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Burning

BY: JOHN R. MANEY, JR.

THE BURNING

On March 20, 2011, during a mock jury trial in which the Reverend Terry Jones (Reverend Jones) presided from the pulpit as judge, the Koran was found guilty of crimes against humanity.¹ Reverend Jones, dressed in a judicial robe, then ordered it torched and had the burning streamed live to Muslims around the world on the Internet with Arabic subtitles.²

Afghan President Hamid Karzai condemned this event on March 31, 2011, and the following day, violent rioting broke out across the Arab world.³ Before this rioting ended, over ninety people were injured⁴ and twenty-three lay dead, including two American soldiers.⁵

THE REACTION

Most disagree with the way in which Reverend Jones expressed his dissatisfaction with the Muslim religion;⁶ yet, most agree that the First Amendment of the Constitution gave him a right to do so.⁷ I, on the other hand, believed prosecution should have been considered immediately. In so urging I wrote:

[It] is illegal to falsely yell fire in a crowded theater because doing so presents a clear and present danger, and it should be illegal to set fire to the Koran for the same reason. Authorities should immediately begin considering the prosecution of Mr. Jones for inciting a riot.⁸

This prompted several readers to respond online saying:

This has to be the dumbest letters [sic] to the editor that I have ever read. Is there any requirement for intelligence before the Post publishes a letter? Perhaps the writer was absent the year that they taught the Bill of Rights. You also cannot make up laws as you go along.

MKadymank

So, if someone attacks and kills a flag burner, then all other flag burners should be prosecuted? Free speech is protected only if it does not have negative results.

kitchendragon50

I almost agree: Free speech is protected.

AmviennaVA⁹

THE FIRST AMENDMENT

Free speech is indeed protected. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech . . .”¹⁰ Consequently, the government cannot “[r]estrict expression because of its message, its ideas, its subject matter, or its content.”¹¹ The reason for this protection “[i]s to allow ‘free trade of ideas’—even ideas that the overwhelming majority of people might find distasteful or discomforting.”¹²

Furthermore, certain actions are treated as protected “sym-

bolic speech” under the First Amendment.¹³

For example, after the American flag was burned during a peaceful political protest in Texas¹⁴ the Dallas District Attorney prosecuted and convicted the person responsible for flag desecration.¹⁵ The Texas Court of Criminal Appeals, however, reversed and the United States Supreme Court affirmed, holding that the burning constituted protected symbolic speech.¹⁶

The majority explained, because breach of the peace was not likely, “[n]o reasonable onlooker would have regarded [the defendant’s] generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.”¹⁷ However, the Court added, “[t]he State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent ‘imminent lawless action.’”¹⁸



Indeed, there are generally recognized exceptions to freedom of speech protections.¹⁹ One such exception is when the speech “[i]s directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁰ There is also the “fighting words exception” for words that are “[l]ikely to provoke the average person to retaliation, and thereby cause a breach of the peace.”²¹ These principles, together with the instant facts, lead directly to the “The Anti-Riot Act.”²²

THE ANTI-RIOT ACT

The government is charged with the duty of carefully determining when an expression is not protected speech.²³ It is maintained here that Reverend Jones’ speech should not be considered protected; to the contrary, his speech should be treated as an overt act in violation of the Anti-Riot Act codified in 18 U.S.C. §§ 2101-2102. These sections read in pertinent part:

Section 2101

Whoever . . . uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—(1) to incite a riot; . . . and who . . . during the course of any such use . . . performs or attempts to perform any other overt act for any purpose specified in subparagraph (1) [i.e. to incite a riot] . . . shall be fined under this title, or imprisoned not more than five years, or both.²⁴

Section 2102

(a) As used in this chapter, the term “riot” means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual . . .

(b) As used in this chapter, the term “to incite a riot,” or “to organize, promote, encourage, participate in, or carry on a riot,” includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.²⁵

The statute was enacted in 1968 to address the alleged violent activities of Vietnam War protestors.²⁶ Armed with this new tool, the government immediately began a grand jury investigation of protestors in Chicago during the 1968 Democratic National Convention.²⁷ In response, the protestors filed a class action lawsuit seeking the appointment of a three-judge panel to consider the constitutionality of the Anti-Riot Act.²⁸ The district court, however, refused to appoint the requested panel²⁹ and “granted the Government’s motion to dismiss the lawsuit holding that the constitutional questions presented were ‘wholly insubstantial.’”³⁰ Affirming the decision, the Seventh Circuit noted:

The district court held that the First Amendment does not protect rioting and incitement to riot, observing that these riot provisions ‘deal only with the abuse of First Amendment rights.’ The statute expressly excludes oral or written advocacy of ideas or expressions of belief not involving violence (18 U.S.C. § 2102(b)).³¹

Subsequently, in *Dellinger*, eight targets of the grand jury were indicted for their part in the riots that took place during the Chicago Convention.³² Six defendants were charged with making speeches in order to incite, organize, promote, and encourage riots in violation of 18 U.S.C. § 2101.³³ Two others were charged with teaching the use of an incendiary device in violation of another federal statute and all eight were charged with conspiring to violate the Anti-Riot Act.³⁴

A month after the government began its case, the court declared a mistrial against Seale;³⁵ it took five months to prosecute the other defendants.³⁶ The jury acquitted the seven remaining defendants (the “Chicago Seven”) on the conspiracy charges and acquitted Froines and Weiner of all charges against them.³⁷ Davis, Hayden, Hoffman, Rubin, and Dellinger were convicted of committing overt acts intending to incite riots in violation of 18 U.S.C. § 2101.³⁸ In addition, the trial judge summarily convicted all seven defendants, along with two attorneys on criminal contempt charges.³⁹

