
TERRORIST SPEECH AND THE FUTURE OF FREE EXPRESSION

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INTRODUCTION

On June 16, 2002, Dennis Pluchinsky, a senior intelligence analyst at the U.S. Department of State, wrote an article in the *Washington Post* calling for censorship. The article began, “I accuse the media in the United States of treason.” Pluchinsky, who worked counterterrorism in the government for twenty-five years, pointed to post-9/11 articles that revealed not scientific advancements, but American vulnerabilities in regard to the food supply, electricity, chemical production, transportation, and border security. He suggested that research conducted by the media could not have been funded by one, single terrorist organization: “Our news media, and certain think tankers and academicians, have done and continue to do the target vulnerability research for them.”¹

Pluchinsky has a point. Terrorist organizations can and do use the media—and the protections afforded speech in the United States and the United Kingdom—to obtain and disseminate critical information. Al Qaeda proves instructive: Their training manual, recovered from a safe house in Manchester, England, details how to make bombs, assassinate, conduct espionage and take hostages. It instructs how to avoid detection and withstand interrogation. And it offers advice on how to obtain operational data:

¹ Dennis Pluchinsky, *They Heard It All Here, and That's the Trouble*, WASH. POST, June 16, 2002, at B03.

Using . . . public source[s] openly and without resorting to illegal means, it is possible to gather at least 80% of information about the enemy. The percentage varies depending on the government's policy on freedom of the press and publication. It is possible to gather information through newspapers, magazines, books, periodicals, official publications, and enemy broadcasts.²

What, exactly, *can* be learned from open source material? According to al Qaeda, it provides photographs of government and law enforcement personnel, data on state capabilities, information related to economic vulnerabilities, and announcements of events where the public can gain access to secure buildings. The text advises, “[t]hese may be used in assassination, kidnapping, and overthrowing the government.”³ With the advent of chemical, biological, nuclear, and radiological weapons (CBNRW), the range of information that may create vulnerabilities expands: Municipal data, such as the location of water sources or air intake vents, or the chemicals produced or stored at different facilities, may be essential to a group's ability to launch an assault. Academic articles relating discoveries even in basic biology may prove devastating. Terrorist organizations may use open sources to organize, or to anticipate state surveillance. They may use coverage of past incidents to observe response times, staging grounds, and prophylactic measures used by first responders. Public commentary allows them to analyze their errors and gauge the success of future operations.

The dissemination of critical information, however, is not the only harm caused by speech in the context of terrorism. Free expression allows organizations to persuade others to support the cause. They can draw attention to their aims and manipulate public opinion to reflect particular religious, political, social, military, and economic goals. The al Qaeda manual reads, “Islamic governments . . . are established as they [always] have been by pen and gun[,] by word and bullet[,] by tongue and teeth.”⁴ Osama bin Laden quickly followed 9/11 with a pre-recorded statement to persuade the world of the justness of his cause. Other non-state terrorist organizations also seek, ultimately, to convince: In Northern Ireland the Progressive Unionist Party and Ulster Democratic Party inject the aims of the Ulster Volunteer Force and the Ulster Defense Association into the political debate. The Provisional Irish Republican Army runs the Irish Republican Publicity Bureau. And

² AL QAEDA MANUAL, UK/BM-80-81, <http://www.usdoj.gov/ag/trainingmanual.htm> (last visited July 21, 2005) [hereinafter AL QAEDA MANUAL]; see also Steve Mckenzie, *War on Terrorism: Laden's Blueprint to Destroy West; Trainees Told to Slaughter US Like Lambs*, SUNDAY MAIL, Jan. 6, 2002, at 9.

³ AL QAEDA MANUAL, *supra* note 2.

⁴ *Id.* at UK/BM-3

left-wing organizations in the U.S. and U.K. in the 1970s issued lengthy, turgid prose that attempted to explain *why* they were doing *what* they were doing—an approach mimicked by the Unabomber in his manifesto, “Industrial Society and Its Future.”⁵

If successful, this persuasive aspect may legitimate violence as a way of redressing grievances—a course of action contrary to the fundamental structure of liberal democracy. And media coverage may be complicit, as efforts to report in a neutral manner provide terrorists with a platform. The power differential between the state and the non-state actors may encourage the media to go further, presenting those engaged in violence as underdogs in a broader struggle for self-determination, freedom of religion, and other claims that resonate within liberal democracy. The legitimization of violence as a means of redressing grievances may lead to a copycat effect as it bolsters the confidence of adherents in the same struggle and other organizations employing a similar method to draw attention to their own claims.⁶ This persuasive element may help to establish and expand a base of support, generating assistance, money, and recruits from the uncommitted or sympathetic audience.

Simultaneously, unrestricted speech leaves terrorist organizations free to coerce the government and the population. And related drawbacks attend: Anxiety may have a dramatic influence on elections. It may spur an aggressive state reaction, undermining state political legitimacy and playing into the hands of those engaged in violence. Fear may undermine the economy, affecting tourism, travel, and investment. It also may ultimately emasculate citizens’ belief in liberal, democratic values.

The crucial point is this: Both liberal, democratic states, and non-state terrorist organizations need free speech. Prominent scholars have written elegantly and at length on the role of this liberty for the former.⁷ While their arguments surface at times in the text, I do not dwell on them. Instead, I wrestle with the question: Under what circumstances are the interests of the state secured and the opportunism of terrorist

⁵ Robert D. McFadden, *Times and The Washington Post Grant Mail Bomber’s Demand*, N.Y. TIMES, Sept. 19, 1995, at A1.

⁶ See, e.g., Manus I. Midlarsky et al., *Why Violence Spreads: The Contagion of International Terrorism*, 24 INT’L STUD. Q. 262 (1980). But see ROBERT G. PICARD, *MEDIA PORTRAYALS OF TERRORISM: FUNCTIONS AND MEANING OF NEWS COVERAGE* (1993) (objecting to contagion claim).

⁷ See, e.g., DAVID FELDMAN, *CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES* (2d ed. 2002); JOHN STUART MILL, *ON LIBERTY: ANNOTATED TEXT, SOURCES AND BACKGROUND, CRITICISM*, at ch. 2 (David Spitz ed., Norton 1975) (1859); 2 SIR JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 299-300 (London, MacMillan 1883); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576-89 (1978); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

organizations avoided? Here, the experiences of the United States and United Kingdom prove instructive. On both sides of the Atlantic, where the state acts as sovereign, efforts to restrict persuasive political speech have relaxed over time to allow for more criticism. In the United States, *Brandenburg v. Ohio*⁸ cemented this shift. In the United Kingdom, change came gradually. The practical elimination of treason and seditious libel, and incorporation of the European Convention of Human Rights (ECHR) into domestic law through the 1998 Human Rights Act (HRA), marked the transition. If free speech remains central to our understanding of liberal democracy, it would nevertheless be naïve to rely on these alterations to protect expression in the contemporary counterterrorist environment—regardless of how remarkable they might be in the context of what went before.

First, neither *Brandenburg* nor the HRA may prove so robust in the future. The clear and present danger test, designed to respond to a particular geopolitical situation, technically remains good law. Terrorist access to biological or nuclear weapons would similarly create a unique, and substantial threat. This would make it difficult for the court to adhere to a case that did not take twenty-first century technology on board. Arguing against this is a strong cultural norm against blatant political speech restrictions; few justices would want to be remembered for the modern-day equivalent of *Dennis v. United States*.⁹ But this should not lull us into thinking that political speech is thus protected. The English constitution, in turn, historically restricted political speech. While the ECHR offers some protection from a recurrence of these measures, it provides an exception for national security. Resultantly, English law's traditional appeal to unlawful assembly as a way to stifle dissent, while not fully endorsed, gained some acceptance in Strasbourg. The European Court of Human Rights also found the media ban placed on Sinn Féin, as well as broadcast restrictions, to be consistent with the ECHR. Outside of conventional threats, the dissemination of chemical, biological, nuclear, and radiological weapons (CBNRW) would make it even easier for the U.K. to meet the ECHR's national security exception.

Second, and more importantly, these shifts *only apply to persuasive speech when the state acts as sovereign*. In what I term knowledge-based speech, neither the United States nor the United Kingdom has much that offers protection from increasing strictures. Thus, to focus on *Brandenburg*, or the cultural norm that has since developed, may be, in effect, to target the wrong area of the law.

⁸ 395 U.S. 444 (1969).

⁹ 341 U.S. 494 (1951).

Important precedents, such as the Invention Secrecy Act¹⁰ and the Atomic Energy Act,¹¹ restrict scientific information from being circulated widely. Here, the advent of modern technology suggests ever greater threats to the state posed by the expansion of scientific knowledge—making calls for restrictions in this category more likely. Indeed, since 9/11 demands to restrict the publication of even basic microbiology have proliferated. Across the Atlantic, while informal controls accompanied knowledge-based speech for the greater part of the twentieth century, recent export control laws limit the transfer of scientific information within Great Britain. Moreover, where the state acts in a *privileged* position vis-à-vis speech—as either employer or information-holder—the record in both countries demonstrates extreme judicial deference to the Executive and substantial inroads into free expression.

Third, neither *Brandenburg* nor the provisions governing free expression in the 1998 HRA apply to areas of traditional counterterrorism, where the secondary effect on speech may be quite pronounced. Executive detention and proscription, for instance, may have a significant chilling affect—although they themselves do not place outright restrictions on speech. It appears increasingly likely that the state will use criminal charges, such as conspiracy, to go after those suspected of terrorism. Here, particularly in the United States, broader standards allow First Amendment-protected activity to be used as evidence of participation in criminal enterprises. Evidentiary standards also introduce concerns—such as waiving the right to silence in the U.K. for those accused of membership in a terrorist organization.

Underlying my argument in this paper is a deeper concern that centers on the shifting nature of technology. What the average person could have done in 1776, or for that matter, 1976, to hurt either state pales in comparison to what a person with basic knowledge of microbiology, \$1000, and a lab can do today. But neither American nor British law appears to have come to terms with what weapons of mass destruction, in terrorist hands, means for free speech.

¹⁰ Invention Secrecy Act of 1951, ch. 44, 66 Stat. 3.

¹¹ Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919.

I. STATE AS SOVEREIGN IN RELATION TO TERRORIST SPEECH

The United States and United Kingdom stand in a weaker position to control speech when they act as sovereign than when they stand in a privileged position vis-à-vis the information. Nevertheless, both countries have introduced formal and informal mechanisms to counter persuasive and knowledge-based speech. This section explores each.

A. *Persuasive Speech*

One of the chief harms evinced by terrorist-related speech is the possibility that individuals dedicated to violence will be able to convince others of the justness of their cause and thus gain either the acquiescence of the population or explicit support. American statutes relating to incitement and sedition fall under this heading. Equivalent efforts across the Atlantic can be found in laws relating to treason, unlawful assembly, sedition, and prohibitions on music, monuments, and flags.

1. Sedition and Incitement in the American Context

The United States has a long history of restricting political speech to prevent violent challenge. The eighteenth century Alien and Sedition Acts, suspension of habeas corpus during the Civil War, and twentieth century Espionage and Sedition measures and Red Scare present salient examples.¹² While introduced to address real threats, these incidents illustrate the tendency of the government to apply restrictions to political opponents, and not just those engaged in violence. Commentators thus point to *Brandenburg* as a watershed and evidence of the Court's willingness to adopt a strict standard to limit the state's efforts to impose restrictions on political speech.

¹² See, e.g., MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 55 (2000); DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 33-66 (2004); James Parker Hall, *Free Speech in War Time*, 21 COLUM. L. REV. 526 (1921).

The importance of the *Brandenburg* test in protecting persuasive political speech ought not to be underestimated. But its strength in the face of modern terrorism remains less than clear. The persistence of *Schenck v. United States*,¹³ *Dennis v. United States*,¹⁴ *Yates v. United States*¹⁵ and the clear and present danger test suggest a rockier base than one otherwise might expect. Confronted by possible terrorist acquisition of biological or nuclear weapons, courts may well lower the bar. This speculative argument, though, only goes so far—working against it are both precedent and a strong cultural norm against outright limitations on purely political speech. By far, the more pressing concern is likely to be knowledge-based speech, where the *Pentagon Papers* case¹⁶ rather than *Brandenburg*, sets the critical precedent. Moreover, as Parts II and III of this article suggest, *Brandenburg* has little to say about situations where the state acts as sovereign—and completely falls by the wayside where the state introduces counterterrorist measures that do not target but have a significant secondary effect on free speech.

a. Life Before *Brandenburg*

In 1798, Federalists—faced with imminent war with France and exasperated by Republicans—introduced the Alien and Sedition Acts. This legislation made “any false, scandalous and malicious writing” against the government, either house of Congress, or the President, “with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . hatred of the good people of the United States, or to stir up sedition” a high misdemeanor, with penalties ranging from fine to imprisonment.¹⁷ To ensure that Republicans would not have access to the same powers, Federalists set the statute to expire on Adams’s last day in office.¹⁸

This legislation ultimately backfired.¹⁹ Public outrage at Adams’s use of the powers helped to carry Jefferson to the White House. The new President pardoned those convicted under the previous legislation. In Jefferson’s words, the statute represented a “nullity as absolute and

¹³ 249 U.S. 47 (1919).

¹⁴ 341 U.S. 494 (1951).

¹⁵ 354 U.S. 298 (1957).

¹⁶ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

¹⁷ Alien Act, ch. 58, 1 Stat. 570 (1798); Sedition Act, ch. 74, § 2, 1 Stat. 596, 596-97 (1798).

¹⁸ See STONE, *supra* note 12, at 67.

¹⁹ For discussion of the political fallout that ensued, see CURTIS, *supra* note 12, at 52-116; STONE, *supra* note 12, at 44-73; Gregg Costa, *John Marshall, the Sedition Act, and Free Speech in the Early Republic*, 77 TEX. L. REV. 1011, 1030-31 (1999).

as palpable as if Congress had ordered us to fall down and worship a golden image.”²⁰ And Congress repaid all fines—with interest.²¹

But for more than half a century the shadow of government excess loomed large. During the Civil War, the Lincoln Administration avoided the outright prohibition of political speech by, instead, suspending the writ of habeas corpus.²² When it is “politically inexpedient to legislate against disloyal utterances in general,” (flash forward to 2001) other measures may indeed prove more effective.²³ Indeed, the executive detained thousands of citizens—estimates run as high as 38,000—many on the basis of speech.²⁴ This figure eclipsed the number of people prosecuted under the Alien and Sedition Acts or, later, the Espionage Act. But the suspension of the great writ demonstrated that “there is more than one way to skin a cat—or, in the more dignified language of political science, a powerful government in war time can find other means of dealing with disloyalty than through the courts.”²⁵

The May 1915 bombing of the *Lusitania* catapulted the United States into World War I and reinvigorated state efforts to restrict political speech. With the 1905-1907 Russian Revolution just past and the October 1917 Revolution close at hand, Woodrow Wilson announced: “[I]f there should be disloyalty, it will be dealt with with a firm hand of stern repression.” Those daring to agitate “had sacrificed their right to civil liberties.”²⁶ The Assistant Attorney General, Charles Warren, drafted the 1917 Espionage Act. This statute made it a crime to “make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies.”²⁷ Any “attempt to cause insubordination, disloyalty, mutiny” or refusal of military duty, or to obstruct recruiting or enlistment, became illegal.²⁸ This disaffection provision turned out to be of paramount importance: It did not allow truth as a defense—thus marking a significant departure from

²⁰ STONE, *supra* note 12, at 73 (citation omitted).

²¹ *Id.*

²² An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, March 3, 1863, ch. 81, § 2, 12 Stat. 755 (1863); *see also* U.S. CONST. art. I, § 9. This does not mean no effort was made to enact outright speech restrictions. The Virginia Emancipation Debates heralded the introduction of southern state measures to prevent abolitionist speech from gaining ground. However, the northern states did not follow suit. Efforts to get Congress to pass similar statutes also met with little success. *See* CURTIS, *supra* note 12, at 125, 152, 184, 229.

²³ Hall, *supra* note 12, at 527.

²⁴ *Id.* at 528. The War Department, which acknowledged that it had incomplete records, reported more than 13,000 people detained without charge. *See* STONE, *supra* note 12, at 113-15.

²⁵ Hall, *supra* note 12, at 527.

²⁶ STONE, *supra* note 12, at 137 (citation omitted).

²⁷ Espionage Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219.

²⁸ *Id.*

even the 1798 Sedition Act, which had made true statements exculpatory.²⁹

To control public opinion, the Wilson Administration created a Committee on Public Information. The panel hammered home two themes—hate the enemy and be faithful to the nation. The Attorney General directed all “loyal Americans” to report their suspicions directly to the Department of Justice. A plethora of volunteer groups, with Batman-like names formed: the Sedition Slammers, Terrible Threateners, Knights of Liberty, and Boy Spies of America. These organizations wiretapped, broke and entered, bugged offices, and examined bank accounts and medical records.³⁰

The courts provided precious little respite from either statutory restrictions or rather over-enthusiastic patriots. Although a few judges did take a clear stand for free speech, most did not. Instead, lower federal courts applied a “bad tendency” rationale. In other words, judges considered whether the “natural and probable tendency and effect of the words” were “calculated to produce the result condemned by the statute.”³¹ Anyone questioning the legal or moral aspects of the war threatened public order.³² Juries narrowly determined as a question of fact whether the law had been violated, and a high conviction rate followed.

One of the first significant challenges to this statute—and the bad tendency test—arose within a month of the passage of the Espionage Act. The New York postmaster decided that *The Masses*, a monthly revolutionary publication that featured anti-war poems, cartoons, and articles, fell afoul of the law. In the process of granting the paper an injunction against the postmaster, Judge Learned Hand rejected the bad tendency test.³³ He pointed to the vague standards and broad discretion granted under the statute and noted that it would be nearly impossible to refute charges. Only such speech “thought directly to counsel or advise insubordination” or that directly advocated “resistance to the recruitment and enlistment service” ought to fall under the legislation.³⁴ The circuit court stayed the injunction and overruled Hand’s interpretation of the statute. But his effort to distinguish between advocacy and discussion resurfaced in later years.

²⁹ STONE, *supra* note 12, at 150. The legislation also empowered the postmaster general to prevent documents expressly advocating or urging unlawful actions from traveling through the mail. Such actions had to be directed towards causing “insubordination, disloyalty, mutiny, or refusal of duty.” *Id.* (quoting Gilbert Roe, an attorney representing the Free Speech League, testifying before the House Judiciary Committee).

³⁰ STONE, *supra* note 12, at 156-58.

³¹ *Id.* at 171 (quoting *Shaffer v. United States*, 255 F. 886 (9th Cir. 1919)).

³² *Id.* at 173.

³³ *Masses Publ’g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev’d.*, 246 F. 24 (2d Cir. 1917).

³⁴ *Id.* at 540-41.

