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À PROPOS DE NOUS

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Irène Bouhadana, docteur en droit, est maître de conférences en droit du numérique et droit des gouvernements ouverts à l'Université Paris 1 Panthéon-Sorbonne où elle dirige le master Droit des données, des administrations numériques et des gouvernements ouverts au sein de l'École de droit de la Sorbonne. Elle est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Elle est aussi fondatrice et Secrétaire générale de l'IMODEV. Enfin, elle est avocate au barreau de Paris, associée de BeRecht Avocats.

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ABOUT US

The **International Journal of Digital and Data Law / Revue Internationale de droit des données et du numérique (RIDDN)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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IMODEV is an international, independent, non-profit scientific organization created in 2009 that promotes good public governance in the context of the information and digital society. This network brings together experts and researchers from around the world who, through their work and actions, contribute to a better knowledge and understanding of the digital society at the local, national or international level by analyzing, on the one hand, the actions of public authorities in the context of the regulation of the data society and the digital economy and, on the other hand, the ways in which digital public policies are implemented within public administrations and open governments.

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REGULATING ONLINE HATE SPEECH: A U.S. PERSPECTIVE

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In the early 2010s, Terry Jones of Florida became known for his threats to burn, and for eventually burning, the Koran, the holy book of Muslims[1]. The actions and message of the pastor eventually attracted the attention of figures as prominent as U.S. President Barack Obama and, with transmission around the world via the Internet, spread to countries far from the United States like Afghanistan and Indonesia[2]. The response was explosive[3].

The burning of sacred texts such as the Koran provides particularly rich opportunities for study by academics in a variety of fields. Topics like religion, politics, marginalization, nonverbal communication, intercultural communication, and hate speech come together. Digital dissemination adds an element of contemporary technology to the mix.

Drawing upon the Florida Koran-burning case, this paper briefly examines the constitutional regulation of online hate speech in the United States, illustrating how limited the punishment and thus regulation of such hate speech generally are. Hate speech is discourse that aims to promote hatred based on categories such as ethnicity, race, national origin, class, and similar categories[4]. The paper proceeds with a summary of the Florida Koran-burning case, continues with a discussion of relevant constitutional principles, and then moves to constitutional analyses of the Florida case.

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[1] K. SIEFF, "Florida pastor Terry Jones's Koran burning has far-reaching effect", *Washington Post*, Apr. 2, 2011 [https://www.washingtonpost.com/local/education/florida-pastor-terry-joness-koran-burning-has-far-reaching-effect/2011/04/02/AFpiFoQC_story.html?utm_term=.58b624b03f28].

[2] S. CLARKE & R. MCHUGH, "Exclusive: President Obama says Terry Jones' plan to burn Korans is 'a destructive act'", *ABC News*, Sept. 9, 2010 [https://abcnews.go.com/GMA/president-obama-terry-jones-koran-burning-plan-destructive/story?id=11589122] (providing video excerpt from interview with Obama); SIEFF, *vide supra* note 1.

[3] SIEFF, *vide supra* note 1.

[4] M. ROSENFELD, "Hate speech in constitutional jurisprudence: A comparative analysis", *Cardozo Law Review*, n°24/2003, p. 1523.

§ 1 – THE FLORIDA KORAN-BURNING CASE

Terry Jones of Florida developed an extensive resume regarding Koran-burning and the media. In 2010, the fundamentalist Christian pastor made headlines around the world when he threatened to burn 200 copies of the Koran on the anniversary of September 11, 2001[5]. Protests in Afghanistan and Indonesia followed, and hundreds of death threats against Jones arrived[6]. Both Defense Secretary Robert M. Gates and General David H. Petraeus called Jones, informing him that his actions were risking the lives of members of the U.S. Military who were stationed overseas[7]. President Barack Obama claimed that the Koran-burning "would be 'a recruitment bonanza for Al Qaeda'"[8]. Echoing Secretary Gates and General Petraeus, the President added, "'As a very practical matter, as commander (in) chief of the armed forces of the United States, I just want [Jones] to understand that this stunt that he is pulling could greatly endanger our young men and women in uniform who are in Iraq, who are in Afghanistan'"[9]. Eventually, Jones chose not to carry out his threat at that time[10].

