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Free Speech and Public Order Exceptions: A Case for the U.S. Standard

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Free Speech and Public Order Exceptions: A Case for the U.S. Standard

Asma T. Uddin[*]

> "An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard."
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> – John Stuart Mill, *On Liberty* (1859)
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> "Any person of the Quadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name), who directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine."
>
> – Pakistani Penal Code 298-C

INTRODUCTION

Every society must deal with speech that could potentially lead to violence. Governments in several Muslim-majority countries have struggled to develop proper constitutional protections for free speech and religious freedom. The challenge has been especially clear in countries like Pakistan, where religious violence is widespread. Yet, while the unrest has increased demands for speech restrictions, the key to stability is liberty.

This Paper will focus on Pakistan's speech restrictions under its blasphemy laws—the source of some of the most egregious religious freedom violations in the world. Pakistan's blasphemy laws often lead

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to riots, community violence, and infringement of basic human rights. For example, on May 7, 2014, human rights lawyer Rashid Rehman was murdered for defending Junaid Hafeez, a poet and Fulbright scholar, who was accused by his students of insulting the Prophet Muhammad on Facebook.[1] The accusations were baseless, but as with most cases of blasphemy charges in Pakistan no real evidence was needed. Hafeez was charged by the police and was defenseless without a lawyer when Rehman agreed to represent Hafeez in court.[2] The government did nothing to protect Rehman, who received death threats even as he stood in front of the judge in the courtroom.[3]

The blasphemy laws persecute not only Pakistan's Muslims, but also its religious minorities. In June 2009, a Pakistani Christian woman, Aasia Bibi, offered water to fellow farm workers.[4]

> They refused to accept on the grounds that she was a Christian and, therefore, they believed the water must be contaminated. An exchange of words occurred, with each side defending their religion. Allegedly, Aasia insulted the Prophet Muhammad by saying, "The Quran is fake and your prophet remained in bed for one month before his death because he had worms in his ears and mouth. He married Khadija just for money and, after looting her, kicked her out of the house." A few days later, a mob set upon Aasia, and the police rescued her from certain death. However, the police later charged her with committing blasphemy and held her in isolation for 17 months while she awaited trial.[5]

Aasia Bibi was found guilty of blasphemy and the local court ruled that there were "no mitigating circumstances," sentencing her

1. Andrew Buncombe & Umair Aziz, *Pakistani Lawyer Rashid Rehman Murdered After Taking on Blasphemy Case*, THE INDEPENDENT (May 8, 2014), http://www.independent.co.uk/ incoming/pakistani-lawyer-rashid-rehman-murdered-after-taking-on-blasphemy-case-9341021.html.

2. Ali Sethi, *Pakistan's Tyranny of Blasphemy*, N.Y. TIMES (May 20, 2014), http://nyti.ms/1nhPZIG.

3. Waqar Gillani, *Pakistani Activist Shot Dead; Aided Blasphemy Suspects*, N.Y. TIMES, May 7, 2014, at A8, *available at* http://nyti.ms/1kN6smp.

4. Asma T. Uddin, *Blasphemy Laws in Muslim-Majority Countries*, REV. FAITH & INT'L AFF. Summer 2011, at 47, 47.

5. *Id*. (citations omitted).

to death by hanging.[6] This unfortunate event reveals the contradiction of Pakistan's blasphemy laws, which are premised on protecting public order, but once again appeased rather than controlled violent extremists, giving them license to bully a religious minority while the police and justice system looked the other way.

This Paper will explain why and how policy makers can use the U.S. free speech standard to guide the formulation of free speech standards in other countries such as Pakistan. Part I will explain the current state of religious freedom in Pakistan and other similar countries, in particular as it relates to the religious speech and alleged blasphemy. Part II will analyze the history of free speech in Pakistan, comparing and contrasting the era before and after General Zia-ul-Haq's regime. It will also look at how Pakistani law treats religious speech or blasphemy differently than other types of speech, with a focus on Pakistani courts' use of U.S. case law. Lastly, it will discuss Pakistan's role internationally with speech-related resolutions at the Organization of Islamic Cooperation (OIC).

Part III will use the Pakistani courts' reliance on U.S. case law as a launch pad for a more detailed comparison between Pakistan's and the United States' use of public order arguments in speech cases. Part of the exploration of the guiding value of U.S. law is how and *why* U.S. free speech jurisprudence arrived at its current state—Part IV will explore precisely that issue. Finally, in Part V, this Paper will present policy reasons for what the U.S. model can offer as guidance to countries that are in the process of developing their free speech standard. The Paper will conclude with concrete recommendations for policymakers.

I. BACKGROUND: PAKISTAN AND OTHER MUSLIM COUNTRIES' APPROACH TO RELIGIOUS SPEECH

A. Pakistan's Challenges with Religious Speech

Pakistan is the focus of this Paper for two reasons. First, it consistently performs very poorly at protecting religious speech and is thus emblematic of bad free speech law and the consequences of such laws as explained above. Second, it provides a good example of domestic courts that have recently sought U.S. guidance by

6. *Id.*

referencing U.S. case law, especially concerning public order. These two factors together make Pakistan a good case study in how U.S. law can be used to guide the development for broader protections of free speech law.

Pakistan's greatest limitations on religious speech were instituted by an expanded set of blasphemy laws.[7] These laws originate in the Indian Penal Code of 1860, and were enacted by the British colonial government.[8] The purpose of the laws was to maintain order in a multi-religious society and to prevent attacks against members of any religion.[9] However, after the creation of Pakistan, the push by some Muslim fundamentalist groups to turn Pakistan into a Sunni Islamic theocracy began in the 1950s.[10] In 1973, these efforts culminated in the Constitution's Repugnancy Clause, Article 227(1).[11] Article 227(1) provides that: "[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions."[12] To ensure that the "Injunctions of Islam" are followed, the Constitution further established the Islamic Council, a type of Islamic think-tank for Parliament and the Provincial Assemblies.[13] General Zia-ul-Haq (Zia) translated these changes into the country's blasphemy laws.[14] In 1977, as part of his Islamization efforts, Zia imposed martial law on Pakistan and "assumed for himself the power of amending the Constitution."[15] One of his many amendments was the addition of five new sections typically referred to as the blasphemy laws.[16]

7. Asma T. Uddin, *A Legal Analysis of Ahmadi Persecution in Pakistan*, *in* STATE RESPONSES TO MINORITY RELIGIONS 81, 82 (David M. Kirkham ed., 2013).

8. Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INTL L. 303, 336 (2008).

9. *Id*. at 337 ("[I]t would appear that the purpose of Chapter 15 was the maintenance of order in a multi-religious society and the containment of attacks targeted at *any* religion.").

10. Uddin, *supra* note 7, at 83.

11. PAKISTAN CONST. art. 227, § 1.

12. *Id*.

13. PAKISTAN CONST. art. 230, § 1.

14. Siddique, *supra* note 8, at 310–12.

15. *Id*. at 314.

16. *Id*. at 310–12.

Since the end of Zia's regime, the number of blasphemy cases has continued to increase.[17] As of June, Pakistan used its blasphemy laws to put four people on death row in 2014, now adding up to seventeen total waiting execution.[18] Nineteen people are imprisoned for life and sixty-eight attorneys were charged in May 2014 with this same crime after "protest[ing] police abuse."[19] Not surprisingly, Pakistan leads the world in the number of people jailed for blasphemy.[20]

However, there is some hope. When making their decisions, Pakistani domestic courts have referenced U.S. case law. As will be discussed below, the highest court in Pakistan referenced five U.S. Supreme Court cases to justify speech restrictions on religious minorities.[21] The courts have also referenced it at least twice when dealing with other free speech issues.[22] In fact, the court has looked to the United States for issues outside of freedom of speech as well.[23] All of this suggests that, at minimum, they are relying on U.S. case law to legitimize their opinions (even if they may be intentionally misinterpreting the U.S. law) and, at most, looking to the United States for legal guidance.

A recent *suo moto*[24] Pakistani Supreme Court decision (hereafter, "S.M.C. NO. 1 OF 2014") also offers hope.[25] The decision came in

17. *Id*. at 324–27. According to one study, there were only twelve blasphemy cases in the 1980s during General Zia's regime, but the following decade saw that number triple, and from 2000–2007 that number increased again to forty-eight. *Id*. at 325.

18. Thomas J. Reese & Daniel I. Mark, *Pakistan's War on Conscience*, THE PHILADELPHIA INQUIRER (June 8, 2014), http://www.uscirf.gov/news-room/op-eds/the-philadelphia-inquirer-pakistans-war-conscience.

19. *Id*.

20. *Id*.

21. *See* Zaheeruddin v. State, (1993) 26 SCMR (SC) 1718 (Pak.).

22. *See, e.g.*, Syed Masroor Ahsan and Others v. Ardeshir Cowasjee and Others, (1998) PLD (SC) 823 (Pak.) (citing Craig v. Harney, 331 U.S. 367, 376 (1947); Muhammad Nawaz Sharif v. President of Pakistan and Others, (1993) PLD (SC) 473 (Pak.)).

23. Watan Party v. Federation of Pakistan, (2011) PLD (SC) 997 (Pak.); Justice Tassaduq Hussain Jillani, *The Rule of Law and the Supreme Court of Pakistan*, INT'L ASS'N OF SUPREME ADMIN. JURISDICTIONS, *available at* http://www.aihja.org/images/users/1/files/pakistan.national .report_pakistan.en.0.pdf (referencing a U.S. Supreme Court case and Martin Luther King, Jr.).

24. "Suo moto is a Latin term meaning 'on its own motion.' It is used in situations where a government or court official acts of its own initiative." *Suo Moto Law & Legal Definition*, USLEGAL.COM, http://definitions.uslegal.com/s/suo-moto/.

25. (2014) S.M.C. No. 1 of 2014 (SC) (Pak.), *available at* http://www.supremecourt.gov.pk/web/user_files/File/smc_1_2014.pdf.

the aftermath of a series of complaints from different religious communities (including Christians, Hindus, the Kalash tribe, and Ismailis) about harassment and violence.[26] These incidents included a 2013 suicide bomb attack on a Peshawar church that killed eighty-one people;[27] attempts at forced conversion of members of the Kalash tribe and Ismailis in Chitral to a different sect within Islam;[28] and the frequent desecration of Hindu temples.[29] In addressing these incidents, the court explained the special legal protection that the Pakistan Constitution affords to minorities.[30] Chief Justice Jillani, quoting a professor from Seattle University School of Law, stated that "[t]he express guarantees for freedom of belief and practice of religion, rule of law, due process, equal protection, and a progressive legislative agenda, proffered by the leadership of the Pakistan Movement, constitute an implied social covenant with religious minorities in Pakistan."[31] Jillani also explained that Pakistan's origins lie in the principle of liberty for all:[32] "One of the famous Fourteen Points enumerated by Mohammad Ali Jinnah on proposed constitutional changes was that 'full religious liberty, i.e. liberty of belief, worship and observance, propaganda, association and education shall be guaranteed to [all] communities.'"[33]

As will be examined in detail below, the opinion reflects a remarkable change in tone compared to recent judicial treatments of religion-based violence.[34] And again, it uses the U.S. cultural and legal context to bolster its broad interpretation of religious freedom. The court not only quotes an American law professor, but in explaining that the country must "undo the injustices done to the minorities," the court relies on the U.S. Supreme Court decision *Brown v. Board of Education*.[35]

26. *Id*. at 4.

27. *Id*. at 2, 4.

28. *Id*.

29. *Id*. at 4.

30. *Id*. at 11–12.

31. *Id*. at 12.

32. *Id*. at 12–13.

33. *Id*. at 12 (citing Sekrut Yakhni, *The Fourteen Points of Quaid-e-Azam Muhammad Ali Jinnah*, PAKISTAN DEFENCE (Aug. 14, 2010), http://defence.pk/threads/the-fourteen-points-of-quaid-e-azam-muhammad-ali-jinnah.69201/).

34. *See infra* Part II.

35. S.M.C. No. 1 of 2014 at 26 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

Yet, while this case is a major step in the right direction, much work lies ahead in ensuring religious liberty in Pakistan. Even as Jillani explained in detail the rights afforded to religious minorities and the religious "conscience" under Article 20 of the Constitution, he completely failed to mention Pakistan's extensive list of globally-notorious blasphemy laws, which on their face violate any constitutional guarantee of religious freedom.[36] So long as blasphemy laws continue to fuel religion-based violence, little will change in the courts and in the community.

Pakistani courts—like many courts struggling with the treatment of potentially controversial speech—are concerned about public order. Their concern is that blasphemous speech runs the risk of angering people, who will then become violent. Even though the court acknowledged in this case that "general restrictions of law, public order and morality . . . cannot be interpreted or used in such a restrictive way as to curtail the basic essence and meaning of the pre-eminent right to religious conscience,"[37] the likelihood of the court applying this principle to alleged blasphemy remains uncertain.

This Paper tackles the issue of public order concerns as applied to religious speech. It argues that the United States was also worried about public order early on in the development of its free speech jurisprudence, but moved past it (the sections below on the U.S. law demonstrate how and why). Because of these similar experiences, U.S. history and jurisprudence provide useful guidance to nations trying to balance between free speech protection and the preservation of public order.

