Koran burner, cartoonist, human-rights advocate, citizen inciting violence from abroad, and foreign publisher in proper perspective.[193] In general, Americans are no longer merely speaking to and associating with one another in the confines of local, state, or national communities. Sometimes intentionally and sometimes not, citizens are increasingly involved in a robust transborder marketplace of ideas. That marketplace is less homogenous than its domestic counterparts. Further, First Amendment transparency and other self-governance concerns extend to extraterritorial wars, intelligence operations conducted abroad, and foreign diplomacy.

In many ways, we are now simply re-experiencing the growing pains that attended the birth of the domestic marketplace of ideas. Our commitment to core First Amendment free speech, association, and press guarantees will be severely tested in the global theater. As that theater develops, we will have many opportunities to explain and defend America's exceptional commitments to such principles, often to a deeply skeptical global community. Indeed, an important part of transborder dialogue will involve explaining marketplace, self-actualization, self-governance, and tolerance principles to those who do not share or fully understand them (including, unfortunately, some people in the United States).[194] The emergence of the global theater has highlighted the extent to which First Amendment doctrines and principles deviate from European and other international

193. *See generally id.* at 948–49 (discussing the need for a more cosmopolitan view of transnational First Amendment rights).

194. In response to media inquiries from domestic and foreign news organizations regarding Pastor Jones, the Koran burner, I was frequently asked to explain why the First Amendment generally forbids the government from restricting even deeply offensive expression based solely on its content. With regard to some of the uninformed domestic commentary on the Koran burning, see sources cited *supra* note 48.

standards.[195] For example, unlike many other democratic nations, the United States values speaker autonomy over equality and dignitary interests.[196] In the global theater, these differences, and the tensions they sometimes create, will become a more prominent concern.

As we move deeper into the twenty-first century, First Amendment norms and principles will compete against other expressive systems across the globe. We ought to view this competition as an opportunity, rather than as a burden or as an occasion for nationalistic defensiveness. It is a salutary thing that Americans reflect upon and debate the balance that has been struck under our First Amendment. As the Koran burning demonstrates, however, if indeed we are intent on retaining it, we will have to do a much better job of explaining our First Amendment exceptionalism to diverse global audiences.

C. Freedom of the Press in the Global Theater

In the global theater, the press will play a central role in the transborder dissemination of information and will lead global dialogues on a variety of pressing issues with transborder salience. The press will face a variety of unique challenges in this emerging theater.[197] One preliminary challenge is definitional (i.e., who or what is a member of the "press"?). Members of the emerging global press will have to report responsibly on topics of global concern. They will confront professional and ethical concerns in their relationships with distant and unfamiliar information sources. Finally, the global press may face potential liability for disclosure of governmental secrets.

In the global theater, the press will continue to face fundamental identity issues. Bloggers have already staked a claim to the press mantle in the digital era.[198] New types of global information intermediaries and outlets like WikiLeaks may also seek refuge under

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195. *See generally* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH, at xiv (2006) (discussing the different global conceptions of freedom of speech).

196. *See id.* at 90–92 (summarizing the differing approaches of Canada and Germany).

197. For an excellent account of some of the challenges facing the press in a global society, see LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE OPEN: A FREE PRESS FOR A NEW CENTURY 6 (2010).

198. Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 399 (2006); Joseph S. Alonzo, Note, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 751, 752 (2006); *see also* Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1375 (2003) (examining three possible approaches to defining "journalist").

the First Amendment's press protections.[199] In addition to the constitutional issues discussed earlier,[200] these identity claims will create professional tensions. For example, mainstream media outlets in the United States, some of whom have benefited substantially from the WikiLeaks disclosures in terms of their own reporting, supported a provision of a proposed federal law that would preclude organizations like WikiLeaks from claiming press protection regarding the identity of confidential sources.[201]

Mainstream press outlets must carefully consider whether it is wise to codify a definition of "journalist" or "press" that closely tracks domestic norms and practices. Traditional press outlets may gain some short-term advantage if global competitors are excluded from such definitions—as would be the case if a much-desired federal shield law for reporters passed.[202] However, limiting protections for new global information intermediaries that do not function in traditional ways could produce long-term disadvantages in terms of access to governmental secrets and transborder information flow more generally. As transborder information flow becomes more critical to self-governance, transparency, and other First Amendment values, the domestic press ought to start thinking more globally and less provincially about its roles and functions.

As reporting and other communications transcend territorial borders, the domestic press will also face new challenges with regard to reporting on matters of global concern. One challenge is to ensure that the domestic press devotes adequate resources to coverage of international events and concerns.[203] Owing to the pressures (largely financial) currently facing the press, this may require additional infusions of public funding for press activity abroad.[204]

Reporting on sensitive matters of global concern will be another challenge for journalists operating in the global theater. Religion—in particular, ideas and opinions regarding Islam—will be one such concern. In the global theater, common language will not always be enough to bridge national, cultural, and religious divides.