In 1918 the Executive strengthened its hand even further with the introduction of the Sedition Act—one of the most Draconian pieces of legislation in American history. Congressional members who attempted to oppose any portion of it immediately became seen as enemies of the state.³⁵ The new statute expressly prohibited *all* “unpatriotic or disloyal” language, regardless of whether an immediate harm might follow.³⁶

Within a year three important cases upheld the Espionage and Sedition Acts and, under the bad tendency doctrine, found those charged with their violation guilty. The first, *Schenck v. United States*,³⁷ involved distribution of a Socialist Party leaflet arguing that the Espionage Act ought to be repealed, and that the draft amounted to involuntary servitude—a violation of the Thirteenth Amendment. Although the pamphlet did *not* advocate breaking the law, Justice Oliver Wendell Holmes said that the pamphlet would not “have been sent unless it had been intended to have some effect”—to discourage people from complying with the draft.³⁸ In a passage that recognized the leaflet would have been lawful in the absence of the war, Holmes famously remarked:

[T]he character of every act depends upon the circumstances in which it is done 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.³⁹

Although the United States had already signed the armistice, Holmes maintained that the exigencies of the situation met the test.

One week later, the Supreme Court handed down a ruling against a German language newspaper that had prepared, but not published, a

³⁵ STONE, *supra* note 12, at 186.

³⁶ The 1918 legislation added nine offenses to three from Espionage act, making it illegal for individuals to

utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag . . . or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government . . . or the Constitution . . . or the military or naval forces . . . or the flag . . . of the United States into contempt, scorn, contumely, or disrepute

Sedition Act, ch. 75, § 3, 40 Stat. 553 (1918). It also made it unlawful to “urge, incite, or advocate any curtailment of production in this country of any thing or things . . . necessary or essential to the prosecution of the war” Moreover, it made it a crime not just to do these things, but to “advocate, teach, defend, or suggest” to do them, or to “support or favor the cause of any country with which the United States is at war or . . . [to] oppose the cause of the United States.” The penalty for violations included up to \$10,000 and twenty years’ imprisonment. *Id.*

³⁷ 249 U.S. 47 (1919).

³⁸ *Id.* at 51.

³⁹ *Id.* at 52.

series of articles arguing that Wall Street had forced the United States into war. In *Frohwerk v. United States*,⁴⁰ the Court convicted the writer of conspiracy to violate the Espionage Act. Again writing for the majority, Justice Holmes acknowledged that no evidence had been provided that the article in any way *actually* impacted the war; nevertheless, because it *might* have an impact, the government had the authority to ban it.⁴¹

That same week the Supreme Court considered a high-profile case against Eugene Debs, a Socialist Party official who received one million votes in the 1912 Presidential race. In a public address Debs exhorted his audience, “you need to know that you are fit for something better than slavery and cannon fodder.”⁴² He received a ten year sentence. Holmes acknowledged that this represented only a small portion of a much longer address; nevertheless, the central issue was whether the purpose of Debs’ speech was to oppose the war. *Schenck* provided the controlling opinion.

The next significant case heralded a change in the tide: *Abrams v. United States*⁴³ involved Russian immigrants who threw English and Yiddish leaflets from a building, urging workers to stop making weapons that eventually would kill their Russian counterparts.⁴⁴ Although the leaflets did not directly encourage draft dodging, the Court upheld the convictions under the Espionage Act. Somewhat surprisingly, though, Brandeis, author of *Sugarman v. United States*,⁴⁵ which upheld the Espionage Act, and Holmes, author of *Schenck*, *Frohwerk*, and *Debs*, dissented. Holmes wrote, “It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion”⁴⁶ While either the intent of creating, or the actual creation of, a clear and present danger might prove sufficient, “nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.”⁴⁷

⁴⁰ 249 U.S. 204 (1919).

⁴¹ *Id.* at 208-09.

⁴² *Debs v. United States*, 249 U.S. 211, 214 (1919).

⁴³ 250 U.S. 616 (1919).

⁴⁴ *Id.* For the text of the circular, see Zechariah Chafee, Jr., *A Contemporary State Trial—The United States versus Jacob Abrams et al.*, 33 HARV. L. REV. 747, 748 n.2 (1920).

⁴⁵ 249 U.S. 182 (1919).

⁴⁶ *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

⁴⁷ *Id.* Holmes’s somewhat unexpected dissent signaled a split within the Court that continued in subsequent cases. *See, e.g.*, *Schaefer v. United States*, 251 U.S. 466 (1920); *Pierce v. United States*, 252 U.S. 239 (1920); *Gilbert v. Minnesota*, 254 U.S. 325 (1920).

The Red Scare, however, meant that not everyone shared Holmes' view that the "clear and present danger" had dissipated.⁴⁸ The growth of the Socialist Party, the formation of the Communist Labor Party, and the increasing number of labor strikes heightened concern.⁴⁹ Violence against prominent citizens resulted in widespread panic. Law enforcement intercepted more than thirty-four bombs addressed to Postmaster General Burleson, Justice Oliver Wendell Holmes, Senator Lee Overman, Attorney General A. Mitchell Palmer, John D. Rockefeller, and others.⁵⁰ Palmer responded by appointing John Edgar Hoover as head of the newly-formed General Intelligence Division in the Bureau of Investigation. The branch collected more than 200,000 names of suspects, and in November 1919 the Palmer raids commenced with the arrest of some 650 people. On January 2, 1920, Palmer arrested another 4000 in thirty-three different cities.⁵¹ The police simply went to "radical hangouts," such as pool halls, cafés, and bowling alleys, and picked up the clientele.⁵² In total, Palmer deported more than 3000 aliens and charged more than 1400 Americans with violations of the newly-coined criminal syndicalism statutes, which made it illegal to attempt to overthrow the government of the United States.⁵³

In 1925, concern about the chilling effect of these statutes on free speech prompted the Supreme Court to consider whether the First Amendment applied to the states and not just to the federal government. In *Gitlow v. New York*,⁵⁴ Benjamin Gitlow's *Left Wing Manifesto* violated a New York criminal anarchy statute. Although the prosecution failed to present evidence that the document had any appreciable effect, the Court upheld the statute, saying that speech advocating the forceful overthrow of the government may be penalized regardless of success. Because the statute *said* such actions were dangerous, they were to be considered presumptively valid. Ex ante punishment for such dangers being reasonable, the Court lacked the authority to determine whether the outlawed actions would have had their intended effect.⁵⁵ Holmes again dissented, claiming that the case failed the clear and present danger test: The manifesto represented mere theory—not advocacy of a crime.⁵⁶

⁴⁸ See, e.g., John H. Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War Time and Peace-Time*, 14 ILL. L. REV. 539 (1920).

⁴⁹ STONE, *supra* note 12, at 220-22.

⁵⁰ *Id.* at 221.

⁵¹ *Id.* at 223.

⁵² *Id.*

⁵³ *Id.* at 224.

⁵⁴ 268 U.S. 652 (1925).

⁵⁵ *Gitlow v. New York*, 268 U.S. 652, 668-70 (1925).

⁵⁶ *Id.* at 672-73 (Holmes, J., dissenting). Two years later Brandeis and Holmes's position in

While *Gitlow* (and later *Whitney v. California*⁵⁷) essentially adopted Learned Hand's approach in *Masses*—that only express advocacy fell beyond the Pale—this test proved not utterly useless. Using this standard, in a series of cases, the court overturned three convictions.⁵⁸ Justices Holmes and Brandeis continued to attack the majority's position. By 1941, the Court acknowledged that “before utterances can be punished,” the “substantive evil must be extremely serious and the degree of imminence extremely high.”⁵⁹

While the judiciary moved steadily, albeit slowly, in the direction of increasing protection for free speech, the political climate progressed down the opposite path. In 1940, Representative Howard W. Smith of Virginia took sedition by the horns. The Smith Act made it illegal for anyone to knowingly or willfully advocate, abet, advise, or teach the necessity or desirability of overthrowing the government through the use of force.⁶⁰ It also outlawed printing, publishing, editing, issuing, circulating, selling, distributing, or publicly displaying any written or printed matter endorsing the same.⁶¹

As the war drew to a close, public fear of Communism lurked in the shadow of the Iron Curtain. And it grew in strength. Congress passed the Subversive Activities Control Act of 1950, which required the registration of all “Communists.”⁶² This statute created a Subversive Activities Control Board, which could declare any organization that refused to voluntarily register to be a Communist organization. This designation barred any members from working in government or for private industry defense firms. It also authorized the executive detention of anyone believed to have a propensity to engage in espionage or sabotage. It omitted any form of judicial review or right to confront evidence. With the House of Representatives' Un-American Activities Committee leading the charge, all levels of government sought out disloyal citizens. These measures had a significant impact on free speech.⁶³ By the time Congress considered the Communist Control Act of 1954,⁶⁴ not one Senator had the nerve to vote against it.⁶⁵

Whitney v. California again raised the issue of clear and present danger. 274 U.S. 357 (1927). Brandeis and Holmes refrained from dissenting, giving the fact that the state of California felt the need to introduce special legislation “great weight.” However, they again put forward the clear and present danger test. *Id.*

⁵⁷ 274 U.S. 357 (1927).

⁵⁸ *See, e.g.,* Herndon v. Lowry, 301 U.S. 242 (1937); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Fiske v. Kansas*, 274 U.S. 380 (1927).

⁵⁹ *Bridges v. California*, 314 U.S. 252, 263 (1941).

⁶⁰ Smith Act of 1940, ch. 439, 54 Stat. 670.

⁶¹ *Id.* The state found some two hundred people in violation of this statute, and the Espionage Act, in the course of the Second World War. STONE, *supra* note 12, at 275.

⁶² Subversive Activities Control Act of 1950, ch. 1024, tit. I, 64 Stat. 987.

⁶³ Under the Truman Administration, more than 4.7 million government employees came under scrutiny. The Federal Bureau of Investigation conducted approximately 40,000 investigations, only twenty percent of which led to formal charges. Ninety percent of these were

In this atmosphere, the Supreme Court held that the First Amendment did *not* protect indoctrination in preparation of future, violent action.⁶⁶ Chief Justice Vinson's words strike a particular chord when held against contemporary biological and nuclear threats: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁶⁷ Here, *the overwhelming government interest in preventing its own overthrow made the imminence or likelihood of its execution irrelevant*. Justice Frankfurter concurred: "The right of a government to maintain its existence—self-preservation—is the most pervasive aspect of sovereignty."⁶⁸

The context here matters: By 1947, the Communist Party had swelled to some 60,000 members. Russia's overthrow in the early twentieth century and Czechoslovakia's in 1948 created a climate wherein the persuasive aspect of such speech appeared to threaten national security. Despite some three billion dollars in American aid, in 1949 China fell to the Communists; the same year, the USSR exploded its first nuclear bomb.⁶⁹ Korea represented a proxy battle. As in the contemporary terrorist challenge, the political intent—in the case of Korea the pursuit of a socialist ideal—mattered. Justice Jackson noted, "The Communists have no scruples against sabotage, terrorism, assassination, or mob disorder; but violence is not with them, as with

cleared. This meant that between 1947 and 1953, the federal government fired approximately 350 "disloyal" federal employees. Another 2200 "voluntarily" resigned. Although the net result does not appear to be statistically significant, the social impact of the entire system was profound: a "sense of being 'watched'" permeated the U.S. This affected citizens' ability to engage in even ordinary conversation. And the standard of what could be considered "disloyal" behavior steadily expanded: Truman broadened it in 1951; then in 1953 Eisenhower issued Executive Order 10450, which defined it as "[a]ny behavior, activities or associations which *tend to show* that the individual is not reliable or trustworthy." He later amended the order to allow for automatic dismissal if anyone pled the Fifth. Under such loose standards, by 1956 the government had fired an additional 2350 employees and accepted "voluntary" resignations from another 9800. Despite these extreme measures, *the state failed to uncover a single case of actual subversion or espionage*. STONE, *supra* note 12, at 348-52. In return, Stone concludes,

The loyalty program stifled meaningful debate, demanded conformity, and discouraged Americans from thinking, reading, talking, or acting in any way that was out of the 'mainstream' of contemporary political, cultural, or social thought.

Perhaps most important, it reversed the essential relationship between the citizen and the state in a democratic society.

Id. at 352.

⁶⁴ Communist Control Act of 1954, ch. 886, 68 Stat 775.

⁶⁵ 100 CONG. REC. S15121 (1954).

⁶⁶ *Dennis v. United States*, 341 U.S. 494 (1951).

⁶⁷ *Id.* at 510. Note that although Chief Justice Vinson, who authored *Dennis*, claimed to be using Holmes's clear and present danger test, he cited Hand's opinion in *Gitlow*. *See id.* (citing *Gitlow v. New York*, 268 U.S. 652 (1925)).

⁶⁸ *Dennis*, 341 U.S. at 519 (Frankfurter, J., concurring).

⁶⁹ STONE, *supra* note 12, at 330.

the anarchists, an end in itself.” He continued, “The authors of the clear and present danger test never applied it to a case like this, nor would I [I]t [would mean] . . . the Government can move only after imminent action is manifest, when it would, of course, be too late.”⁷⁰

In the short term, *Dennis* allowed the federal government broad leeway to go after Communists. Indeed, arrests under the Smith Act accelerated. In the long term, however, this period came to be regarded as one of the most embarrassing in American history. It profoundly changed the relationship between the citizens and the state. Thousands of people employed in public and private industry lost their jobs and their reputations. Free speech—central to the health of a liberal, democratic state—suffered.

b. *Brandenburg* and Beyond

The seminal First Amendment incitement case that continues to serve as the gold standard came in 1969. *Brandenburg v. Ohio*⁷¹ exonerated a Klu Klux Klan leader who had been convicted under an Ohio criminal syndicalism statute. The Court held that advocacy of the use of force or unlawful activity was unprotected only where (a) it is directed at inciting (b) imminent, lawless action, and (c) is likely to incite or produce such action.⁷² This test means that the actor must *intend* the action to produce a certain effect—but it does not require that that effect become manifest. In a subsequent case, the Court suggested that imminent lawless action amounted to a matter of hours—or at most, several days; it did not open the door to indefinite action.⁷³

The *Brandenburg* decision has been hailed as a watershed in the development of First Amendment law. It tried to curb the Executive’s ability to restrain political opponents or those with unpopular ideas, while still leaving the door open to restricting the kinds of harmful speech that may emanate from groups like terrorist organizations—bent on destroying the state. Relying on *Brandenburg* as a guarantee that speech necessary to the liberal, democratic discourse is protected, however, may be somewhat naïve.⁷⁴

⁷⁰ *Dennis*, 341 U.S. at 564, 570 (Jackson, J., concurring).

⁷¹ 395 U.S. 444 (1969).

⁷² *Id.* at 447.

⁷³ *Hess v. Indiana*, 414 U.S. 105 (1973).

⁷⁴ In addition to the arguments that follow in the text, it is possible that the contemporary environment may make it easier for speech to meet the *Brandenburg* criteria, leading to less protected speech. Modern means of communications, such as publication on the Internet—which, from the design of the site itself intent might be inferred—or participation in chat rooms dedicated to subversive ideas, make it easier to establish that the action in question sought to incite unlawful behavior. While *Brandenburg* requires that the unlawful action sought be imminent, the nature of modern technology again matters. If the Court interprets the initial

While this case overturned *Whitney*, it stopped short of ruling on the fate of *Schenck*, *Dennis*, or *Yates*. To some extent, this seems to go to the definition of what constitutes a clear and present danger. As Jackson was at pains to point out in *Dennis*, a very different situation prevailed in 1919 than in 1947. But by the mid-twentieth century, superpower rivalries had begun to take form, Communism was widespread, and the world stood on the edge of the nuclear age. We are now well into this nuclear age, attended by the growth of technologies that weaponize basic chemical and biological processes. The national security threat posed by the advent of weapons of mass destruction, if credible, appears to more than meet the clear and present danger test.

The court's refusal to overturn these earlier cases also may have something to do with deference to the legislature in times of need. As Frankfurter wrote, "Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province."⁷⁵ He continued, "How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment."⁷⁶

Are we entering an age where the clear and present danger will push back on the *Brandenburg* standard? The Court views unpatriotic, disrespectful, or patently offensive speech as constitutionally protected.⁷⁷ Abusive expressions or those contemptuous of public officials also fall under the court's shield as long as *they do not incite others to perform unlawful acts or to breach the peace*. Geoffrey Stone, however, makes the powerful observation that, historically, when fear has controlled the state, protections otherwise afforded recede.⁷⁸ When the law feels the full force of the CBNRW threat, the decision may well be made that that this test no longer fits the times we face. And, like *Dennis* and *Yates*, the Court never formally overturned the Sedition

posting as the relevant date, then the traditional standard would apply. However, the almost constant transfer of information between web sites means that publication transcends particular points in time. At the moment in time someone picks up the call to arms and translates it into action, it may be easier to establish a point in proximity to that act. The likelihood of violence, in turn, rests in part on the precedent set by the last attack, combined with access to technical and operational information—data increasingly available in an age of expanded electronic communications. Finally, the Court has *not* distinguished between different kinds of advocacy (e.g., private nonideological v. public ideological)—an issue central to the threat posed by fundamentalist terrorism.

⁷⁵ *Dennis*, 341 U.S. at 539 (Frankfurter, J., concurring).

⁷⁶ *Id.* at 539-40 (Frankfurter, J., concurring).

⁷⁷ *Watts v. United States*, 394 U.S. 705 (1969).

⁷⁸ STONE, *supra* note 12, at 13, 73-76, 528-30.

Act.⁷⁹ An emergency evinced by terrorist acquisition of devastating weapons may serve as the basis for significant speech restrictions.

The lesson to be learned from the foregoing text is that a relaxation of these standards to address a unique national security threat ought to give us pause. In the past, speech restrictions ended up being applied to political opponents, not just those engaged in violence. And they had a significant chilling effect on free speech. Moreover, as Frankfurter's words in *Dennis* suggest, courts may be particularly reluctant to interfere in the Executive determination of what constitutes a national security threat.

The possibility of the Court rolling back *Brandenburg* is, of course, a speculative inquiry. Perhaps the strongest argument against the likelihood of its occurring, aside from the role played by precedent in the courts, is the powerful cultural norm against outright efforts to stifle (particularly political) speech. While this norm may itself change with the magnitude of the threat posed, its presence ought to be acknowledged and given the weight it deserves. However, it ought not to be afforded more than that. Perhaps of greater concern is the sense that to focus on *Brandenburg* is to focus on the past, and not on the more likely manner in which counterterrorism currently or will in the future affect free speech. Here, there are a range of areas in which *Brandenburg* has only a limited reach or where it does not reach at all, such as knowledge-based speech and counter-terrorist provisions with significant secondary effects on expression. I return to these in Parts I.B and III. Similarly, *Brandenburg* says nothing about situations where the state acts as sovereign—an area where national security may demand the free flow of ideas in contrast to past censorship. First, however, I briefly consider elements of English law that address persuasive political speech where the state acts in the position of sovereign vis-à-vis those undertaking the expression.