B. Similar Challenges in Other Muslim-majority Countries

Importantly, Pakistan is not alone in either its abuses or its use of American court language to justify restricting speech in the name of public order.[38] In the wake of the Arab Spring, other Muslim-

36. *Id*. at 17–21.

37. *Id*. at 18.

38. *See, e.g.*, Jacey Fortin, *Saudi Arabia Suggests Global Internet Regulations to Preserve 'Public Order'*, INT'L BUS. TIMES (Oct. 12, 2012), http://www.ibtimes.com/saudi-arabia-suggests-global-internet-regulations-preserve-public-order-845179. For example, when Saudi Arabia recently pushed for greater Internet regulations, it did so because "there is a crying need for international collaboration to address 'freedom of expression,' which clearly disregards public order." *Id*.

majority countries are also looking to U.S. law as a source of guidance. This Paper's argument is thus applicable beyond the case of Pakistan.

Tunisia provides one of the clearest examples. In June 2012, extremist Muslims across the country rioted and the governing Islamic party, Ennahda,[39] linked the riots to art displays and films that allegedly disrespected Islam.[40] The government continued to punish the artists.[41] In response, Ennahda proposed constitutional

39. Monica Marks, *Speaking on the Unspeakable: Blasphemy and the Tunisian Constitution*, SADA J. (Sept. 4, 2012), http://carnegieendowment.org/2012/09/04/speaking-on-unspeakable-blasphemy-tunisian-constitution/drca.

40. There were several examples of riots allegedly caused because of art displays and films, including: 1) an art display in La Marsa. John Thorne, *Books and Art Pit Freedom of Religion Against Free Speech in Tunisia*, CHRISTIAN SCI. MONITOR (Aug. 17, 2012), http://www.csmonitor.com/World/Middle-East/2012/0817/Books-and-art-pit-freedom-of-religion-against-free-speech-in-Tunisia/(page)/2; 2) Nadia El-Fani's film, "No God, No Master," *Persepolis Verdict Exposes Misuse of Blasphemy Laws in Tunisia*, HUM. RTS. FIRST (May 04, 2012), http://www.humanrightsfirst.org/press-release/persepolis-verdict-exposes-misuse-blasphemy-laws-tunisia (drawing opposition simply because of the film's title); 3) Andrew Hammond, *"No God" Film Angers Tunisian Islamists*, REUTERS (Jul. 6, 2011, 9:25 AM), http://www.reuters.com /article/2011/07/06/ozatp-tunisia-islamists-tension-idAFJOE7650F320110706; and 4) Marjane Satrapi's animated film, "Persepolis," Marc Fisher, *Tunisian Court Finds Broadcaster Guilty in Showing God's Image*, WASH. POST (May 3, 2012) http://www.washingtonpost.com/world/africa/ tunisian-who-showed-persepolis-on-tv-fined-in-free-speech-case/2012/05/03/gIQA0GpzyT_story.html (outraging some Muslims because it portrayed God in human form with the *Washington Post* reporting that the part of "Persepolis" in question involved God telling a "young girl to act in an honest and forthright manner").

41. The Tunisian government has persisted in prosecuting both the artists from La Marsa and the TV station that aired "Persepolis." In the latter, a trial court convicted the station's owner of causing "troubles to the public order" and "offence [sic] to good morals." *Tunisian Court Fines TV Station Boss for Airing Animated Film Persepolis*, GUARDIAN (May 3, 2012, 10:35 AM), http://www.guardian.co.uk/world/2012/may/03/tunisian-court-tv-station-persepolis. He was fined the equivalent of $1,600, and two employees were fined the equivalent of $800 each. *See* Fisher, *supra* note 40. The Tunisian court gave no explanation for its decision. *Id*. Some Muslim clerics defended the charges because "the movie insulted Islamic values by showing the face of God." *Id*. Meanwhile, charges are still pending against Nadia Jelassi and Mohamed Ben Salem, two sculptors involved in the La Marsa display, for disrupting the public order. *Tunisia: Hollande Should Raise Rights Concerns*, HUM. RTS. WATCH, http://www.hrw.org/news/2013/07/02/tunisia-hollande-should-raise-rights-concerns (last updated July 1, 2013). As the same post goes on to note, there have also been prosecutions and convictions for nonviolent speech, including a song called "Cops are Dogs," accusing officials of dereliction of duty in the decision to extradite the former Libyan prime minister, calling on the defense minister to open an investigation against the director of a military hospital, criticizing the general rapporteur of the legislature, and accusing a former foreign minister of misuse of public funds. *Id*. By persisting with these prosecutions, Tunisia has

provisions that would criminalize "all attacks on that which is sacred,"[42] justifying them on the need for public order with some even invoking the famous dictum from *Schenck v. United States* about shouting "fire!" in a crowded theater.[43]

However, the language was not adopted later[44] and Tunisia's newly ratified Constitution[45] instead has a vague clause that the government "commits itself . . . to the protection of the sacred," suggesting that the State is still empowered to potentially outlaw

continued to misunderstand the public order exception to free speech even after dropping the controversial constitutional provision.

42. *See* Marks, *supra* note 39. A proposed "Sacred Values" law would also have imposed prison terms or fines for insulting or mocking the "sanctity of religion" and for "insults, profanity, derision and representation of Allah and Mohammed." *Ennahda Proposes Blasphemy Law in Tunisia*, PROJECT ON MIDDLE EAST DEMOCRACY BLOG (D.C.), pomed.org/blog-post/human-rights/blasphemy-law/ (last visited Dec. 28, 2015).

43. 249 U.S. 47, 52 (1919). The theory was that insults to Islam would produce violence, so any affront to Islam should be punished. *See* Marks, *supra* note 39. Unfortunately, although the language about shouting fire is more colorful than *Brandenburg*, that case is now obsolete. As the history of the "clear and present danger" standard will reveal later in the Paper, those words can be stretched to restrict a great deal of speech. The *Brandenburg* standard, on the other hand, is remarkably protective of speech, strictly requiring imminence and intent.

44. The bill and proposed constitutional provision were later withdrawn. In doing so, National Constituent Assembly Speaker Mustapha Ben Jafaar explained: "[T]he sacred is something very, very difficult to define. Its boundaries are blurred and one could interpret it in one way or another, in an exaggerated way." *Tunisia Plans to Outlaw Blasphemy Dropped*, TELEGRAPH (Oct. 12, 2012, 9:30 PM), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/tunisia/9605965/Tunisia-plans-to-outlaw-blasphemy-dropped.html. Jafaar also commented that "freedom of expression and of the press" were "a fundamental achievement of the revolution that should never be called into question, and that no one should be able to challenge." *Id*. The change came on the heels of criticism from UN Special Rapporteur on Human Rights Defenders, Margaret Sekaggya, and other human rights groups. *See, e.g.*, *id*.

45. Article 6 deals specifically with religious liberty:

> The State is the guardian of religion. It guarantees liberty of conscience and of belief, the free exercise of religious worship and the neutrality of the mosques and of the places of worship from all partisan instrumentalization. The State commits itself to the dissemination of the values of moderation and tolerance and to the protection of the sacred and the prohibition of any offense thereto. It commits itself, equally, to the prohibition of, and the fight against, appeals to Takfir [charges of apostasy] and incitement to violence and hatred.

Amna Guellali, *The Problem with Tunisia's New Constitution*, HUM. RTS. WATCH (Feb. 3, 2014), http://www.hrw.org/news/2014/02/03/problem-tunisia-s-new-constitution (quoting CONSTITUTION OF THE TUNISIAN REPUBLIC, 2014, art. 6, *available at* http://www.jasmine-foundation.org/doc/unofficial_english_translation_of_tunisian_constitution_final_ed.pdf [hereinafter Constitution]).

blasphemy.[46] But some argue that other provisions in the Constitution will help balance against government overreach in this area.[47] The Constitution also provides several protections for freedom of expression,[48] but seeks to balance this freedom with the prevention of violence.[49] Now, it will be up to the courts to

46. *See* Guellali, *supra* note 45 ("Article 6 attempts the impossible task of reconciling two radically different visions of society. On the one hand, it caters to a hyper-religious audience that sees the government as a watchdog and protector of all things sacred. At the same time, the article describes a society that leaves each person the freedom of religious choice, without intrusion or interference. The two irreconcilable visions are forced together in a complicated and wordy fashion."); *Tunisia Signs New Constitution*, GUARDIAN (Jan. 27, 2014, 10:38 AM), http://www.theguardian.com/world/2014/jan/27/tunisia-signs-new-constitution-progressive/print.

47. *See Tunisia Signs New Constitution*, *supra* note 46 ("'This formulation [regarding protecting the sacred] is vague and gives too much leeway to the legislators to trample other rights such as the right to free expression, artistic creation and academic freedoms,' said Amna Guelleli, of the charity Human Rights Watch. 'However, the risk is reduced given the strong safeguards [in place in other articles] against overly broad interpretations.'"); Carlotta Gall, *Tunisian Constitution, Praised for Balance, Nears Passage*, N.Y. TIMES (Jan. 14, 2014), www.nytimes.com/ 2014/01/15/world/africa/tunisian-constitution-praised-for-balance-nears-passage.html?_r=1 ("But Mr. Fehri, the secular politician, said the balance was necessary. 'Our opinion is different, so you have two explanations for the same thing,' he said, referring to an assembly member who is also an imam, who praised the first article from an Islamic point of view. 'So when it comes to interpretation, they will take both into account.'"). One article even suggested that the text would potentially "permit atheism and the practice of non-Abrahamic religions frowned upon in other Islamic countries." *Tunisia Signs New Constitution*, *supra* note 46.

48. "Freedom of opinion, thought, expression, information and publication shall be guaranteed. These freedoms shall not be subject to prior censorship." CONSTITUTION, art. 31 (emphasis added). "The Audio-Visual Communication Commission shall . . . seek to *guarantee freedoms of expression and of the media* and the existence of pluralistic and fair media." *Id.* art. 127 (emphasis added).

49. Article 6 contains "the first constitutional condemnation of takfir [calling someone an apostate] in the Arab region." Mohammad al-Hayat, *Tunisia's New Constitution Criminalizes 'Takfir'*, AL-MONITOR (D.C.) (Feb. 3, 2014), http://www.al-monitor.com/pulse/security/2014/02 /tunisia-new-constitution-bans-takfir.html#. Takfirs are "religious edicts claiming someone is an apostate" that often lead to death threats and assassination attempts on the person. *Id.* Some argue that this ban was unnecessary and conflicts with freedom of expression. *See* Asma Ghribi, *The Problem with Tunisia's New Constitution*, FOREIGN POL'Y (D.C.) (Jan. 9, 2014, 11:13 AM), http://transitions.foreignpolicy.com/posts/2014/01/09/the_problem_with_tunisias_new_constitution ("Constitutional expert Slim Loghmani said that Tunisia does not need to criminalize apostasy because incitement to violence is already banned in the Tunisian penal code. . . . This article [Article 6] limits the freedom of expression, because it fails to provide a clear definition of apostasy, and does not specify whether apostasy is prohibited in all cases, or only when it implies an incitement to violence. The opposition presents itself as a bulwark against creeping Islamization and conservative attempts to curb liberties. But in their efforts to prevent themselves from being dismissed as infidels, members of the secular opposition have actually pushed for a provision that limits freedom of speech—specifically, the freedom of

determine how to interpret this balance and they may look to the United States for guidance.

Indonesia has also recently grappled with the same issue.[50] In response to a 2010 case seeking the repeal of Indonesia's Blasphemy Act,[51] the country's highest court—the Constitutional Court—upheld the Act on public order grounds based on the International Covenant of Civil and Political Rights (ICCPR).[52] The Indonesian Blasphemy Act prohibits speech promoting "an interpretation of a religion or a form of religious activity that is similar to the interpretations or activities of an Indonesian religion but deviates from the tenets of that religion."[53] It also includes a criminal prohibition on speech that "principally ha[s] the character of being at enmity with, abusing or staining a religion adhered to in Indonesia," or expression with "the intention to prevent a person to adhere to any religion based on the belief of the almighty God."[54]

speech for Islamists. The secularists did this by taking away the Islamists' most powerful rhetorical tool: religion."); Sarah Mersch, *Tunisia's Compromise Constitution*, SADA J. (D.C.) (Jan. 21, 2014), http://carnegieendowment.org/sada/2014/ 01/21/stunisia-s-compromise-constitution/gyzc ("Protection of the sacred and the freedom of conscience and faith do not go together—and neither do the interdiction against accusing somebody of apostasy and the freedom of expression (guaranteed in article 30)."); *See also* CONSTITUTION, art. 35 ("The freedom to establish . . . associations is guaranteed. . . . [A]ssociations must abide . . . by the constitution, the law . . . and the rejection of violence."); ("The law shall determine the *limitations related to the rights and freedoms* that are guaranteed by this Constitution and their exercise, on the condition that it *does not compromise their essence. These limitations can only be put in place where necessary in a civil democratic state, with the aim of protecting the rights of others or based on the requirements of public order, national defense, public health or public morals. Proportionality between these limitations and their motives must be respected. Judicial authorities shall ensure that rights and freedoms are protected from all violations.* No amendment that undermines any human rights acquisitions or freedoms guaranteed in this Constitutions is allowed.") (emphasis added) *Id.* art. 49.