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199. *See* Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (noting the difficulty of defining the category of newsmen entitled to privilege).

200. *See supra* notes 161–72 and accompanying text.

201. Douglas Lee, *Trying to Exclude WikiLeaks from Shield Law Stinks*, FIRST AMENDMENT CENTER (Aug. 25, 2010), http://www.firstamendmentcenter.org/commentary.aspx?id=23303.

202. *See* Paul Farhi, *Wikileaks is Barrier to Shield Arguments*, THE WASH. POST, Aug. 21, 2010, at C1 (discussing how WikiLeaks affected legislation that would protect journalists from being forced to reveal confidential sources).

203. *See* BOLLINGER, *supra* note 188, at 132–36 (noting funding and other challenges affecting the international presence of the domestic press).

204. *Id.*

Journalists are uniquely positioned to play an educational role in the global theater. A more knowledgeable and responsible press can encourage and facilitate respectful debate on sensitive matters, like religion, that reach across deep cultural divides. In order to serve this important function, however, reporting on religion and other important global concerns must be as factual and neutral as possible. For example, many journalists simply erred in referring to the proposed Islamic center in lower Manhattan as the "Ground Zero Mosque."[205] The label is both factually inaccurate and incendiary. To face the challenge of reporting on such matters in the global theater, journalists may need to improve their substantive training with regard to transborder religious and cultural issues. In the global theater, journalists will need to think more globally in terms of audiences and cultures.

Another challenge facing the domestic press in the emerging global theater relates to the sorts of relationships it will enter into with private and governmental sources of information. The whistleblower of yesterday (e.g., Daniel Ellsberg in the *Pentagon Papers Case*) may be replaced by information intermediaries with uncertain credentials and agendas (e.g., Julian Assange and WikiLeaks). This new breed of intermediary may be thousands of miles away and subject to the laws of foreign nations. It may be a private venture or a foreign government, or a foreign government masquerading as a private venture. In the emerging global theater, journalists may need to reassess standards of journalistic ethics and responsibility relating to their relationships with sources. The press may need to hold some sources at arm's length. It may need to scrutinize information with greater care, particularly when the source appears to be suspect and the information may potentially be damaging to U.S. national security or foreign policy interests.[206]

As the WikiLeaks episode shows, the press may be exposed to greater criminal liability as a result of cooperating or collaborating with foreign sources, persons, and organizations. As discussed earlier, if history is any guide, the likelihood of a criminal prosecution of the domestic press for merely disclosing information of public concern appears to be rather slim.[207] Nevertheless, some of the theories that officials are currently considering in connection with possible

205. *See* sources cited *supra* note 24 (discussing the inaccurate labeling of the Manhattan mosque).

206. *See* Arthur S. Brisbane, *Sharing Secrets at Arm's Length*, N.Y. TIMES, Oct. 31, 2010, at WK-8 (discussing the relationship between WikiLeaks and *The New York Times*).

207. *See supra* notes 163–67 and accompanying text.

prosecution of Assange and WikiLeaks leave little breathing space between these actors and the domestic press.[208] Even if the government were able to split hairs in a manner that relieves the domestic press of criminal liability, the resulting uncertainty could chill future reporting regarding governmental secrets.

Moreover, in the emerging global theater, the threat of criminal liability is not limited to contexts in which individuals disclose confidential government information. The domestic press must also be mindful that any relationship or collaboration with foreign terrorists or foreign-terrorist organizations could give rise to criminal charges of "material support" or criminal conspiracy. Under the reasoning of *Humanitarian Law Project*, a domestic editorial board that makes print space available to a foreign terrorist may be accused of providing "material support" to terrorists. The resulting fear of criminal liability may interrupt or chill the free flow of information in the global theater.

In sum, the press will be a critical transborder conduit of information on matters of global concern. In the global theater, the press will face identity, professional, and liability challenges. It ought to face those challenges mindful of the globalization of the profession and the unique characteristics of the theater in which it now operates.

D. New Threats to First Amendment Freedoms

Finally, in the global theater speakers and publishers will face new threats to freedom of speech and the transborder dissemination of information. Only some of these will emanate from the state, as in the case of potential criminal charges against information distributors like WikiLeaks. Other restrictions will arise from the conduct of nonstate actors, including information intermediaries. Moreover, the global theater may give rise to unique rule of law concerns regarding access to judicial process for speakers located abroad.[209]

In the global theater, speakers and publishers will continue to face the usual challenges in terms of governmental restrictions, regulations, and prosecutions. Authorities may be able to effectively regulate some transborder and extraterritorial expression by pursuing

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208. *See supra* notes 163–72 and accompanying text. Domestic journalists are not the only ones who face potential difficulties as a result of disclosure of confidential information. Government employees may face penalties for viewing still-classified documents. Even job-seekers who post comments on the documents may face repercussions when they apply for sensitive federal positions.