2. United Kingdom: Offences Against the State and Public Order

Prior to incorporation of the European Convention of Human Rights (ECHR) into domestic law, the English constitution provided a range of ways in which the state could restrict persuasive speech.⁸⁰

⁷⁹ *But see* *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (setting a stricter standard to warrant restrictions).

⁸⁰ English law differs from American constitutional law in its embrace of parliamentary sovereignty. Westminster has “the right to make or unmake any law whatever; and . . . no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament” A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, at xviii (8th ed. 1915); *see also* 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 160-61 (University of Chicago Press, photo. reprint 1979) (1769). This

Treason stood first amongst these. By the mid-twentieth century, however, the charge fell into disuse. Sedition tread a similar path: Although wielded throughout much of English history, towards the end of the nineteenth century, it became dormant. The law of seditious conspiracy, however, took hold. It became one of the principal weapons in the battle against communism. In Northern Ireland sedition took on a particular character: Under the 1922-1943 Civil Authorities (Special Powers) Acts it became an important way to prevent publication of subversive ideas. Throughout the twentieth century, Great Britain and Northern Ireland also made extensive use of unlawful assembly provisions. Like the media ban from 1988 to 1994, these powers ultimately rested on the right not to be offended.⁸¹ While incorporation of the ECHR has had some impact on British efforts to limit political speech, in other areas the European courts' jurisprudence appears to endorse it. In some part, the greater acceptance of restrictions can be seen most clearly in the intolerance for hate speech that marks both British and European law.

a. Treason

In English law, treason historically served as the foremost offence against public order. Together with the law of prior restraint, it

means that the legislative body does not fall subject to a written constitution; rather, it can change any and all of its laws at will. A.W. BRADLEY & K.D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* (12th ed. 2003). Judicial review thus focuses not on statutory validity, but on questions such as whether subsidiary measures fall within the remit granted by Parliament, or whether officials abused their discretion under the law. The courts also oversee the application of remedial guarantees. For much of British history then, rights represented implicit legal protections. See Jack Straw & Paul Boateng, *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into U.K. Law*, 1997 EUR. HUM. RTS. L. REV. 71. In 1998, however, British law shifted, making individual rights both explicit and statutory. See Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World*, 33 U. MICH. J.L. REFORM 497, 501-03, 512, 516 (2000). The Human Rights Act incorporated the European Convention of Human Rights into domestic law. This legislation carries the same status as any other act of Parliament. However, it includes a principle of statutory interpretation: "So far as it is possible," all British legislation must be read or given effect in a manner compatible with the Convention. Human Rights Act, 1998, c. 42, § 3(1) (Eng.). English courts—not Strasbourg—make this determination. In the event that Parliament *does* pass a contradictory measure, the courts cannot strike it down. Instead, the judiciary simply declares the legislation incompatible with the 1998 statute.

⁸¹ Compare *Papworth v. Coventry*, (1967) 2 All E.R. 41 (Q.B.D.) (Eng.) (holding that legislation giving the Metropolitan Police the ability to prevent speech on the basis of preserving public order was not *ultra vires* § 52 of the Metropolitan Police Act of 1839), and *Williams v. DPP*, (1968) 112 Sol. J. 599 (holding that leaflets urging American soldiers to desert in protest against the Vietnam War were prohibited as an insulting writing under the Public Order Act of 1936), with *Terminello v. City of Chicago*, 337 U.S. 1, 4 (1949) (finding public annoyance insufficient to override the First Amendment).

provided the means by which the state could restrict the political challenge. Its essence lay in what Glanville understood as *sedition exercitus vel regni*—or betrayal of the realm.⁸² Peace represented a privilege, granted by the king; war thus served as a liability and a reversion to the state of nature that lay outside the king's peace.⁸³ Any act threatening tranquility meant that the allegiance owed to the king had been violated.⁸⁴

Under common law, treason consisted, more specifically, of imagining the king's death, levying war, and giving aid to the king's enemy. Although the monarch initially left what qualified as a treasonous offence to judges' discretion, confusion led to the enactment of the 1351 Treason Act, which limited treason to specific offences.⁸⁵ This statute, shaped through subsequent judicial decisions, reinforced the relationship between the monarch and his subjects. The judiciary, however, considered it outside criminal law, as treason represented an attack on the state itself—not on subjects within the realm.⁸⁶

The sentence for treason was most severe. The motivating sentiment was that those convicted of the crime would find hell a relief.⁸⁷ The punishment involved drawing, hanging, disemboweling, burning of one's entrails (while still alive), beheading, and quartering—at the same time.⁸⁸ Successive monarchs expanded the list of treasonable offences, which included acts startlingly similar to modern-day terrorism.⁸⁹ The Treason Act of 1795 made it illegal to depose or levy war against the king “in order, *by force or constraint, to change his measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe both houses or either house of parliament,*

⁸² 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 503 n.2 (2d ed. 1968) (citing Glanville, i. 2); *see also* J.G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* (1970); MICHAEL SUPPERSTONE, *BROWNLIE'S LAW OF PUBLIC ORDER AND NATIONAL SECURITY* 230-45 (2d ed. 1981).

⁸³ 2 STEPHEN, *supra* note 7, at 62.

⁸⁴ 4 HENRY JOHN STEPHEN, *NEW COMMENTARIES ON THE LAWS OF ENGLAND* 138 (16th ed. 1914).

⁸⁵ Treason Act, 1351, 25 Edw. 3, c. 2 (Eng.)

⁸⁶ 2 STEPHEN, *supra* note 7, at 241-42, 263.

⁸⁷ 2 POLLOCK & MAITLAND, *supra* note 82, at 500.

⁸⁸ 4 BLACKSTONE, *supra* note 80, at 92.

⁸⁹ *See* BELLAMY, *supra* note 82; RANULF DE GLANVILLE, *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND* (G.D.G. Hall ed., 1965); MATTHEW HALE, *THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND* (Lawbook Exchange 2000) (London, 1713); 2 STEPHEN, *supra* note 7, at 241-84. For instance, under Henry VIII, it was considered treason to “‘attempt any bodily harm to the king,’ by writing, printing, or *exterior act*, maliciously ‘do or procure anything to the peril of the king's person,’ or to the disturbance of the king's enjoyment of his crown” 2 STEPHEN, *supra* note 7, at 264 (citations omitted). The Treason Act of 1795 made it unlawful to “compass, imagine, invent, devise, or intend death, or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of his Majesty.” Treason Act, 1795, 36 Geo. 3, c. 7 (Eng.).

or to move or stir any foreigner . . . to invade this realm or any other of his Majesty's dominations."⁹⁰ The use of force to coerce parliament or the crown to change its course of action lies at the heart of political terrorism. Although more statutes followed the 1795 Act, treason remained frequently used and largely unchanged until the mid-nineteenth century.⁹¹ In 1848, heightened fear caused by the Continental Revolution again led to an expansion—conspiracy to treason became a felony.⁹² The legislation outlawed discussion about the form of the English government. By the end of the nineteenth century, almost all political offences had been defined by statute.

In the early twentieth century England primarily applied the charge of treason to the Irish question.⁹³ Its use, however, had a polarizing effect on Irish nationalism. Last levied in Northern Ireland in the 1950s, the charge fell into disuse. Nevertheless, the 1848 statute remained on the books. In 1998, the Crime and Disorder Act amended the legislation, formally ending the use of the death penalty for treason in peacetime and commuting the sentence to life imprisonment.⁹⁴

In 2001, the *Guardian* newspaper tried to get the Attorney General to declare that the Treason Felony Act, and its prohibition on advocacy of different forms of government, violated the 1998 HRA. Alan Rusbridger, the editor of the *Guardian*, wrote to Lord Williams of Mostyn, "I write to give you notice that from December 6 superth . . . onwards the Guardian propose[s] to publish a number of articles which will invite and incite support for a republican government in the United Kingdom."⁹⁵ Rusbridger invited Mostyn

to announce your intention to disapply the Treason Felony Act (1848) in respect of all published advocacy of the deposition or destruction of the Monarchy other than by criminal violence Alternatively you might use your 'parens patriae' position to seek a declaration in the

⁹⁰ Treason Act, 1795, 36 Geo. 3, c. 7 (Eng.).

⁹¹ See, e.g., Treason Act, 1817, 57 Geo. 3, c. 6 (Eng.).

⁹² Treason Felony Act, 1848, 11 & 12 Vic., c. 12 (Eng.) This included printing, writing, or engaging in any act to convince anyone to "compel [the monarch] to change his methods or counsels, or, in order to put force or constraint upon, or to intimidate or overawe, either House of parliament." STEPHEN, *supra* note 84, at 147.

⁹³ Of the 183 civilians tried by courts-martial following the Easter Rising, ninety received sentences of death. K.D. EWING & C.A. GEARTY, *THE STRUGGLE FOR CIVIL LIBERTIES, POLITICAL FREEDOM AND THE RULE OF LAW IN BRITAIN, 1914-45*, at 342.7 (2000). Alarmed by the public response to the first fifteen executions, Prime Minister Asquith ordered a halt; but it was too late to stop the rising tide of public sentiment against the harsh penalties associated with treason. Conor Gearty, *The Casement Treason Trial in Its Legal Context*, Lecture Delivered at the Royal Irish Academy's Symposium on Roger Casement, Roger Casement in Irish and World History 9 & n.14 (May 6, 2000) (manuscript on file with the author) (citing PARL. DEB., H.C., May 11, 1916, cols. 935-70).

⁹⁴ Crime and Disorder Act, 1998, c. 37, § 36 (Eng.).

⁹⁵ R. (on the application of Rusbridger) v. Attorney Gen., [2002] EWCA (Civ) 397, [1].

High Court that as a result of the operation of . . . the Human Rights Act . . . the Treason and Felony Act . . . no longer bears its literal meaning . . .⁹⁶

Mostyn refused to do either, whereupon Rusbridger published the articles and sent them to the Attorney General, daring him to prosecute. The Attorney General replied, “Thank you for your letter of 6 December, enclosing a copy of the Guardian. I had in fact already read it It is not for any Attorney General to disapply an Act of Parliament: that is a matter for Parliament itself.”⁹⁷

Alan Rusbridger and Polly Toynbee, who penned the articles, promptly took the Attorney General to Court, requesting, *inter alia*, that the judiciary make a declaration of incompatibility with the HRA.⁹⁸ The Court of Appeals flippantly dismissed the case, underscoring the defunct nature of the crime:

There are powerful arguments against letting litigants occupy the time of the court with problems which do not affect them personally. There are people with pressing problems whose cases await solution. They are waiting longer because this case is being heard. We do not understand the claimants to suggest that the uncertainty of our law as to treason has affected their decision to publish in the past or is likely to in the future. Their stance is that of the Duke of Wellington: publish and be damned. Nor is there any evidence to suggest that the existence of the 1848 Act causes them to sleep in their beds less soundly.⁹⁹

The court continued, “Times have moved on. No one has been prosecuted under the 1848 Act for over 100 years.”¹⁰⁰ As far as the HRA went, “Parliament chose, for reasons which are readily understandable, not to amend all Acts which might require amendment in the light of our obligations under the Convention but instead to leave the Courts to do what they can with the help of section 3 of the HRA. This technique is valuable”¹⁰¹

b. Unlawful Assembly

Another powerful way in which English law dealt with speech related to political violence lies in the realm of unlawful assembly. England differs from the United States, where unlawful assembly rarely appears; instead, potential and actual disruption tends to be addressed

⁹⁶ *Id.* (formatting omitted).

⁹⁷ *Id.* at [4].

⁹⁸ *Id.* at [16].

⁹⁹ *Id.* at [21].

¹⁰⁰ *Id.* at [23].

¹⁰¹ *Id.* at [24].

under disorderly conduct statutes. In the U.K., however, prior restraints on such gatherings served as an effective way to restrict persuasive speech. Like other rights in the English constitution, the right to gather has historically been a negative one.¹⁰² The question centered on whether the initial gathering could be considered *unlawful* in that participants' conduct, or intent "to excite a breach of the peace on the part of opponents, fills peaceable citizens with reasonable fear that the peace will be broken . . ." ¹⁰³ Thus, for instance, if a lawful procession was planned, and an unlawful organization attempted to prevent the march from occurring, the judiciary considered the original procession to be within their right to proceed, despite a magistrate's order to the contrary.¹⁰⁴ The English constitution does not provide the authority for the state to convict a man "for doing a lawful act if he knows that his doing it may cause another to do an unlawful act."¹⁰⁵ As an Irish judge noted, the remedy for the protection of this right "is the presence of sufficient force to prevent [the unlawful] result, not the legal condemnation of those who exercise those rights."¹⁰⁶ However,

[i]f there is anything unlawful in the conduct of the persons convening or addressing a meeting, and the illegality is of a kind which naturally provokes opponents to a breach of the peace, the speakers at and the members of the meeting may be held to cause the breach of the peace, and the meeting itself may thus become an unlawful meeting.¹⁰⁷

While for the most part the law requires that lawful assemblies be allowed, it provides a loophole for necessity: If dispersing a meeting provides the only way of preserving the peace, law enforcement may declare the gathering unlawful and demand that it disperse.¹⁰⁸ The difficulty, of course, is determining what meets that necessity.

The most thorough use of the law of unlawful assembly to restrict terrorist-related speech occurred in Northern Ireland, where a second parliament, technically subservient to Westminster, operated between 1922 and 1972.¹⁰⁹ The 1922 Civil Authorities (Special Powers) Act

¹⁰² Professors Keith Ewing and Conor Gearty write, "The great British bluff on freedom is nowhere more clearly exposed than in relation to freedom of assembly. There is not and never has been a 'right' to demonstrate." K.D. EWING & C.A. GEARTY, *FREEDOM UNDER THATCHER: CIVIL LIBERTIES IN MODERN BRITAIN* 85 (1990).

¹⁰³ DICEY, *supra* note 80, at 269 (citations omitted).

¹⁰⁴ *Beatty v. Gillbanks*, (1882) 9 Q.B.D. 308.

¹⁰⁵ *Id.* at 314 (Field, J.).

¹⁰⁶ *Reg. v. Justices of Londonderry*, (1891) 28 L.R. Ir. 440, 450 (O'Brien, J.).

¹⁰⁷ DICEY, *supra* note 80, at 273.

¹⁰⁸ *Id.* at 175; *see also* *O'Kelly v. Harvey*, (1883) 14 L.R. Ir. 105.

¹⁰⁹ Between December 1921 and May 1922, political violence killed 236 people, and injured 346. Unionists, in control of the new provincial parliament, responded with the 1922 Civil Authorities (Special Powers) Act (SPA). Drawn largely from Britain's 1914-15 Defense of the Realm Acts and the 1920 Restoration of Order in Ireland Act (ROIA), the statute included a one-

(SPA), introduced by Stormont, the Northern Ireland Parliament, granted the Executive extraordinary power to introduce whatever regulations it deemed necessary to preserve order and maintain peace.¹¹⁰ More than 100 subsidiary measures followed. Not only did it become an offence to act against any regulation, but the statute made it unlawful to incite or endeavor to persuade another person to commit an offence. It further provided, "If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be deemed to be guilty of an offence against the regulations."¹¹¹

Regulation 4 of the 1922-1943 SPAs made it unlawful for three or more persons to gather to carry out any lawful or unlawful purpose in a way that endangered the public peace—or gave "firm and courageous persons" in the neighborhood grounds to apprehend a breach of peace.¹¹² Although the statutory instrument did not differ in any substantial way from the Northern Ireland Government's common law powers to prevent unlawful assembly, the state regularly used it to prevent nationalists and republicans from gathering.

From 1922 to 1950 the Northern Ireland Ministry of Home Affairs prohibited more than ninety meetings, assemblies and processions. This included bans on Easter commemorations (that hearkened back to the Easter Uprising in the South), unemployed workers' meetings, ceilidhs, films, Gaelic Athletic Association events, anti-partition meetings, and St. Patrick's Day celebrations. In 1951, primary legislation replaced Regulation 4. Although a common law offence of unlawful assembly still existed, the Public Order Act became the primary vehicle for preventing marches and processions.¹¹³ This statute allowed the state to regulate and prohibit not just gatherings, but any "provocative conduct."¹¹⁴ It required a forty-eight-hour notice period before any gatherings. Any Royal Ulster Constabulary (RUC) officer or head constable could impose whatever conditions appeared appropriate, including banning the meeting. The legislation gave the Minister of Home Affairs the authority to suspend all processions in a certain area

year limit on its powers. Violence ceased within six months. Nevertheless, the Northern government renewed the statute annually 1923 through 1927, extended it in 1928, and in 1933 made it permanent. For detailed discussion of these measures, see LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000, at 16-17 (2001).

¹¹⁰ Civil Authorities (Special Powers) Act, 1922, 12 & 13 Geo. 5, c. 5, (N. Ir.) [hereinafter SPA].

¹¹¹ *Id.* § 2, ¶ 4.

¹¹² Memorandum at the Ministry of Home Affairs (on file with the Public Record Office of Northern Ireland, HA/32/1/465).

¹¹³ Public Order Act, 1951, 14 & 15 Geo. 6, c. 19 (N. Ir.).

¹¹⁴ *Id.* § 3.

or of a particular class, for up to three months. It outlawed threatening, abusive, or insulting words or behavior and prohibited individuals from allowing any premises or land in their control to fall subject to conduct leading to public disorder.

As civil disorder grew, the unionist government gradually expanded its powers. In 1966, the Ministry of Home Affairs introduced Regulation 38, which gave law enforcement the authority to prevent three or more people from gathering where a breach of the peace might ensue.¹¹⁵ In 1969, the Ministry again extended its authority to restrict public use of premises used for entertainment, exhibition, performance, or sports.¹¹⁶ Then in 1970, the Ministry gave the Civil Authority the explicit ability to prevent processions or meetings where such gatherings might give rise to public disorder *or* cause undue demands to be made on law enforcement.¹¹⁷

Almost all of the events outlawed under these regulations related to nationalist or republican aspiration, culture, or identity. Instead of threatening grave disorder, they represented a political view that promoted disaffection. In no event did the Ministry of Home Affairs consciously ban a loyalist gathering, march, or procession—despite the incendiary effects of such actions. On the one occasion that a loyalist gathering inadvertently fell under an order issued to prevent nationalists and republicans from assembling, the Ministry of Home Affairs opted not to prosecute the hundreds of people who defied the ban and, instead, prepared an extensive apology to be given in the Northern Ireland House of Commons.¹¹⁸

The Ministry received overwhelming support for these actions from the majority population: Orange Lodges routinely passed resolutions approving of the bans and forwarded them to the Ministry. The Coleraine Drumming Club exhorted, “Long may you occupy the position to keep those Popish rebels in check. No Surrender. God Save the King.”¹¹⁹ The Falls Road Methodists felt “that if more of our leaders were as faithful and fearless in their duties, Ulster would truly be great.”¹²⁰ Many of the letters referred to the “right” to be free from being confronted with the rhetoric or symbols of Irish republicanism. It symbolized “[t]he Popish trial of strength as between the forces of

¹¹⁵ 1966 S.R. & O. 1966/173 (N. Ir.).