On appeal, those convicted of violating § 2101 contended, among other things, that the Anti-Riot Act was unconstitutional.⁴⁰ In a two to one decision, the Seventh Circuit, in *Dellinger*, reaffirmed the constitutionality of the statute.⁴¹ Many more First Amendment issues were raised in *Dellinger* than were raised in *Foran*,⁴² but the *Dellinger* majority ended up reaching the same conclusion.⁴³

Dellinger is particularly instructive because, like the instant case, the overt acts were based wholly on speech.⁴⁴ In upholding the constitutionality of the statute, the Court looked at the dual requirement test in *Brandenburg v. Ohio*,⁴⁵ which holds that speech is not protected if it is “[d]irected to inciting or produc-

The question then becomes, does burning the Koran amount to “symbolic fighting words” that lose First Amendment protection under the present circumstances?

ing imminent lawless action” and “[l]ikely to incite or produce such action.”⁴⁶

The *Dellinger* court reaffirmed the constitutionality of the Anti-Riot Act, but reversed the convictions on other grounds and remanded the case for further action, as the government deemed appropriate.⁴⁷ Before remanding, the Court reviewed the sufficiency of the evidence to determine whether any defendant was entitled to a judgment of acquittal when the case was returned to the trial court and concluded no such ruling was mandated.⁴⁸

In *United States v. Markiewicz*,⁴⁹ the Anti-Riot Act was again tested and its constitutionality was again upheld.⁵⁰ *Markiewicz* involved an intra-tribal feud between two factions of the Oneida Indian Nation.⁵¹ During the feud, members of the aggressive faction damaged and closed a gas station owned by an Oneida family in the opposing faction.⁵² In another incident, members of the aggressive faction broke into “The Nation’s” bingo hall and assaulted members of the opposing faction and confronted television reporters.⁵³

As a result of these incidents, five individuals were charged on several counts, including a conspiracy to violate the Anti-Riot Act (Count III) and a substantive violation of the Act (Count IV).⁵⁴ All defendants were convicted on the conspiracy charge and four of the five were convicted of the substantive charge.⁵⁵ The statute withstood constitutional attack on appeal.⁵⁶

The Supreme Court has not examined 18 U.S.C. § 2101, but its holding in *R.A.V. v. St. Paul* is informative.⁵⁷ Here, an individual known as R.A.V. allegedly burned a cross on the lawn of an African-American family and, as a result, was charged with violating an ordinance⁵⁸ that provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.⁵⁹

The trial court dismissed this charge on the ground the ordinance was substantially overbroad and impermissibly content-based.⁶⁰

The Minnesota Supreme Court reversed, holding that the ordinance was not overly broad because the phrase “arouses anger, alarm or resentment in others” limited its reach to “fighting words” within the meaning of *Chaplinsky*, a category of expression unprotected by the First Amendment.⁶¹ The court also held that “the ordinance was not impermissibly content-based because it was narrowly tailored to serve a compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.”⁶²

The United States Supreme Court reversed.⁶³ Justice Scalia, writing for the majority, agreed that the ordinance was limited to “fighting words” and as such did not “have a claim upon the First Amendment.”⁶⁴ However, Justice Scalia stated,

St. Paul has not singled out an especially offensive mode of expression—it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.⁶⁵

In reversing, the Court held that the ordinance was fatally flawed because it did not identify the type of fighting words that were prohibited with sufficient specificity, and because it only prohibited the use of fighting words that insult, or provoke violence “on the basis of race, color, creed, religion or gender.”⁶⁶ The latter was completely unacceptable considering that “[t]hose who wish to use ‘fighting words’ in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.”⁶⁷ The Court stated, “[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”⁶⁸

The Anti-Riot Act is distinguishable from the ordinance in *R.A.V.*, because it only prohibits “those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner”⁶⁹ and because these fighting words are not limited to provoking any specified class such as “race, color, creed, religion or gender.”⁷⁰ Depending on the circumstances,

fighting words or words that are “likely to incite a riot” can lose First Amendment protection.⁷¹ The question then becomes, does burning the Koran amount to “symbolic fighting words” that lose First Amendment protection under the present circumstances?

The answer is found in *Virginia v. Black*,⁷² which addressed several First Amendment issues.⁷³ Relevant here, two individuals burned a cross on an African-American’s front yard and were charged with violating a Virginia statute making it a felony to burn a cross on the property of another with the intent of intimidating any person or group.⁷⁴ One defendant pled guilty, “reserving the right to challenge the constitutionality” of the statute.⁷⁵ The other went to trial and was convicted.⁷⁶ In the contested case the victim testified that, although not hurt, he was “very nervous” because he “didn’t know what would be the next phase,” and because “a cross burned in your yard . . . tells you that it’s just the first round.”⁷⁷

Each defendant appealed his conviction on the ground that Virginia’s “burning statute” was “facially unconstitutional.”⁷⁸ In upholding the constitutionality of the statute the Court noted its previous holding that “[a] State may punish those words ‘which by their very utterance inflict injury or tend to incite an immediate breach of the peace.’”⁷⁹ Justice O’Connor, writing for the Court, more specifically found,

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 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.⁸⁰

That is, Virginia’s “burning statute” passes constitutional muster because in order to make the burning illegal it requires that the act take place with an intent to do something more than convey a message or idea. Like the Virginia statute, 18 U.S.C. § 2101 requires something more than burning the Koran to make the act illegal.⁸¹ The Koran must have been burned with the intent to incite a riot.⁸²

Some may argue that foreign extremists should not be allowed to limit our First Amendment rights.⁸³ Such an argument will not prevail, however, because the statute specifically prohibits the use of both domestic and “foreign commerce” to incite riots, and a riot is a riot regardless of where it occurs. The question remains, did Reverend Jones intend to incite foreign extremists?