In 2011, Jones changed his course of action. After putting the Koran "on trial", Jones burned a copy of the Muslim holy book, live-streaming the event with Arabic subtitles for overseas Muslim viewers[11]. He said that he intended to draw attention to a book that he felt was "'dangerous'"[12]. "'We wanted to raise awareness of this dangerous religion and dangerous element'", Jones stated[13]. In

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[5] T. ERDBRINK, "Iran denounces Florida pastor over Koran burning", *New York Times*, Apr. 30, 2012 [http://www.nytimes.com/2012/05/01/world/middleeast/iran-denounces-florida-pastor-over-koran-burning.html?_r=0];
R. GOLDMAN, "Who is Terry Jones? Pastor behind 'Burn a Koran Day'", *ABC News*, Sept. 7, 2010 [http://abcnews.go.com/US/terry-jones-pastor-burn-koran-day/story?id=11575665].
Because of the potentially offensive nature of the visual images that might have resulted, and eventually did result, from coverage of the story, the news media faced an ethical problem. *See* C. CALVERT, "Defining 'public concern' after *Snyder v. Phelps*: A pliable standard mingles with news media complicity", *Villanova Sports & Entertainment Law Journal*, n°19/2012, p. 70. Some news outlets decided to limit the visual images in their reporting. B. GLADSTONE, "The Quran-burning coverage conundrum", *National Public Radio*, Sept. 10, 2010 [https://www.npr.org/templates/story/story.php?storyId=129773873] (offering an opinion piece).

[6] A. HULL, "Koran-burning preacher's pulpit of defiance and chili cheese dogs", *Washington Post*, Jan. 17, 2015 [https://www.washingtonpost.com/national/koran-burning-preachers-pulpit-of-deance-and-chili-cheese-dogs/2015/01/17/c98a79e2-9d9e-11e4-a7ee-526210d665b4_story.html?utm_term=.052d60104d64].

[7] *Ibidem*.

[8] CLARKE & MCHUGH, *vide supra* note 2.

[9] *Ibidem*.

[10] ERDBRINK, *vide supra* note 5.

[11] SIEFF, *vide supra* note 1.

[12] *Ibidem*.

[13] M. GUTMAN *et al.*, "Pastor Terry Jones receives death threats after Koran burning", *ABC News*, Apr. 4, 2011 [http://abcnews.go.com/US/pastor-terry-jones-receives-deaths-koran-burning/story?id=13289242#.UbIvluvQo7A] (providing video of interview with Jones).

Mazar-e Sharif, Afghanistan, a mob upset about the burning attacked a United Nations compound and killed seven employees[14]. Associated protests in Kandahar, Afghanistan, led to the death of nine people and injuries to ninety others[15]. Death threats against Jones poured in[16]. Before burning a copy of the Koran, Jones had realized that violent responses might follow his actions[17].

In 2012, he burned several copies of the Koran and an image of the Muslim prophet Muhammad[18]. Jones maintained that the purpose of the 2012 burning was to draw attention to the matter of a Christian minister who was being held in an Iranian prison[19]. Although not widely announced, the 2012 burning of the Korans was live-streamed[20]. The Iranian Ministry of Foreign Affairs condemned the actions of Jones, and at least one Iranian politician called for the pastor's execution[21].

Approximately two months earlier, the U.S. Military had, by mistake, burned copies of the Koran on an air base outside Kabul, Afghanistan[22]. In Afghanistan and elsewhere, riots had followed the accidental burning, and dozens of people had been killed[23].

In 2013, Jones was planning to burn, at a local park, 2,998 copies of the Koran, one for every person whom terrorists had killed on September 11, 2001[24]. While Jones was on his way to the park in a truck, which was towing a barbeque-style grill loaded with kerosene-soaked copies of the Koran, police pulled him over and arrested him for the felony of unlawful conveyance of fuel[25]. Ultimately, an unlawful conveyance of fuel charge was dismissed, and the dismissal was upheld on appeal[26].