¹¹⁶ 1969 S.R. & O. 1969/312 (N. Ir.) (promulgated in the Belfast Gazette [hereinafter B.G.], Nov. 28, 1969).

¹¹⁷ 1970 S.R. & O. 1970/198 (N. Ir.).

¹¹⁸ See DONOHUE, *supra* note 109.

¹¹⁹ Letter from The Coleraine Drumming Club to the Ministry of Home Affairs, Northern Ireland, Public Record Office of Northern Ireland.

¹²⁰ Letter from The Falls Road Methodists to the Ministry of Home Affairs, Northern Ireland, Public Record Office of Northern Ireland.

Roman tyranny and Protestant freedom.”¹²¹ Private letters were even more vitriolic: “I am proud to see that you . . . have got the guts to defy those who would desecrate the walls of the maiden city by their filthy flags and their disloyal music.”¹²²

In 1972, Westminster suspended the Northern Ireland Parliament and took direct control of the Province. The 1973 Northern Ireland (Emergency Powers) Act (EPA) extended powers relating to unlawful assembly. Section 21 enabled the security forces to disperse any assemblies considered a threat to the peace.¹²³ The EPA also increased the maximum penalty for riotous and disorderly behavior, from six to eighteen months imprisonment.¹²⁴ In the heightened unrest, funeral proceedings proved to be incendiary gatherings. Schedule 3(4) of the EPA granted law enforcement the power to interfere with burials, in the event that peace or serious public disorder might ensure, or undue demands might be made on HM forces or the police. The schedule left just what restrictions would be used to the discretion of the police.

Although the Northern Ireland Parliament made the most use of unlawful assembly provisions to prevent persuasive political speech, Great Britain made use of similar powers. These too began as emergency statutory instruments but transformed into primary legislation. And, as in the United States, World War I and growing fears about Communist insurgency spurred their introduction. Regulation 9A of the Defence of the Realm Consolidation Act¹²⁵ provided the British Home Secretary with the power to ban meetings and processions. In 1921, under the authority of the 1920 Emergency Powers Act, Regulation 20 of the new Emergency Regulations¹²⁶ extended this power. It granted the authority to prevent public gathering where the Home Secretary had reason to believe meeting would give rise to grave disorder, or, for a procession, a breach of the peace. It entitled the police to take whatever steps deemed necessary to disperse the meeting. The state initially exercised the powers against their intended target. However, use of the regulation soon expanded beyond communists to include the 1926 Miners’ General Strike, the National Unemployed Workers’ Movement and the British Union of Fascists.¹²⁷ The latter gave rise to permanent public order legislation.

¹²¹ Letter from Brown’s Dental Depot to the Minister of Home Affairs (March 6, 1926) (on file with the Public Record Office of Northern Ireland, HA/32/1/295).

¹²² Letter from D.G. Evans to the Minister of Home Affairs (March 4, 1948) (on file with the Public Record Office of Northern Ireland, HA/32/1/475).

¹²³ Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 21 (Eng.).

¹²⁴ *Id.* § 22.

¹²⁵ Defence of the Realm Consolidation Act, 1914, 5 Geo. 5, c. 8.

¹²⁶ Emergency Powers Act, 1920, 10 & 11 Geo. 5, c. 55.

¹²⁷ EWING & GEARTY, *supra* note 93, at 94-330.

In 1936, left-wing organizations prevented Sir Oswald Mosley and the British Union of Fascists from marching through Jewish areas of London. Westminster swiftly introduced the 1936 Public Order Act.¹²⁸ This legislation became the most important statute outside Northern Ireland for state control of public meetings. As a preventive measure, it allowed any chief police officer, who reasonably apprehended that a procession “may occasion serious public disorder,” to impose *whatever conditions* “appear[ed] to him necessary for the preservation of public order.”¹²⁹ If insufficient, the officer could apply to the Home Secretary or local council for an order banning any meeting in the area for up to three months. Here, the statute differed substantially from its Northern Ireland counterpart: While in the Province orders could be issued for specific meetings, in Great Britain, to prevent discrimination, *all* processions would have to be banned in specified area.¹³⁰

The 1936 Public Order Act also created a statutory offence that, unlike the preventative measures, did become heavily used by the state.¹³¹ Section 5, as amended in 1965, made it illegal to intentionally provoke a breach of the peace or to break the peace through threatening, abusive, or insulting words or behavior, or any writing, sign, or other threatening, abusive, or insulting representations.¹³² The key element here was the flexibility of the phrase “breach of the peace”—which came to include everything from nudity to meowing at a police dog.¹³³ This led some commentators to suggest: “To the extent that freedom of expression figured at all, it was no more than as an implicit principle sitting silently in the gaps between the words. Not unnaturally, therefore, it was often squeezed.”¹³⁴ For the Court of Appeal, a breach of the peace meant that “there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done.”¹³⁵ The requirement, however—that there be an *imminent* breach of the peace—rarely has found itself subject to judicial scrutiny; instead, the courts have granted great deference to those entrusted with enforcing the law.¹³⁶

¹²⁸ Public Order Act, 1936, Edw. 1, c. 8 & Geo. 6, c. 62, § 5.

¹²⁹ *Id.*

¹³⁰ The first of these bans, in June 1937, brought the East End of London under a six week ban. However, only sporadic use followed. Instead, custom dictated that the police simply increase their presence when disorder loomed.

¹³¹ EWING & GEARTY, *supra* note 102, at 87.

¹³² *Id.*

¹³³ *Id.* at 87-88.

¹³⁴ *Id.* at 88.

¹³⁵ *Id.* at 90 (citing *R. v. Howell*, [1982] Q.B. 416).

¹³⁶ *See, e.g.*, *Thomas v. Sawkins*, [1935] 2 K.B. 249; *Duncan v. Jones*, [1936] 1 K.B. 218; *Piddington v. Bates*, [1960] 3 All E.R. 660 (Q.B.D.).

In 1986, the British state revised the Public Order statute to consolidate previous measures, produce new authorities, and take account of competing rights within society. The resulting statute tilted the balance further in favor of the state; the legislation expanded section 3 preventative powers and section 5 powers. It replaced the common law offence of unlawful assembly with a “violent disorder” provision.¹³⁷ It also introduced new provisions for serious public order offences, such as unlawful assembly and riot. The 1986 statute required *written* notice to be submitted to the police at least six days prior to the planned procession. It expanded the powers to apply to processions and meetings. No longer must law enforcement find a direct link to public disorder. Now, it is sufficient for police to reasonably believe that there may be serious damage to property, serious disruption to the life of the community, or the intimidation of others “with a view to compelling them not to do an act they have a right to”—or not to—do.¹³⁸ Once satisfied, whatever conditions appear to the police “to be necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession” may be imposed either in advance or at the time of the gathering.¹³⁹

Most relevant to our current inquiry,

[a] person is guilty of an offence if he (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, *within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby*.¹⁴⁰

While in section 4 such insults must be connected with the threat of, or actual, violence, in section 5, all that is necessary is that they be *likely* to cause “harassment, alarm, or distress.” This included two men kissing in a park in the presence of two heterosexual males.¹⁴¹ Perhaps more to the point, a poster created by a Republican organization in Northern Ireland, showing four boys throwing stones at a Saracen with “Ireland: 20 years of resistance” printed underneath, fell afoul of section 5.¹⁴² As actions leading to violence are already addressed under section 4, it is unclear exactly how far the police can go in ascertaining what constitutes “disorderly behaviour.” No one, though, need actually be offended—it may just be a hypothetical person, who would *likely* be insulted by the behavior in question.¹⁴³

¹³⁷ Public Order Act, 1986, c. 64, §§ 1, 2 (Eng.).

¹³⁸ *Id.* §§ 12, 14.

¹³⁹ EWING & GEARTY, *supra* note 102, at 119.

¹⁴⁰ Public Order Act, 1986, c. 64, § 5(1) (Eng.) (emphasis added).

¹⁴¹ *Masterson v. Holden*, [1986] 1 W.L.R. 1017.

¹⁴² EWING & GEARTY, *supra* note 102, at 123 (quoting *Letter from the Irish Freedom Movement*, INDEPENDENT, Sept. 12, 1988).

¹⁴³ *Id.*

The United Kingdom applies similar strictures to hate speech—another form of political expression and one treated by Britain and the EU as a crime. This sharply contrasts with U.S. law, which, outside of direct fighting words, grants hate speech broad constitutional protection.¹⁴⁴ This distinction derives from a difference between First Amendment jurisprudence and the English constitution. The latter has a long tradition of preventing such utterances.¹⁴⁵ The difference can also be seen in light of World War II and the immediacy of the threat posed by Adolph Hitler's rise to power. The 1965 Race Relations Act, for instance, outlawed any publication or pronouncement deemed "threatening, abusive or insulting" and intended to incite hatred on the basis of race, color or national origin.¹⁴⁶ The 1986 Public Order Act extended this further, making harassment illegal. Just over a decade later, this provision entered into its own with the Protection from Harassment Act.¹⁴⁷ The European Court found prohibitions on hate speech to be consistent with Article 10 of the ECHR.¹⁴⁸

Similarly, although the 1998 HRA initially had some impact on Britain's public order law, questions remain regarding the extent to which the EU will limit broader strictures placed on political speech. Article 10 of the ECHR states, "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."¹⁴⁹ Article 11 continues, "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests." In 2001, the court applied Articles 10 and 11 to set aside a conviction for defacing an American flag. The court suggested that this amounted to an undue interference with political speech.¹⁵⁰ A British subject with a long history of objecting to Britain's foreign policy towards Iraq also availed

¹⁴⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *But see Terminiello v. Chicago*, 337 U.S. 1 (1949); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003). For a lower court decision granting similar deference to hate speech on constitutional grounds, see *Village of Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978).

¹⁴⁵ Seditious libel, for instance, attempted to address tension between different social groups. See ANTHONY LESTER & GEOFFREY BINDMAN, *RACE AND LAW IN GREAT BRITAIN* 345 (1972).

¹⁴⁶ Race Relations Act, 1965, c. 73, § 6(1) (Eng.).

¹⁴⁷ Public Order Act, 1986, c. 64, §§ 5, 6 (Eng.); Protection From Harassment Act, 1997, c. 40, § 7 (Eng.).

¹⁴⁸ See, e.g., *Glimmerveen & Hagenbeek v. Netherlands*, Appn. Nos. 8348/78 & 8406/78, 18 D.R. 187 (allowing racist leaflets to be banned); *H., W., P. and K. v. Austria*, Appn. No. 12774/87, 62 D.R. 216 (1989) (addressing speech that denied the existence of the Holocaust).

¹⁴⁹ *Jersild v. Denmark*, App. No. 15890/89, 19 Eur. H.R. Rep. 1 (1994).

¹⁵⁰ *Percy v. Dir. of Pub. Prosecutions*, [2001] EWHC (Q.B.) 1125; see also C.A. GEARTY, *PRINCIPLES OF HUMAN RIGHTS ADJUDICATION* 55 (2004).

himself of Article 10 to overturn an injunction preventing him from protesting in Parliament Square.¹⁵¹

The ECHR, however, also allows for restrictions on this speech to be imposed in the interests of national security.¹⁵² The state enjoys a certain “margin of appreciation” in determining the nature and breadth of a restriction on free expression; however, the European Court reserves a final say in whether the restrictions satisfy the two central requirements: that they meet a “pressing social need” and are proportionate to a legitimate aim.¹⁵³ Notably, these requirements satisfy the democratic society side of the equation—not the national security aim. Article 17 further asserts,

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.¹⁵⁴

c. Sedition

Sedition provided another way in which English law restricted persuasive speech. The common law offence consisted of the “intention (i.) to bring into hatred or contempt, or to excite disaffection against, the King or the government and constitutions of the United Kingdom, or either House of Parliament, or the administration of justice.”¹⁵⁵ Thus, it was not *actual* incidents of violence, but *efforts to promote disaffection* that constituted the crime. Sedition did not just protect the Crown or Parliament from unwanted criticism. It reinforced England’s social and economic hierarchy: The charge included promoting “feelings of ill will and hostility between different classes of such subjects.”¹⁵⁶ While the

¹⁵¹ Westminster City Council v. Haw, [2002] All E.R. 59 (Gray J.); see also GEARTY, *supra* note 150, at 55.

¹⁵² European Convention for the Protection of Human Rights & Fundamental Freedoms, art. 10(2), Nov. 4, 1950, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/English_Anglais.pdf.

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, [or] for the protection of the reputation or rights of others

¹⁵³ FELDMAN, *supra* note 7, at 34-112, 756-57.

¹⁵⁴ European Convention for the Protection of Human Rights & Fundamental Freedoms, art. 10(2), Nov. 4, 1950, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/English_Anglais.pdf.

¹⁵⁵ STEPHEN, *supra* note 84, at 149-50.

¹⁵⁶ *Id.* at 150.

judiciary exempted efforts to demonstrate that the monarch “has been *mised* or mistaken in his measures, or to point out errors and defects in the government or constitution *with a view to their reformation*,”¹⁵⁷ in practice, political considerations strongly influenced where the line was drawn.

For Blackstone, the law of sedition appeared consistent with liberty of the press: “Every freemen has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but *if he publishes what is improper, mischievous, or illegal*, he must take the consequence of his own temerity.”¹⁵⁸ Prior restraint would make the licenser more powerful than the courts and the legislature in their power to restrict speech. Yet, the good order of society required that some sort of restriction be available. Imposing restraints after the fact preserved liberty; making only the abuse of “that free will . . . the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects.”¹⁵⁹

The issue, of course, was what counted as “improper, mischievous, or illegal.” In 1792, for instance, Thomas Paine’s *The Rights of Man* qualified. That same year Fox’s Libel Act settled the controversy about whether to adopt a different definition of sedition. This legislation added the intent of the defendant to the elements of the crime.¹⁶⁰ And, like the 1798 Alien and Sedition Acts in the United States, it gave the jury, not the judge, the authority to determine whether a statement should be considered defamatory. This reduced judicial power and forced the law to conform to the general tenor of the times through the role of the jury. As it became more difficult to obtain seditious libel convictions, prosecutions shifted to a public order approach—such as unlawful assembly and seditious conspiracy.¹⁶¹ By the late nineteenth century, these reforms had relegated purely political libel to the dustbin of history.

The law of seditious conspiracy centered on a similar principle: It made it illegal to conspire to effect a purpose “inconsistent with the peace and good government of the country.” Such conspiracy had to be manifest by making speeches, holding meetings, or taking other steps in

¹⁵⁷ *Id.* (emphasis added).

¹⁵⁸ 5 WILLIAM BLACKSTONE, COMMENTARIES 151-52 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803).

¹⁵⁹ *Id.* at 152.

¹⁶⁰ 2 STEPHEN, *supra* note 7, at 355-59.

¹⁶¹ Michael Lobban, *From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c. 1770-1820*, 10 OXFORD J. LEGAL STUD. 307-52 (1990).

concert with others.¹⁶² By the end of the nineteenth century, “the law as to seditious conspiracy [had become] of greater practical importance than the law of seditious libel.”¹⁶³ It also bore an intimate connection to the law of unlawful assembly.¹⁶⁴ Relying on the elements of intent, the provocation of violence, and the use of force against the government, in the twentieth century the state used seditious conspiracy against members of the Communist Party.¹⁶⁵

As with unlawful associations, the law of sedition took on a particular texture in Northern Ireland. Under the 1922-1943 SPAs, Regulation 26 (and later Regulation 8) governed the restriction of printed matter. Like Regulation 4, which prevented meetings and assemblies, the unionist government used the publication restrictions almost exclusively against unpopular ideas. Regulation 26 allowed the Civil Authority to prohibit the *circulation* of newspapers. It expanded in 1943 to prohibit the *publication* and circulation of any newspaper, periodical, book, circular, or other printed matter.¹⁶⁶ In 1971, the Unionists further amended it to make it illegal to print, publish, circulate, distribute, sell, offer or expose for sale, or have in possession for purposes of publication, circulation, distribution or sale, *any* document advocating: (a) an alteration to the constitution or laws of Northern Ireland by some unlawful means, (b) the raising or maintaining of a military force, (c) the obstruction or interference with the administration of justice or the enforcement of the law, or (d) support for any organization which participates in any of the above.¹⁶⁷ Additionally, any individual that the security forces reasonably believed

¹⁶² 2 STEPHEN, *supra* note 7, at 379.

¹⁶³ *Id.* at 380.

¹⁶⁴ *Id.*

If a meeting is held for the purpose of speaking seditious words to those who may attend it, those who take part in that design are guilty of a seditious conspiracy, of which the seditious words spoken are an overt act, and their meeting is an unlawful assembly. If at a meeting lawfully convened seditious words are spoken of such a nature as to be likely to produce a breach of the peace, the meeting may become unlawful in all those who speak the words or do anything to help those who speak to produce upon the hearers their natural effect. The speaking of the seditious words is in itself an offence in the speaker, but a mere meeting for the purpose of political discussion is not in itself illegal unless the circumstances under which it is convened or its behaviour when it is convened is such as to produce reasonable fear of a breach of the peace.

Id. at 386.

¹⁶⁵ See, e.g., *Hector v. Attorney-General of Antigua and Barbuda*, (1990) 2 A.C. 312; EWING & GEARTY, *supra* note 93, at 136-44. Although seditious libel traditionally related to attacks on state institutions, more attempts have been made to use it to address friction between groups within society. In 1989, for instance, a group of Muslims tried to prosecute Salman Rushdie for seditious libel. See, e.g., *R. v. Chief Metro. Magistrate, Ex parte Choudhury*, (1991) 1 Q.B. 429.

¹⁶⁶ 143 S.R. & O. 1943/137 (N. Ir.). The unionist government revoked this measure in 1949, 1949 S.R. & O. 1949/147 (N. Ir.), but reintroduced five years later as Regulation 8. 1954 S.R. & O. 1954/179 (N. Ir.).

¹⁶⁷ 1971 S.R. & O. 1971/40 (N. Ir.).

had such a document in her possession, would be found in violation of the offenses if she refused to turn it over upon demand. The amendment exempted government ministers, the Northern Parliament, and the judiciary; it also lifted any requirement to issue subsidiary orders banning particular publications.¹⁶⁸

Between the inception of the state and the expiration of the final order on December 31, 1971, the Northern Executive issued more than fifty orders banning in excess of 140 publications.¹⁶⁹ Most of these represented republican or nationalist views. A handful, such as *Workers' Life*, *The Irish World and American Industrial Laborer*, and *Irish Workers Weekly*, espoused socialist or communist ideals. Additional texts that fell subject to the censor included poetry, Gaelic Athletic Association scores, obituaries, quotations, coverage of recent government raids or actions, religious texts, calls to arms to fight the English, and the Irish Republican Army's position on social issues. Actual unrest had little to do with the decisions. The first publication ban came long after violence had come to a standstill.