50. *See* Syamsul Arifin, *Indonesian Discourse on Human Rights and Freedom of Religion or Belief: Muslim Perspectives*, 2012 BYU L. REV. 775, 808 (discussing that an Indonesian Muslim party leader, Zallum, sees "freedom of religion [and] freedom of speech" as "contradictory to Islam").

51. *See* Decision No. 140/PUU-VII/2009, Indonesian Constitutional Court (April 19, 2010).

52. This was the primary international law instrument at issue in the case.

53. W. Cole Durham, *Forward* to THE LEGAL TRAINING INSTITUTE, INDONESIA: A RESOURCE GUIDE FROM THE LEGAL TRAINING INSTITUTE iii (2012) [hereinafter RESOURCE GUIDE], http://www.becketfund.org/wp-content/uploads/2012/02/Indonesia-Resource-Book-Final-5-2011.pdf.

54. *Id.* at 134 (quoting Criminal Code of Indonesia art. 156(a) (internal quotations omitted).

The court's opinion does not cite U.S. case law, but it does grapple with public order exceptions in a way that invites international comparison. The court used Article 19, paragraph (3) which states that the right to freedom of expression "carries with it special duties and responsibilities," including restrictions "[f]or the protection of national security or of public order (*ordre public*)."[55] The court also relied on Article 18 of the ICCPR, which states that religious freedom "may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[56] The court held that these treaties justified the Blasphemy Act's censure of religious interpretations that "could trigger reactions that threaten security and public order if [they are] expressed or practiced in public."[57] In other words, the government could limit blasphemous statements as a means of preserving public order.

But the Indonesian court construed the public order exception too broadly. The official commentary of the U.N. Human Rights Committee explains that "[l]imitations . . . must be *directly related and proportionate to the specific need* on which they are predicated. Restrictions *may not be . . . applied in a discriminatory manner*."[58] The Blasphemy Act is neither directly related nor proportionate to the specific need at issue, and is not applied in a non-discriminatory manner. It prohibits public communication of support for an unofficial religion (i.e. not Islam, Protestant Christianity, Catholicism, Hinduism, Buddhism, or Confucianism), rather than simply prohibiting communications on religious subjects that incite individuals to violence.[59] And the Act's officially acknowledged purpose is to "channel . . . religiosity" towards the approved religions, rather than to treat all religions equally.[60] The Indonesian

55. G.A. Res. 2200A (XXI), art. 19 ¶ 3, International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

56. *Id.* art. 18 ¶ 3.

57. Translation of Decision No. 140/PUU-VII/2009, Indonesian Constitutional Court, [3.52] (April 19, 2010).

58. U.N. Human Rights Comm., *General Comment No. 22: Freedom of thought, conscience or religion*, art. 18, ¶ 8, CCPR/C/21/Rev.1/Add.4 (July 30, 1993) (emphasis added).

59. RESOURCE GUIDE, *supra* note 53, at 6.

60. Enactment of the President of the Republic of Indonesia, No. 1/PNPS of 1965 Concerning the Prevention of Religious Abuse and/or Defamation, § I(3).

court thereby misinterpreted the public order exception, conflating it with blasphemy prohibitions and, in so doing, undeservedly legitimized these prohibitions.

Because of these misunderstandings, it is important for policy makers to be educated on the limits of the public order exceptions and how they can be corrected. For Pakistan, this begins with learning about its own development of laws on religious speech.

II. RELIGION IS DIFFERENT: PAKISTAN'S INCONSISTENT SPEECH JURISPRUDENCE

As this Part will show, Pakistani courts have drawn heavily on the old U.S. conception of public order exceptions to free speech in interpreting its blasphemy laws. Yet these courts misunderstand the U.S. standard and, more broadly, the public order exception in international law.

A. Impact of General Zia Amendments

To better understand the Pakistani blasphemy laws in their current state, it is helpful to compare Chapter 15 of the Pakistani Penal Code, *Of Offenses Relating to Religion*, before and after General Zia's amendments in the 1980s. The table below compares the language of the Penal Code before and after General Zia's amendments.

Penal Code Comparison: Pre & Post General Zia Amendments[61]

Adopted Indian Penal Code	**General Zia Amendments**
Section 295: Whoever destroys, damages or defiles *any place of worship, or any object held sacred by any class of persons* with the intention of thereby *insulting the religion of any class of persons* or	**Section 295–B. Defiling, etc., of Holy Qur'an**: Whoever wilfully [sic] *defiles, damages or desecrates a copy of the Holy Qur'an* or of an extract therefrom or *uses it in any derogatory manner* or for any

61. Underlined words deal with mens rea. Italicized words deal with key aspects of the text.

with the knowledge that *any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion*, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[62]	unlawful purpose shall be punishable with imprisonment for life.[63]
Section 298: Whoever, with the deliberate intention of *wounding the religious feelings of any person*, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.[64]	**Section 295–C. Use of derogatory remarks, etc., in respect of the Holy Prophet**: Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, *directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad* (peace be upon him) *shall be punished with death*, or imprisonment for life, and shall also be liable to fine.[65]
Section 295–A: Whoever, with deliberate and malicious intention of outraging *the 'religious feelings of any class of [the citizens of Pakistan],*[66] by words, either spoken or written, or by visible representations, *insults or attempts to insult the religion or the religious beliefs of*	**Section 298–B. Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places**: (1) *Any . . . 'Ahmadis' . . . who . . . (a) refers to . . . any person, other than a Caliph or companion of the Holy Prophet Muhammad . . .* as "Ameer-ul-

62. The Penal Code Act, No. XLV of 1860, PEN. CODE (1860) ,ch. XV, § 295 (emphasis added) [hereinafter IPC].

63. Pakistan Penal Code Act, No. XLV of 1860, PAK. PEN. CODE (1982), ch. XV § 295–B, *added by* P.P.C. Ordinance, I of 1982 (emphasis added) [hereinafter PPC].

64. IPC ch. XV, § 298 (emphasis added).

65. PPC ch. XV § 295–C (emphasis added).

66. The phrase "citizens of Pakistan" replaced the Indian Penal Code's phrase "His Majesty's subjects" by Adaption Order 1961, art. 2 (w.e.f. Mar. 23, 1956). *See* I PPC ch. XV § 295–A, n.2 (1982).

that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[67]	Mumineen", "Khalifatul-Mumineen", "Khalifa-tul-Muslimeen", "Sahaabi" or "Razi Allah Anho"; (b) refers to . . . any person, other than a wife of the Holy Prophet Muhammad . . . as "Ummul-Mumineen"; (c) refers to . . . any person, other than a member of the family "Ahle-bait" of the Holy Prophet Muhammad . . . as "Ahle-bait"; or (d) refers to . . . his place of worship a "Masjid" *shall be punished with imprisonment* of either description for a term which may extend to three years, and shall also be liable to fine.[68]
<u>Chapter 15 Preface</u>: The principle on which this chapter has been framed is a principle on which it would be desirable that all Governments should act, but from which the British Government in India cannot depart without risking the dissolution of society ; it is this, that *every man should be suffered to profess his own religion, and that no man should be suffered to insult the religion of another*.[69]	**<u>Section 298–C.</u> Person of Quadiani group, etc., calling himself a Muslim or preaching or propagating his faith**: *Any . . . 'Ahmadis' . . . who directly or indirectly, poses himself as a Muslim*, or *calls, or refers to, his faith as Islam*, or *preaches or propagates his faith*, or *invites others to accept his faith*, by words, either spoken or written, or by visible representations, or in *any manner whatsoever outrages the religious feelings of Muslims* shall be punished with imprisonment of either description for a term which may

67. INDIA PEN. CODE, *supra* note 62, at 1328 (emphasis added).
68. PPC ch. XV § 298–B (emphasis added).
69. INDIA PEN. CODE AS ORIGINALLY FRAMED IN 1837, 136 (1888).

	extend to three years and shall also be liable to fine.[70]

Chapter 15 originated from the Indian Penal Code (XLV of 1860), which the British colonial government enacted for the Indian subcontinent in October 1860.[71] As seen above in the preface to Chapter 15, the Law Commissioner's main motivation for its inclusion in the Indian Penal Code was to maintain "order in a multi-religious society" and prevent attacks targeting *any* religion.[72] Moreover, given the fact that Muslims formed a minority in the Indian subcontinent prior to its partition, "it appears plausible that part of the motivation for inclusion of this chapter was the protection of religious rights of minorities."[73] In a recent Lahore High Court judgment, Justice Ali Nawaz Chohan corroborated this view: "Historically speaking, [these laws were] enacted by the British to protect the religious sentiments of the Muslim minorities in the subcontinent before partition against the Hindu majority."[74]

However, while the drafters were specifically thinking of Islam, they were doing so because of its status as a minority religion and thus were making this law not only for the protection of Islam, but also for any minority religion.[75] As seen in the table above, Sections 295 and 298 reflect these concerns. The language protects "any person"[76] or "any class of persons,"[77] not just the majority religion, and it does not discriminate against any religion.[78] In 1927, this pattern continued with the insertion of Section 295-A by the Criminal Law Amendment Act of XXV of 1927.[79] In their original form, sections 295, 295–A and 298 of Chapter 15 were clearly intended to apply to all religions.[80]

70. PPC ch. XV sec. 298–C (emphasis added).

71. *See* Siddique & Hayat, *supra* note 8, at 336.

72. *Id*. at 337 (emphasis in original).

73. *Id*.

74. *Id*. (quoting Muhammad Mahboob v. State, (2002) 54 PLD (Lahore) 587, 597 (Pak.)).

75. *Id*.

76. PPC ch. XV § 295–C.

77. *Id*. at § 298.

78. Siddique & Hayat, *supra* note 8.

79. *Id*. at 338.

80. *Id*.

In contrast, and as will be described further below, the blasphemy laws in their current form "pertain specifically to the protection of Islam."[81] For example, Section 295–B "pertains only to the defilement of the Holy Quran."[82] Section 295–C focuses exclusively on "derogatory remarks against [the Prophet] Muhammad."[83] And Sections 298–B and 298–C deal exclusively with the punishment of Ahmadis.[84]

The Ahmadiyya is a minority religious group founded in the late nineteenth century by Mirza Ghulam Ahmad.[85] Ahmadis consider themselves Muslims, although other Muslims disagree because of the group's variant belief about the finality of Prophet Muhammad's prophethood.[86] Anti-Ahmadiyya sentiment was relatively absent at the time of Pakistan's founding and Pakistan's courts decided several cases in favor of Ahmadi freedom of religion and speech in the 1960s.[87] But anti-Ahmadiyya sentiment has intensified in the years since and was codified into law in the 1980s by General Zia-ul-Haq. In particular, the 1983 Ordinance XX criminalized various forms of Ahmadi worship and speech.[88] More than a thousand people have been arrested under the blasphemy laws, forty percent of them Ahmadi.[89] "Sections 298B and 298C of Pakistan's Penal Code, added in 1984 through Ordinance XX, are dedicated entirely to the

81. *Id*.

82. *Id*.

83. *Id*.

84. *Id*.

85. *Id*. at 312.

86. *Id*. at 312 n.10.

87. *See* Abdur Rahman Mobashir v. Amir Ali Shah Bokhari, (1978) PLD (Lahore) 113 (Pak.) (holding "no law or legal right can be used to prevent Ahmadis from worshipping freely and calling their house of worship a 'masjid,' religious terms are not property, and public nuisance law cannot be used to punish Ahmadis for praying and reciting the call to prayer"); Abdul Karim Shorish Kashmiri v. Province of West Pak., (1969) 21 PLD (Lahore) 289 (1968) (Pak.) (holding freedom to profess Ahmadi religion is protected and civil courts cannot answer who is Muslim).

88. *See* Ordinance No. XX of 1984The Gazette of Pakistan Islamabad, Thursday, 26 April 1984No.F.17(1)84-Pub, *available at* http://defence.pk/threads/ordinance-xx-that-bars-a-muslim-being-called-muslim-in-pakistan.379610/; *see also* PAKISTAN CONST. Pt XII, ch.5 art. 260 (3)(b); PAKISTAN CONST. Pt XV, ch.5 art. 298-B, 298-C, *available at* http://www.pakistani.org /pakistan/legislation/1860/actXLVof1860.html.