The Koran-burning activities of Jones led to restrictions on his abilities to travel internationally. For example, in 2011, the U.K. Home Office, then led by Home Secretary Theresa May, banned Jones from the entering the U.K.[27]. Jones had planned to speak to the group England Is Ours[28]. The Home Office indicated that "the

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[14] SIEFF, *vide supra* note 1.
[15] *Ibidem*.
[16] GUTMAN *et al.*, *vide supra* note 13.
[17] SIEFF, *vide supra* note 1.
[18] ERDBRINK, *vide supra* note 5.
[19] *Ibidem*.
[20] *Ibidem*.
[21] *Ibidem*.
[22] *Ibidem*.
[23] *Ibidem*.
[24] T. LUSH, "Fla. pastor arrested as he prepped to burn Qurans", *USA Today*, Sept. 12, 2013 [http://www.usatoday.com/story/news/nation/2013/09/11/florida-pastor-burning-qurans/2802169/].
[25] *Ibidem*.
[26] S. SCHOTTELKOTTE, "Court upholds dismissal of charges on controversial pastor Terry Jones", *The Ledger*, June 27, 2015 [http://www.theledger.com/news/20150627/court-upholds-dismissal-of-charges-on-controversial-pastor-terry-jones].
[27] "US pastor Terry Jones banned from entering UK", *BBC News*, Jan. 20, 2011 [https://www.bbc.co.uk/news/uk-12231832].
[28] *Ibidem*.

government 'oppose[d] extremism in all its forms'"[29]. The following year, Canadian authorities prohibited Jones from entering Canada via Windsor, Ontario[30]. They stated that Jones had a prior legal infraction in the U.S. and that Germany had filed a complaint against Jones[31]. Several years later, in 2017, Denmark banned Jones and several Islamic clerics from entering the country, deeming Jones and the others threats to security[32]. Danish Immigration Minister Inger Stojberg used the term "'hate preachers'" in talking about the bans[33].

After most of the media attention had faded, Jones continued to be involved in controversy, although in a much less visually inflammatory manner. In 2015, he was operating Fry Guys Gourmet Fries in the DeSoto Square Mall in Bradenton, Florida[34]. That year, following the terrorist attack on *Charlie Hebdo*, the French magazine that had satirized Muhammad[35], Jones used his fry stand to promote his anti-Islam views, something which drew attention from the local media[36].

In 2017, he briefly drove for ridesharing service provider Uber, which maintained that Jones had passed a background check prior to being allowed to drive for the company[37]. Jones admitted that he expressed his anti-Islam views to his Uber passengers, but he insisted that he only discussed his views if passengers asked him about those views[38]. For self-defense while driving for Uber, Jones had in his possession a 9mm pistol[39]. Following media inquiries, Uber suspended Jones while investigating him for discrimination and carrying a gun on the job[40]. Meanwhile, Jones applied to drive for Uber competitor Lyft[41].

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[29] *Ibidem*.
[30] R. BLINCH, "Koran-burning U.S. pastor barred from entering Canada for debate", *Reuters*, Oct. 11, 2012 [https://www.reuters.com/article/us-jones-blocked/koran-burning-u-s-pastor-barred-from-entering-canada-for-debate-idUSBRE89A1MA20121011].
[31] *Ibidem*.
[32] T. JENSEN, "Demark bans six 'hate preachers' from entering the country", *Reuters*, May 2, 2017 [https://www.reuters.com/article/uk-denmark-security-religion-idUSKBN17Y1N9].
[33] *Ibidem*.
[34] C. SCHELLE, "Florida pastor on al-Qaida hit list opens French fry stand at Bradenton Mall", *Miami Herald*, Jan. 9, 2015 [https://www.miamiherald.com/news/state/florida/article5676957.html].
[35] *See, e.g.*, "*Charlie Hebdo*: Gun attack on French magazine kills 12", *BBC News*, Jan. 7, 2015 [http://www.bbc.co.uk/news/world-europe-30710883]; "*Charlie Hebdo* attack: Three days of terror", *BBC News*, Jan. 14, 2015 [http://www.bbc.co.uk/news/world-europe-30708237].
[36] F. SIDDIQUI, "The Koran-burning preacher has been driving for Uber", *Washington Post*, Feb. 4, 2017 [https://www.washingtonpost.com/news/dr-gridlock/wp/2017/02/04/the-quran-burning-preacher-has-been-driving-for-uber/?noredirect=on&utm_term=.f1a15ce922d8].
[37] *Ibidem*.
[38] *Ibidem*.
[39] *Ibidem*.
[40] *Ibidem*.
[41] *Ibidem*.

§ 2 – CONSTITUTIONAL PRINCIPLES

As indicated above, hate speech is discourse that aims to promote hatred based on categories such as ethnicity, race, national origin, class, and similar categories[42]. In various countries, this type of speech has received legal attention primarily since the second half of the twentieth century[43]. The First Amendment of the U.S. Constitution, as the U.S. Supreme Court has interpreted it, generally makes restricting hate speech difficult. This point can be seen via the approaches that the Supreme Court has taken toward various types of often-overlapping speech. Because the Court has afforded great protection to the Internet as well as hate speech in general, online hate speech is not easy to regulate.