While Regulation 26 focused on printed materials, Regulation 26A, established in 1930, gave the Executive the power to ban films and gramophone records.¹⁷⁰ Unlike Regulation 26, mere possession of items banned under Regulation 26A constituted an offence. As the Ministry of Home Affairs understood it,

[i]n the case of newspapers it was not desirable to make mere possession an offence, since individuals may be sent a single copy of a newspaper without any intention on their part of possessing or circulating it, but it is obvious that nobody becomes possessed of a cinematograph film or gramophone record unless by his own deliberate intention and with a previous knowledge of the subject.¹⁷¹

The primary purpose of Regulation 26A also differed. Rather than focus on republicans or nationalists, it sought to halt communist challenge to the state.¹⁷² The Home Office in the United Kingdom had already banned a number of films under the Secretary of State's common law power, which, according to the authorities, formed part of the "inherent prerogative" of the Crown.¹⁷³ Unsure as to whether they could be applied to Northern Ireland, and concerned at the formation in

¹⁶⁸ *Id.*

¹⁶⁹ DONOHUE, *supra* note 109, at 88-90.

¹⁷⁰ 1930 S.R. & O. 1930/58 (N. Ir.).

¹⁷¹ Memorandum at the Ministry of Home Affairs (May 27, 1930) (on file with the Public Record Office of Northern Ireland, HA/32/1/627).

¹⁷² Memorandum from E.W. Shewell at the Ministry of Home Affairs (May 27, 1930) (on file with the Public Record Office of Northern Ireland, HA/32/1/569).

¹⁷³ List of Films banned by the Home Office (on file with the Public Record Office of Northern Ireland, HA/32/1/569).

1929 of the Belfast Workers' Film Guild, the Northern Executive adopted similar powers. In the event, however, it was not a communist film banned under the regulation, but a republican one.¹⁷⁴

The British state, in turn, had at its disposal the 1984 Prevention of Terrorism (Temporary Provisions) Act.¹⁷⁵ Section 11 of this statute required that individuals in possession of information that they knew or had reason to believe might be of material assistance in apprehending terrorists or preventing an act of terrorism contact officials immediately.¹⁷⁶ The government used this provision to intimidate the media into not allowing supporters of, or participants in, paramilitary movements to appear on the air.¹⁷⁷ The Prime Minister saw the issue in black and white, "one [was] on the side of justice in these matters or one [was] on the side of terrorism."¹⁷⁸

For some time, informal censorship took place.¹⁷⁹ Media coverage following a Provisional Irish Republican Army (PIRA) attack in 1988, though, led to a six-year formal ban. In October of that year a PIRA Active Service Unit bombed the home of Sir Kenneth Bloomfield, head of the Northern Ireland Civil Service from 1984 to 1991. BBC Radio Ulster's *Talkback* afterwards featured Gerry Adams. Outraged at the publicity obtained by the organization, on the nineteenth of October, Douglas Hurd issued two notices—one each to the British Broadcasting Corporation (BBC) and the Independent Broadcasting Authority (IBA)—requiring them to refrain from broadcasting any statements

¹⁷⁴ On November 27, 1936, the Civil Authority banned *Ourselves Alone*, a work of fiction about Sinn Féin created by a British film company. DONOHUE, *supra* note 109, at 94.

¹⁷⁵ Prevention of Terrorism (Temporary Provisions) Act, 1984, c.8.

¹⁷⁶ *Id.* § 11.

¹⁷⁷ EWING & GEARTY, *supra* note 102, at 241. For instance, in 1979 a crew from the U.K. television show *Panorama* filmed an IRA road-block in Carrickmore. The Attorney-General wrote to the BBC to underscore the effect of section 11. Again in 1988, the RUC used it to obtain pictures from Independent Television News (ITN) and BBC that showed who killed two army corporals at a West Belfast funeral. *Id.*

¹⁷⁸ EWING & GEARTY, *supra* note 102, at 241 (citing HC Debs, Vol. 194, 22 Mar. 1988).

¹⁷⁹ For instance, in 1985 the Home Office pressured the BBC not to show *Real Lives: at the Edge of the Union*, which carried an interview with Martin McGuinness, a Sinn Féin leader and former member of the IRA Army Council. In the interview, McGuinness, an elected member of the Ulster Assembly, tried to justify IRA opposition to British rule in the context of the mistreatment of Catholics. Leon Brittan, the Home Secretary, announced that airing the program would be "wholly contrary to the public interest." The BBC delayed and then changed it. Joel Bellman, *BBC: Clearing the Air*, THE JOURNALIST, Jan. 1986, at 20. Similarly, in September 1988, at the urging of the British Government, Channel 4 eliminated one of the *After Dark* programs, in which Gerry Adams was scheduled to appear. EWING & GEARTY, *supra* note 102, at 242-43. That same year Sir Geoffrey Howe, Foreign Secretary, tried to prevent *Death on the Rock* (a program exploring the death of three PIRA operatives in Gibraltar) from being shown until after the inquest. See LORD WINDLESHAM & RICHARD RAMPTON, THE WINDLESHAM/RAMPTON REPORT ON DEATH ON THE ROCK, at ch. 11 (Faber & Faber, 1989). Although the Chairman of the IBA, Lord Thomson of Monifieth, refused to cancel the showing, the government then tried to discredit the program. FELDMAN, *supra* note 7, at 817.

made by proscribed organizations or individuals supporting them. Hurd based his actions on a moral claim:

When you had a bomb outrage, and there are pictures of bodies to distressed and weeping relatives, and the next thing that happens on the screen, in people's living rooms, is somebody saying, "I support the armed struggle" or "They deserved it"—that I think is not only offensive, but it's wrong and it's perfectly reasonable to remove that.¹⁸⁰

The ban included proscribed organizations as well as Sinn Féin, Republican Sinn Féin, and the Ulster Defence Association—all of which claimed to be political arms of their paramilitary movements. Sinn Féin at the time had sixty councilors and one Member of Parliament (MP) holding office.¹⁸¹

Three weeks after the government introduced the ban, in the face of heavy criticism, it adopted new justifications—each based on the persuasive aspect of speech. First, the government evinced concern that paramilitaries were using the airwaves to transmit threats and to create fear. Thus it was not a specific threat from the individuals interviewed, but rather their contribution to a broad, generalized anxiety that justified the restriction. Second, the state suggested that the "terrorists themselves draw support and sustenance from access to radio and television."¹⁸²

The media strenuously objected to the restriction. Nevertheless, it was cautious not to run afoul of the law. The BBC and IBA interpreted it as applying, for instance, to statements made in documentaries, "whether or not the speaker was dead, and even though he may have been dead for some time."¹⁸³ The BBC expressed concern about airing demonstrators singing Irish songs. In 1988, the IBA actually did ban the Pogues' *Streets of Sorrow* because it expressed sympathy for the Birmingham Six and suggested that the Irish did not receive equal justice.¹⁸⁴ (Ironically, three years later, British courts quashed the convictions of the six men who had been found guilty of the 1974 Birmingham pub bombings after having "confessions" beaten out of them by police.)¹⁸⁵ In November 1988, London's LBC independent radio station refused to allow the Dubliners recording of the 1798 ballad

¹⁸⁰ INT'L HERALD TRIB., Oct. 20, 1988, at 2.

¹⁸¹ *The British Broadcasting Ban: An Update*, CENSORSHIP NEWS, Oct. 1991, available at <http://www.article19.org/docimages/335.htm> (last visited Dec. 1, 2004) [hereinafter *British Broadcasting Ban*].

¹⁸² See 139 PARL. DEB., H.C. (6th ser.) (1988) 1082.

¹⁸³ *Id.* at 1128.

¹⁸⁴ Annette Gartland, *Terrorist Ban Hits Pop Song*, THE OBSERVER, Nov. 20, 1988, at 4.

¹⁸⁵ 1991: *Birmingham Six Freed After 16 Years*, BBC NEWS, Mar. 14, 1991, http://news.bbc.co.uk/onthisday/hi/dates/stories/march/14/newsid_2543000/2543613.stm.

Kelly the Boy from Killane.¹⁸⁶ Censorship did have an effect on the publicity afforded the Republican movement. Between October 1988 and March 1989, for instance, broadcast journalist inquiries to Sinn Féin dropped by seventy-five percent. At the February 1991 party conference, the political report urged, "The priorities for SF in the year ahead are to develop and strengthen our party organization, to improve our publicity output and to overcome the effects of censorship."¹⁸⁷

But caution does not mean that the media simply took the ban lying down: indeed, it took advantage of a loophole in the law. When it became clear that the order did not apply to the written media, broadcast authorities began subtitling interviews. They later used voice-overs to allow the views of the parties prohibited from appearing on the programs to be expressed. In 1991, the Law Lords upheld the Broadcasting Ban.¹⁸⁸ Three years later the case reached Strasbourg. The European Court decided that the restriction placed on Sinn Féin did *not* violate the ECHR.¹⁸⁹

d. Monuments and Flags

Two additional endeavors to prevent persuasive speech are worth mention. The first consists of efforts to stave off the construction of memorials. In 1931, the East Tyrone Republican Association began building a monument to honor past IRA leaders. The RUC Inspector General, evincing a concern that it would spark efforts by "loyal elements" in the community to remove it, requested that the Ministry of Home Affairs ban its erection. In response, Regulation 8A provided for the Civil Authority to prohibit the construction of memorials connected to proscribed groups.¹⁹⁰ The Ministry subsequently banned two monuments before withdrawing the order in 1951.¹⁹¹

The second relates to the flying of the Tricolour. The Unionist government in Northern Ireland responded to an avalanche of letters protesting the presence of the southern flag with Regulation 24C:

Any person who has in his possession, or displays . . . any emblem, flag or other symbol consisting of three vertical or horizontal stripes coloured respectively green, white and yellow purporting to be an emblem, flag or symbol representing the Irish Republican

¹⁸⁶ *British Broadcasting Ban*, *supra* note 181.

¹⁸⁷ SF Political Report, Feb 1-3, 1991 Party Conference, at 29.

¹⁸⁸ *Brind v. Sec'y of State for the Home Dep't*, [1991] 1 A.C. 696.

¹⁸⁹ *Brind v. United Kingdom*, 18 Eur. H.R. Rep. C.D. 76 (1994); *see also Purcell v. Ireland*, 70 Eur. Comm'n H.R. Dec. & Rep. 262 (1991).

¹⁹⁰ 1931 S.R. & O. 1931/85 (N. Ir.) (promulgated in the supplement to the B.G., July 27, 1931).

¹⁹¹ *See DONOHUE*, *supra* note 109, at 94-95.

Army . . . and Irish Republic . . . or . . . any . . . unlawful association shall be guilty of an offence.¹⁹²

This regulation did not limit removal to times when a breach of the peace was likely to occur. The Ministry of Home Affairs quickly issued a circular saying, in fact, that the only time the flag should *not* be removed was during formal display as the flag of the Irish Free State.¹⁹³

In accordance with the Regulation, the police frequently removed the flag. However, prosecutions rarely followed. Law enforcement expressed concern that where there was no imminent danger of a breach of the peace, the regulation would be found wanting. Instead, the RUC recommended simply banning the meetings at which the flag would be flown.¹⁹⁴ Efforts to address the matter in the Northern Parliament met with little success. Responding to a Unionist MP who claimed that the flag was a rebel emblem, a Nationalist MP waived the Tricolour and asserted, “This is the flag of the Irish Free State.” The Speaker of the House interjected: “The Hon. Member must not make a speech, but he is entitled to bring any handkerchief he pleases into the House.”¹⁹⁵

¹⁹² 1933 S.R. & O. 1933/127 (N. Ir.) (promulgated in the B.G., Dec. 15, 1933).

¹⁹³ Circular Ref. 26/1480, Feb. 12, 1934, PRONI no. HA/32/1/603 (on file with the Public Record Office of Northern Ireland).

¹⁹⁴ See, e.g., Letter from the RUC to the Ministry of Home Affairs, Ref. CS.26/1480/15(A) (on file with the Public Record Office of Northern Ireland, HA/32/1/603).

¹⁹⁵ DONOHUE, *supra* note 109, at 96 (quoting 17 PARL. DEB., Dec. 4, 1934 (Northern Ireland)). Not only did the flag attract special enmity, but the national anthem of the south obtained for itself a special place of (dis)honor. Between 1930 and 1950 the Ministry of Home Affairs received a flood of letters requesting that “A Soldier’s Song” also be banned. In 1935 the Ministry issued a circular to law enforcement, saying that the music ought not to be allowed at any election meetings. The RUC again objected, saying that unless the song was likely to lead to a breach of the peace, law enforcement would be on shaky ground. Letter from Charles Wickham, RUC Inspector General, to the Ministry of Home Affairs (Nov. 9, 1935) (on file with the Public Record Office of Northern Ireland, HA/32/1/603). To address this lacunae, the Ministry of Home Affairs drafted a Regulation to make it illegal to reproduce any song “in such a manner as is likely to cause a breach of the peace or to give offence to any of His Majesty’s subjects.” Recognizing that nationalists might then be able to force law enforcement to prevent the rendering of loyalist songs, the Ministry re-wrote the regulation, making it unlawful to render “A Soldier’s Song” vocally or instrumentally in a manner either likely to lead to a breach of the peace or to give offence to HM’s subjects. See Draft Regulation (on file with the Public Record Office of Northern Ireland, HA/32/1/603). The Ministry of Home Affairs did not use the regulation in 1935; however, in 1938, the issue again came to the fore when some erstwhile nationalists dared to sing it. The Ministry prepared to introduce the regulation; but, once again, law enforcement protested. Letter marked “secret” from Charles Wickham, RUC Inspector General, to the Ministry of Home Affairs (May 19, 1938) (on file with Public Record Office of Northern Ireland, HA/32/1/603). Although the police enforced a *de facto* ban during the 1938 elections, the Ministry refrained from introducing the formal Regulation. For similar reasons, although the Ministry prepared a Regulation to outlaw the wearing of an Easter Lily, a symbol of the 1916 Easter Uprising and a flower that shared the colors of the Irish flag, it stopped short of introducing it. The 1922 to 1943 SPAs already covered breaches of the peace. And it turned out to be very difficult to describe an Easter Lily. DONOHUE, *supra* note 109, at 80.

e. Persuasive Speech and the 1998 Human Rights Act

In summary, by the mid-twentieth century treason and sedition—two charges historically used to prevent persuasive political speech—had fallen by the wayside. In contrast, seditious conspiracy, unlawful assembly, and public order provisions remained central to suppressing dissident political views. In Northern Ireland, the Executive made further efforts to prevent the building of monuments and the flying of the Irish flag. Although the latter fell with Stormont, public order provisions continued to operate. And from 1988 to 1996 the British state instituted a media ban. The ECHR, although it guarantees freedom of expression, has thus far not proven to be a strict limit on the exercise of these powers. As aforementioned, it provides a back door to Article 10. Exactly how the courts interpret that provision relates to the European context. On the one hand, the countries that make up the union are liberal, democratic states, and are, for the most part, committed to pluralism.¹⁹⁶ This seems somewhat at odds, though, with the right not to be offended that permeates the English constitution. But on the other hand, perhaps European courts also recognize the importance of hate speech in spurring violence within society.

The result is a swathe of grey area, where question can be raised about the degree to which the court, in the future, will provide a check on British law that limits persuasive political speech. The national security exception suggests that where the very existence of the British state may be in question—as it would be in the event of terrorist acquisition of CBNRW—the government may take what steps it deems necessary. Indeed, the court found a much lower level of necessity sufficient to establish an ongoing “state of emergency” in the U.K. during the final three decades of the twentieth century.¹⁹⁷ Levels of violence in Northern Ireland throughout the Troubles¹⁹⁸ remained substantially below most major cities in the United States. While the European Court thus raised its eyebrows at the suggestion of an ongoing emergency, it did not directly challenge—or reject—the underlying claim. To some extent this relates to the nature of terrorism: a violent challenge to state structure. Even courts in the same jurisdiction—much less in other jurisdictions—tend to be reluctant to assume the responsibilities of the Executive when national security issues are at

¹⁹⁶ FELDMAN, *supra* note 7, at 754.

¹⁹⁷ The court repeatedly upheld the state of emergency reflected in the U.K.’s derogation from Article 5(1) of the ECHR. *See, e.g.,* Brannigan & McBride v. United Kingdom, App. No. 14553/89, 17 Eur. H.R. Rep. 21 (1993).

¹⁹⁸ The term Troubles is commonly used to refer to the past thirty years of violence in Northern Ireland.

stake. And so, once a state claims an emergency, it becomes difficult to refute. What makes such refutation even less likely is the outright inclusion of “national security” in Article 10(2) as a legitimate basis on which to suspend free expression. While the 1998 HRA requires that legislation be interpreted, as far as possible, in a manner compatible with the text, it does not bind other legislation. That is, parliamentary supremacy holds; and so, Westminster, if it so wishes, can restrict political speech in a manner incompatible with the ECHR.

B. *Knowledge-Based Speech*

Outside of efforts to prevent persuasive political speech, the U.S. and U.K. attempt to counter political violence by placing strictures on what I call “knowledge-based speech”: information on its face innocuous, but which can be used either for good or ill.¹⁹⁹ This section begins with current American concerns about, particularly, biological research. The debate provides a good example of the issues involved. The text then moves to specific twentieth century restrictions: the Invention Secrecy Act,²⁰⁰ the Atomic Energy Act,²⁰¹ and the 1999 federal bomb-making provisions.²⁰² The second part of this section focuses on British initiatives. It starts with the state of the debate on biological weapons. It then moves to the Export Control Act²⁰³ and non-statutory measures—specifically, the Voluntary Vetting Scheme and the D-Notice system. At the outset, it is worth noting that *Brandenburg*, focused on advocacy, has little to say about purely knowledge-based communication. Similarly, ECHR provisions that guard against inroads into political speech remain silent on this issue. Nevertheless, limitations in this area go to the heart of free speech.

¹⁹⁹ This category is similar to what Eugene Volokh defines as crime-facilitating speech: “[A]ny communication that, intentionally or not, conveys information that makes it easier or safer for some listeners or readers (a) to commit crimes, torts, acts of war . . . or (b) to get away with committing such acts.” His term, however, suggests that the information itself plays a role in the commission of the crime, which risks biasing the discussion against allowing this language. The concept of knowledge-based speech avoids this bias, focusing instead on the nature of the speech, which is rooted in data that can be used to assist, prevent, or to accomplish other goals utterly unrelated to criminal activity. See Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1103 (2005).

²⁰⁰ Invention Secrecy Act of 1951, ch. 4, § 1, 66 Stat. 3.