Recent history has demonstrated that radical Muslims (who make up approximately .001 percent of the two billion Muslims)⁸⁴ react violently to particularly virulent attacks on their religion.⁸⁵ In 1989, Ayatollah Ruhollah Khomeini condemned *The Satanic Verses*, by Salman Rushdie, because of its heretical depiction of the Muslim religion.⁸⁶ Consequently, Khomeini declared a “fatwa” and ordered that Rushdie be put to death.⁸⁷ As a result of this “fatwa,” Japanese and Italian translators of the book were killed and a Norwegian publisher was attacked and almost killed.⁸⁸ Rushdie, a British citizen, went into hiding for almost ten years, and was given twenty-four/seven police protection.⁸⁹

The violent reaction of radical Muslims to cartoons insulting the prophet Muhammad is also common knowledge. It is only necessary to click on Wikipedia to see that:

- In 2005, a Danish newspaper published twelve editorial cartoons of the prophet Muhammad that incited rioting and worse.
- When the cartoons were reprinted in newspapers around the world, Islamic protests escalated.
- Approximately 139 people, were killed protesting these cartoons; most due to police firing on the crowds, mainly in Nigeria, Libya, and Afghanistan.
- Reaction to these cartoons caused Danish embassies in Syria, Lebanon, and Iran to be set on fire and European buildings stormed.
- Danish troops stationed in Oruzgan Province, Afghanistan, became the “primary target” of the Taliban.⁹⁰

In September 2010, Reverend Jones said, “[o]ur message is a message of warning to the radical element of Islam.”⁹¹ When the word of his planned “burning” got out, an angry mob chanting “[d]eath to America” formed in Afghanistan while thousands gathered in protest outside the embassy in Jakarta, Indonesia.⁹²

General David H. Petraeus, commander of United States Forces in Afghanistan, warned that if “the burning” actually took place “the safety of our soldiers and civilians would be put in jeopardy”⁹³ President Obama addressed the consequences over the airwaves to ensure that Reverend Jones was aware of what could happen,⁹⁴ and Defense Secretary Robert M. Gates even called Reverend Jones directly.⁹⁵

In spite of the reactions in Afghanistan and Indonesia and warnings from General Petraeus, Secretary Gates, and the President, Reverend Jones put the Koran on trial and, after the guilty verdict was in, ordered it burned.⁹⁶ In so doing, Reverend Jones said he understood this might elicit a violent response⁹⁷ and it worried him.⁹⁸

However, after thinking twice about it,⁹⁹ he decided to proceed because “[i]n the end, his desire to shed light on what he calls a ‘dangerous book’ won out.”¹⁰⁰ “‘Did our action provoke them?’ the pastor asked. ‘Of course,’” he answered.¹⁰¹

Reverend Jones emphasized, “[i]t [i.e. the burning] was intended to stir the pot: if you don’t shake the boat everyone will stay in their complacency,”¹⁰² and added, this “shows the radical element of Islam.”¹⁰³ These statements make it clear that Reverend Jones intended to tease radical Muslims and, tellingly, he indicated that “[g]iven the chance he would do it all over again.”¹⁰⁴

After the burning and in the midst of the ensuing violence, General Petraeus took things out of academia and put them in the real world when he said:

Every security force leader’s worst nightmare is being confronted by essentially a mob, if you will, especially one that can be influenced by individuals that want to incite violence, who want to try to hijack passions, in this case, perhaps understandable passions.¹⁰⁵

THE CRIME

18 U.S.C. § 2101

Whoever . . . uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent (1) to incite a riot; . . . and who . . . during the course of any such use . . . performs or attempts to perform any other overt act for any purpose specified in subparagraph (1) [i.e. to incite a riot] . . . is subject to fine and imprisonment.¹⁰⁶

Reverend Jones is guilty of violating this statute. He burned the Koran intending to incite a riot and hijack passions. He knew the burning would enrage Muslims and he made sure the event reached those who historically reacted violently to attacks on their religion to increase the likelihood of riots. He did this by streaming the event worldwide over the Internet with Arabic subtitles.¹⁰⁷

The Anti-Riot Act does not prohibit speech; it protects the peace. Reverend Jones is free to convey his thoughts about the Koran and his speech will be, and has been, protected, but “fighting words” and words “directed to inciting and likely to incite imminent lawless action” do not constitute protected speech. As Justice Scalia said in *R.A.V.*:

The reason why fighting words are categorically excluded from the protection of the First Amendment

is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.¹⁰⁸

Congress enacted the Anti-Riot Act to deal with Vietnam radicals back in the 1960s and, indeed, when the speech of some “radicals” incited other “radicals” to riot, the speechmakers were indicted, prosecuted, and convicted under this statute.¹⁰⁹ When the statute was attacked on First Amendment grounds on appeal, the Seventh Circuit held it to be constitutional.¹¹⁰

Furthermore, under this statute, the crime is complete when an individual uses any facility of interstate or foreign commerce with the intent to incite a riot and commits an overt act to achieve this purpose, whether a riot occurs or not.¹¹¹ The Koran burning, of course, did result in riots.¹¹²

THE FUTURE

Reverend Jones has taken his show on the road.¹¹³ On April 30, 2011, he spoke in Dearborn, Michigan, where it was reported that:

Repeatedly [Reverend Jones] provoked the crowd and insulted them. At one point, he ignored police requests by ambling down to the front of police barricades while taunting his opponents.