89. *Tom Lantos Human Rights Commission: Hearing before H. Comm. on Foreign Affairs*, 112th Cong., 3–4 (2012) (testimony of Amjad Mahmood Khan, Esq., UCLA Law Professor), *available at* http://tlhrc.house.gov/docs/transcripts/2012_3_21_South%20Asia/Amjad%20Khan%20 Testimony.pdf.

persecution of Ahmadis," prohibiting them from declaring their faith publicly, calling themselves Muslims, building mosques, and engaging in most other religious activities.[90]

In comparing the Pakistani Penal Code's original sections of Chapter 15 and the current blasphemy laws as General Zia enacted them in the 1980s, another fundamental difference is the elimination of any intent requirement as a mens rea of the offense.[91]

> The 1860 and 1927 versions of the Indian Penal Code. . . emphasize[d] the intention of the accused, as evidenced by the[] inclusion of the following requirements in the relevant provisions" of Section 295 and 298: "'*with the intention* of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion" in Section 295; "*with the deliberate and malicious intention* of outraging the religious feelings of any class of citizens of Pakistan" in Section 295–A; and "*with the deliberate intention* of wounding the religious feelings of any person" in Section 298.[92]

However, General Zia's amendments are nearly devoid of any mens rea.[93] The only exception is section 295–B: "whoever *wilfully* [sic] defiles, damages or desecrates a copy of the Holy Qur'an."[94] The new provisions in sections 295 and 298 fail to use any form of mens rea: "*by any imputation, innuendo, or insinuation*, *directly or indirectly, defiles* the sacred name of the Holy Prophet Muhammad"[95] in Section 295–C (or of any family members "of the Holy Prophet" in Section 298-A)[96]; "*Any . . . 'Ahmadis' . . . who . . . refers to*"[97] in Section 298–B; and "*directly or indirectly*, poses himself as a Muslim, . . . or in *any manner whatsoever* outrages the religious feelings of Muslims"[98] in Section 298–C.[99] Thus, these amendments

90. Uddin, *supra* note 7, at 82; see also Syamsul Arifin, *Indonesian Discourse on Human Rights and Freedom of Religion or Belief: Muslim Perspectives*, 2012 BYU L. Rev. 775, 777–78 (discussing the persecution of the Ahmadi faith in Indonesia).

91. Siddique & Hayat, *supra* note 8, at 340.

92. *Id.* (quoting IPC,ch. XV, §§ 295, 295–A, 298) (emphasis added).

93. *See id.* at 339–40.

94. PPC ch. XV § 295–B (emphasis added).

95. *Id.* § 295–C (emphasis added).

96. *Id.* § 298–A (emphasis added).

97. *Id.* § 298–B(2) (emphasis added).

98. *Id.* § 298–C (emphasis added).

are based on strict liability, making it easier for the government to prove that a person has committed blasphemy against Islam.[100]

B. Case Comparison

Next, it is important to understand the differences in case law before and after the Zia amendments.[101] The case of *Punjab Religious Book Society of Lahore v. State*[102] exemplifies the Pakistan Supreme Court's understanding of Chapter 15's "Offenses Relating to Religion" intent requirement prior to General Zia's enactment of the blasphemy laws in the 1980s.[103] The Society had published a book entitled "Mizan-ul-Haq" comparing Islam and Christianity, which the Home Department declared was "calculated to outrage the religious feelings of the Muslims of Pakistan and publication of which is punishable under Section 295-A of the Pakistan Penal Code."[104] But the court disagreed.[105] Even though the court found that the "[author's] object was to show the superiority of Christianity over Islam," it also found that "he ha[d] said at more places than one that *he had no intention* of injuring the feelings of Muslims whom at places he called his brethren."[106]

The court's reasoning hinges on the mens rea aspect of the crime, not on the book's potential effect on its readers. The court held that this intent requirement "is not just the ordinary intention that one finds mentioned with regard to almost all other offences [sic] . . . but a deliberate and malicious intention to do the thing mentioned therein."[107] The court went on to note that the "laws of Pakistan . . . do not forbid religious discussions and preaching," so if "a person engaged in a religious discussion is merely attempting

99. *See* Siddique & Hayat, *supra* note 8, at 340–41.

100. *See id.* at 337.

101. Many of these ideas come thanks to the great work of others. *See id.*

102. (1960) 12 PLD (Lahore) 629 (Pak.).

103. Siddique & Hayat, *supra* note 8, at 341–42.

104. *Id.* at 341 (quoting Punjab Religious Book Society v. State, (1960) 12 PLD (Lahore) 629 (Pak.)).

105. *Id.*

106. *Id.* (quoting Punjab Religious Book Society v. State, (1960) 12 PLD (Lahore) 629, 631 (Pak.)) (emphasis added); *see also* Muhammad Khalil v. State, (1962) 14 PLD (Lahore) 850 (Pak.) (addressing similar facts and confirming the same interpretation of Section 295–A's intent requirement).

107. Siddique & Hayat, *supra* note 8, at 341 (quoting Punjab Religious Book Society v. State, (1960) 12 PLD (Lahore) 629, 637 (Pak.)).

to show that the religion he is advocating is the best in the world, he is not doing anything to which the law takes exception."[108] The court would only presume a deliberate and malicious intent when the conduct of the accused "is extremely offensive and has no reliable source to justify its acceptance as correct" or if the "argument in favour [sic] of one religion has sunk to the level of abuse to another."[109]

This initial emphasis on Chapter 15's intent requirement and general applicability to all religions is in stark contrast to the blasphemy laws enacted under General Zia, which eliminated the "deliberate and malicious" intent requirement, and focused exclusively on offenses against Islam.[110] Additionally, and as will be described further below, the blasphemy laws in their current form "lack any nexus with the prerequisite of a causation of any breach of peace, and in that sense are strict liability offenses."[111]

In 1993, the court handed down *Zaheeruddin v. State*, the major case on freedom of speech and religion under the blasphemy laws in their current form.[112] It upheld convictions under Ordinance XX and section 295(c) of the Pakistan Penal Code by a three-to-two vote.[113] According to the Pakistani court, public religious expression by Ahmadis was offensive to Pakistan's other Muslim citizens and could lead the offended citizens to engage in violence.[114] The court reasoned that since Ahmadi practices can elicit such violent reactions, the Pakistani government had the power to restrict the practices.[115] The majority opinion, written by Abdul Qadeer Chaudhry, based its decision primarily on concerns about public order and drew heavily

108. *Id*. at 342 (quoting Punjab Religious Book Society v. State, (1960) 12 PLD (Lahore) 629, 637–38 (Pak.)).

109. *Id*. (quoting Punjab Religious Book Society v. State, (1960) 12 PLD (Lahore) 629, 638 (Pak.)).

110. *Id*. at 343.

111. *Id*. at 337.

112. *Id*. at 374–75.

113. Zaheeruddin v. State, (1993) 26 SCMR 1718 (Pak.).

114. Amjad Mahmood Khan, *Misuse and Abuse of Legal Argument by Analogy in Transjudicial Communication: The Case of* Zaheeruddin v. State, 10 RICH. J. GLOBAL L. & BUS. 497, 507–09 (2011). The court also spent a considerable portion of its opinion discussing the applicability of copyright and trademark law to religious terminology, agreeing that it does apply and does serve to prevent usage of these terms by non-Muslims. *Id*. at 509.

115. *Id*. at 509.

on U.S. case law.[116] Among its citations were six U.S. Supreme Court cases:[117] *Cantwell v. Connecticut* (1940);[118] *Jones v. Opelika* (1942);[119] *Reynolds v. United States* (1879);[120] *Hamilton v. Board of Regents* (1934);[121] *Cox v. New Hampshire* (1941),[122] and *Lanzetta v. New Jersey* (1939).[123] Of these, *Cantwell* and *Jones* are the most relevant.

The *Cantwell* citations generally invoked the U.S. Supreme Court's warning that freedom of religion does not allow individuals to violate laws with impunity. The Pakistani court quoted the U.S. Supreme Court as saying, "the cloak of religion or religious belief does not protect anybody in committing fraud upon the public."[124]

The *Zaheeruddin* court also focused on the *Cantwell* Court's acknowledgement that:

116. *Id*.

117. *Zaheeruddin*, 26 SCMR 1718.

118. 310 U.S. 296.

119. 316 U.S. 584.

120. 98 U.S. 145. *Reynolds*, held, among other things, that a defendant could not violate a law prohibiting polygamy because he considered it his religious duty. *Id*. *Zaheeruddin* uses this case to support the proposition that, while laws cannot interfere with religious belief, they can legitimately interfere with religious practice. Zaheeruddin, 26 SCMR at 25.

121. 293 U.S. 245. In *Hamilton*, the U.S. Supreme Court held that the government does not violate religious freedom when it makes military training compulsory on a university campus, despite students' religious objections, because such training is essential to the government duty to maintain peace and order. *Id*. at 256. But the law in question applied equally to all university students of a certain age and did not explicitly target adherents of a particular set of religious beliefs. In fact, the Supreme Court in *Hamilton* underscores its belief in robust religious liberties: "Undoubtedly [religious liberty] does include the right to entertain the beliefs, to adhere to the principles, and to teach the doctrines on which these students base their objections to the order prescribing military training." *Id*. at 262.

122. 312 U.S. 569. *Cox* involved the arrest of defendants Jehovah's Witnesses for marching near city hall with religious literature and signs without a license. The defendants argued that the applicable statute, which prohibited a "parade or procession" on public streets without a license, was invalid under the Fourteenth Amendment. The lower court held, and the Supreme Court affirmed, that it was a traditional exercise of state power to regulate parades and processions on public streets. The Court also held that the statute's purpose was not to restrict religious or free speech. *Id*. at 573–74.

123. 306 U.S. 451. *Lanzetta* is a case about the difference between vagueness and overbreadth. *Id*. In a sad irony, however, Pakistan's blasphemy law is often abused for its vagueness. *See* FREEDOM HOUSE, POLICING BELIEF: THE IMPACT OF BLASPHEMY LAWS ON HUMAN RIGHTS, 73–74 (2010) ("Pakistan's blasphemy laws are routinely used to exact revenge, apply pressure in business or land disputes, and for other matters entirely unrelated to blasphemy.").

124. *Zaheeruddin*, 26 SCMR 1718. In reality, the Court wrote, "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

> [c]onduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. . . . It is . . . clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading [upon religious] liberties[.][125]

Although *Cantwell* clearly cautioned against misuse of the public order argument to suppress a fundamental right, the *Zaheeruddin* court cited *Cantwell* even as it "wholly den[ied Ahmadis'] right to" religious expression.[126] Even setting aside the fact that *Cantwell* was superseded in 1969 by *Brandenburg v. Ohio*,[127] the Pakistani court failed to note that the decision actually *upheld* the Free Exercise claim at issue. In the course of reaching its holding in *Cantwell*, the U.S. Supreme Court wrote:

> When clear and present danger of riot, disorder . . . or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.[128]

A permissible law under *Cantwell* must therefore be tightly drawn to strike at a "clear and present danger of" an "immediate threat to public safety, peace, or order."[129] The *Zaheeruddin* court cited *Cantwell* to do precisely the reverse. By choosing the wrong standard and then misapplying it, the Pakistani court managed to reach the exact opposite result that a U.S. court would. Of course, this misapplication may have been intentional; the court's reliance on U.S. law lent it legitimacy—even as the court contorted the very meaning of the law.

The court also cited, third-hand, a Supreme Court case from 1942. Via a decision of the Indian Supreme Court, which in turn quoted an Australian court decision, Justice Chaudhry wrote:

125. *Cantwell*, 310 U.S. at 304.
126. *Id.* (emphasis added).
127. 395 U.S. 444.
128. *Cantwell*, 310 U.S. at 308.
129. *Id.*

> The Supreme Court said in *Jones v. Opelika*, . . . with reference to the constitutional guarantees of freedom of speech, freedom of press and freedom of religion: "They are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument." It was held that these privileges must be reconciled with the right of a State to employ the sovereign power to ensure orderly living "without which constitutional guarantees of civil liberties would be a mockery."[130]

This time the Pakistani court was not ignoring the holding of the U.S. case. But it did fail to explain that *Jones v. Opelika* was vacated the next year on the authority of *Murdock v. Pennsylvania*.[131] In the interim, Justice Byrnes had retired and been replaced by Justice Rutledge. The new majority struck down solicitation restrictions on free speech grounds, writing, "It does not cover, and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation."[132] That language, of course, would not have supported the Pakistani restriction.

C. Religious Speech vs. Other Speech

The *Zaheeruddin* decision also illustrates the growing disconnect between the blasphemy laws in Pakistan as the courts are currently interpreting them, and the rest of the courts' free speech jurisprudence. First, it is important to understand the relevant text of the Pakistani Constitution protecting both free speech and religious freedom. Article 19 guarantees freedom of speech:

> Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence [sic] of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence [sic].[133]

130. *Zaheeruddin*, 26 SCMR 1718 (quoting Jones v. Opelika, 316 U.S. 584, 593 (1942)).

131. 319 U.S. 105 (1943).

132. *Id.* at 116 (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

133. PAKISTAN CONST., art. 19.

And Article 20 protects the freedom to profess religion:

> Subject to law, public order and morality, — (a) every citizen shall have the right to profess, practice and propagate his religion; and (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.[134]

In its non-religious speech cases, Pakistan has taken the general approach of its Article 19 case law by considering the intent of the speaker and the imminence of the threat to public order as essential elements of the analysis. For example, in the contempt of the court case of *Syed Masroor Ahsan v. Ardeshir Cowasjee*, the court noted that in the United States:

> [T]he vehemence of the language used is no longer alone the measure of power to punish for contempt, but the deciding factor is whether it constitutes imminent, not merely likely, threat to the administration of justice and that the danger must not be remote or even probable, it must immediately imperil.[135]

Similarly, during the constitutional crisis and conflict between Prime Minister Nawaz Sharif and President Ghulam Ishaq Khan in 1993, the Supreme Court became involved and held that the president could dissolve the National Assembly only if a constitutional breakdown had occurred. In assessing allegations of treason leveled against Prime Minister Sharif by President Ishaq Khan, Justice Saleem Akhtar had occasion to remark:

> The danger should "imminently threaten immediate interference with the lawful and pressing purposes of the law" requiring immediate step [sic] to ensure security of the country. . . . The concept of "clear and present danger" in [sic] USA was liberalised [sic] by making "imminence" as [sic] a basic test.
>
> . . . If such a speech makes allegation [sic] or defames anyone without any justification, but does not create lawlessness, disorder,

134. *Id.* art. 20 §§ a–b.

