IN HARM'S WAY: THE DESPERATE NEED TO UPDATE AMERICA'S FREE SPEECH MODEL

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I. INTRODUCTION

Throughout American history, technological advancements have forced multiple revisions to be made to America's free speech and free expression model. When that model became overly restrictive, those oppressed pushed back to regain their freedoms.[1] Likewise, when it became overly liberal, those harmed pushed back to maintain their safety.[2] For this reason, America's free speech legislation, like numerous forms of legislation, must be updated continuously to accurately reflect the needs of society and the demands of technology. In the previous two decades, the Internet introduced a major technological advancement—the ability to remotely, yet directly, influence worldwide activities

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1. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 165–66 (2002) (holding that the government may not require evangelists to obtain a permit before preaching door to door because such a requirement violates the First Amendment).

2. Janice Wolak, David Finkelhor & Kimberly Mitchell, *1 in 7 Youth: The Statistics About Online Sexual Solicitations*, CRIMES AGAINST CHILD. RES. CENTER (Dec. 2007), http://www.unh.edu/ccrc/internet-crimes/factsheet_1in7.html. For example, according to the Crimes Against Children Research Center, online predators threaten one in seven youth and one in twenty-five receive aggressive sexual solicitations, including attempts to meet them in person. *Id.* In other words, at least one child in every classroom in America has been aggressively solicited online for sex. This has led to the passing of severe legal restrictions of Internet use to solicit minors for sex. *Id.*

from anywhere, anonymously or otherwise.[3] This development has upset the delicate balance between the freedom of speech and freedom from harm distinguished by Supreme Court decisions.[4] This Article focuses on remote, malicious, or incendiary speech and how its reasonably foreseeable consequences demonstrate a high likelihood of physical proximate harm to innocent third parties.[5] It argues that, currently, the First Amendment protects such speech despite the resulting material physical harm to innocent third parties. This situation creates a constitutional imbalance that we propose to remedy. To be sure, this Article does not suggest, endorse, or allude to any form of "antiblasphemy" legislation, commonly found in Pakistan.[6] Instead, this Article suggests that America's free speech legislation, like other forms of legislation,[7] must be updated to accurately reflect the needs of contemporary society and technology.

Part II of this Article briefly analyzes the dangers of free speech models that are either too restrictive or not sufficiently restrictive. Part III provides historical and modern context to America's free speech models and includes an analysis of hate

3. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 850 (1997) (explaining that "[t]he Internet is a 'unique and wholly new medium of worldwide human communication.'") (quoting Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996).

4. *See generally* Ira Glasser, *The Struggle for a New Paradigm: Protecting Free Speech and Privacy in the Virtual World of Cyberspace*, 23 NOVA L. REV. 627 (1999) (examining the constitutional implications of technology's impact on free speech).

5. *See, e.g.*, Ben Brantley, *Theater Review; Nice Young Man and Disciples Appeal for Tolerance*, N.Y. TIMES (Oct. 14, 1998), http://www.nytimes.com/1998/10/14/arts/theater-review-nice-young-man-and-disciples-appeal-for-tolerance.html (describing how *Corpus Christi*, a play that depicts Jesus Christ and his disciples as homosexuals, has resulted in numerous death threats to third parties unaffiliated with its production, merely because the third parties were incidentally involved in hosting the play); Enayat Nazajafizada & Rod Nordland, *Afghans Avenge Florida Koran Burning, Killing 12*, N.Y. TIMES (Apr. 1, 2011), http://www.nytimes.com/2011/04/02/world/asia/02afghanistan.html?pagewanted=all (describing violence in Afghanistan that left twelve dead, including seven UN workers, as Afghans protested Pastor Terry Jones, who burned a Qur'an on March 20, 2011).

6. *See* Pakistan Penal Code (XLV of 1860), SS. 298B, 298C. http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html (last visited Aug. 30, 2017) (explaining that Pakistan's anti-blasphemy legislation serves to chill genuine differences of opinion and belief, even the private practice thereof).

7. Privacy laws are updated and changed to keep up with new arenas requiring advanced privacy due to advanced technology, such as healthcare, online banking, and social networking accounts. *See, e.g.*, U.S. Dep't of Health & Human Servs., *Understanding Patient Confidentiality*, HHS.GOV, https://www.hhs.gov/hipaa/for-professionals/patient-safety/index.html (last visited Oct. 25, 2017) (explaining that the Patient Safety and Quality Improvement Act of 2005 ("PSQIA") was introduced "to enhance the data available to assess and resolve patient safety and health care quality [issues, to] encourage the reporting and analysis of medical errors . . . and to provide[] Federal privilege and confidentiality protections for patient safety information called *patient safety work product*").

speech and obscenity speech legislation. Parts IV and V detail the proposed revised free speech model, dubbed *reasonable proximate impact*. These Parts provide historical precedent, contemporary legislative trends, and caselaw to demonstrate the demand and legal justification for remedying the technologically-induced imbalance. Parts IV and V use international precedent to thoughtfully modify our approach to free speech while not unjustly chilling our freedom of expression. Additionally, Parts IV and V respond to the Heckler's Veto argument and how it supports the reasonable proximate impact revision to American free speech. Finally, Part VI provides the conclusion of this Article.

II. UNDERRESTRICTION, OVERRESTRICTION, AND THE FREE SPEECH BALANCE

Though they ratified and still champion the First Amendment as a fundamental right, Americans agree that unrestricted free speech has the potential to cause our nation irreparable harm. But, Americans also agree that unrestricted free speech has the potential to prevent irreparable harm.[8] Though the Constitution affords a generous and liberal application of free speech, it does not recognize absolute freedom of speech.[9] A simple illustration of this is the restriction of yelling "fire" in a crowded theater.[10]

Any adjustments to our understanding of free speech, however, must be done with the strictest care. Some nations, like Pakistan, have gravitated toward extremism in their free speech restrictions by instituting "antiblasphemy" legislation.[11] These laws have not only chilled free speech protected under Article 18 of the Universal Declaration of Human Rights[12] ("UDHR") and

8. *See* Brantley, *supra* note 5 (providing examples of irreparable harm related to unrestricted free speech).

9. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (exemplifying that pornography, child pornography, hate speech, and speech or expression inciting violence were forbidden under the "clear and present danger" theory).

10. *Id.*

11. *See* Pakistan Penal Code (XLV of 1860) SS. 298B, 298C, 295C (collectively prescribing fine, imprisonment, and death for any member of the "Quadiani group or the Lahori group (who call themselves 'Ahmadis')").

12. *See* Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 74-5. Article 18 states, "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Article 19 of the UDHR adds, "[e]veryone has the right to freedom of opinion and expression; this right includes

Article 19 of the International Covenant on Civil and Political Rights[13] ("ICCPR"), but have made it criminal for religious minorities to hold particular religious views that are arbitrarily deemed offensive to religious sentiments of clerics.[14] These discriminatory laws further violate Pakistan's own Constitution[15] and have become so entrenched in legal precedent that in 1993 Pakistan's Supreme Court reached a near-unanimous verdict to ensure these laws were upheld.[16] Such laws perpetuate

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freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." *See also* Charter of the United Nations, 26 June 1945, 59 Stat. 1031 (1945), *entered into force* 24 Oct. 1945, Art. 55(c), which declares, "the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

13. *See* International Covenant on Civil and Political Rights, Dec. 23, 1975, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), *entered into force* 23 Mar. 1976, Art. 19. Article 19 states:

> (1) Everyone shall have the right to hold opinions without interference.
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (*odre public*), or of public health or morals.

14. *See Asia Bibi: Pakistan Supreme Court Adjourns Death Row Appeal*, BBC NEWS (Oct. 13, 2016), http://www.bbc.com/news/world-asia-37641354. For example, in 2010 Asia Bibi, a Pakistani Christian woman was accused and convicted of violating Section 295C. Without any tangible evidence, due process of law, or legal representation, she is currently on death row in Pakistan, simply for allegedly insulting the Prophet Muhammad. *See* Katie Mansfield, *Christian Boy, 16, Facing Death Penalty for Offending Muslims in Facebook Post* (Sept. 30, 2016), http://www.express.co.uk/news/world/715776/Christian-boy-16-facing-death-penalty-offending-Muslims-Facebook-post-Pakistan (detailing the stories of a young boy from Pakistan and a young boy from Singapore); Pakistan Penal Code (XLV of 1860) *supra* note 6, at S. 295-8C. 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.

15. *See* CONST. art. XIX (stating that "[e]very citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press.").

16. *See* Zaheeruddin v. State, 1993 SCMR 26 (holding that Ahmadi Muslims do not qualify for religious freedom protection because they are outside the fold of Islam, and as apostates, do not have the right to engage in Islamic behavior). Just as Coca-Cola has the

antagonism toward religious minorities, empower extremists to engage in vigilante justice,[17] with over 62,000 lives lost since 2003.[18] This violence has become so severe, that to protect antiblasphemy laws in 2011, extremists assassinated two prominent Pakistani politicians for advocating a repeal of those laws.[19] This underscores the dangers of carelessly crafted speech and expression legislation.

As this Article demonstrates, the danger is a two-way street—overly liberal free speech legislation can cause similar violence. Both wholly restrictive and wholly unrestrictive free speech models compromise freedom. In the appropriate balance, protected free speech is not restricted, nor is unrestricted free speech protected.

III. FREE SPEECH, HATE SPEECH, AND OBSCENITY DEVELOPMENT IN AMERICAN HISTORY

A. Free Speech Development in American History

Technological advancements in the modern era illustrate the gaps in America's current free speech model. According to Mark Twain: "The American people enjoy three great blessings . . . [f]ree

right to protect their product trademark, Pakistan has the right to protect the usage of Islamic terms and behaviors and to reserve them exclusively for Muslims. *Id.* Therefore, Ordinance XX anti-blasphemy laws were not only constitutional, but necessary to protect Islam and preserve the peace by not offending Pakistan's Sunni Muslim majority population. *Id.* For a detailed scholarly analysis of Zaheeruddin v. State, see Tayyab Mahmud, *Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT'L L.J. 40 (1995). The case was rejected again on appeal in 1999.