Angered, some of those protesters stormed past their police barricades and marched across Michigan Avenue as they hurled bottles and shoes at Jones’ supporters across from them. One woman spit in Jones’ direction.

The young crowd then pushed down a security fence that separated them from Jones’ supporters and surged forward, their faces tight with anger. For a moment, it appeared a major clash was about to break out.

But Arab-American leaders and police pushed back the angry group as dozens of police officers in full riot gear marched out in single file to separate the two sides. At least two were arrested. Dearborn Mayor John O’Reilly Jr. said afterward that Jones was responsible for creating the disturbance by ignoring city requests not to approach the barricade.

“He refused to comply,” O’Reilly said. “He was asked, ‘Please don’t come to the barricade.’ He just ignored us. . . . His goal was to start trouble. . . . That shows his character.”¹¹⁴

Reverend Jones now says he is considering a mock trial for the Islamic prophet Muhammad.¹¹⁵

Should Reverend Jones “strike” again with the same intent and with the same results, both the rioters and the inciters should be prosecuted. No one should be able to escape prosecution because foreign, instead of domestic, extremists are incited or because innocent people lay dead in Afghanistan instead of New York.

THE END

Burning the Koran in the United States to express disagreement with Islam is not a crime. The response is different in other parts of the world.¹¹⁶ Most Western European countries have made hate speech, which includes burning the Koran, a criminal offense.¹¹⁷ For example, in Great Britain, an individual who burned the Koran in January 2011, has been convicted of a hate speech crime and sentenced to seventy days in jail.¹¹⁸

In the Netherlands, a man was prosecuted for making a film in which he sharply criticized the Koran and called upon Muslims to destroy it; and publishers, editors, and authors in France, Canada, Norway, and Italy, were prosecuted for their sharp critiques of Islam and Muslim immigration.¹¹⁹ Film star, Brigitte Bardot was convicted five times for her derogatory remarks about Islamic practices.¹²⁰

In Pakistan, Afghanistan, Iran, Saudi Arabia, the Sudan, and many other countries in the Organization of Islamic States, burning the Koran is blasphemy and punished by imprisonment or execution.¹²¹ In short, burning the Koran is recognized as symbolic “fighting words” in many countries around the world.

While burning the Koran in order to express an opinion about the Muslim religion is not a crime in the United States, it is a crime to burn it with the *intention* of inciting a riot.¹²² The distinction is subtle, but it is a distinction with a difference, and one that must be proved beyond a reasonable doubt.

Who is the bad guy here: “The beast or the person who teased the beast so much so that it killed innocent people?”¹²³ The answer is, both. Riots and murder in response to symbolic attacks on religion, no matter how offensive, cannot be condoned. Those involved in the riots were immediately arrested in Afghanistan,¹²⁴ and, here, the person who teased the beast should have been under investigation.

To appeal to a jury, the time for putting Reverend Jones on trial for this burning may have passed. However, he is now threatening to place the prophet Muhammad on trial.¹²⁵ Should this happen, and should the evidence so warrant, prosecution of both incidents would be justified. If timely brought, there would

be a reasonable probability of conviction and a reasonable probability the conviction would be sustained on appeal.

Congress enacted the Anti-Riot Act to prevent rioting and the potential killing of innocent people.¹²⁶ If twenty-three people lay dead in New York because someone admittedly incited domestic extremists with “fighting words,” the inciter, along with those responsible for the killing would likely have been indicted by now.

Should Reverend Jones “strike” again with the same intent and with the same results, both the rioters and the inciters should be prosecuted. No one should be able to escape prosecution because foreign, instead of domestic, extremists are incited or because innocent people lay dead in Afghanistan instead of New York.

¹ Lizette Alvarez & Don Van Natta Jr., *Pastor Who Burned Koran Demands Retribution*, N.Y. TIMES, (Apr. 1, 2011), at A10, available at <http://www.nytimes.com/2011/04/02/us/politics/02burn.html> (discussing how the jury found the Koran guilty of “promotion of terrorist acts and ‘the death, rape and torture of people worldwide whose only crime is not being of the Islamic faith’”).

² Kevin Sieff, *Florida Pastor Terry Jones’s Koran Burning Has Far-Reaching Effect*, WASH. POST (Apr. 2, 2011), http://www.washingtonpost.com/local/education/florida-pastor-terry-jones-koran-burning-has-far-reaching-effect/2011/04/02/AFpiFoQC_print.html (quoting Reverend Jones opining that the burning “could be an awakening” for some Muslims).

³ Tom A. Peter, *Why Did Karzai Spotlight Terry Jones’s Quran Burning?*, CHRISTIAN SCI. MONITOR (Apr. 5, 2011), <http://www.csmonitor.com/layout/set/print/content/view/print/374814> (focusing on diplomatic accusations that President Karzai fueled Muslim rioting by waiting nearly two weeks after the burning to condemn Reverend Jones’ actions).

⁴ See Sieff, *supra* note 2.

⁵ Laura King, *Afghan Policeman Kills 2 U.S. Soldiers*, L.A. TIMES, (Apr. 5, 2011), at A4, available at <http://articles.latimes.com/print/2011/apr/05/world/la-fg-afghan-shooting-20110405> (showing that the burning of the Koran even spurred United States-trained Afghan police officers to violence against American soldiers).