135. Syed Masroor Ahsan v. Ardeshir Cowasjee, (1998) 50 PLD (SC) 823 (Pak.) (citing Craig v. Harney 331 U.S. 367, 376 (1947)).

> or threat to security or disruption, it will hardly amount to subversion of the Constitution.[136]

The contrast between the Pakistan Supreme Court's uses of U.S. free speech jurisprudence in the case of *Nawaz Sharif v. President of Pakistan* and in the case of *Zaheeruddin v. State* could not be more striking. This is particularly curious given the two opinions were issued in the same year. While the court focused on the imminence and immediacy of the threat to the public order when assessing Nawaz Sharif's free speech rights, the court in *Zaheeruddin* not only neglected addressing the imminence of any threat to the public order, but it also completely failed to consider the Ahmadi's free speech rights under Article 19.[137] In this regard, it is clear that the court's blasphemy law jurisprudence has been completely unmoored from the court's free speech jurisprudence. Not only has the necessary prerequisite of intent been eliminated from the statutory offenses in Chapter 15, the requirement of demonstrating an imminent threat to the public order has been eliminated from the court's analysis as well.

As will be discussed further in Parts IV and V below, in the United States, laws limiting hateful speech require a showing that "a violent reaction and a resultant breach of the peace" is *imminent*, in order for the speech to be constitutionally restricted.[138] The speech's mere prejudicial effect or offensiveness is not sufficient to subject it to restriction.[139] In contrast, Pakistan's blasphemy laws in their current form do not require a connection between the offensive speech and an imminent breach of the peace. "Not only do these laws not require a nexus between intent and action, they also do not require a nexus between action and outcome."[140]

Moreover, even in those cases where Pakistani courts discuss whether the impugned speech is likely to provoke a breach of the peace, there is "not a single instance" where the freedom of speech guaranteed by Article 19 of the Pakistan Constitution is invoked, nor is there a discussion of whether it has a role to play in the

136. Muhammad Nawaz Sharif v. President of Pakistan, (1993) 45 PLD 473 § 20 (Pak.) (quoting Saia v. N.Y., 334 U.S. 558 (1948)) (citing Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950)) (internal quotation marks omitted).

137. *See* Siddique & Hayat, *supra* note 8, at 375–76.

138. *Id*. at 373.

139. *Id*.

140. *Id*.

analysis.[141] On the rare occasion that the blasphemy laws are challenged on constitutional grounds, Pakistan has been quick and "categorical in rejecting such arguments."[142] In this respect, the *Zaheeruddin* opinion is a rare example of the court "conducting a cost-benefit analysis of the" fundamental rights and "freedoms enshrined [in] the Constitution [albeit Article 20's protection of freedom of religion instead of Article 19's protection of freedom of speech] vis-à-vis [the] public policy" concern with preventing a "breach of the peace."[143]

Generally speaking, since General Zia's Islamization efforts, Pakistan's blasphemy law jurisprudence and free speech jurisprudence have become completely disconnected. Principles, such as intent and imminence, that made general free speech restrictions unconstitutional under Article 19, have been completely ignored when determining the constitutionality of religious speech under Article 20.[144] This is unusual, given the fact that prior to the enactment of the blasphemy laws in their current form, Pakistani courts looked at both the intent of the speaker and the imminence of the threat to public order when deciding whether religious speech violated Chapter 15 of the PPC—just as the court did in *Punjab Religious Books Society*.[145]

As will be discussed more fully below in Part IV, Pakistan can benefit from the example of U.S. free speech jurisprudence. In many ways, the Supreme Court of Pakistan has been wrestling for some time with the incorporation of the U.S. standard into its Article 19 case law. But what is ironic is that while the U.S. standard of intent and imminence of violence is being incorporated into Pakistan's free speech jurisprudence, the requirements of intent and imminence are simultaneously being eliminated from Pakistan's blasphemy law jurisprudence. This discrepancy suggests that Pakistan's misuse of U.S. law in the blasphemy context may be intentional.

141. *Id.* at 374.

142. *Id.*

143. *Id.* at 375.

144. *Id.* at 375–76.

145. *Id.* at 341 (quoting Punjab Religious Book Society v. State, (1960) 12 PLD (Lahore) 629, 631 (Pak.)).

D. OIC Defamation of Religions Resolution and Resolution 16/18

The debate over the "defamation of religions" at the UN provides another example of U.S. free speech laws' influence in the international context—and Pakistan's rejection of those principles as applied to religious speech. In 1999, Pakistan was at the forefront of an effort by the Organization of Islamic Cooperation (OIC) to pass a resolution in the U.N. Commission on Human Rights on the Defamation of Religions.[146] Pakistan presented the draft resolution as a solution for rising intolerance toward Muslims in the West, which Pakistan likened to anti-Semitic violence in Europe prior to World War II.[147]

Other delegates thought the Resolution was unbalanced and criticized its sole focus on Islam, arguing that adherents of other religions were also discriminated against and subject to intolerance and persecution. Pakistan's delegate agreed to change the title and paragraph 3 of the Resolution to make it inclusive of all religions, while the text continued to reflect Pakistan's concerns regarding the treatment of Islam specifically.[148] In 1999 and 2000, the resolution was adopted without a vote after these changes and

146. Asma T. Uddin, *The UN Defamation of Religions Resolution and Domestic Blasphemy Laws: Creating a Culture of Impunity*, *in* FREE SPEECH AND CENSORSHIP AROUND THE GLOBE 495 (Peter Molnar ed., 2015).

147. *See* U.N. ESCOR, 55th Sess., 61st mtg. at ¶¶ 1–9, U.N. Doc. E/CN.4/1999/SR.61 (Oct. 19, 1999).

148. U.N. ESCOR, 55th Sess., 62d mtg. at ¶¶ 1–9, U.N. Doc. E/CN.4/1999/SR.62 (Nov. 17, 1999).

comments.[149] From 1999 until 2005, the Commission adopted similar resolutions annually.[150]

A well-known example of the "defamation of religion" claim came after the publication of twelve cartoons of the Prophet Mohammed in a Danish newspaper in 2005. The culture editor of the newspaper subsequently explained his decision:

> When I visit a mosque, I show my respect by taking off my shoes. I follow the customs, just as I do in a church, synagogue or other holy place. But if a believer demands that I, as a nonbeliever, observe his taboos in the public domain, he is not asking for my respect, but for my submission. And that is incompatible with a secular democracy.[151]

The OIC, however, issued a press release in 2005 criticizing "the recent incident of desecration of the image of the Holy Prophet Mohamed" and "using the freedom of expression as a pretext to defame religions."[152] This incident illustrates the disparity between public order exceptions and the defamation of religions

149. Comm'n on Human Rights, Rep. on the Sixty-First Sess., 2005/3, at 21, Mar. 14–Apr. 22, 2005, U.N. Doc. E/CN.4/2005/135, Supp. No. 3 (2005); Comm'n on Human Rights, Rep. on the Sixtieth Sess., 2004/6, at 28, Mar. 15–Apr. 23, 2004, U.N. Doc. E/CN.4/2004/127, Supp. No. 3 (Apr. 13, 2004); Comm'n on Human Rights, Rep. on the Fifty-Ninth Sess., 2003/4, at 34, Mar. 17–Apr. 24, 2003, U.N. Doc. E/CN.4/2003/135, Supp. No. 3 (2003); Comm'n on Human Rights, Rep. on the Fifty-Eighth Sess., 2002/9, at 56, Mar. 18–Apr. 26, 2002, U.N. No. E/CN.4/2002/200, Supp. No. 3 (2002); Comm'n on Human Rights, Rep. on the Fifty-Seventh Sess., at 47, Mar. 19–Apr. 27, 2001, U.N. No. E/CN.4/2001/167, Part II (Apr. 27, 2001); Comm'n on Human Rights Res. 2000/84, Defamation of Religions, 56th Sess., U.N. Doc. E/CN.4/Res/2000/84, at 336 (Apr. 26, 2000); Comm'n on Human Rights, Rep. on the Fifty-Sixth Sess., 2000/84, Mar. 20–Apr. 28, 2000, U.N. Doc. E/CN.4/2000/167, Supp. No. 3 (2000); Comm'n on Human Rights, Res. 1999/82, Report on the 55th Sess., Mar. 22–Apr. 30, 1999, U.N. Doc. E/CN.4/1999/167, at 280 (Apr. 30, 1999); Comm'n on Human Rights, Rep. on the Fifty-Fifth Sess., Mar. 22–April 30, 1999, U.N. Doc. E/CN.4/1999/167, Supp. No. 3 (1999).

150. G.A. Res. 60/150, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/150 (Dec. 16, 2005); G.A. Res. 61/164, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/164 (Dec. 19, 2006); G.A. Res. 62/154, U.N. GAOR, 62d Sess., U.N. Doc. A/RES/62/154 (Dec. 18, 2007); G.A. Res 63/171, U.N. GAOR, 63d Sess., U.N. Doc. A/RES/63/171 (Dec. 18, 2008).

151. Flemming Rose, *Why I Published Those Cartoons*, WASHINGTON POST (Feb. 19, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/02/17/AR2006021702499_2.html.

152. Organization of Islamic Cooperation, *Meeting the Challenges of the 21st Century, Solidarity in Action*, Final Communique of the Third Extraordinary Session of the Islamic Summit Conference, art. 2, ¶ 11(Dec. 7–8, 2005), http://www.oic-oci.org/ex-summit/english/fc-exsumm-en.htm.

slogan, as well as the OIC's application of "defamation of religions" only to Islam.

The Defamation of Religions Resolution was long criticized as a cover for domestic blasphemy laws. Over the years, the resolution began to lose popularity among delegates.[153] In early 2011, two prominent Pakistani politicians were killed for opposing Pakistan's blasphemy laws.[154] The murders focused attention on the problematic concept of "Defamation of Religions" and its association with domestic blasphemy laws. As a result, the United States and other states opposed to the defamation concept worked with the OIC on a new resolution that dropped the "defamation" term entirely and replaced it with "vilification."[155]

In March of 2011, delegates passed U.N. Human Rights Council Resolution 16/18, completely removing the defamation language and replacing the title with, "Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief."[156] Operative Clause 2 states that the Human Rights Council:

> *[e]xpresses its concern* that incidents of religious intolerance, discrimination and related violence, as well as of negative stereotyping of individuals on the basis of religion or belief, continue to rise around the world, and condemns, in this context, any advocacy of religious hatred against individuals that constitutes incitement to discrimination, hostility or violence, and urges States to take effective measures, as set forth in the present resolution, consistent with their obligations under international human rights law, to address and combat such incidents.[157]

153. Uddin, *supra* note 146.

154. Jane Perlez, *Extremists Are Suspected in Killing of Pakistani Minister*, INT'L N.Y. TIMES (MAR. 2, 2011), http://www.nytimes.com/2011/03/03/world/asia/03pakistan.html?pagewanted=all&_r=0.

155. Uddin, *supra* note 146, at 501–02.

156. Human Rights Council Res. 16/18, Res. adopted by the Human Rights Council: Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, 16th Sess., Feb. 28–Mar. 11, 2011, U.N. GAOR, 65th Sess., A/HRC/RES/16/18 (March 24, 2011).

157. *Id.*

Operative Clause 5(f) further calls for governments to "[a]dopt[] measures to criminalize incitement to imminent violence based on religion or belief."[158]

Those words echo the U.S. standard as announced in *Brandenburg v. Ohio*.[159] The State Department has praised the resolution on multiple occasions, no doubt because the formal language matches the Supreme Court's standard so neatly.[160] The OIC's permanent representative to the United Nations, Ufuk Gokcen, actually wrote in a 2012 op-ed:

> We moved away from the anti-defamation language of the previous OIC sponsored resolutions to a clearer acceptance of freedom of expression and focused on upholding the rights of the individuals against discrimination in an effort to foster international cooperation. Using much of the United States First Amendment language, Resolution 16/18 promotes respect for and protection of the individual rights of all people.[161]

Both the OIC and the State Department thus see 16/18 as more consistent with U.S. standards than the old "Defamation of Religions" resolution.

Despite widespread agreement on Resolution 16/18, Pakistan continues to maintain that its original resolution on defamation of religions is still necessary and valid. In introducing Resolution 16/18, Pakistan's OIC ambassador said, "I want to state categorically that this resolution does not replace the OIC's earlier resolutions on combatting defamation of religions which were adopted by the Human Rights Council and continue to remain

158. *Id.*

159. 395 U.S. 444 (1969).

160. *See, e.g.*, Press Release, U.S. Dep't of State, Joint Statement on Combating Intolerance, Discrimination, and Violence Based on Religion or Belief (July 15, 2011) [hereinafter Joint Statement], *available at* http://www.state.gov/r/pa/prs/ps/2011/07/168653.htm; Press Release, U.S. Dep't of State, Esther Brimmer, Assistant Secretary, Bureau of Int'l Org. Affairs, Remarks on U.S. Priorities at Opening of UN Human Rights Council 22 (Feb. 26, 2013), *available at* http://www.state.gov/p/io/rm/2013/205203.htm.