17. *See Fatalities in Terrorist Violence in Pakistan 2003-2017*, SOUTH ASIA TERRORISM PORTAL, http://www.satp.org/satporgtp/countries/pakistan/database/casualties.htm (last visited Oct. 25, 2017). The South Asia Terrorism Portal records the number of violent attacks and fatalities, and demonstrates that the number of deaths and attacks have generally increased in Pakistan year after year. *Id.*

18. *Id.*

19. In January 2011, Governor of the Punjab Province, Salman Taseer was assassinated by his own bodyguard, Mumtaz Qadri. In March 2011, Pakistan's Minorities Minister Shabazz Bhatti, a Christian, was assassinated by extremists. Both were murdered due to their opposition of Pakistan's discriminatory anti-blasphemy laws. Karin Brulliard & Shaiq Hussain, *Shahbaz Bhatti, Pakistan's Sole Christian Minister, Is Assassinated in Islamabad*, WASH. POST FOREIGN SERV. (Mar. 2, 2011, 10:26 PM), http://www.washingtonpost.com/wp-dyn/content/article/2011/03/01/AR2011030101394.html. *See generally* Asif Shahzad, *Pakistani Governor Killed Opposing Blasphemy Law*, SALON (Jan. 4, 2011, 12:04 PM), http://www.salon.com/2011/01/04/as_pakistan_violence (discussing the assassinations).

speech, a free press, and the good sense not to use either."[20] Prior to World War I, Twain's comment was an accurate analysis of American society. In fact, the "Free Speech Re-definition Movement" of the 1920s and 1930s represented the first time in U.S. history where Americans demanded their First Amendment rights actively.[21] Professor Paul L. Murphy elaborates that after massive arrests during WWI, those who opposed the war went on labor strikes or took measures against the national interest, and many appealed the current state of affairs.[22] However, without much precedent, appellate lawyers had difficulty writing substantive briefs for the then prisoners of conscience. Professor Murphy writes:

> If an attorney was seeking precise meaning of the [free speech] concept, he went to works on the common law, or to various commentaries and treatises commonly used at the time. . . . [But no] precise legal opinions drew the line in the areas in which the free-speech issue was relevant.[23]

The U.S. government passed no material legislation addressing free speech prior to WWI, except for the 1798 Sedition

20. Thomas M. Rickers, *High on the Hog*, THE AM. INTEREST (Nov. 1, 2008), https://www.the-american-interest.com/2008/11/01/high-on-the-hog/; AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 71 (1995).

21. PAUL L. MURPHY, THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR 248–49 (1972).

22. *Id*.

23. *Id.* at 249.

Act.[24] Although this Act has since been ruled unconstitutional,[25] the Sedition Act was a step *forward* from the colonial days when little freedom of expression existed at all. For example, legislation from as early as 1618 punished Christians with a week of slavery if they missed church.[26]

Prior to WWI, most state constitutions followed provisions similar to what was elucidated in the First Amendment.[27] Because of this, state constitutions offered little insight into the actual meaning of free speech and how it applied to practical situations.[28] No clear line existed as to which types of speech were legally permissible and which would be considered illegal: "[T]he operational rule of thumb of the permissible limits of free speech turned on an imprecise delineation between the proper use of utterance and its abuse. A line existed between 'liberty' and 'license.' The former was permissible, the latter was punishable."[29] Instead, as Professor Chafee explains, "[b]ut when we asked where the line actually ran and how they knew on which side of it a given utterance belonged, we found little answer in [the courts'] opinions."[30] The generally understood and—admittedly subjective—consensus was that "[w]hen free discussion led to the

24. Sedition Act, ch. 74, 1 Stat. 596 (1798).

SECTION I. Punishes combinations against United States government.

(1) Offense: Unlawful [to] combine or conspire to oppose any measure of the United States government

(2) Grade of offense: a high misdemeanor.

(3) Punishment: Fine not exceeding $5000, and imprisonment six months to five years.

SECTION II. Punishes seditious writings.

(1) Offense: To write, print, utter or publish, or cause it to be done, or assist in it, any false, scandalous, and malicious writing against the government of the United States, or either House of Congress, or the President, with intent to defame, or bring either into contempt or disrepute, or to excite against either the hatred of the people of the United States, or to stir up sedition, or to excite unlawful combinations against the government, or to resist it, or to aid or encourage hostile designs of foreign nations.

(2) Grade of offense: misdemeanor (not explicitly stated).

(3) Punishment: Fine not exceeding $2000, and imprisonment not exceeding two years.

SECTION III. Allows accused to give in evidence the truth of the matter charged as libelous.

25. *Id.*; *see* MURPHY, *supra* note 21, at 248.
26. DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM 73 (2011).
27. MURPHY, *supra* note 21, at 248.
28. *Id.*
29. *Id.*
30. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 14–15 (1941).

advocacy of improper social, economic, and political ends, reasonable repression of its advocates was not an unwarranted restriction on free expression."[31] Perhaps this was a result of President Washington's lasting influence. As a Founding Father, his understanding of speech was defined in his infamous "Rules of Civility," namely Rule 49 and Rule 65.[32] Rule 49 implored, "[u]se no Reproachfull Language against any one neither Curse nor Revile."[33] Likewise, Rule 65 added, "[s]peak not injurious Words neither in Jest nor Earnest Scoff at none although they give Occasion."[34] Thus, working off the theory of originalism,[35] we may construe that President Washington believed *reasonable* repression of improper social, economic, and political ends was not an unwarranted restriction on free expression.

This perception also stemmed from the 1904 case of *United States ex rel. Turner v. Williams*,[36] which developed from the famous British case, *R. v. Hicklin*.[37] In *Hicklin*, the British court held that, at common law, the legislature can outlaw any form of speech that "deprave[s] and corrupt[s] those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."[38] In contrast, in 1919 Supreme Court Justice Oliver Wendell Holmes, Jr. realized that, while free speech required certain objective limitations demonstrated by his "clear and present danger" test, free speech still needed to be free.[39] Justice Holmes explained his rationale in *Schenck*:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as

31. MURPHY, *supra* note 21, at 27.

32. George Washington, *Rules of Civility & Decent Behaviour in Company and Conversation: A Book of Etiquette*, COLONIAL WILLIAMSBURG–HISTORY.ORG, http://www.history.org/almanack/life/manners/rules2.cfm (last visited Aug. 31, 2017).

33. *Id.*

34. *Id.*

35. *Id.*

36. 194 U.S. 279, 279 (1904).

37. R. v. Hicklin [1868] L.R. 3 (QB) at p. 360.

38. *Id.* at 371.

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

> men fight and that no Court could regard them as protected by any constitutional right.[40]

In this unanimous Supreme Court decision, Justice Holmes famously wrote, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[41] Likewise, the author of a Tulsa, Oklahoma editorial published in The Daily World on February 16, 1919 implored:

> If we as a free people are to retain unhampered our prized privilege of free speech, we must heartily encourage every reasonable effort to close the mouths of those who habitually abuse the privilege. There have been a number of people in our midst whose rantings have about convinced the people that free speech is a dangerous liberty. *If the privilege is to be saved from destruction we must see to it that its sanctity is preserved*.[42]

The editorial described only one purpose and benefit of free speech legislation—to prevent unwarranted abuse. The majority American consensus at that time embraced this approach, as Professor Murphy notes:

> Every American has the privilege of free speech, but "liberty is not license," became an almost ritualistically parroted statement. James A. Emery told the Annual Convention of the NAM in 1920 that there was "danger in restricting liberty, but not in controlling license. . . . Every form of restriction exercised by government," he contended, "rests upon the necessity of protecting the public welfare and securing the equal freedom of all. Liberty without order is fire on the floor; liberty with order is fire in the hearth."[43]

Under this premise, Justice Holmes' unanimous court ruling in *Schenck*[44] withstood half a century of scrutiny. Even when *Schenck* was overruled in favor of *Brandenburg v. Ohio* in 1969,[45] Justice Holmes' holding that the First Amendment does not offer

40. *Id.*
41. *Id.*
42. MURPHY, *supra* note 21, at 23 (emphasis added).
43. *Id.* at 27.
44. 249 U.S. at 48–53.
45. 395 U.S. 444, 444 (1969).

protection for falsely yelling fire in a theatre remained intact, as it does to this day.[46]

As early as 1931, however, it became clear that courts would need to define and redefine free speech consistently to accommodate the ever-changing world:

> In establishing the tenuous beachhead of 1931, the courts, the most logical agency to give a practical working meaning to freedom of speech, looked both backward and forward. . . . Present reality was confronted for a functional meaning which would lead to the successful and proper operation of that concept within modern society. The question remained whether such a beachhead could be held and what steps should be taken to secure and extend it. . . . *In assuming a new responsibility for translating immediate human and national needs into workable law in the free-speech area, [the courts] would be under constant pressure to keep such law relevant to the fast changing challenges of burgeoning national government, war, cold war, and the inevitable complexities created by such developments*.[47]

In 1969, *Brandenburg* was the next major case to recognize this need for ongoing free speech modification.[48] When overruling *Schenck*, *Brandenburg* proposed the "imminent lawless action" test.[49] This advanced the clear and present danger test and declared that the First Amendment cannot be used to protect speech calling for imminent actions that are likely to occur, and are in violation of the law.[50] *Brandenburg* was tempered by *New York Times Co. v. Sullivan* in 1964,[51] which established that actual malice is needed before a press report can be considered defamatory or libel.[52] *Brandenburg* was also tempered by *Hess v. Indiana* in 1973,[53] which clarified that "imminent" must actually be imminent, and not some arbitrary, vague future possibility.[54] By the 1970s, free speech had become more liberal. However, public opinion still focused on monitoring speech as a greater national interest, reflecting The Daily World editorial from fifty years

46. *Id.* at 456.
47. MURPHY, *supra* note 21, at 272 (emphasis added).
48. 395 U.S. at 451.
49. *Id.* at 449.
50. *Id.* at 447.
51. 376 U.S. 254 (1964).
52. *Id.* at 279.
53. 414 U.S. 105 (1973).
54. *Id.* at 109.

prior.[55] The New York Times reported these findings on April 19, 1970:

> About three fourths of the people interviewed [in a C.B.S. poll] said extremist groups should not be permitted to organize demonstrations against the Government, even if there appeared to be no clear danger of violence. Over half of those questioned would not give everyone the right to criticize the Government if the criticism were thought to be damaging to the national interest, and 55 percent added that newspapers, radio and television should not be permitted to report some stories considered by the Government to be harmful to the national interest.[56]

Through the 1960s, however, no case substantively addressed the issue of technology as it related to free speech.