²⁰¹ Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919.

²⁰² Act of Aug. 17, 1999, Pub. L. No. 106-54, § 2, 113 Stat. 398, 398-99.

²⁰³ Export Control Act, 2002, c. 28, § 8.

1. Prior Restraint in the American Context

In February 2001, the American Society of Microbiologist's *Journal of Virology* carried the five-page article: "Expression of a Mouse Interleukin-4 by a Recombinant Ectromelia Virus Suppresses Cytolytic Lymphocyte Responses and Overcomes Genetic Resistance to Mousepox."²⁰⁴ The paper reported the results of Australian scientists' findings in 1999 that combining a gene from the rodent's immune system (interleukin-4) with the mousepox virus, and inserting the pathogen into mice, killed the mice. All of them. Even the ones who were naturally immune or who had been vaccinated against mousepox. Aside from a smattering of articles that focused mainly on the implications for recombinant DNA technology and the human smallpox virus, and related discussion on strengthening the Biological Weapons Convention,²⁰⁵ little public discourse in the U.S. or U.K. questioned whether the researchers should have published their findings in the first place.²⁰⁶ Then came 9/11, and the spate of anthrax mailings in the United States in autumn 2001. And everything changed.

In December 2001, rumors began to surface about the White House pressuring American microbiology journals to restrict the publication of articles that might be helpful to terrorists.²⁰⁷ Dr. Ronald Atlas, the President of the American Society for Microbiology (ASM), contacted Dr. Samuel Kaplan, the Chair of the ASM Publishing Board, and reported that many people in the Administration were upset with ASM for publishing the mousepox article.²⁰⁸ Kaplan convened a meeting in December 2001 for the Editors-in-Chief of the ASM's nine primary journals and two review journals, cumulatively responsible for publishing some 70,000 pages of research each year. At that meeting the Publishing Board reaffirmed their decision to print the piece, as it had contained important scientific information. Nevertheless, the board recognized that some information may be harmful in the hands of

²⁰⁴ Ronald J. Jackson et al., *Expression of a Mouse Interleukin-4 by a Recombinant Ectromelia Virus Suppresses Cytolytic Lymphocyte Responses and Overcomes Genetic Resistance to Mousepox*, 75 J. VIROLOGY 1205 (2001); see also Christopher F. Chyba & Alex L. Greninger, *Biotechnology and Bioterrorism: An Unprecedented World*, SURVIVAL, Summer 2004, at 143.

²⁰⁵ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, available at <http://www.opbw.org/convention/documents/btwctext.pdf>.

²⁰⁶ See, e.g., William J. Broad, *Australians Create a Deadly Mouse Virus*, N.Y. TIMES, Jan. 23, 2001, at A6; Tim Radford, *Lab Creates Killer Virus by Accident*, GUARDIAN, Jan. 11, 2001, at 13; Clive Cookson, *International Economy: Scientists Convert Virus Into Killer: Biowarfare Fear*, FIN. TIMES, Jan. 12, 2001, at 15; Thomas Barlow, *The Perpetrators of Biological Warfare*, FIN. TIMES, July 28, 2001, at 2.

²⁰⁷ *Secrets and Lives*, ECONOMIST, Mar. 9, 2002.

²⁰⁸ Telephone Interview with Samuel Kaplan, Chair, Publishing Board, American Society of Microbiology, in Palo Alto, Cal. (Oct. 26, 2004).

terrorists. Although the ASM code of ethics already stated that the organization was “dedicated to the utilization of microbiological sciences for the promotion of human welfare and the accumulation of knowledge,”²⁰⁹ the organization adopted procedural changes that would require reviewers to consider this code in light of U.S. national security.²¹⁰

Two aspects of the research gave the Australian article traction in the ensuing American political debate: fears surrounding the implications of the research for the possible re-introduction of smallpox, and the low-cost, simple procedures used by the scientists conducting the experiment. Many scientists regard smallpox as the most dangerous pathogen known to humans. In the twentieth century alone, approximately 500 million people died from the disease.²¹¹ Almost three decades ago, in a political and medical triumph, scientists managed to eradicate it from the natural world. There are only two locations where, to public knowledge, the disease exists: A Russian laboratory in Siberia, and a Centers for Disease Control and Prevention facility in Atlanta—both of which fall under World Health Organization regulation. The U.S. administered its last vaccines, believed to be potent three to five years, in 1972.²¹² Even if freshly administered, these vaccines, discovered in 1796, would be unlikely to stop a modern, genetically-engineered virus.²¹³ Additionally, the experiment underscored that even simple, standardized procedures, which could be replicated in a small space with limited (less than \$1000) funding, posed a significant threat to U.S. national security.²¹⁴

By March 2002, the argument over whether to introduce restrictions on microbiologists entered hyper drive. The White House Chief of Staff told federal officials not to release any unclassified (but sensitive) information on biological weapons.²¹⁵ The newly-formed Department of Homeland Security began developing an “information-

²⁰⁹ ASM Code of Ethics, <http://www.asm.org/general.asp?bid=14777> (last visited Sept. 4, 2005).

²¹⁰ Between January 2002 and November 2004, this process isolated three articles dealing with anthrax, shigalatoxin, and botulinum toxin. In two cases the editors contacted the authors to determine their intent. Although the journals did not require that the authors alter the text, the researchers changed the titles and headings prior to publication to bring the pieces into line with editorial policy. The author of the third paper, which focused on the aerosolization of botulinum toxin, added *additional* findings to the piece that demonstrated an *increase* in antigen properties, highlighting its non-violent applications. The ASM published all three. Interview with Samuel Kaplan, *supra* note 208.

²¹¹ 147 CONG. REC. S12378 (statement of Sen. Joseph Lieberman regarding S. 1764).

²¹² *Id.*

²¹³ Richard Preston, *The Specter of a New and Deadlier Smallpox*, N.Y. TIMES, Oct. 14, 2002, at A19.

²¹⁴ *Id.*

²¹⁵ Daniel J. Kevles, *Biotech's Big Chill*, TECH. REV., July-Aug. 2003, at 41.

security” policy that targeted foreign nationals. The 2001 USA PATRIOT Act²¹⁶ tightened restrictions on foreign students and provided some thirty-seven million dollars for construction of the Student Exchange Visitor Information System to monitor university students. In May 2002, further measures required institutions of higher education to record information relating to international students—the subjects they studied, their work loads, and whether they had shifted their programs.²¹⁷ In June, further legislation denied certain people (e.g., dishonorably discharged military personnel, drug users, terrorist suspects, and citizens from a list of “state sponsors of terrorism”) access to particular substances. An onslaught of regulations followed. For instance, in December 2002, fifty pages of Federal Register directed that universities, private companies, and government laboratories with certain materials had to submit to unannounced inspections, register their supplies with the federal government, obtain federal security clearances and background checks for personnel, and secure certain substances.²¹⁸ The legislation further required that any genetic engineering experiments had to be cleared by the federal government.²¹⁹

a. Invention Secrecy Act

That new discoveries might be used either for good or ill does not present a novel claim. Concerned that “those inventions which are of most use to the Government during a time of war are also those which would, if known, convey useful information to the enemy,” Congress introduced the 1917 Voluntary Tender Act, which gave the Commissioner of Patents the authority to withhold certification from inventions that might harm U.S. national security, and to turn the invention over to the United States government for its own use.²²⁰ The legislation required the government, if it made use of the discovery, to reimburse the inventor. If the invention fell into disuse, it was more or less a case of “too bad” for the inventor. The statute expired at the end of the war, and for more than two decades, no legislation or secrecy orders issued.

²¹⁶ Pub. L. No. 107-56, 115 Stat. 272 (2001).

²¹⁷ Kevles, *supra* note 215, at 46.

²¹⁸ *Id.* at 42.

²¹⁹ *Id.*

²²⁰ Voluntary Tender Act, ch. 95, 40 Stat. 394 (1917) (repealed by Invention Secrecy Act of 1951, ch. 4, 66 Stat. 3). This statute related to Article I of the United States Constitution, which grants Congress the authority to “promote the progress of Science and the Useful Arts by securing for a limited time to Authors and Inventors the exclusive right to their respective Writing and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

In 1940, prior to WWII, Congress re-introduced an amended version of the legislation.²²¹ It was to last only two years, with stronger sanctions (that of permanent denial of patent) for violation. The following year, Congress again strengthened the legislation with, inter alia, criminal penalties applied to violations.²²² A third set of revisions emerged the following year, extending the statute's life to U.S. participation in the war.²²³ On November 30, 1945 the Commissioner of Patents rescinded 6575 secrecy orders.²²⁴ The Defense Department strenuously objected on grounds of national security.²²⁵ As of December 31, 1945, some 799 secrecy orders remained.²²⁶ Although the statute ceased to have force at the end of the war, the government claimed a continued national emergency, which remained in place until April 28, 1952.²²⁷ During this time, the state issued more secrecy orders, with some 2395 in place by 1951.²²⁸ The following year the Invention Secrecy Act became the peacetime regulator of inventions that created threats—or opportunities—for U.S. national security.

The 1951 Invention Secrecy Act established a prior restraint on government employees and—more pertinent to the current discussion—private inventors, to prevent them from publishing inventions deemed to be “detrimental to the national security.”²²⁹ When an inventor applied for a patent, the state had the opportunity to review the national security implications of the invention. If deemed a threat, the inventor could be forestalled from producing the device or sharing the information with anyone else. The statute provided for a right of appeal to the Secretary of Commerce under whatever rules the Secretary established. The orders lasted one year but could be extended indefinitely once a determination was made that the release of the patent would threaten national security. The statute empowered the government to control efforts by the inventor to file for patents in foreign countries, with penalties ranging from fine and imprisonment to permanent loss of patent.²³⁰ It also carried special emergency provisions to allow for secrecy orders during peacetime. Truman declared a national

²²¹ Act of July 1, 1940, ch. 501, 54 Stat. 710.

²²² Act of Aug. 21, 1941, ch. 393, 55 Stat. 657.

²²³ Act of June 16, 1942, ch. 415, 56 Stat. 370.

²²⁴ H.R. REP. NO. 96-1540, at 47 (1980).

²²⁵ *Patent Disclosure: Hearings on H.R. 4687 Before Subcomm. No. 3, Comm. on the Judiciary of the House of Representatives*, 82d Cong., 35, 36 (1951).

²²⁶ H.R. REP. NO. 96-1540, at 47 (1980).

²²⁷ Proclamation No. 2974, 3 C.F.R. 158 (1949-1953), *reprinted in* 50 U.S.C. app., note prec. 1, *and in* 66 Stat. c. 31 (1952).

²²⁸ H.R. REP. No. 96-1540, at 47 (1980).

²²⁹ Invention Secrecy Act of 1951, ch. 4, § 1, 66 Stat. 3.

²³⁰ *Id.* §§ 2-4, 66 Stat. 4-5.

emergency in 1950;²³¹ this lasted until 1979, which was the first time that the Invention Secrecy Act began operating as a peacetime measure.²³²

Congress's aim in enacting the measure was to help the U.S. develop new national security technology while preventing other countries access.²³³ And the state has not hesitated to use it. From 1959 until 1979 the annual number of secrecy orders for government employees *and* private inventors hovered between 4100 and 5000.²³⁴ The ending of the emergency in 1979 marked the beginning of a federal reporting requirement.²³⁵ However, statistics provided by the Patent and Trademark Office demonstrate not a *decrease*, but an *increase* in the use of such orders.²³⁶ Total secrecy orders nearly doubled in the span of just a decade: from 3302 in 1981, to 6193 in 1991.²³⁷ An outcry erupted when the state provided this information to the Federation of American Scientists in response to a Freedom of Information request.²³⁸

Since the peak in the early 1990s, the annual number of secrecy orders has steadily decreased. A rather high average, though, persists: Between 1991 and 2003 the state issued approximately 5200 per annum. These aggregate numbers do *not* reveal the percentage of new orders that are placed on non-government-funded (private) research. From 1978 to 1979, approximately fifteen percent of the new secrecy orders applied to these so-called John (or Jane) Doe orders. In 1982, this number hovered around fourteen percent.²³⁹ But by 1991, this number had leapt to seventy-five percent (506 out of 774).²⁴⁰ The Pentagon responded to the release of this information and the subsequent outcry by announcing that it would be limiting its use of secrecy orders.²⁴¹ But

²³¹ Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950).

²³² National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (terminating "existing declared emergencies" two years after enactment of the Act).

²³³ *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958); *see also* Exec. Order No. 10,457, 18 Fed. Reg. 3,083 (May 28, 1953); Exec. Order No. 13,286, 6 U.S.C.A. § 111 (Feb. 28, 2003).

²³⁴ H.R. REP. NO. 96-1540, at 1-2 (1980).

²³⁵ National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).

²³⁶ Gary L. Hausken, *The Value of a Secret: Compensation for Imposition of Secrecy Orders Under the Invention Secrecy Act*, 119 MIL. L. REV. 201, 201-02 (1988).

²³⁷ *Id.* at 202 n.10; Secrecy Order Statistics from the USPTO (2004), <http://www.fas.org/sgp/othergov/invention/stats.pdf> (last visited July 24, 2005) [hereinafter Secrecy Order Statistics].

²³⁸ *See, e.g.,* Edmund L. Andrews, *Patents: Cold War Secrecy Still Shrouds Inventions*, N.Y. TIMES, May 23, 1992, at A35.

²³⁹ Hausken, *supra* note 236, at 202 n.10 (statistics for 1979-1986). Secrecy Order Statistics, *supra* note 237 (statistics for 1988-2003).

²⁴⁰ Lee Ann Gilbert, *Patent Secrecy Orders: The Unconstitutionality of Interference in Civilian Cryptography Under Present Procedures*, 22 SANTA CLARA L. REV. 325, 325 n.1 (1982) (citing Sanders, *Data Privacy: What Washington Doesn't Want You to Know*, REASON, Jan. 1981, at 25, 35).

²⁴¹ This may be related in some measure to efforts to modernize the military. Hausken, *supra* note 236, at 202.

between 1997 and 2003 the number of John Doe orders reflects, in general, an upward trend, with an average of forty-six new private patents denied per year for national security reasons.²⁴² Although the statute conferred a right of compensation for the Jane/John Doe inventions taken over by the state, structural difficulties exist: The judiciary considers information regarding the design, construction, and use of federal cryptographic encoding devices, for instance, to be inside the scope of state secrets, making efforts to obtain records to prove violations difficult.²⁴³

The manner in which the state uses the secrecy orders effectively controls both ideas and technology. And history suggests that the government tends to err on the side of caution.²⁴⁴ Certain areas of research consistently fall within their gamut, such as atomic energy and cryptography. But the government has also placed secrecy orders on (the ill-fated) cold fusion, space technology, radar missile systems, and citizens' band-radio voice scramblers.²⁴⁵ Similar efforts to prevent the publication of optical-engineering research and vacuum technology provide examples of the breadth of the national security net.²⁴⁶

²⁴² John/Jane Doe secrecy orders issued by year: 1997 (23), 1998 (99); 1999 (18); 2000 (24); 2001 (44); 2002 (37); 2003 (51). Secrecy Order Statistics, *supra* note 237.

²⁴³ In 1968, for example, Eugene Emerson Clift applied for a patent for a cryptographic device. The Commissioner issued a secrecy order, whereupon the inventor filed for reimbursement for losses incurred. The government withdrew the order and refused reimbursement. In the subsequent suit, the state denied having used the invention, but blocked efforts by the plaintiff to demonstrate state dependence on the cryptographic device. The court upheld executive privilege to maintain secrecy, saying that the state's need for secrecy outweighed the inventor's need for information. *Clift v. United States*, 808 F. Supp. 101, 103 (D. Conn. 1991).

²⁴⁴ In 1978, for instance, Professor George I. Davida of the University of Wisconsin applied for a patent on a cipher device. The unclassified project on computer security had been funded by the National Science Foundation. At the NSA's recommendation, the Commerce Department's Patent Office issued a secrecy order, prohibiting Davida from discussing his work. Wisconsin Chancellor Warner A. Baum, calling the order a threat to academic freedom, pressed the NSF to assist in protesting the order. The same year, NSA issued a gag order against William Raikie, Carl Nicolai, Carl Quale and David Miller to stop them from marketing a "Phasophone"—a device to protect private radio and telephone conversations. *See* Gilbert, *supra* note 240, at 327-28 n.6; Judith Miller, N.Y. TIMES, May 31, 1978, at 11; Evans Witt, N.Y. TIMES, Sept. 26, 1978, at 57; Evans Witt, N.Y. TIMES, Oct. 11, 1978, at 84. The inventors charged that the secrecy order seemed to be "part of a general plan by the N.S.A. to limit the privacy of the American people. They've been bugging people's phones for years, and now someone comes along with a device that makes this a little harder to do, and they oppose this under the guise of national security." David Burnham, *The Silent Power of the NSA*, N.Y. TIMES, Mar. 27, 1983, at 6. The Agency reversed its decision, admitting that an inexpensive device meant to protect conversations against eavesdroppers failed to present a compelling national security threat. Witt, *supra*.

²⁴⁵ *See* Andrews, *supra* note 238 (cold fusion); Sabra Chartrand, *Patents; Speeding the Way for Processing Patents of Antiterrorism Devices, at Times Cloaked in Secrecy*, N.Y. TIMES, Oct. 8, 2001, at C1 (space technology); Teresa Riordan, *Patents*, N.Y. TIMES, Sept. 20, 1993, at D2 (radar missile systems); Evans Witt, N.Y. TIMES, Sept. 2, 1978, at 66 (voice scramblers).

²⁴⁶ *See* *Secrets and Lives*, *supra* note 207. *But see* *Sealectro Corp. v. L.V.C. Indus.*, 271 F. Supp. 835 (E.D.N.Y.1967) (holding that a semiconductor receptacle that eliminates the need for

In addition to formal strictures, the NSA developed various informal techniques to prevent new discoveries with national security implications from reaching the public realm. The National Science Foundation submitted all applications for cryptographic research to the NSA for review. The agency also developed a more general volunteer vetting scheme, where scientists could submit articles pre-publication to ensure that no information damaging to national security would be released. In 1989, the NSA announced that this scheme prevented approximately seven percent of the papers submitted from moving forward.²⁴⁷ The NSA also began to fund various unclassified research projects, “buying up” scientists who might otherwise develop technologies of concern and, in the process, gagging them from speaking publicly on these issues.²⁴⁸ And it issued overt threats of more extensive, formal censorship. For example, in a speech to the American Association for the Advancement of Science, Vice Admiral Bobby R. Inman, former Director of the NSA and Deputy Director of the CIA, openly warned academics that failure to self-censor would lead to strict government controls imposed by the government: “Congress is ready to move to resolve the conflict between academic freedom and national security in favor of the latter.” Failure to cooperate would mean that “far more serious threats to academic freedom would occur.” He threatened, “the situation could well cause the government to overreact.”²⁴⁹ The breadth of innovations Inman included in this category was nothing short of staggering: Computer hardware and software, electronic gear and techniques, lasers, crop projections, and manufacturing procedures. The same day of his speech the Association passed a resolution: “Whereas freedom and national security are best preserved by adherence to the principles of openness that are a fundamental tenet of both American society and the scientific process, be it resolved that the A.A.A.S. opposes governmental restrictions on the dissemination, exchange or availability of unclassified knowledge.”²⁵⁰ This statement echoed other calls from prominent scientists, such as Edward Teller, warning against efforts to restrict scientific research.²⁵¹

solder does *not* fall within a clear national security interest).