One type of speech relevant to regulating hate speech is cross-burning. While burning a Koran is not precisely the same as burning a cross, the two communicative actions have some resemblance. Cross-burning in the United States developed in the early twentieth century around the time of D. W. Griffith's film *The Birth of a Nation* and became associated with the white supremacist group the Ku Klux Klan, an organization known for its hateful messages to African-Americans and other minority groups[44]. Likewise, Koran-burning by non-Muslims sends a hateful message to Muslims. Burning a Koran degrades the Koran because the holy book is treated as if it were waste material to be incinerated. Of note, people have burned books that were considered to be heretical, blasphemous, or seditious[45]. Because of the similarities between cross-burning and Koran-burning, using the legal standard for cross-burning is appropriate for Koran-burning.

In *Virginia v. Black*, the Supreme Court stated that cross-burning was expressive conduct[46]. As such, the government cannot ban all cross-burning, although First Amendment protection does not apply if the speaker has "the intent to intimidate"[47]. Conveying "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" is a "true threat" such that the government may punish the speech[48]. The Court's concern was with the motivations of the individual who had made the threat, not with the perceptions of the target of the threatening communication[49].

Previously, in *R.A.V. v. St. Paul*, the Court had struck down a local ordinance that allowed for the punishment of cross-burning,

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42 ROSENFELD, *vide supra* note 4, at 1523.
43 F. KÜBLER, "How much freedom for racist speech?: Transnational aspects of a conflict of human rights", *Hofstra Law Review*, n°27/1998, p. 336.
44 J. BELL, "O say, can you see: Free expression by the light of fiery crosses", *Harvard Civil Rights-Civil Liberties Law Review*, n°39/2004, pp. 343-45.
45 D. CRESSY, "Book burning in Tudor and Stuart England", *Sixteenth Century Journal*, n°36/2005, p. 374 (observing the lack of success in destroying the ideas in books burned in Tudor and Stuart England).
46 538 U.S. 343, 360 (2003).
47 *Ibidem* at 363.
48 *Ibidem* at 359-60.
49 BELL, *vide supra* note 44, at 368.

among other things, "'which one kn[ew] or ha[d] reasonable grounds to know arouse[d] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender'"[50]. The Court explained that the wording of the statute employed impermissible content-based and viewpoint-based discrimination[51].

Fighting words are another type of speech suitable for a discussion of regulating hate speech. As the Supreme Court noted in *Chaplinsky v. New Hampshire*, fighting words include words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace"[52]. They are "words likely to cause an average addressee to fight"[53]. A communicator conveys fighting words in a face-to-face context[54]. Fighting words convictions are difficult to uphold, and laws that prohibit fighting words often fail because they are vague or overly broad[55].

An additional type of speech pertinent to a discussion of hate speech is incitement. After experimenting with various formulations of the legal standard for at least half a century, the Supreme Court eventually settled on a modern formulation in *Brandenburg v. Ohio*[56]. The Court determined that government may not punish advocacy under the category of incitement unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"[57]. The *Brandenburg* test has three elements that respectively address intent, probability, and proximity[58]. This formation of the incitement standard "is the most speech-protective standard yet evolved by the Supreme Court" for this type of speech[59].

In general, the Supreme Court has been skeptical of regulations based on the content of speech. For example, the Court struck down, in *United States v. Stevens*, a federal statute that banned creating, selling, or possessing depictions of cruelty to animals[60]; in *Brown v. Entertainment Merchants Association*, a state statute that criminalized selling or renting violent video games to minors who lacked parental consent[61]; and, in *United States v. Alvarez*, a federal statute that criminalized falsely asserting that one had been awarded military honors[62].

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[50] 505 U.S. 377, 380 (1992).
[51] *Ibidem* at 391-92.
[52] 315 U.S. 568, 572 (1942).
[53] *Ibidem* at 573.
[54] *Ibidem*.
[55] E. CHEMERINSKY, *Constitutional law: Principles and policies*, 6th ed., New York, Wolters Kluwer, 2019, pp. 1105-06.
[56] 395 U.S. 444 (1969) (per curiam).
[57] *Ibidem* at 447.
[58] *See* C. R. SUNSTEIN, "Constitutional caution", *University of Chicago Legal Forum*, 1996, p. 369. *See also* S. M. GILLES, "*Brandenburg v. State of Ohio*: An 'accidental', 'too easy', and 'incomplete' landmark case", *Capital University Law Review*, n°38/2010, pp. 522-25.
[59] G. GUNTHER, "Learned Hand and the origins of modern First Amendment doctrine: Some fragments of history", *Stanford Law Review*, n°27/1975, p. 955.
[60] 559 U.S. 460 (2010).
[61] 546 U.S. 786 (2011).
[62] 567 U.S. 709 (2012).