Post-*Hess*, the most notable cases involving free speech are *Hustler Magazine v. Falwell*[57] (1988) and *Snyder v. Phelps*[58] (2011). Both cases affirmed the holding in *Hess* and applied a more liberal understanding of the First Amendment.[59] In *Hustler Magazine*, Jerry Falwell won a suit against the magazine for publishing a cartoon alleging he engaged in an incestuous relationship with his mother.[60] The Supreme Court reversed this decision and unanimously held that the First Amendment forbids awarding damages to public figures for emotional distress intentionally inflicted upon them.[61] In *Snyder*, the Supreme Court granted Snyder certiorari after the Fourth Circuit overturned the court below.[62] The Supreme Court overturned Snyder's $5 million settlement for Phelps' intentional infliction of emotional distress.[63] However, in affirming the Fourth Circuit, the Supreme Court held, in an 8-1 decision, that the First Amendment protects speech related to a public issue even when it is disseminated on a public sidewalk.[64] Phelps' protest of Snyder's son's funeral happened to be

55. *See* MURPHY, *supra* note 21, at 23 (stating that every reasonable effort to "close the mouths" of those who habitually abuse the privilege of free speech must be encouraged).
56. *Id.* at 273.
57. 485 U.S. 46 (1988).
58. 562 U.S. 443 (2011).
59. 414 U.S. 105, 105-09 (1973).
60. 485 U.S. at 47–57.
61. *Id.* at 56–57.
62. *Id.*
63. 562 U.S. at 447–51 (referencing *Snyder v. Phelps*, 580 F.3d 206, 221 (4th Cir. 2009)).
64. *Id.*

just that, and therefore, constitutional.[65] The problem with these relatively recent holdings, however, is that both are based on an understanding of free speech solidified nearly forty years ago—pre-technological advancement.

For example, the CBS poll from 1970 demonstrates that our current twenty-first century understanding of the First Amendment is unique in American history, and in some ways, unprecedented. In twenty-first century America, free speech liberties have developed to include virtually every form of speech and expression except hate speech, obscenity, and pornography. Within the category of what can be considered pornographic material, adult pornography is still allowed for adult viewing, but child pornography is absolutely forbidden under any circumstance.[66] Throughout the twentieth century, courts recognized that numerous new social issues mandated the need for an ongoing revision of America's free speech standards.[67] It stands to reason that such revisions must continue to ensure the law is kept up with the ever-changing future. Going forward, the current agreed upon restrictions indicate how to effectively modify our free speech model.

B. Hate Speech Restrictions

Hate speech is legally defined as "[s]peech not protected by the First Amendment, because it is intended to foster hatred against individuals or groups based on race, religion, gender, sexual preference, place of national origin, or other improper classification."[68] Historically, hate speech was considered in the context of physical proximity. For example, if a Ku Klux Klan[69] ("KKK") member burns a cross in the privacy of his home and

65. *Id.* at 456–61.

66. New York v. Ferber, 458 U.S. 747, 765–74 (1982).

67. *E.g.*, Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997); Hustler Magazine v. Falwell, 485 U.S. 46 (1988); 458 U.S. 747; Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Schenck v. United States, 249 U.S. 47 (1919).

68. *Hate Speech*, LAW.YOURDICTIONARY.COM, http://law.yourdictionary.com/hate-speech (last visited Aug. 6, 2017).

69. S. Poverty Law Ctr., *Ku Klux Klan*, WWW.SPLCENTER.ORG, https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan (last visited Aug. 6, 2017) (defining the Ku Klux Klan as a white supremacist hate group that flourished for some time after the Civil War, known for terrorism of Blacks and non-Protestant Christians). The KKK has been officially designated a hate group by the Anti-Defamation League and by the Southern Poverty Law Center. *Id.*

without the intent to intimidate, he is protected under the First Amendment.[70] However, if the cross is burned in public in front of the home of an African American, it may be classified as hate speech because it is intimidating.[71] Therefore, it is not protected by the First Amendment.[72] In such a scenario, the cross burning itself is not the issue. Instead, it is physical proximity that determines the legality of cross burning.

C. Obscenity Restrictions

Another important restriction on free speech is the use of obscenity. Obscenity is legally defined as "prurient in nature; completely devoid of scientific, political, educational, or social value; and in violation of local community standards."[73] This ever-changing community standard further solidifies the need for a consistent reevaluation of free speech definitions. For example, in 1999, a Michigan man was convicted for cursing in public, violating an 1897 state law where public verbal obscenities were illegal.[74] The defendant won, as the Court of Appeals held that the law "unquestionabl[y] . . . operates to inhibit the exercise of First Amendment Rights" and is therefore unconstitutional.[75]

Besides verbal obscenities, the current free speech platform allows pornography under some basic restrictions. The First Amendment affords no protection for child pornography under the 1982 Supreme Court case of *New York v. Ferber*.[76] In *Ferber*, the Court held that child pornography is not a protected expression under the First Amendment because the state of New York has a

70. Virginia v. Black, 538 U.S. 343, 347–48 (2003).

71. *Id.* (stating that "The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.").

72. *Id.* at 365–68.

73. Austl. Law Reform Comm'n, *Appendix 3. International Comparison of Classification and Content Regulation: The United States*, WWW.ALRC.GOV.AU, http://www.alrc.gov.au/publications/appendix-3-international-comparison-classification-and-content-regulation/united-states (last visited Aug. 6, 2017).

74. Michigan v. Boomer, 655 N.W.2d 255 (2002).

75. *Id.*

76. 458 U.S. 747 (1982).

compelling interest to protect children from sexual abuse.[77] Likewise, the state of New York demonstrated a close connection between such child abuse (i.e. child pornography), and the use of more children in the production of pornographic materials.[78] That is, child pornography availability leads to the production of more child pornography in general, which further increases child abuse and creates a vicious cycle.[79]

The Supreme Court's analysis demonstrates a simple principle: vitriolic communication can influence and perpetuate that same vitriol throughout a community, continuing to cause harm. The New York ruling left a gap: it allowed those in current possession of child pornography to maintain legal possession. Finally, eight years later, the Supreme Court closed that gap in *Osborne v. Ohio* in 1990.[80] The Court outlawed possession and viewing of child pornography.[81] What motivated this stricter regulation? Technology. In the intervening years, advanced video technology created an increase in the home production of child pornography. This development had not been adequately addressed in the *Ferber* ruling. Therefore, the Supreme Court had to modify free speech standards to ensure that gaps created by advancing technology were filled and children's rights remained protected. The proposed, revised free speech model is built on this platform.

IV. THE REVISED FREE SPEECH MODEL—REASONABLE PROXIMATE IMPACT

Terry Jones, a Florida pastor who burned the Qur'an on March 20, 2011,[82] provides a prime example of the technological gap that has caused a much-needed revision to America's current free speech model. In addition to placing a sign on his church's lawn that stated: "Islam is of the Devil," Jones burned the Qur'an and streamed it live on the Internet, including Arabic subtitles to

77. *Id.* at 757.
78. *Id.* at 758.
79. *Id.*
80. 495 U.S. 103 (1990).
81. *Id.*
82. Kevin Sieff, *Florida Pastor Terry Jones' Koran Burning Has Far-Reaching Effect*, WASH. 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=.93f53ab36fed.

ensure Muslims—particularly in war-torn Afghanistan—could see exactly what was happening.[83] Like the cross-burning KKK member who might burn a cross in front of his African-American neighbor to specifically target him, Qur'an-burning Jones specifically targeted Muslims in a war-torn nation.

Government officials and military experts warned Jones beforehand that a high likelihood of violence would erupt in response to his actions.[84] Jones acknowledged that he was aware of such consequences and burned the Qur'an anyway.[85] In the subsequent rioting that occurred in Afghanistan, sixteen innocent third party members were killed (including seven UN workers) and ninety more civilians were injured.[86] Violence and deaths notwithstanding, the KKK member, not Terry Jones, would be guilty of wrongdoing under the current model—even if the KKK member's actions did not lead to violence. Though both parties engaged in equally incendiary behavior, a lack of physical proximity from Jones' behavior to the subsequent harm done protects his behavior under the current model.

Historically, proximity has played an important role in free speech, particularly during wartime noted by Justice Holmes.[87] America's war against Afghanistan has been the longest war in U.S. history.[88] In July 2011, around the time Jones burned the Qur'an, ninety thousand American soldiers were deployed in Afghanistan.[89] The distinction between Jones and the KKK member is proximity and degree. The cross-burning KKK member intimidated his fellow Americans in their hometown. Terry Jones' actions, however, were not felt in America. Rather, Jones' actions were felt halfway around the world—putting U.S. soldiers and innocent Afghan civilians at grave, unnecessary risk.

Therefore, the gap due to technology in America's current free speech model becomes clear. That is, if the victim of a person's

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83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. MURPHY, *supra* note 21, at 250 (emphasis added) (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)).
88. Thomas Nagorski, *Editor's Notebook: Afghan War Now Country's Longest*, ABC NEWS (June 7, 2010), http://abcnews.go.com/Politics/afghan-war-now-longest-war-us-history/story?id=10849303.
89. *Afghanistan Troop Numbers Data: How Many Does Each Country Send to the Nato Mission There?*, THE GUARDIAN (Jan. 20, 2012), http://www.guardian.co.uk/news/datablog/2009/sep/21/afghanistan-troop-numbers-nato-data.

incendiary expression is not physically proximate to the action, then the incendiary expression is protected. It is protected even if violence occurs, and even while the person making the expression is aware of the likely violent consequences beforehand. Likewise, the victims of the resulting violence have no cause of action against the party who knowingly made the incendiary expression. Let's apply this to Terry Jones' case. Afghanistan is not physically next door to the church where Terry Jones burned the Qur'an. Because of this, his actions do not count as hate speech, despite the lives lost, despite the prior knowledge that lives would likely be lost, and despite the higher risk of harm placed upon America's deployed soldiers. Per the current model—though lives were lost as a direct result of Terry Jones' actions, he did nothing illegal. And yet, Justice Holmes held that "no Court could regard [such actions] as protected by any constitutional right."[90]

To close this technology gap, physical proximity can no longer be the deciding factor. This Article proposes a revised free speech model which includes reasonably foreseeable proximate harm as an element of negligence. This new standard—which I've named *reasonable proximate impact*—would need to be determined on a case-by-case basis. The burden would be on the plaintiff to demonstrate that the offender could reasonably foresee that his actions would have violent proximate impact on another party, even if that impact was not physically proximate.