161. Ufuk Gokcen, *The Reality of Freedom of Expression in the Muslim World*, THE HILL CONG. BLOG (Oct. 19, 2012, 1:00 PM), http://thehill.com/blogs/congress-blog/foreign-policy/262855-the-reality-of-freedom-of-expression-in-the-muslim-world; *see also* Joint Statement, *supra* note 160.

valid."[162] He later told a reporter that all sides made concessions, but the OIC would never compromise on "anything against the Quran, . . . the Prophet, and . . . the Muslim community in terms of discrimination."[163] Other OIC representatives offered similar statements confirming Pakistan's view of the Resolution and refuting the permanent representative's position.[164]

This dispute over interpretation may have been due to the vagueness of 16/18's language. Partly to deal with this problem, the U.N. Special Rapporteur of the Right to Freedom of Opinion and Expression, other experts, and national representatives developed the Rabat Plan of Action in 2012.[165] The Rabat Plan is a series of recommendations about the implementation of the international prohibition on incitement to hatred.[166] Among other things, it recommended that states repeal blasphemy laws.[167] It also urged courts to consider the context, speaker, intent, content, and extent of speech, as well as the "likelihood, including imminence" of violence.[168]

Yet, while the UN reported that Pakistan's OIC Representative said in early 2014 that "[t]he Rabat Plan of Action was useful in

162. Robert C. Blitt, *Defamation of Religion: Rumors of Its Death Are Greatly Exaggerated*, 62 CASE W. RES. L. REV. 347, 362–63 (2011) (citing Zamir Akram, Permanent Representative of Pak. to the U.N. Office at Geneva, *Remarks at the 16th Session, 46th Plenary Meeting of the Human Rights Council* (Mar. 24, 2011) (emphasis added), *available at* http://webcast.un.org/ramgen/ondemand/conferences/unhrc/sixteenth/hrc110324pm2-eng.rm? start=00:39:20&end=00:49:44).

163. Maha Akeel, *A Roadmap for Implementing UNHRC Resolution on Combating Religious Intolerance*, OIC J., June–Aug. 2011, at 4, 5, *available at* http://www.oic-oci.org/oicv2/journal/?lan=en. He went on to say that Islamic countries have a religious duty to protect religious minorities, even though he felt that none of them are "deliberately discriminating against [these] minorities." *Id*. He added that most countries "have strong laws against religious discrimination," but need to implement them. *Id*. He finished by saying, "At the same time we are asking for protection of Muslims living in the West, we must also be prepared to give the same treatment of minorities living in Muslim countries." *Id*.

164. Blitt, *supra* note 162 at 362–64. This paper also highlights statements from the United States and other nations that ignore the statements of the OIC member nations. *Id*.

165. U.N. Office of the High Commissioner for Human Rights, *Between Free Speech and Hate Speech: The Rabat Plan of Action, a Practical Tool to Combat Incitement to Hatred* (February 21, 2013), http://www.ohchr.org/EN/NewsEvents/Pages/TheRabatPlanofAction.aspx.

166. *Id*.

167. U.N. Office of the High Commissioner for Human Rights, *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial, or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence* (October 5, 2012), http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

168. *Id*. at 6.

balancing freedom of expression and incitement to hatred or violence,"[169] Pakistan has not embraced the approach in recent blasphemy cases. Even as it has paid lip service to Rabat Plan principles—and even as it has applied the principles in non-religious speech cases—Pakistan is careful not to let these discussions affect its ability to keep and enforce its blasphemy laws. Thus, Pakistan continues to resist the international consensus.

In sum, Pakistan has insisted on treating religious speech differently than other speech; in particular, Pakistan, concerned about the public order ramifications of controversial religious speech, has failed to apply principles such as intent and imminence in its post-General Zia blasphemy law cases. This treatment of religious speech has led to widespread human rights abuses.

One way to address Pakistan's selective treatment of religious speech is to delve deeper into the U.S. law Pakistan purports to rely on and look to it for guidance. This Paper accomplishes this by looking at the reasons the United States shifted its approach to controversial speech. It will then demonstrate the relevance of the U.S. trajectory to Pakistan. Finally, it will discuss implementation of the U.S. standard in the Pakistani context.

III. THE MIS-RECEPTION OF THE U.S. STANDARD

The current American test for restricting speech on the grounds of public order was announced in *Brandenburg v. Ohio*.[170] In a per curiam opinion, the Court wrote, "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[171] The Court continued by holding that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[172] There are thus three components:

169. U.N. Human Rights, Office of the High Commissioner for Human Rights, *Council Starts Dialogue with Special Rapporteurs on Freedom of Religion and on Human Rights and Counter-Terrorism* (Mar. 11, 2014), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14352&LangID=E.

170. 395 U.S. 444 (1969).

171. *Id*. at 447.

172. *Id*. at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).

incitement (as opposed to "mere advocacy"),[173] intent to incite,[174] and objective likelihood that violence is imminent.[175]

Before looking closer at these factors, it is important to distinguish between incitement and "fighting words." Whereas incitement is intended to rouse the listener to violence against a third party, fighting words are intended to insult the listener. As the U.S. Supreme Court explained in *Chaplinsky v. New Hampshire*, the leading case on fighting words:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech . . . . These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—*those which by their very utterance inflict injury or tend to incite an immediate breach of the peace*. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[176]

Chaplinsky held that "the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[177] Importantly, American courts consider insults to a listener to be different from incitement to violently strike at a third party, with *Chaplinsky* governing the former and *Brandenburg* governing the latter. In many ways, this is the most important distinction between U.S. incitement law and the Pakistani laws: incitement requires a third-party reaction, not simply what Professor Robert C. Post has called "provocation" that makes a speaker's audience "so outraged that it

173. *Id*. at 449.

174. *Id*. at 447.

175. *Id*.

176. 315 U.S. 568, 571–72 (1942) (quoting Cantwell v. Connecticut, 310 U.S. 296, 309, 310 (1940)) (emphasis added).

177. *Id*. at 574.

[feels] compelled to riot and commit mayhem."[178] In many (though not all) cases, when judges and officials in these countries talk about "public order," they really ought to be using the different concept of "fighting words."

Of course, this raises the question: if "fighting words" is an unprotected category of speech, and if blasphemous statements are considered "fighting words" in different cultural contexts, would blasphemy laws be justified under U.S. free speech law? The answer is no—for several reasons.

From a legal perspective, while fighting words is a category of speech not protected by the First Amendment, every time the U.S. Supreme Court has opined on a case involving fighting words, it has reversed the conviction, even if it has not overruled *Chaplinsky*.[179] The Court has used three different avenues to overturn the convictions and narrow the fighting-words doctrine.[180] The first way is by ruling that the doctrine only applies to speech that is directed to another person and is likely to produce a violent response.[181] The second way, which the Court uses more frequently, is by ruling that the laws prohibiting fighting words are either unconstitutionally overbroad or vague.[182] Third, the Court has made clear that laws that prohibit only some fighting words, for example hateful speech that is based on race or gender, are content-based restrictions, which are also impermissible.[183]

For example, in *R.A.V. v. City of St. Paul*, a Minnesota local ordinance in St. Paul prohibited placing symbols, objects, or graffiti, including a burning cross or Nazi swastika on any public or private property which would arouse anger on the basis of race, color, creed, religion, or gender.[184] The Supreme Court held this ordinance unconstitutional because it was content-based, that is, it prohibited only those fighting words that were based on race,

178. Robert C. Post, *Free Speech in the Age of YouTube*, FOREIGN POL'Y (Sept. 2012), http://foreignpolicy.com/2012/09/17/free-speech-in-the-age-of-youtube/.

179. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1002 (3d ed. 2006).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 1005.

color, creed, religion or gender.[185] By so holding, the Court made it very unlikely that a law banning fighting words would ever be upheld. If the law is narrow, the Court will most likely hold that it is unconstitutionally content-based, and if it is broad, then it will be held overbroad and vague.[186]

These restrictions help explain why blasphemy should not be treated akin to fighting words. Blasphemy laws are inherently vague and overbroad—even broader than the broadest set of fighting words.[187] Blasphemy is also inherently subjective, often depending on individual proclivities: How is one supposed to know whether, for example, a Christian preacher teaching beliefs variant from the dominant religion will enrage people, especially those outside of his congregation—that is, members of an unintended audience? Basic principles of statutory construction hold that a law is overly vague if a reasonable person cannot tell whether the law prohibits his or her actions or not.[188] Blasphemy laws would clearly fall under this category. Blasphemy laws also constitute content-based prohibitions, as they prohibit only religion-based claims, and moreover, privilege some religious claims over others.

Turning back to the *Brandenburg* standard, the Supreme Court reads "imminence" narrowly. Four years after *Brandenburg*, the Supreme Court explained in *Hess v. Indiana* what did *not* amount to an imminent threat.[189] Gregory Hess had been convicted of disorderly conduct for saying either "We'll take the fucking street later" or "We'll take the fucking street again" at an anti-war demonstration.[190] The Supreme Court concluded:

> [S]ince there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had "a 'tendency to lead to violence.'"[191]

185. *Id*.

186. *Id*. at 1002.

187. *See* LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE 523 (1993).

188. CHEMERINSKY, *supra* note 179, at 941.

189. 414 U.S. 105 (1973).

190. *Id*. at 107.

191. *Id*. at 108–09 (quoting Hess v. State, 297 N.E.2d 413, 415 (Ind. 1973)).

The U.S. Supreme Court therefore requires violence to be within a very limited timeframe. To return to the example of the Danish cartoons of Mohammed, violent protests several months after the publication date would not count as "imminent."[192]

Finally, it is important to keep in mind that the American conception of "public order" is a narrower concept than the international idea of "l'ordre public," borrowed from the French. As a result, the definition of the American public order exception itself is narrower than the French and international one:

> [T]he English expression "public order" [is] not equivalent to—and indeed [is] substantially different from—the French expression *l'ordre public* (or the Spanish expression *orden público*). In civil law countries *l'ordre public* is a legal concept used principally as a basis for negating or restricting private agreements, the exercise of police power or the application of foreign law. In common law countries the expression "public order" is ordinarily used to mean the absence of public disorder. The common law counterpart of *l'ordre public* is "public policy" rather than "public order".[193]

Accordingly, an imminent threat to *l'ordre public* may not be recognized as an imminent threat under the U.S. courts' public order exception.

An explication of this sort by policymakers is possible, and may well have an impact, because it is the Pakistani courts that, in the first instance, relied on U.S. free speech law. If Pakistani courts had not looked to the United States for guidance, such a dialogue would likely be interpreted as cultural imposition. And despite fundamental cultural differences between the United States and Pakistan, Pakistan's reliance on U.S. case law suggests room for common ground.

192. Of course, the cartoons also did not count as "incitement" because the violence resulted from insult felt by certain Muslims, not instructions to attack a third party. There was certainly incitement in that case, but it was on the part of irresponsible leaders who called on Muslims to carry out violence against the newspaper, the cartoonists, and other targets.

193. International Covenants on Human Rights, G.A. Res. 833 (IX), Annex, U.N. GAOR, 10th Sess., Agenda item 28, Part II, U.N. Doc. No. A/2929 ch. VI, art. 18, at ¶ 113 (July 1, 1955).

IV. THE AMERICAN EXPERIENCE

While the current U.S. doctrine should be a model for other countries, this was not always the case. There is no single explanation of why the United States rejected its earlier speech-restrictive jurisprudence. But as modern liberalism and libertarianism came to prominence—with their skepticism of government, censorship, and commitment to democratic processes—the Court eventually moved from the restrictive "bad tendency" test to the *Brandenburg* standard.

A. From Bad Tendency to "Clear and Present Danger"

In eighteenth-century America, free speech protections were much closer to the state of affairs today in Pakistan. Blackstone believed that "blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libel[ous]" speech could all be prohibited.[194] There was certainly some support for free speech. As one historian suggests, "[T]he actual practice of the American people reveals a society in which people certainly valued—and took for granted—the ability to read the news and opinion of others, as well as speak their minds on most subjects."[195] In some circles, the famous line from *Cato's Letters* about free speech as "the great Bulwark of liberty" held sway.[196] And when the Americans set about writing state constitutions during the Revolution, nine protected freedom of the press. But only Pennsylvania protected "freedom of speech" itself.[197] Furthermore, when political tensions worsened at the close of the eighteenth century, the federal government passed the now-infamous Sedition Act to punish certain speech.[198]

194. 4 WILLIAM BLACKSTONE, COMMENTARIES *151.

195. Stewart Jay, *The First Amendment: The Creation of the Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 784 (2008).

196. *Id*. at 785 (quoting JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 25 (1988) (citing JOHN TRENCHARD & WILLIAM GORDON, CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS 99 (1724))).

197. *Id*. at 787.

198. The Sedition Act of 1798, Fifth Congress; Enrolled Acts and Resolutions; *available at* http://constitution.org/rf/sedition_1798.htm.