²⁴⁷ See John Markoff, *Paper on Codes is Sent Despite U.S. Objections*, N.Y. TIMES, Aug. 9, 1989, at A16.

²⁴⁸ One of the first two recipients of NSA funding, Professor Martin E. Hellman of Stanford University said, “One of the fears is that they are trying to buy people. If they support you, then they own you, and you really are going against them if they ask you not to publish something and you do.” Burnham, *supra* note 244.

²⁴⁹ Christina Ramirez, *The Balance of Interests Between National Security Controls and First Amendment Interests in Academic Freedom*, 13 J. C. & U.L. 179, 182 (1986).

²⁵⁰ Burnham, *supra* note 244, at 6-7.

²⁵¹ *Id.*

b. Atomic Energy Act

The 1954 Atomic Energy Act²⁵² classified nuclear information from the moment of its birth. Neither the state nor private actors could pass data to anyone lacking appropriate clearances. Although as a prior restraint the legislation carried a “heavy presumption” against its constitutional validity,²⁵³ the potential offensive use of a nuclear device against the United States and its citizens appears to satisfy this burden.²⁵³ The legislation created a “Restricted Data” category that included “all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy.”²⁵⁴ It granted the Atomic Energy Commission the authority to declassify information if it could be demonstrated that the information could be released “without undue risk to the common defense and security.”²⁵⁵ Scientists protested that secrecy would actually work against national security by retarding research efforts.²⁵⁶ Private industry made almost no protest.²⁵⁷

In addition to the Restricted Data designation (preventing private research on atomic energy or weapons), at least twice, the U.S. government used informal pressure to censor publications on the subject. The first occurred in 1950, when Dr. Hans Bethe wrote an article in *Scientific American*. The Atomic Energy Commission, which had obtained a prepublication copy of the article, requested that Bethe delete sensitive portions. The Commission then demanded that the original article and printed plates be destroyed.²⁵⁸

The second case arose in 1979, when the *Progressive* commissioned Howard Morland, a free-lance writer, to author a series on nuclear weapons.²⁵⁹ The first piece presented no difficulties. The second, however, entitled, *The H-Bomb Secret; How We Got It, Why*

²⁵² Ch. 1073, 68 Stat. 919 (1954).

²⁵³ *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *see also* *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

²⁵⁴ Atomic Energy Act of 1954, ch. 1073, § 11(r), 68 Stat. 919, 924.

²⁵⁵ *Id.* § 142(a), 68 Stat. 941; *see also* Harold Green, *The Atomic Energy Information Access Permit Program*, 25 GEO. WASH. L. REV. 548, 549 (1957).

²⁵⁶ *See, e.g.*, Mary M. Cheh, *The Progressive Case and the Atomic Energy Act: Walking to the Dangers of Government Information Controls*, 48 GEO. WASH. L. REV. 163, 168 n.26 (1980) (citing *Hearings on H.R. 4280 Before the House Comm. on Military Affairs*, 79th Cong., 80-82, 97-100, 118 (1945)).

²⁵⁷ *Id.* at 179.

²⁵⁸ Wikipedia.com, Prior Restraint, http://en.wikipedia.org/wiki/Prior_restraint (last visited Sept. 20, 2005).

²⁵⁹ *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

We're Telling It, which included drawings of a nuclear weapon, raised concerns at the Department of Energy. The Department offered to re-write approximately twenty percent of the article, but the *Progressive* refused. The state filed for, and obtained, an injunction.²⁶⁰ The *Progressive* enjoyed a circulation of approximately 40,000 copies per month and had earned for itself some respect as a forum for the discussion of contemporary political affairs.²⁶¹ Nevertheless, the judge suggested that citizens could discuss proliferation and disarmament issues without intimate knowledge of how the H-bomb worked (which was the subject of the article) or how to build one (which was not the subject of the piece, although it was frequently attributed to the article).²⁶² The court explained, "What is involved here is information dealing with the most destructive weapon in the history of mankind, information of sufficient destructive potential to nullify the right to free speech and to endanger the right to life itself."²⁶³ Although countries without the atomic weapon eventually might develop it, the court did not want to play a role in accelerating the process.

c. Information Relating to Explosives and
Weapons of Mass Destruction

A third effort to restrict terrorist-relevant knowledge-based speech relates more generally to transmitting information about how to build conventional and WMD explosive devices. The relevant federal statute, passed in 1996, dates back to the April 1995 Oklahoma City bombing. Just under a month after the attack, Deputy Assistant Attorney General Robert Litt testified before the Senate Judiciary Committee's Subcommittee on Terrorism, Technology and Government Information.²⁶⁴ He raised concerns about the availability of bomb making material on the Internet. Three weeks later Senator Diane Feinstein proposed an amendment to the bill that would become the 1996 Antiterrorism and Effective Death Penalty Act.²⁶⁵ It would have made it unlawful

²⁶⁰ Cheh, *supra* note 256, at 176-77.

²⁶¹ *Id.* at 165 n.10.

²⁶² *Progressive*, 467 F. Supp. at 994.

²⁶³ *Id.* at 995.

²⁶⁴ *Mayhem Manuals and the Internet: Hearings Before the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary*, 104th Cong., (1995) (statement of Robert S. Litt, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

²⁶⁵ S. 735. 104th Cong. § 901(a); 141 CONG. REC. S7682 (daily ed. June 5, 1995) (statement of Sen. Feinstein).

for any person to teach or demonstrate the making of explosive materials, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosive materials, if the person intends or knows that such explosive materials or information will likely be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a criminal purpose affecting interstate commerce.²⁶⁶

Two days later, the Senate unanimously passed a modified version. However, the conference committee subsequently replaced it with a new section that required the DOJ to conduct a study and report on the availability, and constitutionality, of restricting the dissemination of bomb-making instructional materials.²⁶⁷ The new section requested information on all print, electronic, and film material, the extent to which domestic and international terrorist incidents used such data, the likelihood that such information might be used in the future, the relevant Federal laws related to such material, the need and utility for additional laws to address this area, and an assessment of the degree to which the First Amendment protects the holding and distribution of this information.²⁶⁸

On April 29, 1997, Attorney General Janet Reno submitted the report.²⁶⁹ The DOJ noted the ease with which such information could be gleaned from “reference books, the so-called underground press, and the Internet.”²⁷⁰ It recognized that “[b]ombmaking information is literally at the fingertips of anyone with access to a home computer equipped with a modem.”²⁷¹ One web site alone yielded over 110 different bombmaking texts (such as “Nifty Things that Go Boom”—believed to be a computer adaptation of the *The Terrorist’s Handbook*).²⁷² Not surprisingly, circumstantial evidence suggested that a number of people found guilty of violent acts had access to similar material. The men indicted for the first bombing of the World Trade Center in New York, for instance, possessed explosives materials copied from American publications.²⁷³ The arrest of Ray and Cecilia

²⁶⁶ S. 735. 104th Cong. § 901(a).

²⁶⁷ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 709, 110 Stat. 1214, 1297.

²⁶⁸ *Id.* § 709(a); see also 142 CONG. REC. S7271-74 (daily ed. June 28, 1996) (Amend. No. 4428 and statement of Sen Feinstein); 142 CONG. REC. H9303 (daily ed. July 30, 1996).

²⁶⁹ U.S. DEP’T OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION (1997), <http://cryptome.org/abi.htm> [hereinafter BOMBMAKING REPORT].

²⁷⁰ BOMBMAKING REPORT, *supra* note 269, at 1-2.

²⁷¹ *Id.* at 7.

²⁷² *Id.*

²⁷³ *Id.* at 10.

Lampley in 1995 interrupted their plan to use homemade C-4 (a plastic explosive used by the military) to attack either the Anti-Defamation League or the Southern Poverty Law Center. Agents found the *Anarchist's Cookbook*, along with Ragnar's *Big Book of Explosives* and *Homemade Weapons* at their residence.²⁷⁴ The Bureau of Alcohol, Tobacco, and Firearms found that thirty bomb investigations between 1985 and June 1986 connected Internet bombmaking literature to the perpetrators.²⁷⁵ The Committee, however, could only find one case where chemical or biological weapons involved access to open source literature: The 1993 arrest of Thomas Lavy, who tried to cross the Canadian border with 130 grams of ricin, yielded *The Poisoner's Handbook*, *Silent Death*, and *Get Even: the Complete Book of Dirty Tricks*.²⁷⁶ The report acknowledged that "no devices producing a nuclear yield have been constructed based on published bombmaking information."²⁷⁷ Less convincingly, the report suggested that of the 117 nuclear terrorism threats since 1970, approximately half included reference to "fictional nuclear 'thrillers'" or contained "descriptive phrases gleaned from information in the public domain."²⁷⁸ Law enforcement expected this information to play a significant role in future acts of terrorism.

Federal law already prevented the use and dissemination of bombmaking information for criminal purposes. Conspiracy makes it illegal to plot to use explosives to commit "any felony which may be prosecuted in a court of the United States"—which includes offences relating to the importation, manufacture, distribution, and storage of explosive materials.²⁷⁹ In addition, "A person may not, as part of a conspiracy to commit an independently defined criminal offense, transmit information to a coconspirator concerning how to make or use explosive devices."²⁸⁰ The individual accused need not *actually* teach another how to commit the crime; rather, the disseminator must (a) *know* what the other person intends to do with the information and (b) *agree* with his coconspirators that the offense will occur.²⁸¹ Solicitation measures also reach speech: Federal law makes it unlawful to solicit, command, induce, or otherwise endeavor to persuade another individual to commit a felony involving physical force.²⁸² The DOJ recognized that many cases brought under this section could be restricted by

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 12.

²⁷⁶ *Id.* at 11.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ 18 U.S.C. § 844(h), (m), (n) (2004).

²⁸⁰ BOMBMaking REPORT, *supra* note 269, at 15.

²⁸¹ *Id.*

²⁸² 18 U.S.C. § 373(a) (2000).

Brandenburg, suggesting that persuasion would have to be accompanied either by threat or inducement.²⁸³

In addition to conspiracy and solicitation, two “aiding and abetting” statutes also prove relevant. One general federal prohibition states that “those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing the crime.”²⁸⁴ Although this includes speech, the DOJ suggested that it might not be that effective as a way to prosecute the dissemination of explosive information: General publication or simply reckless behavior would be insufficient—the individual must intentionally or knowingly participate and share in the criminal intent—and the underlying offence must occur. In contrast, the 1996 AEDPA makes it unlawful to provide “material support or resources” to someone, “knowing or intending that they are to be used in preparation for, or in carrying out,” a specified list of terrorist offences.²⁸⁵ This provision exceeds the federal one in breadth: Neither must the underlying offense occur, nor must specific intent to aid in the underlying offense be demonstrated.²⁸⁶ The DOJ raised questions, however, as to whether the courts would consider “training” to be distinct from “material support or resources”; as well as whether a general manual on explosives would qualify as a “physical asset.”²⁸⁷

Under *Brandenburg*, the Court would be unlikely to consider a prohibition on the general advocacy of illegal activity constitutional.²⁸⁸ Similarly, the federal statutes addressed above stop short of preventing the general dissemination of information *per se*. And case law consistently protects such speech: In August 1981, for example, *Hustler Magazine* published *Orgasm of Death*, which provided a detailed description of autoerotic asphyxia. The Fifth Circuit, indemnifying the magazine for liability from the subsequent death of a fourteen-year-old boy, stated, “The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.”²⁸⁹ This includes instances of criminal violence, such as Michael Barrett’s fatal stabbing

²⁸³ BOMBMaking REPORT, *supra* note 269, at 16-17, 29-30.

²⁸⁴ Cent. Bank of Denver N.A. v. First Interstate Bank of Denver. N.A., 511 U.S. 164, 181 (1994) (citing *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)).

²⁸⁵ Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255 (1996).

²⁸⁶ BOMBMaking REPORT, *supra* note 269, at 20.

²⁸⁷ *Id.* at 21.

²⁸⁸ *See id.* at 30.

²⁸⁹ *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987).

of 16-year old Martin Yakubowicz after seeing the film *The Warriors*,²⁹⁰ or James Perry's use of the information in the novel, *Hit Man*, to murder three people.²⁹¹

Nevertheless, the Supreme Court has *never* held that lawfully-obtained, truthful information is *always* constitutionally protected:²⁹² *such speech may be overcome* by a "state interest of the highest order."²⁹³ Justice Rehnquist, in a concurrence, commented that, "[w]hile we have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented."²⁹⁴ According to the DOJ, "keeping information on how to make explosives out of the hand of persons who want—or would be likely—to use that information in furtherance of violent crime" *does* constitute "a state interest of the highest order."²⁹⁵ Thus, where one finds publication or expression "brigaded with action,"²⁹⁶ the Constitution presents no impediment to its restriction. In *Brandenburg*, the Court *did* explicitly distinguish between "mere abstract teaching" and "preparing a group for violent action."²⁹⁷ The Court explained, "A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control."²⁹⁸ Indeed, in *Dennis*, Justice Douglas specifically said that "the teaching of methods of terror and other seditious conduct *should* be beyond the pale."²⁹⁹

The DOJ cautiously endorsed new legislation prohibiting speech linked to unlawful activity.³⁰⁰ The Committee recognized that "the more difficult question is whether criminal culpability can attach to general publication of explosives information, when the writer, publisher or seller of the information has the purpose of generally assisting unknown and unidentified readers in the commission of crimes."³⁰¹ This situation differs from one in which an individual

²⁹⁰ See *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E. 2d 1067 (Mass. 1989).

²⁹¹ See *Rice v. Paladin Enter.*, 128 F.3d 233 (4th Cir. 1997).

²⁹² BOMBMAKING REPORT, *supra* note 269, at 30 (citing *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989)).

²⁹³ *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979); see also BOMBMAKING REPORT, *supra* note 269, at 30-31 (quoting *United States v. Aguilar*, 515 U.S. 593, 605 (1995) and citing *Butterworth v. Smith*, 494 U.S. 624, 632 (1990)).

²⁹⁴ *Daily Mail*, 443 U.S. at 106 (Rehnquist, J., concurring).

²⁹⁵ BOMBMAKING REPORT, *supra* note 269, at 31.

²⁹⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

²⁹⁷ *Id.* at 447-48.

²⁹⁸ *Id.* at 448; see also *Scales v. United States*, 367 U.S. 203 (1961).

²⁹⁹ *Dennis v. United States*, 341 U.S. 494, 581 (Douglas, J., dissenting) (emphasis added).

³⁰⁰ BOMBMAKING REPORT, *supra* note 269, at 2.

³⁰¹ *Id.* at 41.

prepares a *particular* group for violent action. In this instance, no “joint participation” in the crime exists.³⁰² The Court has not yet squarely addressed this issue—however, it has suggested that, in the context of a serious national security threat, motive matters: “[O]therwise privileged publication of information can lose its First Amendment protection when the publisher has an impermissible motive.”³⁰³ The DOJ then took the rather unusual step of suggesting that the District Court erred in *Rice v. Paladin Enterprises*³⁰⁴ in ignoring the intent of the publisher: “At the very least, publication with such an improper intent should not be constitutionally protected where it is foreseeable that the publication will be used for criminal purposes; and the *Brandenburg* requirement that the facilitated crime be ‘imminent’ should be of little, if any, relevance.”³⁰⁵ Thus, where the information lacked any other conceivable purpose, or where manuals actually asserted as their purpose the facilitation of crime, the state ought to be able to use this “as probative evidence that the disseminator of accompanying information on the techniques of bombmaking intended by such dissemination to facilitate criminal conduct.”³⁰⁶ The “safest strategy” then, to avoid running afoul of Constitutional requirements, would be to tie the prohibition of disseminating bombmaking information to knowledge of the person’s intent to use the information illegally. Thus, the defendant would not have to actually know that some future event would occur. He or she would only have to know the other person’s current intent. Therefore, the state would not have to demonstrate that the defendant was “practically certain” of the intent to engage in particular acts (the standard for future events), but only that there was a “high probability” the person currently intended to use the data for an illegal purpose.³⁰⁷

In 1999, Senator Feinstein attached her amendment to a (completely unrelated) private relief measure.³⁰⁸ The main portion of the bill focused on phosphate prospecting and compensation due to the Menominee Indian Tribe.³⁰⁹ The Senate Judiciary Committee did not prepare any report on Feinstein’s amendment; nor did it receive any attention in its presentation either to the Senate or the House. Instead, the Senate passed it by unanimous vote. This measure made it an offence “to teach or demonstrate the making or use of an explosive, a

³⁰² *Id.*

³⁰³ *Id.* at 42 (citing *Haig v. Agee*, 453 U.S. 280 (1981)).

³⁰⁴ 940 F. Supp. 836 (D. Md. 1996).

³⁰⁵ BOMBMaking REPORT, *supra* note 269, at 43 (emphasis added).

³⁰⁶ *Id.* at 43-44.

³⁰⁷ *Id.* at 49.

³⁰⁸ S.606, 106th Cong. (1999).

³⁰⁹ *Id.*

destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction” either knowing or intending “that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence.”³¹⁰

The net effect of the statute has been to create a double standard, where individuals of certain political persuasions are allowed to speak in a certain manner, while those of different political persuasions are not. For instance, on August 4, 2003, District Court Judge Stephen Wilson sentenced Sherman Martin Austin, the eighteen-year-old owner of Raisethest.com, for violation of this statute.³¹¹ Austin’s anarchist website had hosted and provided a link to *Break the Bank-DC S30 2001*,³¹² which instructed activists on how to prepare for direct action against the World Bank and International Monetary Fund in Washington, D.C. The manual instructed demonstrators to dress in black (the Black Bloc), to “unarrest” other protesters (by linking arms and pulling demonstrators away from the police), to change clothes when leaving the demonstration, how to shield against pepper spray and build barriers against riot police phalanxes, and to build sling-shots.³¹³ One chapter focused on homemade explosives, such as Molotov cocktails (“[t]he most popular choice in street fighting weaponry”³¹⁴), smoke bombs (to shield against the media or police filming), and fuel-fertilizer explosives (“[t]hese will create an overwhelmingly large explosion and should be practiced in large faraway places like the desert before using”³¹⁵). The instructions accompanying the different explosive devices lacked a certain sophistication. For instance, under Molotov cocktail, the author wrote,

[t]he most high explosive and lethal mixture is ammonium-nitrate-based fertilizer mixed with gasoline. Just stuff the bottle with this mixture and light the fucker. This method should be made with a plastic bottle so that it will not break on impact. When you light it, the bottle will quickly explode so be quick. Using a fuse is a good idea.³¹⁶

³¹⁰ Act of Aug. 17, 1999, Pub. L. No. 106-54, § 2, 113 Stat. 398, 398-99.