In the Terry Jones' case, government experts and military personnel informed him that his actions would result in violent proximate damage. This was because America was at war with Afghanistan. Jones proceeded anyway.[91] He chose to burn the Qur'an and knowingly become the catalyst for the death of dozens *elsewhere.* This behavior should not be protected more than the right of a KKK member who has burned the cross in front of the home of an African American. Both demonstrate the same potential to cause intimidation and violence. Both should be held to the same standard, and neither should be protected under the First Amendment. Critics may justifiably ask why Terry Jones should be responsible for the independent violent acts of the terrorists who murdered innocent persons. Part V addresses this argument, and also demonstrates that current and pending

90. MURPHY, *supra* note 21, at 250 (quoting *Schenck*, 249 U.S. at 52).
91. Sieff, *supra* note 82.

legislation as well as historical precedent each support the proposed free speech revisions described above.

V. ARGUMENTS FOR THE REVISED FREE SPEECH MODEL

A. Wartime Restrictions

Established precedent supports that the revision of "reasonable proximate impact" is needed for our free speech model. Historical wartime restrictions are no exception. For example, Senator Lindsey Graham, a Republican Congressman from South Carolina and a military lawyer,[92] echoed the above analysis in response to Terry Jones' actions. Senator Graham's argument suggests for the overall safety of American citizens, the U.S. Congress must explore the possibility of modifying the current free speech model due to technological advancements.[93] Senator Graham sought a free speech model that restricts actions—like the Jones' Qur'an burning—because such actions directly assist those with whom America is at war.[94] He states:

> I wish we could find some way to hold people accountable. Free speech is a great idea, but we're in a war. During World War II, you had limits on what you could say if it would inspire the enemy. . . . Any time we can push back here in America against actions like this that put our troops at risk, we ought to do it.[95]

He adds, "General Petraeus understands better than anybody else in America what happens when something like this is done in our country and he was right to condemn it, and I think Congress would be right to reinforce what General Petraeus said."[96] Senator Graham's point is grounded in historical precedent from WWII wartime speech restrictions.

Six months before the attack on Pearl Harbor, President Roosevelt declared,

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92. Glenn Thrush, *Graham: Explore Limits on Quran Burnings*, POLITICO (Apr. 3, 2011, 11:22 AM), http://www.politico.com/blogs/politico-now/2011/04/graham-explore-limits-on-quran-burnings-034689.

93. George Donnelly, *Lindsey Graham: "Free Speech Is a Great Idea, But We're in a War*," (CBS video Apr. 4, 2011), https://www.youtube.com/watch?v=HSV6iqxL2s0.

94. *Id.*

95. *Id.* at 0:15–0:41.

96. *Id.* at 0:48–1:01.

> Free speech and a free press are still in the possession of the people of the United States and it is important that it should remain there. For suppression of opinion and censorship of news are among the mortal weapons that dictatorships direct against their own peoples and direct against the world. . . . It would be a shameful use of patriotism to suggest that opinion should be stifled in its service.[97]

The attack on Pearl Harbor tested this notion. In 1942, under the guise of free speech, a leaked war secret that was published in the Chicago Tribune infuriated President Roosevelt ("FDR") to the point that he considered sending United States Marines to lock down the Tribune's McCormick Tower.[98] Had Japanese intelligence read the Tribune's report, the results could have been devastating for American forces.[99] While FDR did not seek official sanctions against the Tribune, possibly because no noticeable harm took place, journalists agreed that such reporting is uncharted terrain.[100] Justice Holmes' advice on proximity and degree rings clear.[101]

Historical precedent demonstrates that free speech, as valuable as it is, cannot be taken to supersede the lives and safety of our military personnel, and therefore our own lives. Yet, America's current model protects Terry Jones to do exactly that. If, in a hypothetical war, our military is defeated due to leaked information under the guise of free speech, it only exposes the United States to an attack from an enemy. The government and

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97. MURPHY, *supra* note 21, at 279.

98. Editorial Board, *Editorial: Breaking the Code on a Chicago Mystery from World War II*, CHI. TRIB. (Sept. 23, 2016), http://www.chicagotribune.com/news/opinion/editorials/ct-battle-midway-japan-war-code-tribune-roosevelt-edit-0924-md-20160922-story.html.

99. *Id.*

100. *Id.*

101. MURPHY, *supra* note 21, at 250 (stating "'[i]t is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.'"); *see* Bob Zelnick, *Tenuous Free-Speech Claims*, THE WASH. TIMES (May 10, 2006), http://www.washingtontimes.com/news/2006/may/10/20060510-093239-5715r/#pagebreak (stating that, "As journalists we are on unmapped terrain. The Supreme Court may eventually hold that the press has a constitutional right to report on government surveillance of domestic citizens even if the al Qaeda terrorist on the foreign end of the line is thereby put on alert and takes added future precaution. And it may hold that the press had the right to report on the rendition of terrorist suspects to scary places, even if that terminates such practices, removing a threat that perhaps made many a frightened prisoner talk. But to repeat, the legal bridge supporting the press claim of a special First Amendment license is shaky. If asked to bear too much traffic, it may crumble.").

the public recognized this reality during WWII. The government advised free speech restrictions with well-distributed propaganda posters.[102] The posters varied in style, but all carried a clear message:

> "Loose Lips Might Sink Ships" . . . "WANTED! FOR MURDER: *Her careless talk costs lives*" . . . "ENEMY EARS are listening [picture of Hitler with hand to ear]" . . . "if you talk too much, THIS MAN [picture of sailor] MAY DIE" "Loose Talk can cost Lives! Keep it under your STETSON" . . . "*Careless Words* Can Liquidate Ships—Better Button up Those Blabber-Lips" . . . "FREE SPEECH doesn't mean *Careless* TALK! [parrot squawking]."[103]

These propaganda posters cannot be dismissed as a pre-*Hess* era policy because their principle of censorship to ensure the safety of innocent third parties is still applied today. For example, during America's recent war with Afghanistan, President Obama decided *not* to release postmortem pictures of Osama bin Laden. Despite obligations under the Freedom of Information Act,[104] he made this decision because of the potential harm our military personnel and innocent civilians could face if extremists chose to riot and violently protest bin Laden's gruesome picture.[105] Specifically, President Obama explained: "It is important for us to make sure that very graphic photos of somebody who was shot in the head are not floating around as an incitement to additional violence [or] as a propaganda tool. That's not who we are. We don't trot out this stuff as trophies."[106] Neither the WWII propaganda posters nor President Obama's decision to protect Osama bin Laden's postmortem photo were an unconstitutional restriction on free speech. Rather, both recognized that life, liberty, and the pursuit of happiness are more valuable than the right to view a picture or

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102. *World War II Posters: Don't Talk About Ship Movement or Cargo (Part 2)*, AM. MERCHANT MARINE AT WAR (Dec. 15, 2004), http://www.usmm.org/postertalk2b.html.

103. *Id.*

104. *See* 5 U.S.C. § 552 (West 2017). The U.S. Freedom of Information Act (FOIA) is a law ensuring public access to U.S. government records. FOIA carries a presumption of disclosure; the burden is on the government—not the public—to substantiate why information may not be released. *Id.*

105. *See 60 Minutes* (CBS television broadcast May 4, 2011), transcript *available at* http://www.cbsnews.com/news/obama-on-bin-laden-the-full-60-minutes-interview/. President Obama explained "that given the graphic nature of these photos, [their release] would create some national security risk."

106. *Id.*

publish material that may inspire the enemy to kill, become more violent, or to provide a military advantage to an enemy.

Therefore, to answer the hypothetical critics' question from earlier, Terry Jones would not be responsible for the actions of terrorists under the reasonable proximate impact revision. Rather, he would be responsible for knowingly and deliberately putting American soldiers in harm's way, particularly during wartime. Jones' freedom of speech cannot be more important than our soldiers' or anyone's right to not be killed or harmed. Removing this speech protection cannot violate the First Amendment. In fact, recent developments in American legislation employ speech restrictions beyond just wartime. Proposed and enacted legislation—passed to account for changes in speech channels and influence in light of technological advances—continue to promote the reasonable proximate impact free speech model revision.

B. Cyber-bullying Legislation

Since 2006, forty-nine states have enacted bullying and cyber-bullying legislation to prohibit electronic harassment.[107] A relatively recent phenomenon, cyber-bullying further demonstrates the need to modify America's free speech model to account for technological advances that have left third parties unnecessarily exposed to potential harm. Because of this recent phenomenon, Congress has responded quickly. As of January 2016, forty-eight out of fifty states have enacted cyber-bullying legislation against electronic harassment. Wisconsin and Alaska are the remaining two states who use less specific language.[108] While cyber-bullying has traditionally focused on school or school-related activities, at least fourteen states have enacted or are enacting statutes to address cyber-bullying that originates off-campus. These states hold that off-campus bullying can negatively impact a child's on-campus learning ability.[109] In addition to serving as another example of successful and necessary free speech modification in light of the technology boom, cyber-bullying

107. *State Bullying Legislation Since 2008*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 18, 2013), http://www.ncsl.org/research/education/bullying-legislation-since-2008.aspx.

108. Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RES. CENTER, http://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf (last updated Jan. 2016).

109. *Id.*

legislation demonstrates four important points relevant to this discussion.

First, cyber-bullying legislation punishes the offender for their infliction of emotional distress, even if no threats or physical harm occurred.[110] Thus, cyber-bullying legislation functions to prevent violence from emerging in the first place and is arguably even more restrictive than the reasonable proximate impact revision.

Second, cyber-bullying legislation requires an element of intent behind the act, demonstrating that it is in fact possible to determine intent in vitriolic speech even if it does not incite violence.[111] This separates cyber-bullying legislation from chilling legislation like "anti-blasphemy" laws, which can criminalize even innocent, innocuous, and genuine difference of opinion.[112]

Third, cyber-bullying legislation recognizes that intimidation need not be physically proximate to be considered illegal. States are passing legislation that forbids cyber-bullying outside the school context.[113] This is an even tighter restriction than current hate crime legislation, which does not hold an instigator accountable for violence or harm realized in a non-proximate location.