⁶ Peter, *supra* note 3 (discussing “US and international officials have placed the blame for this week’s deadly Afghanistan protests squarely on Florida pastor Terry Jones . . .”).

⁷ Elizabeth Tenety, *Terry Jones: Koran Burning vs. Free Speech*, WASH. POST BLOG (Apr. 4, 2011, 2:21 PM), <http://www.washingtonpost.com/>

blogs/under-god/post/terry-jones-vs-free-speech/2011/04/04/AF7DgOdC_blog.html (statement of Sen. Lindsey O. Graham (R-S.C.)) (acknowledging Reverend Jones' right to free speech, but suggesting that people should be held accountable for such inflammatory speech during times of war because it inspires our enemies).

⁸ Letter from John R. Maney Jr. to the Editor, *Prosecute the Rev. Terry Jones for Koran Burning*, WASH. POST, Editorial Page (Apr. 6, 2011), http://www.washingtonpost.com/opinions/prosecute-the-rev-terry-jones-for-koran-burning/2011/04/03/AFJO21oC_story.html.

⁹ MKadymank, Comment to Letter to the Editor, *Prosecute the Rev. Terry Jones for Koran Burning*, WASH. POST (Apr. 6, 2011, 10:08 PM), http://www.washingtonpost.com/opinions/prosecute-the-rev-terry-jones-for-koran-burning/2011/04/03/AFJO21oC_story.html; Kitchendragon50, Comment to Letter to the Editor, *Prosecute the Rev. Terry Jones for Koran Burning*, WASH. POST (Apr. 6, 2011, 09:52 PM), http://www.washingtonpost.com/opinions/prosecute-the-rev-terry-jones-for-koran-burning/2011/04/03/AFJO21oC_story.html; AmviennaVA, Comment to Letter to the Editor, *Prosecute the Rev. Terry Jones for Koran Burning*, WASH. POST (Apr. 7, 2011, 12:22 PM), http://www.washingtonpost.com/opinions/prosecute-the-rev-terry-jones-for-koran-burning/2011/04/03/AFJO21oC_story.html.

¹⁰ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

¹¹ See *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (citing *Bolger v. Youngs Drug Products, Corp.*, 463 U.S. 60, 65 (1983)).

¹² See *Virginia v. Black*, 538 U.S. 343, 358 (2003) (citing *Abrams v. United States*, 250 U.S. 616, 639 (1919)) (holding that states may, consistent with First Amendment, ban cross-burning when done to intimidate a group, but rejecting a Virginia statute interpreting any cross burning as *prima facie* evidence of intent to intimidate).

¹³ See *Texas v. Johnson*, 491 U.S. 397, 400 (1989) (deeming flag-burning to be protected symbolic speech when the act took place during a public political demonstration).

¹⁴ See *id.* at 420 (stating that burning a U.S. flag in protest during the “Republican War Chest Tour” outside the Republican National Convention in Dallas, Texas in 1984, “did not threaten or disturb the peace”).

¹⁵ See *id.* at 400 (highlighting that of one hundred demonstrators, only Johnson faced criminal charges).

¹⁶ See *id.* at 400 (affirming, in a five to four decision, the Texas Court of Criminal Appeals finding that, “[g]iven the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant’s act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly ‘speech’ contemplated by the First Amendment.”).

¹⁷ *Id.* at 409.

¹⁸ *Texas v. Johnson*, 491 U.S. 397, 410 (1989).

¹⁹ See *Brown v. Entm’t Merch. Ass’n*, No. 08-1448, slip op. at 3 (U.S. June 27, 2011) (listing obscenity, incitement, and fighting words as “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional” issues).

²⁰ See *Brandenburg v. Ohio* 395 U.S. 444, 449 (1969) (reversing the conviction of a Ku Klux Klan leader for inflammatory public remarks in violation of a statute because his words constituted indirect general advocacy of violence rather than a specific call to violent action.); see also *Bose Corp. v. Consumer Union of United States, Inc.*, 466 U.S. 485, 504 (1984) (reiterating that the “majestic protection” of the First Amendment is broad, but not all-encompassing).

²¹ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (demonstrating the “fighting words” exception. There, defendant Chaplinsky allegedly said to a Rochester, NH City Marshal “[y]ou are a God damned

racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists,” for which he was convicted of violating a Rochester statute which provided that “[n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.” Affirming the conviction, the Supreme Court stated “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court went on to note “[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (commenting “[i]t is clear that ‘fighting words’—those that provoke immediate violence—are not protected by the First Amendment. This Court has made clear, however, that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.” (internal citations omitted)).

²² See generally Federal Anti-Riot Act of 1968, 18 U.S.C. §§ 2101–02 (2006).

²³ See *Johnson*, 491 U.S. at 409 (emphasizing that the government must “carefully consider” the distinction between communication that is merely provocative from that which is “directed to inciting or producing imminent lawless action . . .”).

²⁴ 18 U.S.C. § 2101 (2006).

²⁵ 18 U.S.C. § 2102 (2006).

²⁶ See *United States v. Dellinger*, 472 F.2d 340, 357 (7th Cir. 1972) (noting congressional concern with riots in the 1960s), *cert. denied*, 410 U.S. 970 (1973).

²⁷ See *Nat’l Mobilization Comm. to End War in Viet Nam v. Foran*, 411 F.2d 934, 936 (7th Cir. 1969) (mentioning the protestors’ indictment under 18 U.S.C. §§ 2101–02).