Overall, the Court's perspective on hate speech has been consistent with a libertarian understanding of speech. Language from case law, not limited specifically to the hate speech context, illustrates some of the main assumptions. In a prophetic dissent in *Abrams v. United States*, an incitement case, Justice Oliver Wendell Holmes observed "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"[63]. Many decades later, the Court, having generally adopted a Holmesian perspective on speech, addressed flag-burning, which some people would find hateful. In *Texas v. Johnson*, the Court explained, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"[64]. In the same case, the Court added, "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong"[65].

More than two decades later, in *Snyder v. Phelps*, the Court considered protest speech that included statements like "'Thank God for Dead Soldiers'" and "'God Hates Fags'", communicated on signs near the funeral of a soldier, which many people would consider hate speech[66]. The Court observed the following:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate[67].

Accordingly, in cases of offensive speech like hate speech, "the remedy to be applied is more speech", not government punishment of speech[68]. This approach reflects a deep distrust of government that dates at least to the beginnings of a nation that sought to win its independence from the powerful British Empire[69]. The expectation is that targets of hate speech and their allies will respond with counterspeech. Such responsive speech "should be the remedy of *first resort*"[70].

Because the focus of this paper is online hate speech, some consideration of the online dimension of the regulation of hate speech is now necessary. Since its arrival, the Internet has ushered

63 250 U.S. 616, 630 (1919).
64 491 U.S. 397, 414 (1989).
65 *Ibidem* at 419.
66 562 U.S. 443, 448 (2011).
67 *Ibidem* at 460-61.
68 *See* Whitney v. California, 274 U.S 357, 377 (Brandeis, J., concurring).
69 E. BARENDT, "Free speech in Australia: A comparative perspective", *Sydney Law Review*, n°16/1994, p. 157.
70 R. D. RICHARDS & C. CALVERT, "Counterspeech 2000: A new look at the old remedy for 'bad' speech", *Brigham Young University Law Review*, 2000, p. 586 (italics in original).

in a revolution in communication[71], making communication more democratic[72]. In general, the Supreme Court has afforded great protection to the content of Internet speech, observing, in *Packingham v. North Carolina*, that "the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks" on the Internet[73]. This is so because the Internet is among "the most important places (in a spatial sense) for the exchange of views"[74].

Various cases have supported this approach. In *Reno v. American Civil Liberties Union*, the Court declared prohibiting indecent materials on the Internet to be a violation of the First Amendment, as such a prohibition would restrict adult access to the materials[75]. Later, in *Ashcroft v. American Civil Liberties Union*, the Court determined that a law that required commercial websites to restrict minors' online access to sexually-oriented material was likely unconstitutional because of the impact on adult access to sexually-oriented materials[76]. The Court noted the possibility of employing filters as opposed to restring access to the materials[77]. In *Packingham*, on overbreadth grounds, the Court struck down a statute that prohibited registered sex offenders from accessing commercial social networking websites where the offenders knew the websites allowed minors to join the sites or to have personal webpages[78].

This brief overview of regulation of online communication suggests that the Supreme Court has approached speech on the Internet much as the Court had approached speech before the advent of the Internet, which was from a generally libertarian perspective. Accordingly, given that the Court has been reluctant to restrict hate speech, and equally reluctant to restrict online speech, one can see that online hate speech is difficult to regulate.