Even after the repudiation of the Sedition Act, the speech-restrictive "bad tendency" test remained dominant in the nineteenth century and the early twentieth century. The test allows the State to "retain[] the right to punish speech that tended, even remotely, to encourage violations of the law."[199] As stated by none other than Justice Holmes in 1907, the First Amendment did not prevent "punishment of such [speech] as may be deemed contrary to the public welfare."[200] But four cases in 1919 ultimately initiated a new era. The first three merely planted a seed of speech protection. In *Schenck v. United States*, Justice Holmes first used his now-famous phrase "clear and present danger."[201] In *Frohwerk v. United States*[202] and *Debs v. United States*,[203] Holmes again wrote for the Court and cited *Schenck*. Of course, all four cases rejected the free speech challenge being brought before the Court.

Only in the fourth case, *Abrams v. United States*, did Justice Holmes use his "clear and present danger" test to *protect* speech in his famous dissent, joined by Justice Brandeis.[204] In particular, Holmes interpreted his phrase to require more immediacy and intent than the majority did.[205] He wrote:

> I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.[206]

He continued by reading the immediacy requirement strictly: "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of

199. Thomas L. Haskell, *Redrawing the Boundaries of Permissible Speech*, 77 TEX. L. REV. 807, 809 (1999) (quoting DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 175 (1997)).

200. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

201. 249 U.S. 47, 52 (1919).

202. 249 U.S. 204, 206 (1919).

203. 249 U.S. 211, 215 (1919).

204. 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

205. *Id.* at 627–28.

206. *Id.* at 627.

opinion where private rights are not concerned."[207] Later in the dissent, he also stressed the necessity of intent.[208] Although the *Abrams* dissent was not as strict as *Brandenburg*, Justice Holmes had begun the process of requiring both immediacy and intent.

Among legal scholars, there is something of a pastime in explaining Justice Holmes's apparent switch in 1919. One common theory is that the facts in the first three cases were different from the facts in *Abrams.*[209] The excesses of the Red Scare of 1919 and 1920, after the war's end, may have further encouraged Justices Holmes and Brandeis to dissent.[210] Another common explanation is that Holmes and Brandeis fell under the influence of libertarian academics, especially Professor Zechariah Chafee, Jr.[211]

What is most important for the purposes of today's jurisprudence, however, is the new theory of the First Amendment espoused in these dissents. Justices Holmes and Brandeis were skeptical of government's ability to censor harmful ideas short of those that imminently threaten evil.[212] Instead, they proposed a kind of marketplace of ideas, in which correct ideas would ultimately triumph. Holmes wrote in *Abrams:*

> [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

207. *Id*. at 628.

208. *Id*. (citing Swift & Co. v. United States, 196 U.S. 375, 396 (1905)).

209. *Abrams*, 250 U.S. at 619–20; David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1312 (1983).

210. *See* Jay, *supra* note 195, at 845 (noting that *Abrams* was handed down just three days after the first Palmer Raid).

211. Rabban, *supra* note 209, at 1303, 1345; *see also* Schaefer v. United States, 251 U.S. 466, 486 (1920) (Brandeis, J., dissenting) (referencing the work of Professor Chafee).

212. Abrams, 250 U.S. at 616, 630 (Holmes, J., dissenting) ("While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, *unless they so imminently threaten immediate interference* with the lawful and pressing purposes of the law that an immediate check is required to save the country.") (emphasis added).

> wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[213]

Based on that theory, Justice Holmes phrased his standard as follows:

> I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[214]

The decisions in the *Brandenburg* era would later enshrine the same theory of free debate eventually leading to truth.[215]

There was also an emerging majoritarian democratic argument in the Holmes-Brandeis dissents. As Justice Holmes wrote in *Gitlow v. New York* (1925), "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[216] In *Whitney v. California* (1927), Justice Brandeis's concurrence specifically made democracy about deliberation. He wrote, "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary."[217] Brandeis quoted Jefferson[218] and attributed to the Founders collectively a belief that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced

213. *Id*. at 630 (Holmes, J., dissenting). *See also* Gilbert v. Minnesota, 254 U.S. 325, 338 (1920) (Brandeis, J., dissenting) ("In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril."); Pierce v. United States, 252 U.S. 239, 273 (1920) (Brandeis, J., dissenting) ("The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely, because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language.").

214. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

215. *See* Cohen v. California, 403 U.S. 15 (1971).

216. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

217. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

218. *Id*. at 375 n.2.

silence. Only an emergency can justify repression."[219] For democratic reasons as well as a deep-seated skepticism, Holmes and Brandeis argued for more free speech.

B. Doctrinal Upheaval

Gradually, without settling on a single test, the Supreme Court began upholding First Amendment challenges in the late 1920s and 1930s. In *Fiske v. Kansas*, a unanimous Court overturned a conviction under the Kansas Syndicalism Act for lack of evidence.[220] In *Stromberg v. California*, the Court noted that the right to free speech was included in the due process protection of the Fourteenth Amendment and overturned a conviction for displaying a red flag.[221] As Chief Justice Hughes wrote for the majority, "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[222] The Court was slowly embracing not only the Holmes-Brandeis position but also its justification.

The Court decisively protected speech in 1937. In *De Jonge v. Oregon*, it reversed a conviction on First Amendment grounds because the statute prohibited speech that did not necessarily constitute a threat to the government.[223] Chief Justice Hughes explained,

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.[224]

219. *Id*. at 377.
220. Fiske v. Kansas, 274 U.S. 380 (1927).
221. Stromberg v. California, 283 U.S. 359, 368 (1931).
222. *Id*. at 369.
223. De Jonge v. Oregon, 299 U.S. 353 (1937).
224. *Id*. at 365.

But as Professor David Rabban notes, "the first Supreme Court decisions in which the majority actually protected speech never mentioned [clear and present danger]."[225]

Clear and present danger did return later in 1937, in a case upholding a First Amendment challenge. That case, *Herndon v. Lowry*, turned on the "present danger" requirement.[226] In *Thornhill v. Alabama*, eight members of the Court signed an opinion rewording the test in a Holmesian manner to allow speech restrictions "only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[227] The Court explained:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.[228]

Justices Brandeis and Holmes had won, for now.

But speech restrictions were not entirely out of favor. Justice Jackson dissented in *Terminiello v. Chicago*, voting to uphold a speech restriction only six years after *West Virginia v. Barnette*,[229] which held that students could not be forced to salute the American flag or recite the Pledge of Allegiance in school.[230] Jackson's opinion in *Barnette* offered a powerful defense of free

225. Rabban, *supra* note 209, at 1346.

226. Herndon v. Lowry, 301 U.S. 242, 261 (1937).

227. Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940).

228. *Id*. at 95 (citing United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938)).

229. Terminiello v. Chicago, 337 U.S. 1 (1949).

230. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

speech, stating that constitutional rights are "beyond the reach of majorities and officials."[231]

Terminiello involved a public speech criticizing various political and racial groups as "inimical to the nation's welfare."[232] In his dissent, Jackson argued that the majority, in protecting the speech, was overlooking a real threat to public order. Jackson examined in detail portions of Terminiello's speech and his testimony at trial to demonstrate the tumultuous context of Terminiello's speech. He even invoked the clear and present danger standard.[233] Near the end of the opinion, Jackson famously warned, "if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[234]

In 1951, a majority (with Justice Jackson in it) swung back towards restricting speech. The Court in *Feiner v. New York* upheld the conviction of a street corner speaker by a six-to-three vote.[235] The speaker in that case "gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights."[236] His speech caused some disturbance in a mixed-race crowd, and the police arrested him when he refused to stop speaking.[237] That same year, in *Dennis v. United States*, a fractured court turned back a First Amendment challenge in a national security case without a majority opinion.[238]

Of course, as one might expect by this point in the story, the pendulum was not done swinging. Six years later, Justice Harlan ostensibly clarified the meaning of *Dennis* in *Yates v. United States*, writing, "The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something."[239] Justice Harlan cited *Schenck* and concluded that there was insufficient evidence to

231. *Id*. at 638.

232. *Terminiello*, 337 U.S. at 3.

233. *Id*. at 26 (Jackson, J., dissenting) (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)).

234. *Id*. at 37 (Jackson, J., dissenting).

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

236. *Id*. at 317.

237. *Id*. at 317–18.

238. Dennis v. United States, 341 U.S. 494 (1951).

239. Yates v. United States, 354 U.S. 298, 324–25 (1957).

prove the imminence of the threat or "specific intent."[240] Entering the 1960s, then, the clear and present danger standard was alive but of uncertain meaning.

C. Brandenburg, Cohen, and Free Speech Today

The Court announced its current test, incitement to imminent violence, in *Brandenburg v. Ohio* in 1969. The rise of a "modernist consciousness"[241] and its belief in deliberative democracy, coupled with the emergence of political libertarianism, produced the hands-off approach to speech that reigns today.

Professor G. Edward White has identified the so-called modernist consciousness in twentieth-century free speech doctrine. He specifically lists "the value of scientific knowledge, the importance of rationality, and the significance of the democratic process in furthering individual freedom of thought."[242] White's discussion of the Court's 1970s cases notes:

> Rather than assuming, as earlier courts had, that the messages in *Cohen* [*v. California*] and *Collin* [*v. Smith* (7th Cir. 1978)] were so patently juvenile or unsound that they played "no essential part in any exposition of ideas," courts in the 1970s assumed that such messages might be sought to be suppressed because they were "inherently likely to provoke violent reaction."[243]

This commitment to protecting even lowbrow speech is the final leg on which modern American free speech jurisprudence stands, along with skepticism and democratic theory. To quote Justice Harlan in *Cohen*, "[i]ndeed, we think it is largely because governmental officials cannot make principled distinctions in this area [of speech] that the Constitution leaves matters of taste and style so largely to the individual."[244] This refusal to make distinctions, or even try to make principled ones, explains in large part the modern public order exception. That exception is narrow because the Court is committed to respecting all speech, no matter how

240. *Id*. at 318, 330–31.

241. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 301 (1996).

242. *Id*. at 304.

243. *Id*. at 365 (quoting Cohen v. California, 403 U.S. 15, 20 (1971)).

244. *Cohen*, 403 U.S. at 25.

hurtful, insulting, absurd, or offensive it may be, so long as it is not incitement to imminent violence.

This relatively freewheeling approach to speech was a shared tenet of liberalism and libertarianism, both of which were well represented on the Court. The author of *Cohen*, Justice Harlan, was a libertarian. He was joined by three of the liberal lions (Justices Douglas, Brennan, and Marshall) and a moderate (Justice Stewart).[245] *Brandenburg* was a per curiam opinion. Justice Black, a libertarian, and Douglas concurred, while several liberals (Marshall and Chief Justice Warren) and another libertarian (Harlan) filed no separate opinion.[246] Together with a commitment to deliberative democracy and truth through debate, this refusal to label speech as low-value and censor it underlies the current American case law.

D. Lessons Learned

This complicated history of American free speech jurisprudence offers several lessons for foreign countries. First, the process may not move quickly. Although the United States now has one of the freer speech regimes in the world, it did not settle on that law until 1969. Nor is it an irreversible course; the United States still struggles periodically with the temptation to expand its restrictions on speech. In 2012, Nakoula Basseley Nakoula produced a fourteen-minute film clip called the "Innocence of Muslims," attacking the Prophet Mohammed. The film sparked outrage abroad, and several American public intellectuals have argued that the film may well fall outside the boundaries of protected speech.[247] One of them, Sarah Chayes,

245. David J. Garrow, *The Tragedy of William O. Douglas*, THE NATION (Mar. 27, 2003), http://www.thenation.com/article/tragedy-william-o-douglas/; David J. Garrow, *Justice William Brennan, a Liberal Lion Who Wouldn't Hire Women*, WASHINGTON POST, Oct. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/15/AR2010101502672.html; Thurgood Marshall Biography, BIOGRAPHY.COM, http://www.biography.com/people/thurgood-marshall-9400241 (last visited Oct. 13, 2015); Al Kamen, *Retired High Court Justice Potter Stewart Dies at 70*, WASHINGTON POST, Dec. 8, 1985, https://www.washingtonpost.com/local/obituaries/retired-high-court-justice-potter-stewart-dies-at-70/2011/12/03/gIQA9mhjPO_story.html.

246. Brandenburg v. Ohio, 395 U.S. 444, 449–50 (1969) (Black, J., concurring); *id*. at 450–58 (Douglas, J., concurring).