²⁸ See *Nat’l Mobilization Comm. to End War in Viet Nam v. Foran*, 297 F. Supp. 1, 4 (N.D. Ill. 1968) (rejecting the plaintiffs’ claims that the provisions were void for vagueness).

²⁹ See *id.* at 9 (declaring a three-judge panel to be an “extraordinary procedure” and one “not to be undertaken lightly”).

³⁰ See *Nat’l Mobilization Comm. to End War in Viet Nam*, 411 F.2d at 936 (citing *Nat’l Mobilization Comm. to End War in Viet Nam*, 297 F. Supp. at 4) (affirming the district court’s dismissal of the plaintiffs’ claims).

³¹ *Id.* at 938.

³² See *United States v. Dellinger*, 472 F.2d 340, 348 (7th Cir. 1972) (explaining the procedural history and charges).

³³ See *id.* (listing the six defendants as David Dellinger, Rennie Davis, Tom Hayden, Abbie Hoffman, Jerry Rubin, and Bobby Seale).

³⁴ See *id.* (naming John Froines and Lee Weiner as additional defendants).

³⁵ See *United States v. Seale*, 461 F.2d 345, 350 (7th Cir. 1972) (indicating that because of Seale’s disruptive tactics, his case was severed from that of the other co-defendants and he was charged with sixteen counts of contempt. After being found guilty on all sixteen counts, he was sentenced to four years in prison. On appeal, the contempt convictions were remanded for retrial and were later dismissed. Seale served three days in prison on the contempt charges.); see also *The Chicago Seven Conspiracy Trial*, Biographies, Bobby Seale, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/tu_chicago7_bio_seale.html (last visited Sept. 25, 2011).

³⁶ See *Dellinger*, 472 F.2d at 385 (noting the difficulty in evaluating the trial because of its five month duration, the transcript that exceeded 22,000

pages, and because “[t]rial decorum often fell victim to dramatic and emotionally inflammatory episodes”).

³⁷ *Id.* at 348.

³⁸ *Id.*

³⁹ *See In re Dellinger*, 370 F. Supp. 1304, 1307, 1323–1324 (N.D. Ill. 1973) (mentioning more than 159 specifications of contempt of court with sentences ranging from just over two months to over four years, though many of the convictions were later reversed on appeal).

⁴⁰ *Dellinger*, 472 F.2d at 354.

⁴¹ *See id.* at 355 (concluding that when “fairly read as a whole” the statute was constitutional).

⁴² *See id.* at 354–55 (acknowledging that the new challenges raised merited reconsideration of the statute’s constitutionality).

⁴³ *See id.* at 364 (considering and rejecting the notion that a double negative in the definition of the phrases “to incite a riot” and “to organize, promote, encourage, participate in, or carry on a riot,” made the statute overbroad).

⁴⁴ *Id.* at 359 (recalling that the defendants were specifically charged with inciting, organizing, promoting, encouraging, participating in, or carrying on a riot through making speeches).

⁴⁵ 395 U.S. 444 (1969).

⁴⁶ *Id.* at 447.

⁴⁷ *See Dellinger*, 472 F.2d at 409 (discussing the convictions for both substantive and contempt charges with the contempt charges reversed and remanded in a separate appeal. On January 18, 1973, the United States Attorney dismissed the substantive charges and, thereafter, concentrated on prosecuting the contempt charges.); *see also* *United States v. Briggs*, 514 F.2d 794, 806 n.18 (5th Cir. 1975) (for a chronology).

⁴⁸ *See id.* at 392 (holding that, even though “certain overt acts” were not proved, there was sufficient evidence upon which the jury could find that one or more of the charged overt acts occurred).

⁴⁹ 978 F.2d 786 (2d Cir. 1992).

⁵⁰ *See id.* at 817 (focusing on the jurisdictional issue on appeal, but impliedly affirming the district court’s rejection of a facial constitutional challenge to the Anti-Riot Act).

⁵¹ *See id.* at 794 (discussing tensions regarding the control and administration of a local bingo hall, an important place of business for the Oneida Nation).

⁵² *See id.* at 815–16 (explaining that a group of approximately twenty-seven Oneidas, including some of the defendants, forced the closure of a gas station by entering areas of restricted access and searching business records without permission, in addition to physical tampering with the station’s source of power).

⁵³ *Id.* at 795.

⁵⁴ *United States v. Markiewicz*, 978 F.2d 786, 795 (2d Cir. 1992).

⁵⁵ *Id.*

⁵⁶ *Id.* at 817 (implying the constitutionality of the Anti-Riot Act by affirming the convictions).

⁵⁷ *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 396 (1992) (condemning cross-burning as “reprehensible” but striking down a state statute aimed at restricting such activity because the statute infringed on expression of “particular biases”).

⁵⁸ *Id.* at 379–80.

⁵⁹ *Id.* at 380.

⁶⁰ *See id.* at 380 (noting that the trial court granted the petitioner’s motion to dismiss because it found the city ordinance facially invalid).

⁶¹ *See id.* at 381 (stating that in reversing the trial decision, the Minnesota Supreme Court emphasized that the modifying phrase prevented the ordinance from implicating the First Amendment).

⁶² *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 380 (1992) (referring to the Minnesota Supreme Court’s finding that the governmental interest outweighed the individual interest).

⁶³ *Id.* at 396.

⁶⁴ *See id.* at 386 (analogizing fighting words to “a noisy sound truck” in characterizing them as “non-speech” with regard to the First Amendment).

⁶⁵ *Id.* at 393–94.