Fourth, cyber-bullying legislation demonstrates that alleged infractions can indeed be monitored on a case-by-case basis. This ensures a flexible model that strikes the appropriate balance in

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110. *See generally* MD. CODE ANN., Educ. § 7-424 (West 2017); H.R. 396, 443d Gen. Assemb. (Md. 2017). "Misuse of Interactive Computer Service (Grace's Law) . . . [n]amed after Grace McComas, a high school student who committed suicide in 2012 on Easter after being cyberbullied by a neighbor," provided the following:

> This bill prohibits a person from using an "interactive computer service" to maliciously engage in a course of conduct that inflicts serious emotional distress on a minor or places a minor in reasonable fear of death or serious bodily injury with the intent (1) to kill, injure, harass, or cause serious emotional distress to the minor or (2) to place the minor in reasonable fear of death or serious bodily injury. Violators are guilty of a misdemeanor, punishable by imprisonment for up to one year and/or a $500 maximum fine.

Bullying Laws in Maryland, CYBERBULLYING RES. CENTER, https://cyberbullying.org/bullying-laws/maryland (last visited July 16, 2017).

111. For example, see H.B. 15-1072, 70th Leg., 1st Reg. Sess. 18-9-111 (Colo. 2015).

112. *See* Bibi *supra* note 14 (detailing the experiences of two teenagers charged with violating the blasphemy laws of their respective countries).

113. FLA. STAT. ANN. § 1006.147(1)(d)(West 2017), which includes explicit language allowing schools to discipline students for their off-campus harassment that "substantially interferes with or limits the victim's ability to participate in or benefit from the services, activities, or opportunities offered by a school or substantially disrupts the education process or orderly operation of a school."

which protected free speech is not restricted, nor would unrestricted free speech be protected.

For example, in *Layshock ex. rel. Layshock v. Hermitage School District* in 2006,[114] a high school senior was suspended ten days for creating a "non-threatening, non-obscene parody profile making fun of the school principal" from his grandmother's home computer.[115] The Third Circuit Court of Appeals overturned the suspension, citing that the school failed to effectively argue that Layshock's actions caused a substantial disruption in the school.[116]

The same was true for a fourteen-year-old eighth-grader from Blue Mountain Middle School, despite his significantly more offensive act. This student created a MySpace profile of the school principal depicting him as a sex-obsessed pedophile.[117] Courts overturned the decision to punish the minor student for the off-campus action, holding the student's behavior did not substantially disrupt school matters.[118] It is important to note that in both situations private speech was protected even though it was critical and offensive to the targeted party. These holdings align well with the reasonable proximate impact argument this Article proposes.

Both cases were built upon to the 1969 Supreme Court holding in *Tinker*.[119] *Tinker* held that schools may punish students for off-campus speech that results in substantial disruption.[120] The court in *Doninger v Niehoff* quoted *Tinker* to further assert that *Tinker* does not require "actual disruption to justify a restraint on student speech."[121] Likewise, the court in *Lowery v. Euverard* added, "Tinker does not require school officials to wait until the horse has left the barn before closing the door . . . . [It] does not require certainty, only that the forecast of substantial disruption be reasonable."[122]

This suggests actions that result in non-physically proximate but violent consequences—like the consequences of Terry Jones' actions—should logically be subjected to even stricter standards.

114. 412 F. Supp. 2d 502 (W.D. Pa. 2006).
115. *Id.* at 507.
116. Layshock ex. rel. Layshock v. Hermitage Sch. Dist. 650 F.3d 205, 219 (3d Cir. 2011).
117. J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920–21 (3d Cir. 2011).
118. *Id.* at 923.
119. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
120. *Id.*
121. 527 F.3d 41, 51 (2d Cir. 2008).
122. 497 F.3d 584, 592 (6th Cir. 2007).

In the current model, Terry Jones is exercising his freedom of speech rights, despite lost lives. Meanwhile, the Supreme Court holding in *Tinker* and subsequent circuit court holdings establish that children are accountable for the substantially or potentially substantially disruptive consequences for grotesque speech despite causing no physical harm or death.

However, the *Layshock* and *Blue Mountain* cases demonstrate the impact and genuine practicality of looking at intent on a case-by-case basis, and refutes the assertion that merely offensive speech will be banned. The *Layshock* case was deemed offensive but not disruptive; and thus the court was clear that the child's speech was protected. The court found no intent of malice and nothing obscene,[123] and the student maintained her First Amendment protection.[124] Likewise, the *Blue Mountain* case was in fact determined to be offensive, obscene, and intentional, but private.[125] However, because it was not violent, substantially disruptive, or potentially disruptive, the court decided to overrule the punishment meted out to the student.[126]

Taken together, these two cases—among many others like them—demonstrate that legal precedent redefines free speech in light of advanced technology. These cases demonstrate that a difference exists between hurting someone's feelings unintentionally (*Layshock*) and even using offensive language (*Blue Mountain*), versus off-campus speech that causes potential or substantial violent or non-violent disruption (*Tinker)*—while showing a court can intelligently make that determination between the two on a case-by-case basis.

Critics may argue that cyber-bullying laws are only viable and applicable to children in the public-school system, but not to adults in private, corporate employment. Even assuming that such an argument has merit, the growing demand for *corporate* bullying legislation supports that assertion is wholly false.

123. As mentioned earlier, who decides what is obscene is a societal standard and constantly under judicial review. This flexibility allows for continued technological advancements and changes in social construct, while maintaining free speech standards and protection for innocent third parties. *See generally* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 590–606 (W.D. Pa. 2007).

124. *Id.* at 595–604.

125. 650 F.3d 915, 931-32.

126. *Id.*

C. The Development of Corporate Bullying Legislation

Cyber-bullying laws address and restrict offensive speech and therefore, mitigating potential violence at the juvenile level. Similarly, corporate bullying laws seek to address and restrict offensive speech to prevent an escalation of harassment and violence at the adult and professional level. Corporate bullying is the "repeated, health harming abusive conduct committed by bosses and co-workers."[127] According to the 2014 WBI Survey: "27% of Americans have suffered abuse, another 21% have witnessed it; 72% are aware that workplace bullying happens."[128] These statistics are significant because they have provided the government justification to restrict speech in a private setting that has historically been out of government reach. Some scholars, like Professor Deana Pollard Sacks of Texas Southern University, argue that this is in fact due to the private nature of the incendiary remarking:

> Established speech-tort precedent holds that the greatest speech protection is imposed where the plaintiff is a public figure, the speech is of public concern, and the injury is purely emotional or dignitary in nature. *To the contrary, where the plaintiff is a private individual, the speech is private in nature, or the injury involves more than mere "feelings or reputation," the First Amendment presents less of an obstacle to tort liability.*[129]

Twenty-six states have attempted to pass legislation to make corporate bullying illegal under the premise that such laws are necessary to protect public health.[130] Moreover, the same 2014 WBI survey revealed that ninety-three percent of Americans aware of this issue are in favor of a public health bill to address corporate bullying.[131] These same Americans want Congress to address this

127. *Results of the 2010 WBI U.S. Workplace Bullying Survey*, WORKPLACE BULLYING INST. (2010), http://www.workplacebullying.org/wbiresearch/2010-wbi-national-survey/.

128. Gary Namie, *2014 WBI U.S. Workplace Bullying Survey*, WORKPLACE BULLYING INST. 3 (2014), http://workplacebullying.org/multi/pdf/WBI-2014-US-Survey.pdf.

129. Deana Pollard Sacks, Snyder v. Phelps, *the Supreme Court's Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. ONLINE 193, 215 (2010) (emphasis added).

130. Namie, *supra* note 128, at 16.

131. *Id.*

issue with legislation.[132] Courts have already begun to find in favor of victims of corporate bullying. In 2014, Tennessee became the first state to pass anti-corporate bullying legislation.[133]

In *Raess v. Doescher*[134] in 2008, the Indiana Supreme Court upheld a $325,000 verdict against a cardiovascular surgeon accused of being a "workplace bully."[135] The court held that, "[a]s evidenced by the trial court's questions to counsel during pre-trial proceedings, workplace bullying could 'be considered a form of intentional infliction of emotional distress.'"[136] Perhaps most surprising, even though the trial court refused to instruct the jury that workplace bullying is not illegal, the Indiana Supreme Court found no flaw in this instruction. Meanwhile, in 2015, California passed the following legislation as anti-bullying training for supervisors, defining workplace bullying:

> "[A]busive conduct" means conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.[137]

The demand for corporate bullying laws has grown over the past decade, and will continue to grow to address the technology gap in America's current free speech model. The need to further develop our free speech model is merely a continuance of America's historical understanding of free speech, and therefore should not come as a surprise. In fact, in doing so, the United States will better align itself with several speech cases already decided in numerous federal circuits.

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132. *Id.*

133. David Shadovitz, *Taking Aim at Workplace Bullies*, HUM. RESOURCE EXECUTIVE ONLINE (July 10, 2014), http://hreonline.com/HRE/view/story.jhtml?id=534357295.

134. 883 N.E.2d 790 (Ind. 2008).

135. *Id.* at 794–99.

136. *Id.* at 799.

137. CAL. GOV'T CODE ANN. § 12950.1(g)(2) (West 2017).

D. Post-*Virginia v. Black* Courts Support Reasonable Proximate Impact Revision

Several post-*Virginia v. Black* decisions recognize how technological advancements have changed the way we communicate, and have accordingly applied a standard materially supportive of the reasonable proximate impact concept this Article proposes.

For example, in *United States v. Mabie*[138] "a jury found William Mabie guilty of three counts of mailing threatening communications, in violation of 18 U.S.C. § 876(c), and one count of interstate communication of a threat, in violation of 18 U.S.C. § 875(c)."[139] The Eighth Circuit held that a "true threat" is defined as a "'statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.'"[140] Thus, the Eighth Circuit re-emphasized an objective test to determine if speech is a true threat or not. "The government need not prove that Mabie had a subjective intent to intimidate or threaten in order to establish that his communications constituted true threats. Rather, the government need only prove that *a reasonable person would have found that Mabie's communications conveyed an intent to cause harm or injury*."[141]

Likewise, in *United States v. Williams*,[142] "Williams was indicted for conveying false information about bombing a

138. 663 F.3d 322 (8th Cir. 2011).

139. *Id.* at 325.

140. *Id.* at 330 (quoting Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002) (en banc)); *see* United States v. Spruill, 118 F.3d 221, 228 (4th Cir. 1997) (defining the "true threat" contemplated by 18 U.S.C. § 844(e) as a "'serious threat as distinguished from words as mere political argument, idle talk or jest.'" (quoting United States v. Leaverton, 835 F.2d 254, 256 (10th Cir. 1987)).