209. *See supra* notes 80–86 and accompanying text (discussing case of Anwar Al-Aulaqi).

domestic intermediaries such as internet service providers.[210] The First Amendment implications of prosecuting WikiLeaks are critically important.[211] However, we ought to be focusing more on the power of nonstate actors to affect global information flow, and the power of government actors to engage in various forms of "soft" censorship.[212]

An expanding category of intermediaries will likely become targets of governmental pressure. For example, in an effort to restrict or suppress some potentially harmful speech, officials may seek to pressure intermediaries such as YouTube, Amazon, and PayPal to deny service to certain speakers or publishers. Indeed, in the case of WikiLeaks, U.S. officials initially pressed social networking and financial intermediaries to deny service to the website in an effort to shut it down or at least slow the release of confidential information.[213] These efforts were only marginally successful. It quickly became clear that WikiLeaks had allies in the global information network. The federal government's denial of service strategy precipitated a small-scale information war. Various hackers attacked social networking and financial intermediaries, including through distributed denial of service attacks.[214] In the global theater, efforts by government officials to lean on information intermediaries will likely lead to new forms of cybercivil disobedience and information activism in locations across the globe. Moreover, information distributors like WikiLeaks possess and will likely distribute encrypted files of their caches, which can then be released at different points in the interconnected global network.[215] Thus, regardless of the actions officials may take, the information itself will likely remain available for distribution.

However, unlike WikiLeaks, few speakers or publishers are likely to have a global support network. This may render their

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210. *See* GOLDSMITH & WU, *supra* note 18, at 68–79 (discussing regulation of information intermediaries).

211. *See supra* notes 163–72 and accompanying text.

212. With regard to methods of "soft" censorship of Internet speech, see generally Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926415.

213. *See* Michael Calderone, *Lieberman Pressures Amazon to Drop WikiLeaks*, YAHOO.COM, (Dec. 2, 2010), http://news.yahoo.com/s/yblog_thecutline/20101202/tc_yblog_thecutline/lieberman-pressures-amazon-to-drop-wikileaks; *see also* Bambauer, *supra* note 212, at 27–34 (discussing efforts to censor WikiLeaks through persuasion and pressure).

214. *See, e.g.*, Farhad Manjoo, *The Oldest Hack in the Book*, SLATE (Dec. 9, 2010, 5:46 PM), http://www.slate.com/articles/technology/technology/2010/12/the_oldest_hack_in_the_book.html (discussing WikiLeaks supporters' attempts to deny Internet service to Visa.com and MasterCard.com); David Sarno, *'Hactivists' Fight for Their Cause Online*, L.A. TIMES, Dec. 11, 2010, http://articles.latimes.com/2010/dec/11/business/la-fi-cyber-disobedience-20101211 (discussing hackers' attempts to deny Internet service to Visa.com).

215. Somaiya, *supra* note 39.

communications more vulnerable to private restrictions, which government officials may play a role in imposing through soft forms of persuasion.[216] Owing to their private status, the decisions and policies of intermediaries, such as YouTube and Amazon, are not subject to legal or constitutional constraints. In the global theater, private censorship may become an increasingly prevalent and effective obstacle to transborder information flow.[217] If this occurs, arguments in favor of reconsidering or abolishing the traditional public-private distinction in free speech and other contexts may gain additional force.[218]

Finally, more general rule-of-law and freedom-of-speech concerns will arise in the global theater. The most serious of these will relate to speakers who reside beyond the territorial borders of the United States. Citizens, who likely possess at least some First Amendment rights abroad, may be subjected to new forms of summary punishment.[219] The killing of the U.S.–Yemeni cleric Al-Aulaqi is an example.[220] It may well be that Al-Aulaqi engaged in treasonous or other illegal conduct. However, targeted killing obviously takes the matter away from the courts without any legal determination to that effect. Under such circumstances, we cannot be certain whether the speaker is being punished for protected speech or criminal conduct. In many cases, the public may not even be aware that targeted killing orders have been issued.

To be sure, courts may be ill-equipped to decide the underlying merits of such orders. Still, there ought at least to be some check on the government's ability to order the killing of a citizen based in part, if not substantially, upon his protected expression. The characteristics

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216. *See* John F. Burns & Miguel Helft, *Under Pressure, YouTube Withdraws Muslim Cleric's Videos*, N.Y. TIMES, Nov. 4, 2010, at A16 (discussing how YouTube removed videos under pressure from American and British officials); Ravi Somaiya, *U.S. Islamic Web Site Is Taken Down*, N.Y. TIMES, Nov. 6, 2010, at A5 (discussing an extremist Islamic website that was taken down).