Of note, the United States has taken a rather different perspective on hate speech from the perspectives of other countries, which, having greater trust in government, have restricted hate speech under values like equality and human dignity[79]. For instance, while the U.S. approach has been toward liberty, the more restrictive Canadian approach has been toward equality, dealing with equal participation in democracy[80]. In *Regina v. Keegstra*, the Canadian Supreme Court upheld a criminal conviction for the use of hate

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71 *See generally* R. L. WEAVER, *From Gutenberg to the Internet: Free speech, advancing technology, and the implications for democracy*, 2nd ed., Durham, Carolina Academic Press, 2019.
72 E. BARENDT, *Freedom of speech*, 2nd ed., Oxford, Oxford University Press, 2005, p. 451.
73 137 S. Ct. 1730, 1736 (2017).
74 *Ibidem* at 1735.
75 521 U.S. 844, 874 (1997).
76 542 U.S. 656, 665, 673 (2004).
77 *Ibidem* at 666-68.
78 137 S. Ct. at 1736-37.
79 A. STONE, "The comparative constitutional law of freedom of expression", in T. GINSBURG & R. DIXON (eds.), *Comparative constitutional law*, Cheltenham, Edward Elgar, 2011, p. 415.
80 *Ibidem* at 417.

speech[81]. Meanwhile, the German approach favors human dignity because of Nazi Germany's treatment of the Jewish people and other disfavored groups[82]. So strong is the post-World War II German commitment to human dignity that the German Constitution's expression of the value may not be amended[83]. Israel and many countries in Europe have laws that ban Holocaust denial[84]. In general, different histories have informed different approaches to hate speech[85].

§ 3 – CONSTITUTIONAL ANALYSES

This paper now applies the above constitutional principles to the facts of the Florida Koran-burning case to determine whether the Koran-burning of Jones could be punished as any of the types of speech previously discussed. The analyses will show that punishment most likely would not be possible.

Under the doctrine on cross-burning, which is similar to Korn-burning, punishment probably would be impermissible. As indicated previously, the U.S. Supreme Court has stated that the government may punish cross-burning if there is an intent to intimidate[86]. If Jones is taken at face value, his intent was to warn people about what he thought were the dangers of the Koran and Islam[87]. He also wanted to raise awareness of the imprisonment of a Christian pastor in Iran[88].

Also of note, while cross-burning may be particularly serious on the lawn of a targeted African-American family[89], Jones burned the Koran well away from the homes of the Muslims who eventually comprised at least a part of his audience. He was in Florida, and, since he livestreamed the burning, audience members were around the world[90]. The proximity that might suggest an intent to intimidate was not present in an Internet message the way it would be on the front lawn of a targeted family. According, in the absence of evidence of an intent to intimidate, the communication of Jones could not be punished under the doctrine on cross-burning.

Moreover, punishment under the doctrine on fighting words, which are words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace"[91], would be unsuccessful. The definition of fighting words is limited to the

[81] 3 S.C.R. 697 (1990).
[82] STONE, *vide supra* note 79, at 417.
[83] *German Constitution*, 1949, §§ 1(1), 79(3) [https://www.btg-bestellservice.de/pdf/80201000.pdf].
[84] E. BARENDT, "Freedom of expression", in M. ROSENFELD & A. SAJO (eds.), *The Oxford handbook of comparative constitutional law*, Oxford, Oxford University Press, 2012, p. 903. The United Kingdom does not have a law that prohibits Holocaust denial. BARENDT, *vide supra* note 72, at 177.
[85] BARENDT, "Freedom of expression", *vide supra* note 84, at 904.
[86] Virginia v. Black, 538 U.S. 343, 363 (2003).
[87] SIEFF, *vide supra* note 1; GUTMAN *et al.*, *vida supra* note 13.
[88] ERDBRINK, *vide supra* note 5.
[89] *Black*, 538 U.S. at 350.
[90] SIEFF, *vide supra* note 1.
[91] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

face-to-face context[92]. The Koran-burning of Jones was not in a face-to-face context. Jones livestreamed his Koran-burning message around the world via the Internet[93]. While Jones was in Florida, many members of his audience were in places like Afghanistan and Indonesia[94]. As such, he could not literally have been in the faces of the Muslim members of his audience, and the fighting words doctrine would not provide justification for punishing the speech.

Additionally, punishment under the incitement doctrine probably would not be feasible. As indicated above, the three-part test from *Brandenburg v. Ohio* states that government may not punish advocacy under the category of incitement unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"[95].

First, if one takes him at his word, Jones did not have the intent to bring about imminent lawless action. *Brandenburg* does not specifically call for the lawless action to be serious[96], but one can read the case that way[97]. The intent Jones had was to warn people about what he thought were the dangers of the Koran and Islam[98]. He also wanted to raise awareness of the imprisonment of a Christian pastor in Iran[99]. Jones seems to have been aware that his actions might result in serious harm[100], but such awareness would be insufficient to constitute the requisite intent to bring about imminent lawless action.