141. *Id.* at 333 (citing United States v. White, No. 7:08-CR-00054, 2010 WL 438088, at *8 (W.D. Va. Feb. 4, 2010) (emphasis added) (stating that the public policy rationale outlined in *Black* for prohibiting true threats supports this objective test because, "[i]f the prohibition on true threats is meant to protect listeners from the 'fear of violence' and the corresponding 'disruption that fear engenders,' then the subjective intent of the speaker cannot [sic] be of paramount importance" (quoting Virginia v. Black, 538 U.S. 343, 360 (2003)); *see* New York ex rel. Spitzer v. Cain, 418 F. Supp. 2d 457, 479 (S.D.N.Y. 2006) ("A standard for threats that focused on the speaker's subjective intent to the exclusion of the effect of the statement on the listener would be dangerously under inclusive with respect to the first two rationales [in *Black*] for the exemption of threats from protected speech."). Thus, 18 U.S.C. § 876(c), which does not require a finding that the defendant actually intended to threaten the recipient, is not unconstitutionally overbroad.

142. 690 F.3d 1056 (8th Cir. 2012).

commercial aircraft, a violation of 18 U.S.C. § 35(b), and conveying a threat and false information in interstate commerce about the destruction of life and property by explosives, a violation of 18 U.S.C. § 844(e)."[143] In *United States v. Jeffries*,[144] the court defined what constitutes a "threat":

> All that the First Amendment requires in the context of a § 875(c) prosecution is that the threat be real—a "true threat." *Once that has been shown, once the government shows that a reasonable person would perceive the threat as real, any concern about the risk of unduly chilling protected speech has been answered*. For if an individual makes a true threat to another, the government has the right, if not the duty, to "*protect[ ] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur*," all of which places the menacing words and symbols "outside the First Amendment."[145]

Further, the court expounded upon the "reasonable person standard":

> The reasonable-person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made: A juror cannot permissibly ignore contextual cues in deciding whether a "reasonable person" would perceive the charged conduct "as a serious expression of an intention to inflict bodily harm." Unlike Virginia's cross-burning statute, which did "not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn," the reasonable-person standard accounts for such distinctions. A reasonable listener understands that a gangster growling "I'd like to sew your mouth shut" to a recalcitrant debtor carries a different connotation from the impression left when a candidate uses those same words during a political debate.[146]

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143. *Id.* at 1060.

144. 692 F.3d 473 (6th Cir. 2012).

145. *Id.* at 478 (internal citation omitted) (emphasis added) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)). *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); United States v. White, 670 F.3d 498, 507 (4th Cir. 2012).

146. *Id.* at 480 (internal citations omitted).

The court further elaborated, "[t]he objective standard also complements the explanation for excluding threats of violence from First Amendment protection in the first place. Much like their cousins libel, obscenity, and fighting words, true threats 'by their very utterance inflict injury' on the recipient."[147] That is, actual harm need not even occur. The "very utterance" may be enough to deem injury inflicted.

But perhaps the most significant point to this discussion is how the *Jeffries* court closely compares the government's responsibilities to protect citizens from fear of harm to how this Article's proposed reasonable proximate impact revision protects innocent third parties from fear of and actual harm:

> While the First Amendment generally permits individuals to say what they wish, it allows government to "protect[ ] individuals" from the effects of some words—"from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." What is excluded from First Amendment protection—threats rooted in their effect on the listener—works well with a test that *focuses not on the intent of the speaker but on the effect on a reasonable listener of the speech.*[148]

Post-*Virginia v. Black* holdings demonstrate that a true threat can be determined by the person who would ostensibly be threatened without unjustly chilling free speech. Notice, however, that the victim would not be able to prevent speech simply because he disagreed with it, but because a "true threat" existed.[149] Several of the aforementioned defendants each communicated their threats via the Internet. Thus, courts have begun to recognize the impact that YouTube, Facebook, Twitter, email, and other Internet mediums of communication have on society. Courts have already acted to modify the First Amendment application to protect people from even the fear of violence.[150]

Social media companies are also recognizing the need to combat such abuse. For example, Milo Yiannopoulos, a right-wing extremist, incited his then-significant number of Twitter followers to threaten Leslie Jones in the days after the release of her film

147. *Id.* (quoting *Chaplinsky*, 315 U.S. 572).
148. *Id.* (quoting *R.A.V.*, 505 U.S. at 377, 388) (emphasis added).
149. Texas v. Johnson, 491 U.S. 397, 408–10 (1989).
150. *Id.*

Ghostbusters. Jones was so heavily targeted that she quit Twitter after days of abuse that included misogynoir comments.[151] In response to the abuse, Twitter decided to ban Yiannopoulos permanently and adjust its speech policies to crack down on incendiary language.[152] Moreover, in just a six-month span, Twitter actively suspended 125,000 accounts thought to be affiliated with the Daesh terrorist organization—refusing to afford them the opportunity to use the Twitter platform to engage in bullying or eventual violence.[153] Likewise, the reasonable proximate impact standard proposed in this Article recognizes that hate-filled acts, like those of Terry Jones and Milo Yiannopoulos, have a high likelihood of causing violence because of the context in which they are communicated. This revised free speech model preempts violence from occurring by informing the actor beforehand that he will be held accountable should violence occur, like in the case of Terry Jones. As courts have already mentioned, the reasonable person standard, which determines if an act is a "true threat," can be applied in the previously-described objective manner.

Technological advances in communication also expanded the impact of violent statements during the 2016 presidential election—ultimately proving to have influenced the election and causing proximate violence. This election saw the rise of what is colloquially referred to as "fake news" and "alternative facts," forcing major social media companies to finally change their policies and actively flag them.[154] The incessant barrage of misinformation across the Internet became so severe that fake news outpaced real news in influencing Americans.[155] Likewise, a significant part of candidate Donald Trump's platform included

151. Katie Rodgers, *Leslie Jones, Star of 'Ghostbusters,' Becomes a Target of Online Trolls*, N.Y. TIMES (July 19, 2016), https://www.nytimes.com/2016/07/20/movies/leslie-jones-star-of-ghostbusters-becomes-a-target-of-trolls.html.

152. Mike Isaac, *Twitter Bars Milo Yiannopoulos in Wake of Leslie Jones's Reports of Abuse*, N.Y. TIMES (July 20, 2016), https://www.nytimes.com/2016/07/20/technology/twitter-bars-milo-yiannopoulos-in-crackdown-on-abusive-comments.html.

153. Mark Broomfield, *Twitter Shuts Down 125,000 Isis-Linked Accounts*, INDEPENDENT (Feb. 16, 2016), http://www.independent.co.uk/life-style/gadgets-and-tech/news/125000-isis-linked-accounts-suspended-by-twitter-a6857371.html.

154. Andrew Tarantola, *Facebook Now Flags Fake* News, ENGADGET (Mar. 6, 2017), https://www.engadget.com/2017/03/06/facebook-now-flags-fake-news/.

155. Rob Price, *A Report That Fake News 'Outperformed' Real News on Facebook Suggests the Problem Is Wildly Out of Control*, BUS. INSIDER (Nov. 16, 2016, 6:42 AM), http://www.businessinsider.com/fake-news-outperformed-real-news-on-facebook-before-us-election-report-2016-11.

statements to ban Muslims, activate a deportation force, covertly signal white supremacy, and subtly endorse anti-Semitism—emboldening hate groups nationally.[156] Donald Trump bypassed mainstream media and took to social media—namely Twitter and Facebook—to reach his audience. Within the first week after Donald Trump's election to the presidency, the Southern Poverty Law Center reported over 400 hate crimes against minorities and people of color.[157] In one particularly egregious example, Donald Trump's harassment of a teenage girl over the Internet resulted in her receiving hundreds of death and rape threats.[158] Despite the substantive and material harm to an innocent third party bystander, America's current free speech laws hold that Donald Trump's Internet assault on a teenage girl is protected speech. Likewise, white supremacist Dylann Roof was radicalized through online-based fake news about race, ongoing demonization of people of color from older white supremacists, and the myth that a race war was necessary and emerging.[159] This radicalization inspired him to instigate a mythical race war by mass-murdering nine African Americans at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina on June 17, 2015. [160] The infamous "pizza gate"[161] attack and the Planned Parenthood "no

156. Adam Edelman, *Donald Trump's Racist Rhetoric Emboldens White Supremacist Groups, Neo-Nazis Spouting Hate on the Internet*, N.Y. DAILY NEWS (Dec. 10, 2015), http://www.nydailynews.com/news/politics/donald-trump-emboldens-white-supremacist-groups-racism-article-1.2461471.

157. Melissa Chan, *There Have Now Been More Than 400 Racist Incidents in the U.S. Since Election Day*, TIME (Nov. 16, 2016), http://time.com/4573130/racist-incidents-hate-crimes-us/.

158. Jenna Johnson, *This Is What Happens When Donald Trump Attacks a Private Citizen on Twitter*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/politics/this-is-what-happens-when-donald-trump-attacks-a-private-citizen-on-twitter/2016/12/08/a1380ece-bd62-11e6-91ee-1adddfe36cbe_story.html?utm_term=.11cdd5a034b8.

159. Joel A Brown, *Dylann Roof, the Radicalization of the Alt-Right, and Ritualized Racial Violence*, THE UNIV. OF CHICAGO: DIVINITY SCH. (Jan. 12, 2017), https://divinity.uchicago.edu/sightings/dylann-roof-radicalization-alt-right-and-ritualized-racial-violence.

160. *Id.*

161. *See* Cecilia Kang, *Fake News Onslaught Targets Pizzeria As Nest of Child-Trafficking*, N.Y. TIMES (Nov. 21, 2016), https://www.nytimes.com/2016/11/21/technology/fact-check-this-pizzeria-is-not-a-child-trafficking-site.html?_r=0. (explaining that after fake news and false claims of child trafficking were attributed to presidential candidate Hillary Clinton and authorities refused to act to remove the fake news from social media, a Washington D.C. pizzeria began receiving ongoing threats of violence and death, eventually culminating in an attack on the pizzeria).

more baby parts"[162] terrorist attack are two more examples of people who committed violent acts due to hateful and false incendiary statements broadcasted over the Internet—harming innocent third parties and leaving the inciter unaccountable. New reports demonstrate Russian propaganda weaponized America's hate speech permissions, using the Internet and Facebook to publicize simultaneous pro-Islam and anti-Islam rallies while inciting and encouraging both sides to resort to violence.[163] Such a disruptive and dangerous act of aggression from a hostile foreign government would have been virtually and practically impossible pre-Internet, again demonstrating the desperate need to update our free speech model to catch up with technological advancements. Likewise, using the same playbook as Nazis in pre-Holocaust Germany, Nazis in America have admitted that their current campaigns—which are protected by the First Amendment—seek to ultimately revive Nazi ideology even if it means killing countless people.[164]

In adopting the reasonable proximate impact standard proposed by this Article, the United States will better align itself with numerous European allies. Long ago, these nations recognized the inevitable harm of America's archaic speech model and mitigated the technology gap within their own countries. This is important to consider because these nations, as described below, not only demonstrate higher levels of peace than the United States, but comparable, if not better, levels of individual freedom. International precedent demonstrates that this Article's proposed reasonable proximate impact model is functional—it strikes the appropriate balance in which protected free speech is not restricted, nor would unrestricted free speech be protected.