217. *See* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 14 (2006) (discussing how regulation of intermediaries allows the government to control speech over the Internet).

218. *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (1985) ("[T]he next major expansion in the protection of rights must be to limit infringements of rights made by private entities. The Constitution's declaration of personal liberties must be viewed as a code of social morals that may not be violated without a compelling justification."); Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 103–04 (2004) (proposing that courts invoke the First Amendment to enjoin some nongovernmental action that undermines public debate on matters of national policy).

219. *See* Haig v. Agee, 453 U.S. 280, 308 (1981) (assuming citizens have free speech rights abroad).

220. *See* Shane, *supra* note 82 (reporting the targeted killing of Al-Aulaqi by U.S. forces).

of the emerging global theater may actually offer at least a partial solution to the rule-of-law and justiciability problems associated with the extraterritorial targeted killing of citizens. In its decision dismissing Al-Aulaqi's father's lawsuit, the district court suggested that Al-Aulaqi himself might have been permitted to appear via teleconference to contest the order, rather than enter the United States and risk certain arrest and detention.[221] Although teleconferencing would not resolve all justiciability issues that might arise in such cases and may not be an optimal forum for adjudicating these matters, it would provide the citizen target with an opportunity to appear in a U.S. court. Virtual process would at least allow the target of an execution order to contest the legal and factual validity of the order, as well as to raise any free speech claims.

In general, we ought to begin thinking about how best to balance the rule-of-law and First Amendment concerns in such cases with the need to protect national security. The answer may lie in considering whether targeted killings are consistent with fundamental norms of international law.[222] Whatever may be the source of free speech rights for citizens, and even aliens, abroad, virtual or even remote forms of legal process for speakers would be preferable to extrajudicial, and perhaps illegal, execution orders.

CONCLUSION

Potentially harmful domestic, expressive activities increasingly have transborder effects. In the global theater, increased interconnectivity and the compression of space and time will enhance speakers' ability to communicate offensive and incendiary messages and to enter associations with disfavored and potentially dangerous foreign organizations. Further, the distribution of government secrets and confidential information may affect foreign audiences, foreign affairs, and other nondomestic U.S. interests.

This Article addresses the First Amendment implications of speakers falsely shouting fire in the global theater. The fact that such speech reaches a worldwide audience certainly requires that speakers and officials be aware of potential transborder effects, including violent reactions in foreign nations and potential effects on foreign

221. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 18 n.4 (D.D.C. 2010).

222. *See generally* Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 231 (2010) (discussing the extent of the Constitution's jurisdiction); Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307, 309 (2011) (arguing decisions regarding extraterritorial actions should be based on fundamental norms of jurisprudence).

diplomacy. However, it does not require the courts to revise traditional doctrines relating to offensive, incendiary, inciting, and other forms of potentially harmful expression. As the examples discussed in this Article show, traditional First Amendment doctrines and principles can adequately accommodate potentially harmful speech in the global theater. Moreover, in general, traditional First Amendment justifications ought to apply with full force to transborder expression that offends, upsets, or otherwise affects foreign audiences.

We should also to resist the temptation to react to potential foreign threats or effects by creating new limits on transborder speech, association, and press activities. This includes new forms of guilt by association, cybertreason, and new limits on global press freedoms. Indeed, applying long-standing First Amendment principles and protections with full force to domestic expression that has potentially harmful transborder effects will serve to underscore a national commitment to robust and exceptional free speech, association, and press rights.

There are also more general lessons to draw from the global-theater speech, association, and press controversies highlighted in this Article. We need a more systematic and coherent understanding of the First Amendment's transborder dimension. As the global theater develops, rights to exchange information across borders, to speak to and associate with aliens abroad, and to engage in expressive activities beyond U.S. borders will become increasingly important. As this occurs, courts, elected officials, agency personnel, speakers, and members of the press ought to consider adopting a more cosmopolitan orientation with regard to the First Amendment and its justifications.[223] The press, in particular, will be critical to robust transborder information flow. As the global theater emerges, journalists will need to address fundamental identity, professional, ethical, and legal issues in a manner that preserves their core functions. Finally, in the global theater speakers, journalists, and other information providers will face new regulatory challenges, such as the denial of access and service by private information and financial intermediaries, informal governmental pressure, and extrajudicial punishments. As the First Amendment enters the second decade of the twenty-first century, we ought to be thinking more carefully and systematically about the implications of these and other limits on transborder information flow.

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223. *See generally* Zick, *supra* note 130, at 948–49 (arguing in favor of a cosmopolitan conception of the First Amendment).