⁶⁶ *See id.* at 391 (inferring that the specification of race, color, creed, religion, or gender as classifications for fighting words improperly imposes the state’s preference on which types of expression receive protection).

⁶⁷ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992).

⁶⁸ *Id.*

⁶⁹ *Id.* at 393.

⁷⁰ *Compare R.A.V.*, 505 U.S. 377 (striking down a state statute which implicitly imposed state preferences against certain kinds of fighting words on the bases of race, color, creed, religion, or gender) *with* 18 U.S.C. §§ 2101–02 (focusing on the intent and purpose of offensive words and conduct rather than classifying the types of offensive words and conduct).

⁷¹ *See* 18 U.S.C. §§ 2101–02 (implying that even fighting words, if used with intent to incite, encourage, or further a riot are beyond the scope of First Amendment protection).

⁷² 538 U.S. 343, 343 (2003).

⁷³ *See id.* at 347–48 (consolidating multiple cases to address the single issue of whether a state statute banning cross-burning with intent to intimidate others violates the First Amendment).

⁷⁴ *See id.* at 350 (noting that the cross burning was probably retaliation for an earlier complaint by the African-American victim that his neighbors used their back yard as a firing range).

⁷⁵ *Id.*

⁷⁶ *Id.* at 351.

⁷⁷ *Id.* at 350.

⁷⁸ *See Virginia v. Black*, 538 U.S. 343, 351 (2003) (agreeing with the respondents, the Supreme Court of Virginia held that the cross-burning statute was “analytically indistinguishable” from the ordinance the Court struck down in *R.A.V. v. St. Paul*).

⁷⁹ *See id.* at 359 (citing *Chaplinsky*, 315 U.S. at 572 and *R.A.V.*, 505 U.S. at 413).

⁸⁰ *Id.* at 363.

⁸¹ *See* 18 U.S.C. § 2101 (requiring the element of intent to make words or conduct prohibited under the Anti-Riot Act).

⁸² *Id.*

⁸³ Alan Dershowitz, Editorial, *A Dangerous Slippery Slope*, N.Y. TIMES (Jan. 20, 2011, 11:53 AM), <http://www.nytimes.com/roomfordebate/2010/09/19/can-speech-be-limited-for-public-workers/a-dangerous-slippery-slope> (“The fact that it is widely believed that some foreign extremists may respond to the desecration of a Koran more violently than most Americans would respond to the burning of an American flag or a Bible should not be accepted as a reason for limiting our freedoms.”).

⁸⁴ JamminJahMon, *Is It OK to Delete a Digital Copy of the Quran?*, LOOMIS NEWS (Apr. 10, 2011, 11:38 PM), <http://theloomisnews.com/detail/176004.html> (pointing out the falsity of stereotyping billions of Muslims into a comparatively small category of extremists).

⁸⁵ *See id.* (noting more than fourteen deaths occurred in riots as a result of Reverend Jones’ “claim of burning a book”).

⁸⁶ Milton Viorst, *Ayatullah Ruhollah Khomeini*, TIME, (Apr. 13, 1998), at 127, available at <http://www.time.com/time/magazine/article/0,9171,988165-1,00.html>.

⁸⁷ *Id.* (asserting that even after Khomeini’s death, the fatwa remained an obstacle to Iran’s relations with the West).

⁸⁸ Richard Falk, *Is Limitless Freedom of Expression Possible?*, AL-JAZEERA (May 3, 2011, 7:79 PM), <http://english.aljazeera.net/indepth/opinion/2011/04/2011427141741600125.html> (discussing this fatwa’s lasting impact by pointing out that a fatwa may only be withdrawn by the person who issued, which presents an impossibility here because the issuer has already died).