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162. *See Planned Parenthood Shooting: Suspect Said 'No More Baby Parts*,' BBC NEWS (Nov. 29, 2015), http://www.bbc.com/news/world-us-canada-34954474. (explaining that after fake news and false claims from multiple Republican presidential candidates and a guerilla video emerged claiming Planned Parenthood was "selling baby parts," Robert Lewis Dear attacked a local Planned Parenthood facility in Colorado, killing one and injuring several others). The false claims attributed to Planned Parenthood continued, despite numerous clarifications from the organization that the claims were false, and they were receiving threats as a result. *Id.*

163. Natasha Bertrand, *Russia Organized 2 Sides of a Texas Protest and Encouraged 'Both Sides to Battle in the Streets'*, BUS. INSIDER (Nov. 1, 2017), http://www.businessinsider.com/
russia-trolls-senate-intelligence-committee-hearing-2017-11.

164. Noor Al-Sibai, *Alt-Right Leader Promises a Future Europe with Hitler on Its Currency*, ALTERNET (Sept. 20, 2017), https://www.alternet.org/news-amp-politics/alt-right-leader-promises-future-europe-hitler-its-currency.

E. International Precedent

America's current free speech model is not only unique in its own history, but unique when compared to the contemporary-developed world. In looking to the future of free speech in America, our international allies provide material evidence of successful directions to consider. Supreme Court precedent demonstrates an established history of referring to international law as persuasive authority in domestic jurisprudence. For example, in *Atkins v. Virginia*[165] in 2002, the Supreme Court referred to international precedent in ruling that the execution of mentally handicapped offenders was unconstitutional.[166] Likewise, in the landmark 2003 case, *Lawrence v. Texas*,[167] Justice Kennedy cited a decision from the European Court of Human Rights to hold that a Texas state statute banning sodomy was unconstitutional.[168] Again, in 2009, Justice Kennedy cited to foreign law in *Graham v. Florida*, holding that it was unconstitutional to sentence juveniles, convicted of non-violent homicides to life without parole.[169] But this phenomenon is not new. The U.S. Supreme Court has a rich history of citing to foreign law as persuasive authority on complex matters like the death penalty and various human rights issues.[170] Therefore, it stands to reason that referring to foreign law in the free speech debate has value.

Foreign precedent demonstrates laws that are far stricter than the reasonable proximate impact model. Yet, such laws exist in nations known today for their democratic ideals, tolerance, and progressiveness. They demonstrate that stronger hate speech restrictions *enhance* free speech because these restrictions promote a freer exchange of ideas without intimidation or fear of harm. For the purposes of this Article, we take a sample of

165. 536 U.S. 304 (2002).
166. *Id.* at 316.
167. 539 U.S. 558 (2003).
168. *Id.* at 573.
169. 560 U.S. 48, 79–81 (2010).
170. Rebecca R. Zubaty, *Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority*, 54 UCLA L. REV. 1413, 1414 (2007) (citing Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER (Sept. 12, 2005), http://www.newyorker.com/magazine/2005/09/12/swing-shift (quoting New York University School of Law professor Norman Dorsen: "When it comes to interpreting treaties or settling international business disputes, the Court has always looked to the laws of other countries, and the practice has not been particularly controversial.")).

prosperous allied nations that enforce hate speech restrictions. All of these nations are democracies with strong economies and they all rank ahead of the United States on the Global Peace Index and the Human Freedom Index. This sample demonstrates that other nations have recognized the need to re-evaluate free speech laws in light of twentieth- and twenty-first century technological advancements and have re-evaluated without unjustly chilling free thought and expression. The empirical data presented below supports this assertion. While some of the laws mentioned below are pre-technology boom, several are post-technology boom. All of the following laws are enforced today. If the Global Peace Index, for example, is any indicator of a nation's prosperity, then each of these nations are well ahead of the United States, despite enforcing free speech laws that the First Amendment would ostensibly strike down: Denmark (2nd), Austria (3rd), Switzerland (7th), Canada (8th), Finland (11th), Sweden (14th), Germany (16th), Poland (22nd), Spain (25th), Italy (39th), France (46th), and the United Kingdom (47th), are all significantly ahead of the United States (103rd).[171]

For example, German Penal Code Section 130 states:

> Whosoever, in a manner that is capable of disturbing the public peace[:] incites hatred against segments of the population or calls for violent or arbitrary measures against them; or assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be liable to imprisonment from three months to five years.[172]

Germany has suffered the consequences of the Holocaust—which, in fact, began with Hitler demonizing and spreading hatred about Jews. Germany's laws are designed to ensure such destructive ideologies are nipped in the bud. Accordingly, Germany has also criminalized any Holocaust denial. Likewise, since as early as 1972, France has combated provocation with Article 24 of the July 29, 1881 French Freedom of the Press Law. This law forbids "hatred or violence against a person or group of persons because of their gender, sexual orientation, gender identity, or

171. GLOBAL PEACE INDEX 2016: TEN YEARS OF MEASURING PEACE 13, INST. FOR ECON. & PEACE (2016), *available at* http://economicsandpeace.org/wp-content/uploads/2016/06/GPI-2016-Report_2.pdf.

172. GER. PENAL CODE § 130 StGB.

disability."[173] In fact, a French judge recently ordered Twitter to hand over identifying information of certain users tweeting anti-Jewish remarks that promoted hatred and Nazi ideology.[174]

Article 261 of the Swiss Penal Code states:

> Racial discrimination: Any person who publicly incites hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin or religion, any person who publicly disseminates ideologies that have as their object the systematic denigration or defamation of the members of a race, ethnic group or religion, any person who with the same objective organizes [sic], encourages or participates in propaganda campaigns, any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether verbally, in writing or pictorially, by using gestures, through acts of aggression or by other means, or any person who on any of these grounds denies, trivializes [sic] or seeks justification for genocide or other crimes against humanity, any person who refuses to provide a service to another on the grounds of that person's race, ethnic origin or religion when that service is intended to be provided to the general public, is liable to a custodial sentence not exceeding three years or to a monetary penalty.[175]

A similar law exists in Poland. The Polish Penal Code addresses provocation in free speech with Articles 212, 256, and 257. Article 256 declares:

> Whoever publicly promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, race, or religious differences or for reason of lack of any religious denomination shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.[176]

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173. Marie-Andree Weiss, *RT the Hate: France and Twitter Censorship, Part Two*, DIGITAL MEDIA L. PROJECT (2013), http://www.dmlp.org/blog/2013/rt-hate-france-and-twitter-censorship-part-two.

174. *France Orders Twitter to Identify Racist Users*, FRANCE 24, http://www.france24.com/en/20130124-french-court-twitter-identify-authors-racist-anti-semitic (last updated Jan. 24, 2013).

175. BROTTSBALKEN [BrB] [CRIMINAL CODE] 261 (Swed.)

176. Art. 256 k.k. Promotion of fascism or other totalitarian system.

Arguably stricter than Article 256, Polish Penal Code Article 257 adds:

> Whoever publicly insults a group within the population or a particular person because of his national, ethnic, race, or religious affiliation or because of his lack of any religious denomination or for these reasons breached the personal inviolability of another individual shall be subject to the penalty of deprivation of liberty for up to 3 years.[177]

In addition, Article 212 of the Polish Penal Code criminalizes publicly defaming or humiliating another with a year in prison—two if done in the media.[178] While this law has come under strict scrutiny in Europe because it violates Article 10 of the European Convention on Human Rights,[179] Polish courts hold that while free expression is "'one of the most important values of a democratic state' . . . personal dignity and honour come first."[180]

Likewise, Articles 29B–29G of the English Public Order Act of 1986 criminalize each of the following acts with up to seven years imprisonment from the Crown Court and six months from

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177. Art. 257 k.k (stating that publicly insulting groups of people or an individual person by reason of their national, ethnic, or racial affiliation violates their constitutional rights).

178. Art. 12 k.k.

179. Article 10 of the European Convention on Human Rights states:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

See Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, art. 10, Nov. 4, 1950, 213 U.N.T.S. 221.

180. *Bad Pupil Poland Refuses to Abolish Prison Sentences for Defamation*, REPORTERS WITHOUT BORDERS (Nov. 2, 2016), https://rsf.org/en/news/bad-pupil-poland-refuses-abolish-prison-sentences-defamation.

the Magistrates' court.[181] Article 29B forbids the "use of words or behaviour/display of written material intended to stir up religious hatred."[182] Article 29C forbids publishing or distributing written material intended to stir up religious hatred.[183] Article 29D forbids the "public performance of a play intended to stir up religious hatred."[184] Article 29E forbids "distributing/showing/playing a recording intended to stir up religious hatred."[185] Article 29F forbids broadcasting or including a programme in a programme service intended to stir up religious hatred.[186] Finally, Article 29G forbids possession of inflammatory material intended to stir up religious hatred.[187]

Section 266(b) of the Danish Penal Code states:

> (1) Any person who publicly or with the intention of dissemination to a wide circle of people makes a statement or imparts other information threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin, belief or sexual orientation, shall be liable to a fine, simple detention or imprisonment for a term not exceeding two years.
>
> (2) When handing down the punishment, it is to be considered as an aggravating circumstance that the statement is in the nature of propaganda.[188]

European anti-defamation laws generally require the element of intent behind each act. These laws, while far harsher than America's cyber-bullying laws, share the characteristic of intent. Thus, both European and American cyber-bullying laws demonstrate that it is feasible to determine intent on a case-by-case basis—as opposed to broad sweeping generalizations that carte blanche condemn all critical or "unseemly" speech.