247. *See, e.g.*, Anthea Butler, Op-Ed, *Opposing View: Why 'Sam Bacile' Deserves Arrest*, USA TODAY (Sept. 13, 2012), http://usatoday30.usatoday.com/news/opinion/story/2012-09-12/Sam-Bacile-Anthea-Butler/57769732/1; Sarah Chayes, Op-Ed, *Does 'Innocence of Muslims' Meet the Free-Speech Test?*, L.A. TIMES (Sept. 18, 2012),

suggests that "imminence" should be loosened to cover a period as long as two weeks after the speech.[248] "The White House [even] asked YouTube to review the video to see if it was in compliance with their terms of use."[249]

Second, courts will be most successful in protecting free speech rights when the political branches support them. The American experience between World War I and *Brandenburg* could be mapped on top of rising and falling tensions: World War I (speech-restrictive), backlash against the Red Scare (Holmes and Brandeis), the low-tension 1930s (speech-protective), another Red Scare (speech-restrictive), and then the aftermath of that experience (speech-protective). When political tensions about espionage ran high, the Court turned restrictive. When they abated, the Court eventually returned to protection. Although correlation does not imply causation, it is one of the only tools available to guess at the Supreme Court's motivations.[250]

American courts came to accept limits on government censorship of uncomfortable, hateful, or otherwise ill-meaning speech. Although foreign countries need not embrace the relativism of some U.S. decisions, it is important for them to understand that (for several crucial reasons discussed below) government cannot, and should not, censor speech for its violent tendencies unless it is incitement to imminent violence, "fighting words," or one of the other narrow exceptions in U.S.

http://articles.latimes.com/2012/sep/18/opinion/la-oe-chayes-innocence-of-muslims-first-amendment-20120918.

248. Chayes, *supra* note 247.

249. Byron Tau, *White House Asked YouTube to 'Review' Anti-Muslim Film*, POLITICO (Sept. 14, 2012, 1:20 PM), http://www.politico.com/politico44/2012/09/white-house-asked-youtube-to-review-antimuslim-film-135586.html. The U.S. is not alone in struggling with the temptation to restrict speech. Section 5 of the United Kingdom's Public Order Act prohibited "insulting words or behaviour" until a public outcry to expansive use of the language resulted in its repeal. *See* Robert Booth, *"Insulting" to be Dropped from Section 5 of Public Order Act*, THE GUARDIAN (U.K.) (Jan. 14, 2013), http://www.guardian.co.uk/world/2013/jan/14/insulting-section-5-public-order-act; James Chapman, *Free Speech is "Strangled by Law that Bans Insults" and is Abused by Over-Zealous Police and Prosecutors*, DAILY MAIL (U.K.) (May 15, 2012), http://www.dailymail.co.uk/news/article-2145009/Public-Order-Act-Free-speech-strangled-law-bans-insults.html.

250. And, as Part V will explain, the ultimate solution to the problem of speech with violent tendency involves fundamental societal change.

jurisprudence. As explained above, blasphemy does not fall into any of the categories of unprotected speech.

V. WHY FREE SPEECH IS KEY TO STABILITY

So far, this Paper has identified the ways in which foreign courts and politicians have used American cases to support blasphemy laws and contrasted the international standards with the U.S. version. But even in the discussion of how and why U.S. free speech law changed as it did, this Paper has not yet explained why American standards should be emulated. I offer two reasons. First, in the short term, the American doctrine actually prevents disorder. And second, in the long term, it prevents the infantilization of society and actually encourages the flourishing of religion.

A. Overly Restrictive Speech Laws are Counterproductive

The best way to prevent violence is to punish the violent actor, not the nonviolent speaker. Pakistan has upheld laws that prohibited nonviolent speech on religion, in the name of preserving public order. But violence is far more effectively controlled if states enforce laws that punish criminal behavior, such as laws against arson, murder, and other forms of intimidation and endangerment of religious persons. This sort of legal scheme also makes sense because it protects the fundamental human right to free religious expression. Individuals have the right to not only hold particular beliefs but also to express them in public—as long as they are peaceful and do not contravene the rights of others. This works in favor of the larger society rather than against it, as only in a free marketplace of ideas can those ideas with greater utility or persuasive power prevail.[251]

Under the Pakistani blasphemy laws, the State de facto supports—in fact, *incentivizes*—incidents of violence, even though the purpose of the laws is to reduce violence motivated by religion. Blasphemy laws appease rather than control violent actors, giving them license to continue bullying religious minorities while the

251. Under U.S. law, when speakers are punished, such as in the case of incitement to imminent violence or fighting words, the speaker's intentional state of mind is key: "[O]ne who intends to spur a criminal response on the part of his audience is arguably less deserving of protection . . . than one who recklessly creates that risk." Marc Rohr, *Grand Illusion? The* Brandenburg *Test and Speech that Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 81 (2002).

police look the other way. They create a culture of impunity where increasingly egregious crimes are committed with little or no consequences for the criminals.

Rather than punishing the speaker in order to prevent violence by others, the law should compel potentially violent people to control their own behavior—even in the face of insults. In American jurisprudence, this principle is called the "hostile audience" doctrine.[252] The U.S. Supreme Court has stated that "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[253] In weighing the cost of imposing speech on unwilling listeners against the cost of preventing speech, the Court determined that the latter cost would be greater.[254]

Empirical work confirms this idea. As Professor W. Cole Durham, Jr. testified to the Constitutional Court of Indonesia in the Indonesian Blasphemy Act challenge, "empirical studies analyzing these issues in virtually all the countries on earth demonstrate that government efforts to constrain religious freedom and coerce conformity are in fact the most significant factor leading to interreligious violence."[255] Durham also noted that "[t]he resulting conflicts are etched into collective memories of opposed groups, providing seemingly inexhaustible sources of hate, resentment and recrimination, sometimes extending across generations."[256] To stop this cycle of religious hatred, countries should enforce laws against

252. Feiner v. New York, 340 U.S. 315, 320 (1951) ("We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker.").

253. Boos v. Barry, 485 U.S. 312, 322 (1988) (internal quotation marks omitted).

254. *Id.*; *see also* WOJCIECH SADURSKI, FREEDOM OF SPEECH AND ITS LIMITS 88 (Francisco J. Laporta et al. eds., 1999).

255. *Judicial Review of Law Number 1/PNPS/1965 Concerning the Prevention of Religious Abuse and/or Defamation: Case No. 140/PUU-VII/2009 Before the Constitutional Court of Indonesia* (2010) (testimony of W. Cole Durham, Jr., Director, International Center for Law and Religion Studies Brigham Young University), *in* INDONESIA: A RESOURCE GUIDE FROM THE LEGAL TRAINING INSTITUTE 58 (2012) (citing Brian J. Grim, *Religious Freedom: Good for What Ails Us?*, REV. FAITH & INT'L AFF., Summer 2008, at 3, 5 (2008); BRIAN J. GRIM & ROGER FINKE, THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY (2011)).

256. Durham, *supra* note 255, at 59.

violence and allow free expression on matters of religion, subject only to narrow exceptions like the public order justification.[257]

In a study cited by Professor Durham above, sociologists Brian Grim and Roger Finke specifically found that "[g]overnment regulation is the strongest predictor of religious persecution even when controlling for other possible explanations."[258] In particular, they concluded that religious freedom leads to "a rich pluralism where no single religion can monopolize religious activity, and all religions can compete on a level playing field. Religious grievances against the state and other religions are reduced because all religions can compete for the allegiance of the people without the interference of the state."[259] Additionally, religious freedom "decreases the ability of any single religion to wield undue political power."[260] Less freedom of religion leads to more persecution, which in turn leads to less freedom of religion.[261] On the other hand, as Grim has argued elsewhere, more freedom of religion leads to benefits for society, which in turn leads to more freedom of religion.[262]

In fact, Justice Brandeis made a very similar argument in his *Whitney* concurrence. He wrote that the Founders

> knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[263]

American free speech jurisprudence rests, among other things, on the empirically verified belief that stability should come

257. *See* Asma T. Uddin, *The Indonesian Blasphemy Act: A Legal and Social Analysis*, *in* PROFANE: SACRILEGIOUS EXPRESSION IN A MULTICULTURAL AGE 223 (Christopher S. Grenda et al. eds., 2014); Asma T. Uddin, *Indonesian Blasphemy Act Restricts Free Religious Expression,* HUFFINGTON POST (last updated May 25, 2011, 4:20 PM), http://www.huffingtonpost.com/asma-uddin/the-indonesian-constituti_b_554463.html.

258. Brian J. Grim & Roger Finke, *Religious Persecution in Cross-National Context: Clashing Civilizations or Regulated Religious Economies?*, 72 AM. SOC. REV. 633, 654 (2007).

259. *Id*. at 636.

260. *Id*. at 637.

261. *Id*. at 652.

262. Grim, *supra* note 255, at 3–4.

263. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

through punishment of violent acts and not punishment of non-violent speech.

B. Restrictive Speech Laws Limit the Process of Rational Debate

Individuals need to overcome their biases about other religions, instead of being told by the government how to think or feel. Doing otherwise only infantilizes members of a society. To begin with, government is not well suited to censoring ideas based on their content. By deviating from the state's legitimate role in protecting each speaker's right of expression, governments in states with blasphemy laws have made themselves the arbiter of which ideas warrant protection and which do not—an untenable proposition as spiritual truths do not lend themselves to empirical proofs.[264]

Furthermore, anti-religious speech can be difficult to define, and restricting it can unduly hinder controversial truth claims.[265] Empowering the state to impose its subjective notions of "good" speech creates a cover for censoring all manners of dissent. The U.N. Special Rapporteur on Freedom of Religion or Belief has made a similar point:

> Although legislation that punishes defamation, including blasphemy, is designed to protect religion and addresses a legitimate concern, particularly with regard to phenomena such as fear of Islam and Christianity, it must be acknowledged that blasphemy or defamation are increasingly used by extremists to censure all legitimate critical debate within religions . . . or to bring to heel certain minorities accused of holding erroneous views . . . .[266]

264. It was thus argued in a court case in Victoria, Australia, by Muslims attempting to enforce an 'anti-vilification' law very similar to 'defamation of religion' measures that 'truth is not a defense' when the defendant, a Pakistani-Christian pastor, attempted to read from the Qur'an during his court testimony to show that his statements regarding Islam were Qur'anic.

BECKET FUND FOR RELIGIOUS FREEDOM, DEFAMATION OF RELIGIONS, SUBMISSION TO OSCE HUMAN DIMENSIONAL MEETING 2008 4 n.12 (2008), http://www.osce.org/odihr/34182?download=true. Local authorities have already used the 'anti-vilification' law to prohibit the public reading of the Qur'an "because some Muslims deemed those passages to be defamatory of Islam." *Id*.

265. *Id*. at 5.

266. Special Rapporteur of the Human Rights Comm. on Freedom of Religion or Belief, *Civil and Political Rights, Including Religious Intolerance*, ¶ 187, Econ. & Soc. Council, U.N. Doc. E/CN.4/2001/63 (Feb. 13, 2001) (by Abdelfattah Amor).

For this reason, as well as out of recognition for the broader importance of free speech for societies, governments should endorse more protective speech laws.[267]

C. Limited Debate Prevents True Religious Flourishing

More centrally, re-assessment of a faith can help keep it vibrant and relevant to changing circumstances. Criminalizing blasphemy or "defamation of religions" stifles such exploration and is thus destructive to religious reform. It chills religious speech not just in the context of inter-religious dialogue, but also among members of the same faith who seek to explore and challenge their beliefs together with the laudable aim of spiritual and intellectual growth. Religion can hinder as well as help a society's development. Deciding what the problematic aspects are, and how they should be fixed, is not the place of government, practically or in principle. Rather, governments should allow free speech and free exercise to ensure that religions remain vehicles for finding truth and personal fulfillment.

CONCLUSION

Since its inception in Enlightenment political philosophy, the notion of free speech has been inexorably tied to the idea of political dissent. The recognition of a need for strong public debate on issues that impact society implicates the need for a diversity of voices to formulate such debate. This in turn means that individuals must have liberty—liberty to give voice to ideas that may be unpopular or in direct opposition to the ideas of those in power. As the fledgling democracies of the world struggle to locate the appropriate intersection between safeguarding individual liberties and protecting collective sensitivities, it is important that they foster a vibrant and open marketplace of ideas (to accurately paraphrase Justice Holmes). U.S. law has erred on the side of liberty for over four decades now.

267. Sadly, there are many examples of radicals attempting to silence intellectual debate under cover of restricting religious speech. In Egypt, academic Nasr Abu Zayd was effectively banished from his homeland for academic writings about the nature of the Qur'an. In Kuwait, another professor was investigated for opposing the adoption of Sharia law. And in Lebanon, a composer was charged with blasphemy for singing a verse of the Qur'an Koran. Mona Eltahawy, *Lives Torn Apart in Battle for the Soul of the Arab World*, THE GUARDIAN (U.K.) (Oct. 19, 1999 9:09 PM), http://www.guardian.co.uk/world/1999/oct/20/1.

For both U.S. foreign policy makers and those in Muslim-majority countries seeking more liberal speech laws, the good news is that many countries look to the U.S. for guidance. The challenge is that many of them, like Pakistan, willfully or innocently misunderstand the nature of the U.S. standard. I therefore recommend that foreign courts, U.S. policymakers, and other stakeholders:

- Continue drawing on U.S. free speech standards as a model and source of legitimacy for reform.
- Clarify that "incitement to imminent violence" requires incitement of third parties, intent to incite, and a likelihood of imminent violence.
- Build on the Rabat Plan by encouraging countries to move away from "defamation of religion" and towards the U.S. standard.
- Encourage courts, politicians, and voters to reject the idea that government can, or should, censor unpopular or hateful speech short of the exceptions in U.S. law.
- Promote religious freedom as a means of promoting stability.
- Promote religious freedom as a means of fostering stronger religious belief and a stronger society.

Following these ideas can lead to more liberal free speech laws in Pakistan and similar countries where citizens are suffering from deep injustices simply on account of their faith and religious views.