Second, the communication of Jones was likely to incite or produce lawless action. The Supreme Court has not elaborated on the probability component of *Brandenburg*[101]. However, as Justice Oliver Wendell Holmes observed decades before *Brandenburg*, "Every idea . . . offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth"[102]. If more people receive exposure to the idea offered, the likelihood of resulting harm is greater[103]. When enough upset people are in one place at a given time, violence can result. In this case, many Muslims presumably had strong feelings about their faith and were prone to become upset if they felt that their faith had received an insult. Moreover, by the time he burned the Koran in 2011, Jones already had

92 *Ibidem* at 573.
93 SIEFF, *vide supra* note 1.
94 CLARKE & MCHUGH, *vide supra* note 2.
95 395 U.S. 444, 447 (1969) (per curiam).
96 F. S. HAIMAN, *Speech and law in a free society*, Chicago, University of Chicago Press, 1981, p. 277.
97 M. E. KAMINSKI, "Incitement to riot in the age of flash mobs", *University of Cincinnati Law Review*, n°81/2012, p. 45.
98 SIEFF, *vide supra* note 1; GUTMAN *et al.*, *vide supra* note 13.
99 ERDBRINK, *vide supra* note 5.
100 SIEFF, *vide supra* note 1.
101 T. HEALY, "*Brandenburg* in a time of terror", *Notre Dame Law Review*, n°84/2009, p. 713.
102 Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).
103 SUNSTEIN, *vide supra* note 58, at 370-71.

received international media attention the previous year[104]. Thus, many people in predominantly Muslim countries, as well as in the U.S. and elsewhere, had their eyes on him. A strong response from displeased Muslims somewhere was likely. Indeed, in 2011, when protests turned violent, lawless action did follow in Mazar-e Sharif and Kandahar, Afghanistan[105].

Third, whether potential lawless activity was imminent in the Jones case would be hard to determine. Although *Brandenburg* does not allow the government to punish the "advocacy of illegal action at some indefinite future time"[106], the constitutional definition of imminence is vague, potentially referring to a matter of seconds, minutes, or hours[107]. Regardless, with the diversity of the potential audience of the communication, including Muslims and Muslim allies around the world, whether a response, if any, would occur almost at once or later was unknown at the time of the Koran-burning. For instance, people could have taken to the streets in anger almost immediately or planned mass rallies for later dates. With hindsight, one can note that violence did accompany several protests in Afghanistan over the burning, although the violence occurred nearly two weeks after the burning[108], which would not have constituted imminence.

Accordingly, punishing the communication under the incitement doctrine most likely would be infeasible. While a likelihood of inciting or producing lawless action was present, Jones lacked the intent to bring about imminent lawless action, and a determination of imminence of the potential lawless activity would be difficult to make.

In summary, whether under the doctrine on flag-burning, fighting words, or incitement, the speech of Jones would be unlikely to be punishable. While livestreaming the message created more controversy around the world, sending out the message in that manner did not make punishment, and thus regulation, more likely.

CONCLUSION

Drawing upon the Florida Koran-burning case for illustrative purposes, this paper has provided a succinct overview of the regulation of online hate speech in the U.S. on constitutional grounds. As the paper has illustrated, the U.S. perspective on hate speech generally has been libertarian in nature and focused away from values like equality and human dignity that other legal systems have chosen to protect to a greater degree. In the U.S.,

104 ERDBRINK, *vide supra* note 5.
105 SIEFF, *vide supra* note 1.
106 Hess v. Indiana, 414 U.S. 105, 108 (1973). In *Hess*, the Supreme Court determined that, at a war protest on a university campus, neither "'We'll take the fucking street later'" nor "'We'll take the fucking street again'" was sufficient to justify punishment. *Ibidem* at 106-09. Among other defects in the government's case was the lack of imminence. *Ibidem* at 108-09.
107 KAMINSKI, *vide supra* note 97, at 44.
108 SIEFF, *vide supra* note 1.

counterspeech is the preferred remedy for hate speech. To date, the advent of the Internet has not changed the Supreme Court's general approach to hate speech. Consequently, discourse like that of Terry Jones, offensive as it is to many people, is, for the most part, hard to regulate via punishment. As comparative perspectives on hate speech indicate, other approaches are possible, but the United States, deeply suspicious of government, has remained libertarian in its approach to hate speech, both online and otherwise.