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181. *Racist and Religious Crime—Prosecution Guidance*, THE CROWN PROSECUTION SERV., http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/ (last revised Aug. 21, 2017).
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. Straffeloven [Strfl] § 266(b).

The Swedish Penal Code dedicates Chapter 5 to Defamation, stating:

> *Section 1:* A person who points out someone as being a criminal or as having a reprehensible way of living or otherwise furnishes information intended to cause exposure to the disrespect of others, shall be sentenced for *defamation* to a fine. If he was duty-bound to express himself or if, considering the circumstances, the furnishing of information on the matter was defensible, or if he can show that the information was true or that he had reasonable grounds for it, no punishment shall be imposed.
>
> *Section 2:* If the crime defined in Section 1 is regarded as gross, a fine or imprisonment for at most two years shall be imposed for *gross defamation.* In assessing whether the crime is gross, special consideration shall be given to whether the information, because of its content or the scope of its dissemination or otherwise, was calculated to bring about serious damage.
>
> *Section 3:* A person who vilifies another by an insulting epithet or accusation or by other infamous conduct towards him, shall be sentenced, if the act is not punishable under Section 1 or 2, for *insulting behaviour* to a fine.
>
> If the crime is gross, a fine or imprisonment for at most six months shall be imposed.[189]

Likewise, Chapter 11, Section 10 of the Finnish Penal Code states:

> A person who spreads statements or other information among the public where a certain national, ethnic, racial or religious group or a comparable population group is threatened, defamed or insulted shall be sentenced for *ethnic agitation* to a fine or to imprisonment for at most two years.[190]

Austria[191] and Spain[192] have similar laws in their respective penal codes. Even America's neighbor to the north—Canada—includes the following in its Criminal Code, Section 319:

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189. *Brottsbalken* (BRB) (5:1-3) title.
190. Finland: *Penal Code (General Part)* [11, 8].
191. *Strafgesetzbuch* §188, 282, and 283.
192. *Espana Codigo Penal* Art. 510–21.

> (1) Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) an offence punishable on summary conviction.
>
> Wilful promotion of hatred
>
> (2) Everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) an offence punishable on summary conviction.[193]

Virtually all of the aforementioned examples enforce free speech legislation far more restrictively than the surgical reasonable proximate impact revision this Article proposes. Yet, virtually all of the aforementioned nations are known for their progressiveness, openness, and democratic ideals. Empirical data supports this position. In a recent study by the Cato Institute that determined how free nations actually are, Switzerland (2nd), Denmark (5th), Canada (6th), Austria (6th), the United Kingdom (6th), Germany (13th), Sweden (15th), and Poland (21st) ranked ahead of the United States (23rd). Likewise, Italy (28th), France (31st), and Spain (36th) all were among the world's leading nations in terms of free speech, free expression, and free conscience.[194]

Therefore, it stands to reason that the revisions proposed here will not unjustly chill free speech. The United States would benefit by looking towards the example that much of the developed world is successfully applying. The strategies employed by nations, like Canada and many of our European allies, have helped maintain freedom of expression and conscience while also maintaining high

193. Can. Criminal Code, R.S.C. 1985, c. C-46, s. 319.

194. Ian Vásquez & Tanja Porčnik, *The Human Freedom Index 2016: A Global Measurement of Personal, Civil, and Economic Freedom*, CATO INST. 14–18, https://object.cato.org/sites/cato.org/files/human-freedom-index-files/human-freedom-index-2016.pdf.

levels of peace and prosperity. America need not even endorse legislation as strict as these nations. Rather, this Article holds to the contrary. Instead, America should recognize the success other nations have demonstrated in managing the technology boom with revised free speech standards. This can be done by employing the reasonable proximate impact revision to achieve similar success. If done properly, America can strike the balance necessary to ensure free speech remains free, while innocent third parties remain unharmed from proximate violence caused by non-proximate incendiary speech. In essence, this Article's proposed revision will ensure the current technology gap in free speech is filled.

F. The Heckler's Veto

The free speech laws established in the aforementioned nations answer the "Heckler's Veto" objection. The Heckler's Veto occurs when "an acting party's right to freedom of speech is curtailed or restricted by the government in order to prevent a reacting party's behavior. [T]he common example is that of demonstrators (reacting party) causing a speech (given by the acting party) to be terminated in order to preserve the peace."[195] Free speech absolutists argue that such restrictions will encourage intolerance to different ideas and place the government at the mercy of violent groups. But the contemporary world stage already demonstrates this argument does not hold water. Also, when applied properly, the reasonable proximate impact model this Article proposes actually pre-empts and prevents violence while maintaining high free speech standards.

To be sure, the Heckler's Veto argument is correct that such laws *can* result in the growth of intolerance and the unjust restriction of free speech and free expression. The Veto most accurately describes, for example, the phenomenon in Pakistan where anti-blasphemy legislation has debilitated the government from preventing violent attacks. For example, on May 28, 2010 in Lahore, Pakistan a vicious Taliban attack left dead eighty-six members of the minority and persecuted the Ahmadiyya Muslim Community. Zaeem Qadri, an advisor to Punjab Chief Minister

195. *Heckler's Veto*, POL. L. REV. BLOG (Oct. 12, 2011), http://politicallawreviewblog.blogspot.com/2011/10/hecklers-veto.html; *see Duhaime's Law Dictionary: Heckler's Veto Definition*, WWW.DUHAIME,ORG, http://www.duhaime.org/LegalDictionary/H/HecklersVeto.aspx (defining the term "heckler's veto").

Shahbaz Sharif, admitted afterwards, "the provincial Government had failed to remove the threatening banners from the city's thoroughfares in order to prevent 'adverse reaction against the government' by the groups responsible."[196] As already mentioned, this Article neither endorses, approves, nor advocates for anti-blasphemy legislation of any sort.

But, the Heckler's Veto argument does not prove that such laws *shall* result in the growth of intolerance and the unjust restriction of free speech and free expression. Each of the aforementioned European nations and Canada apply far stricter speech restrictions than the United States. In fact, they apply far stricter regulations than what this Article proposes. Yet, each country is significantly higher than the United States on the Global Peace Index and all are comparable, equal, or significantly higher than America on the Freedom Index. By the "Hecker's Veto" supporters' logic, each of the aforementioned nations should be far more intolerant, unjustly restrictive, and violent than the United States. Again, empirical data presented above demonstrates that the exact opposite is true. Moreover, European nations and Canada demonstrate that the purpose of free speech is not to promote hate speech by a majority against a marginalized minority—but to protect the right of a marginalized minority to express their peaceful difference of opinion against a majority that believes otherwise. This nuanced difference is critical but significant, as this is where hate speech laws prevent demonization of a minority, while protecting a minority to express speech that is peaceful but the majority may find offensive.

By introducing the reasonable proximate impact element in our free speech definition to account for the current technology gap, America will not subject itself to the Heckler's Veto. Rather, it will present on a national scale what almost all fifty states have already begun to pursue in their classrooms via cyber-bullying legislation—recognition that systemic and deliberate incivility and provocation caters to violence because the Internet affords hate mongers the ability to influence and incite in manners never before possible. The proximity element does not stifle legitimate difference of opinion, critical analysis, or outright objection to

196. *Pakistan: Massacre of Minority Ahmadis*, HUM. RIGHTS WATCH (2011), https://www.hrw.org/news/2010/06/01/pakistan-massacre-minority-ahmadis (last visited Mar. 8, 2017).

opposing ideologies. It simply ensures that innocent third parties are not harmed because of matters beyond their control.

V. CONCLUSION

Free speech legislation has historically advanced to account for advanced technology. In the twenty-first century, the advancement of the Internet demands we revisit America's free speech model once again. The revision this Article proposes merely removes the current model's physical proximity requirement before speech is recognized as violent, hate, and obscene. In our interconnected world of advanced technology, the excuse of physical distance cannot protect incendiary behavior that would otherwise be recognized as violent, hate, and obscene speech. Accountability for violence cannot disappear just because the harmed victim is not physically proximate.

Professor Murphy argues: "So long as a man was confident that the truth of his own doctrines could not fail of acceptance, as soon as they won sufficient circulation, he would not fear diversity of opinion or even the freedom of others to propagate patent falsehoods."[197]

The concern here, however, is not fear of a mere difference in belief, but that lives are lost and innocent parties suffer real harm due to intentional and malicious speech under the guise of First Amendment protection. Focusing on America specifically, critics argue that it is not difficult for the offended person to simply "turn away" from incendiary remarks. This belief incorrectly assumes that the only issue is mere offense and not incitement to violence, unconstitutional discrimination, violent radicalization of youth, or intentional malice to cause real mental or physical harm. This belief also incorrectly assumes that the only impact of an incendiary statement is domestic, and never abroad, or against a country against whom we are at war—all abilities the Internet now affords. Consider the sixteen who died after Terry Jones burned the Qur'an to recognize this argument's fallacy. This does not mean that America must force or require foreign nations to work to or above our standard. On the contrary, it requires that Americans hold ourselves to a standard befitting of a world leader—one in which we maintain conscious accountability for our actions.

197. MURPHY, *supra* note 21, at 14.

Furthermore, it hits at the essence of why a revised free speech model is necessary. Technology has changed the manner and impact of our communication. Free speech cannot remain free if it comes at the price of innocent third parties.

And to be sure, this Article's proposed free speech revision is starkly different than anti-blasphemy legislation. Anti-blasphemy legislation criminalizes the statement, whether intentional or not and whether violent or not, as determined by a subjective religious standard. The proposed modifications instead criminalize those intentional statements that result in foreseeable proximate harm to third parties; the harm is practical, reasonably foreseeable, and measurable. The harm is not merely emotional and subjective, but is determined based on a case-by-case, secular, and reasonable person standard, and the burden remains on the plaintiff to prove this standard has been met.

This philosophy is not at odds with our legislative system. Indeed, post-*Virginia v. Black* holdings demonstrate that it is constitutional to uphold an objective standard, wherein the defendant can be held accountable for how the victim reasonably perceives the true threat. Likewise, forty-eight states have enacted cyber-bullying legislation and twenty-six states have proposed corporate bullying legislation. Historical wartime restrictions advocate for this free speech modification. Numerous democratic allies have employed even stricter free speech regulations, but are universally recognized as peaceful, progressive, democratic, and free nations—beyond that of America in every case presented. America's free speech model must change to match advanced technology, close the gap that exposes innocent third parties, and stop doing Americans the disservice of relying on a dangerously archaic model.