- ⁸⁹ *Id.*
- ⁹⁰ *Jyllands-Posten Muhammad Cartoons Controversy*, WIKIPEDIA, http://en.wikipedia.org/wiki/Jyllands-Posten_Muhammad_cartoons_controversy (last visited Oct. 26, 2011).
- ⁹¹ Michael Sheridan, *Attorney General Eric Holder Calls Rev. Terry Jones' "International Burn-a-Koran Day" "Idiotic"*, N.Y. DAILY NEWS (Sept. 8, 2010), http://articles.nydailynews.com/2010-09-08/news/27074859_1_protest-afghanistan-warningsl; see also Sieff, *supra* note 2.
- ⁹² *Id.* (noting Reverend Jones' persistence despite international and domestic resistance).
- ⁹³ *Id.* (quoting Gen. Petraeus stating the burning "could endanger the troops and the overall effort in Afghanistan").
- ⁹⁴ Lizette Alvarez, *Koran-Burning Pastor Unrepentant in Face of Furor*, N.Y. TIMES, (Apr. 2, 2011), at A4, available at <http://www.nytimes.com/2011/04/03/us/03burn.html> (observing Reverend Jones' persistence despite the pleas of high-ranking U.S. officials and public criticism).
- ⁹⁵ *Id.*
- ⁹⁶ See Sieff, *supra* note 2.
- ⁹⁷ *Id.* (mentioning Reverend Jones even thought it possible that some innocent people would be killed in response to the Koran burning).
- ⁹⁸ See Alvarez, *supra* note 94.
- ⁹⁹ See Sieff, *supra* note 2.
- ¹⁰⁰ *Id.*
- ¹⁰¹ Alvarez, *supra* note 94 (reflecting on the possibility of provocation, Reverend Jones implied that the potential violent reaction to the burning would be unjustified, stating that "[w]hen lawyers provoke me, when banks provoke me, when reporters provoke me, I can't kill them. That would not fly.").
- ¹⁰² *Id.*
- ¹⁰³ Scott Weber, *Rev. Terry Jones in Santa Ana Despite Hundreds of Death Threats*, NBC L.A. (Apr. 6, 2011, 1:28 PM), <http://www.nbclosangeles.com/news/local/Rev-Terry-Jones-in-Santa-Ana-Despite-Hundreds-of-Death-Threats-119349194.html> (speaking on the violent reactions to his Koran burning across the globe).
- ¹⁰⁴ Alvarez, *supra* note 94 (indicating that Reverend Jones would have followed the same course of action despite being "saddened" by the resulting deaths).
- ¹⁰⁵ Yaroslav Trofimov & Maria Abi-Habib, *Petraeus Says Quran Burning Endangers War Effort*, WALL ST. JOURNAL (Apr. 4, 2011), <http://online.wsj.com/article/SB10001424052748703806304576240643831942006.html> (noting the Koran burning would present additional obstacles in what was already an unstable environment).
- ¹⁰⁶ 18 U.S.C. § 2101.
- ¹⁰⁷ See Sieff *supra* note 2.
- ¹⁰⁸ See *R.A.V. v. City of St. Paul*, Minn., 505 U.S. 377, 393 (1992).
- ¹⁰⁹ See generally *United States v. Dellinger*, 472 F.2d 340, 348 (7th Cir. 1972).
- ¹¹⁰ See *id.* at 364 (upholding the constitutionality of the Anti-Riot Act).
- ¹¹¹ See *id.* at 394 (noting, however, that when speech is the overt act there must be a high likelihood of a riot and in determining whether there is a high likelihood it is appropriate to consider whether a riot occurred or whether an intervening force such as police action prevented it from occurring).
- ¹¹² See *id.* at 348 (mentioning multiple violent outbreaks throughout Chicago).
- ¹¹³ See Niraj Warikoo, *Tempers Flare at Anti-Islam Pastor's Speech*, DETROIT FREE PRESS, (Apr. 30, 2011), at A3, available at <http://www.azcentral.com/news/articles/2011/04/30/20110430michigan-pastor-islam-ON.html> (referring to a speech in Michigan during which Reverend Jones lashed out at Islam and President Obama in the face of a large crowd of protestors).
- ¹¹⁴ *Id.*
- ¹¹⁵ See Weber, *supra* note 103 (announcing his arrival in California to appear on an Arab-Christian television station, Reverend Jones voiced the idea of a potential mock trial of Islam's Prophet).
- ¹¹⁶ Dave Keating, *Koran Burning: U.S. and Europe Have Different Ideas on Free Speech*, GULF STREAM BLUES BLOGSPOT (Apr. 20, 2011), <http://gulfstreamblues.blogspot.com/2011/04/koran-burning-us-and-europe-have.html> (comparing the U.S.'s struggle to hold Jones accountable and deal with the aftermath of the Koran-burning with the swift and unquestioned prosecution for a similar act in Britain).
- ¹¹⁷ See *id.* (noting that it remains illegal to display Nazi symbols or salutes in Germany).
- ¹¹⁸ *Id.*
- ¹¹⁹ Nina Shea & Paul Marshall, *Burning the Koran*, NAT'L REV. ONLINE (Sept. 7, 2010, 9:00 PM), <http://www.nationalreview.com/articles/245877/burning-koran-nina-shea#> (discussing other examples of European prosecutorial action taken against "sacrilegious" treatment of Islamic holy words such as "Koran" and posting anti-Islamic comments online).
- ¹²⁰ See *id.* (explaining that Bardot, as an animal activist, has spoken out specifically against Islamic practices for meat slaughtering).
- ¹²¹ See *id.* (describing the crime of "blasphemy" as "amorphous" and heavily dependent on the particular controlling religious group).
- ¹²² 18 U.S.C. §§ 2101–02.
- ¹²³ JamminJahMon, *supra* note 84.
- ¹²⁴ See Taimoor Shah & Rod Nordland, *Afghans Protest Koran Burning for Third Day*, N.Y. TIMES, (Apr. 4, 2011), at A5, available at http://www.nytimes.com/2011/04/04/world/asia/04afghanistan.html?_r=1 (stating seven members of the public and four policemen involved in the riots had been arrested and detained).
- ¹²⁵ See Philip Sherwell, *Pastor Terry Jones: 'I May Put Mohammed on Trial.'* TELEGRAPH (Apr. 2, 2011), <http://www.telegraph.co.uk/news/world-news/northamerica/usa/8423603/Pastor-Terry-Jones-I-may-put-Mohammed-on-trial.html> (saying Reverend Jones told reporters that despite the backlash after burning the Koran, he was contemplating a future trial and "day of judgment" for the prophet Muhammad).
- ¹²⁶ See *United States v. Dellinger*, 472 F.2d 340, 357 (7th Cir. 1972) (citing legislative history to indicate Congressional concern to stop riots in the late 1960s).

ABOUT THE AUTHOR

John R. Maney, Jr. earned his Juris Doctor degree from the University of Richmond School of Law and began his legal career in the Army's Judge Advocate General's Corps. He then joined the United States Department of Justice and spent sixteen years as a line prosecutor before becoming Section Chief of the Southern Criminal Enforcement Section in the Tax Division. During his twenty-eight years with the Department of Justice he received numerous awards including a Special Commendation Award presented by the Attorney General of the United States. He joined the Department of Treasury's Office of Technical Assistance in 2002 and for eight years rendered assistance to investigators, prosecutors and judges from over twenty-five countries. Currently, he is retired and lives in Virginia.