³¹¹ Electronic Frontier Found., *Activist Gets Year in Jail for Hosting, Link to Bomb Info*, http://www.eff.org/br/20030807_eff_pr.php (Aug. 7, 2003); *see also* Docket Entries for *United States v. Austin*, <http://cryptome.org/usa-v-sma-dkt2.htm> (last visited Sept. 29, 2005).

³¹² *Hosting of Break the Bank-DC S30 2001 Website*, <http://forbiddenspeech.org/ReclaimGuide/reclaim.shtml> (last visited Sept. 23, 2005).

³¹³ *Id.*

³¹⁴ *Defensive Weapons*, <http://forbiddenspeech.org/ReclaimGuide/weapons.shtml> (last visited Sept. 23, 2005).

³¹⁵ *Id.*

³¹⁶ *Molotov Cocktails*, <http://forbiddenspeech.org/ReclaimGuide/molotov.shtml> (last visited July 16, 2005).

Such sites, however, appear amateur when compared to the information on everything from pipe bombs and Molotov cocktails to high-end nuclear weapons currently available on mainstream Web sites such as CNN.com, Wikipedia.com, and HowStuffWorks.com.³¹⁷ Sites like Amazon.com readily sell books like *Silent Death* (reportedly used by Aum Shinrikyo in its sarin attacks on the Tokyo subway), *Home Workshop Explosives*, and the *Improvised Munitions Black Book*.³¹⁸ The real issue appears to be that Austin attached this to an acknowledged anarchist website. And so (Republican) David S. Touretzky, a Professor at Carnegie Mellon University, freely posts the same material that led to Sherman's arrest—while Sherman himself serves time in jail.³¹⁹

2. Strictures in the United Kingdom

Outside of formal censorship during both World Wars, the United Kingdom has a history of using informal mechanisms to limit the release of information that may harm national security. The attacks of 9/11 and the anthrax mailings in the United States, however, invigorated the debate on the type of strictures that ought to be adopted and led to the introduction of formal measures. These restrictions fall under the national security exception in the ECHR.

a. Informal Restrictions

In 1912, a series of informal meetings between press associations, the Secretary of the Admiralty, and the War Office led to the creation of the “D Notice system.”³²⁰ It initially focused on how to prevent the publication of state secrets, drawing on a D-notice committee to act as a filter prior to the release of government information. Concern quickly arose within military ranks, however, about data *outside* government control. The press balked at the idea of “consultation” in this realm, saying it would be used to stifle criticism. World War I, though, soon

³¹⁷ See e.g., *Pipe Bombs: Low-tech, Lethal Tools of Terror*, CNN, June 27, 1996, <http://www.cnn.com/US/9607/27/pipe.bomb.explain/index.html>; Wikipedia.com, Molotov Cocktail, http://en.wikipedia.org/wiki/Molotov_cocktail (last visited July 16, 2005); How Stuff Works, How Nuclear Bombs Work, <http://science.howstuffworks.com/nuclear-bomb.htm> (last visited July 16, 2005).

³¹⁸ See David S. Touretzky, What the FBI Doesn't Want You to See at RaisetheFist.com, <http://www-2.cs.cmu.edu/~dst/raisethefist/> (last visited Sept. 29, 2005).

³¹⁹ *Id.*

³²⁰ HOUSE OF COMMONS, DEFENCE COMMITTEE, THIRD REPORT, 1979-80, H.C. 773, at v.

overtook the discussions and formal, strict censorship of all media occurred. Following the war, Britain returned to using the D-Notice Committee. During World War II, the government again assumed control, only to return, following hostilities, to the voluntary “consultation” system. The highly-respected Chief Press Censor, Admiral Thompson, ran the program until the early 1960s. In 1962, the Radcliffe Committee on Security Procedures in the Public Service reviewed the scheme and issued a resounding endorsement, stating that it had “no hesitation in recommending the continuance of the system.”³²¹ Following Thompson’s retirement, though, the program degenerated.³²² The state re-drafted the guidelines and established twelve standing D-Notices. These suggested that publications related to defense plans; information about nuclear and conventional weapons systems; and radio and radar transmissions to civil defense, British intelligence services, and the (mysteriously named) “[w]hereabouts of Mr. and Mrs. Vladimir Petrov,” be first submitted to the D-Notice Committee to ensure that they not breach national security.³²³

In 1993, the government renamed the system “DA-Notices,” and by May 2000, consolidated the standing notices to the present five: Military Operations, Plans, and Capabilities; Nuclear and Non-Nuclear Weapons and Equipment; Ciphers and Secure Communications; Sensitive Installations and Home Addresses; and United Kingdom Security and Intelligence Services and Special Forces.³²⁴ With the exception of Ciphers and Secure communications, the remaining Notices specifically reference the threat posed by terrorism to the U.K.’s national security. The purpose of the system is, “to provide to

³²¹ COMMITTEE ON SECURITY PROCEDURES IN THE PUBLIC SERVICE (RADCLIFFE COMMITTEE), REPORT, 1962, Cmnd. 1681.

³²² In 1967, an article in the *Daily Express* alleged that the government opened cables and overseas telegrams. The state appointed a Committee of Privy Counselors to determine whether Chapman Pincher, the journalist who authored the piece, violated the D Notice system. Although the Committee determined that no breach had occurred, the Government countered with a White Paper saying that the article jeopardized national security. COMMITTEE OF PRIVY COUNSELORS, ‘D’ NOTICE MATTERS, 1967, Cmnd. 3309; ‘D’ NOTICE SYSTEM, 1967, Cmnd. 3312. A subsequent inquiry led to the resignation of the D Notice Committee Secretary, Colonel Lohan. Then, in 1971, a highly visible prosecution for a breach of section 2 of the 1911 Official Secrets Act again raised questions about the effectiveness of D Notices. Technically, however, only information relating to British troops or strategic decisions counted—not (even privileged) information about the state of affairs in other states.

³²³ DEFENCE COMMITTEE, THE D NOTICE SYSTEM, 1979-80, H.C. 773 (third report) (together with the Minutes of Proceedings of the Committee relating to the report; part of the Minutes of Evidence taken before the Committee on June 11 and 17 and July 8, 15, and 22; and Appendices, HC 773, August 6, 1980, at v) [hereinafter Defence Committee Report]. For the text of the General Introduction to the D Notice System, see S.H. BAILEY ET AL., CIVIL LIBERTIES CASES AND MATERIALS 431-32 (3d ed. 1991).

³²⁴ See DEFENCE, PRESS AND BROADCASTING ADVISORY COMMITTEE, INTRODUCTION AND STANDING DA-NOTICES, <http://www.dnotice.org.uk/notices.htm#notices> (last visited Sept. 29, 2005). These Notices can be amended by the Committee, which meets on a semiannual basis.

national and provincial newspaper editors, to periodicals editors, to radio and television organisations and to relevant book publishers, general guidance on those areas of national security which the Government considers it has a duty to protect.”³²⁵ It does not legally bind the participants. Neither does the system necessarily reflect the government’s view as to whether certain information should be made publicly available. Instead, it reflects the views of the advisory body. The Committee labels the Notices issued to formal inquiries as “private and confidential,” but their contents do *not* fall under the formal Government security classification. Moreover, it is *not* an offence under the Official Secrets Act (OSA)³²⁶—nor is it considered a breach of the D Notice system—to publish information found to breach one of the categories.

Disagreements between the government and the D Notice Committee occur. Two prominent cases prove illustrative. The first involved a BBC radio series, ironically named *My Country Right or Wrong*, which focused on issues raised by the infamous *Spycatcher* case.³²⁷ Although cleared by the D Notice Committee, the Attorney General forbade the BBC from showing the series. He announced in Parliament that the issue at stake was “the duty of the Government to protect the confidentiality that is owed to them by members and former members of MI5.”³²⁸ The state filed for an injunction based on the civil duty of breach of confidence.³²⁹

In the second case, *Lord Advocate v. Scotsman Publications Ltd. and Others*, Anthony Cavendish, a former MI6 official, sent 300 copies of his tell-all book to his closest friends and relatives for Christmas.³³⁰ For some reason, though, the government did not respond to Cavendish; instead, it obtained injunctions against the *Observer* and the *Sunday Times*—and later the *Scotsman*—to prevent the information from being published again.³³¹ Although the Secretary of the scheme had approved of the printed matter, the government claimed that it was not the content, but disclosure itself that threatened national security.³³²

Even with these differences of opinion, one fascinating aspect of the system revolves on the fact that, for the better part of a century, it worked. Some commentators have suggested that this has much to do

³²⁵ See DEFENCE, PRESS AND BROADCASTING ADVISORY COMMITTEE, HOW THE SYSTEM WORKS, <http://www.dnotice.org.uk/system.htm> (last visited Sept. 29, 2005).

³²⁶ Official Secrets Act, 1989, c. 6.

³²⁷ See *infra* Part II.B.I.

³²⁸ D. Fairley, *D Notices, Official Secrets and the Law*, 10 OXFORD J. LEGAL STUD. 430, 435 (1990).

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.* at 436.

³³² *Id.*

with the great regard shown past Secretaries, as well as editors' wishes to do their part in protecting national security. To some degree, such compliance may also reflect real concern about prosecution under the OSA.³³³ More recently, though, in light of increasing efforts by the state to pursue transgressions through civil penalties, the government has lost some of the trust the system previously enjoyed.³³⁴ The net effect has been for publications to rely more heavily on legal advice than on the informal consultative committee.³³⁵

Other informal controls on knowledge-based speech exist. In 1994, for example, the British government created a Voluntary Vetting Scheme to keep technologies related to weapons of mass destruction within the domestic sphere.³³⁶ The scheme allows universities to "vet" potential students from overseas, by submitting their applications to the government for clearance. The government currently has ten "countries of concern" and twenty-one "academic disciplines of concern."³³⁷ Between April 1, 2002 and March 27, 2003, four universities in the United Kingdom referred more than 500 names to the state.³³⁸ However, not all universities take part—in total, some seventy percent of all institutes of higher education participate in the program, which excludes the National Health Service and private commercial laboratories.³³⁹ The Foreign Affairs Committee recently suggested that that this program is ill-suited to the terrorist threat and recommended that additional steps be taken to increase government control over, particularly, biotechnology.³⁴⁰

The attacks of September 11, 2001, and the subsequent anthrax mailings, spurred further efforts to address knowledge-based information. In November 2002, in an unusual move, Lord May of Oxford, the President of the Royal Society, and Bruce Alberts, the President of the United States Academy of Sciences, issued a joint editorial in *Science*. Timed to coincide with the Fifth Review Conference of the Biological and Toxin Weapons Convention, the editorial stated:

Every researcher, whether in academia, in government research facilities, or in industry, needs to be aware of the potential unintended

³³³ See *infra* Part II.B.2.

³³⁴ Fairley, *supra* note 328, at 439.

³³⁵ *Id.* at 438.

³³⁶ SCIENCE AND TECHNOLOGY COMMITTEE, THE SCIENTIFIC RESPONSE TO TERRORISM, 2002-3, H.C. 415-I, at 62, available at <http://www.publications.parliament.uk/pa/cm200203/cmsselect/cmsctech/415/415.pdf>.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Clive Walker, *Biological Attack, Terrorism and the Law*, 16 TERRORISM & POL. VIOLENCE 175, 187 (2005).

³⁴⁰ FOREIGN AFFAIRS COMMITTEE, THE BIOLOGICAL WEAPONS GREEN PAPER, 2002-3, H.C. 150, para. 31.

consequences of their own and their colleagues' research. . . . [R]esearchers in the biological sciences . . . need to take responsibility for helping to prevent the potential misuses of their work, while being careful to preserve the vitality of their disciplines as required to contribute to human welfare.³⁴¹

This statement reflected increasing focus on this issue within the Royal Society, with four times the number of reports on the topic in the four years following September 11, 2001 than in the previous five years.³⁴²

In many ways this joint statement can be seen as a call to head off formal state restrictions. On December 19, 2002, for instance, the House of Commons's Science and Technology Committee announced the formation of an inquiry into Britain's scientific response to terrorism. The terms of reference included: "[W]hat issues needed to be faced by the research community to ensure that their activities did not unwittingly assist terrorists' activities."³⁴³ As in the United States, scientists emphasize responsibility but oppose formal restrictions. Scientific associations, as well as Parliamentary committees, have endorsed the adoption of a code of ethics. Britain's Society for General Microbiology (SGM), the American Society for Microbiology's counterpart, previously had no policy regarding the publication of sensitive biological research. A chance meeting in London between Dr. Ronald Fraser, SGM's Executive Secretary, and the editor of the *New Scientist*, however, led to an SGM Council discussion on February 21, 2003 regarding the development of a policy and its adoption on May 2, 2003.³⁴⁴ This policy, strongly oriented toward the free publication of scientific research, notes: "The benefits [of scientific information] greatly outweigh the potential dangers."³⁴⁵ It continues, the "SGM Council is against any blanket or external censorship of scientific publication in subject areas such as microbiology, as this would be a barrier to scientific progress. Furthermore, the potential benefits or dangers from a new discovery are not always possible to predict."³⁴⁶ SGM recognized that in "rare cases," "particular concerns" might arise; however, the decision should be left to "authors, editors, referees, and publishers," with the final decision on whether or not to publish left with the editor-in-chief of the journal in question.³⁴⁷ This policy, which

³⁴¹ Bruce Alberts & Robert M. May, *Scientist Support for Biological Weapons Controls*, 298 SCIENCE 1135 (2002).

³⁴² <http://www.royalsoc.ac.uk/templates/statements/index.cfm> (last visited Dec. 1, 2004).

³⁴³ THE SCIENTIFIC RESPONSE TO TERRORISM, *supra* note 336, at 5.

³⁴⁴ Telephone Interview with Dr. Ronald Fraser, Executive Secretary, Society for General Microbiology, in Palo Alto, Cal. (Oct. 29, 2004).

³⁴⁵ Society for General Microbiology, Policy on Scientific Publication, Security and Censorship, available at <http://www.sgm.ac.uk/pubs/policy.cfm> (last visited Sept. 11, 2005).

³⁴⁶ *Id.*

³⁴⁷ *Id.*

applies through SGM to the four main British academic microbiology journals and one quarterly magazine, attracted virtually no comment.³⁴⁸

This lack of attention does not surprise, particularly in light of extensive, new controls passed by Westminster. Parts VI and VII of the Anti-terrorism, Crime and Security Act 2001 made it illegal to assist in the overseas development of chemical, nuclear, biological or radiological weapons: “A person who aids, abets, counsels or procures, or incites, a person who is not a United Kingdom person to do a relevant act outside the United Kingdom is guilty of an offence.”³⁴⁹ The Act also required any facility dealing with the pathogens listed in Schedule 5 to notify the government and to submit to random inspections. It required the directors of such premises to provide detailed information to the police about individuals working in the facilities, and it empowered the Home Secretary to make a list of individuals who would not be allowed to work with certain substances.³⁵⁰ Although early indications suggest that law enforcement is treading lightly, academics have articulated many concerns about the use of these powers.³⁵¹

b. Formal Strictures: The Export Control Act

One significant formal stricture accompanies these informal limits on knowledge-based speech. A damning report issued in 1996 by Sir Richard Scott sparked concern over the export of British weaponry.³⁵² It took 9/11, though, to stimulate a formal government response. The resulting Export Control Act of 2002³⁵³ carried with it considerable powers to prevent the transfer of scientific information. The initial language in the bill—that the “Secretary of State may by order make provision for . . . the imposition of transfer controls in relation to technology of any description”—ignited concern about the implications of this provision for international collaboration and publication.³⁵⁴ The final version created a check, providing that the Secretary of State

shall not make a control order which has the effect of prohibiting or regulating any of the following activities—the effect of interfering with—(a) the communication of information in the ordinary course of scientific research, (b) the making of information generally

³⁴⁸ Interview with Dr. Ronald Fraser, *supra* note 344.

³⁴⁹ Anti-terrorism, Crime and Security Act, 2001, c. 24, § 50 (Eng.).

³⁵⁰ *Id.* §§ 57-61.

³⁵¹ THE SCIENTIFIC RESPONSE TO TERRORISM, *supra* note 336, at 58-61.

³⁵² REPORT OF THE ENQUIRY INTO THE EXPORT OF DEFENCE EQUIPMENT AND DUAL-USE GOODS TO IRAQ AND RELATED PROSECUTIONS (THE SCOTT REPORT), 1996, H.C. 115.

³⁵³ Export Control Act, 2002, c. 28, § 8 (Eng.).

³⁵⁴ Export Control Bill, 2002, H.L. Bill [75]; *see also* 632 PARL. DEB., H.L. (5th ser.) (2002) 16-19.

available to the public, or (c) the communication of information that is generally available to the public, unless the interference by the order in the freedom to carry on the activity is necessary (and no more than is necessary).³⁵⁵

The legislation came into force May 1, 2004. The Labour Government noted that while, in *principle* the Secretary of State may not regulate basic scientific information, where deemed necessary, full authority to do so exists.³⁵⁶ What makes this statute particularly threatening to British scientists is that *it regulates the transfer of both ideas and objects inside domestic bounds*.³⁵⁷ The jury is as yet out on its effect.

In summary, where the state acts as sovereign, within broad limits, the U.S. and U.K. retain the ability to stifle persuasive speech. Even fewer restrictions attend state authority to limit knowledge-based communications. Terrorist challenge, particularly in light of the proliferation of CBNRW, may well lead to increasing strictures in these areas. I turn now to consider the protections afforded to expression where the state has a special relationship to the speech in question.

II. STATE IN PRIVILEGED POSITION IN RELATION TO SPEECH OF TERRORIST VALUE

The U.S. and U.K. exercise greater authority to control speech or expression when they stand in a privileged position in relation to the individual speaking or information released than when they simply serve as the sovereign of the country within which the expression occurs. This section evaluates the American and British approaches where (a) the state acts as employer or contractor, and (b) the state serves as the primary holder of the data in question. This section concludes with a discussion of strictures in relation to Freedom of Information.

A. *Deference and the National Security Claim in the United States*

Following the attacks of 9/11, the United States government immediately took steps to ensure that “sensitive but not classified”

³⁵⁵ Export Control Act, 2002, c. 28, § 8 (Eng.).

³⁵⁶ THE GOVERNMENT REPLY TO THE EIGHTH REPORT FROM THE HOUSE OF COMMONS SCIENCE AND TECHNOLOGY SELECT COMMITTEE, SESSION 2002-2003 HC 415-I, at 31 (2004), available at http://www.homeoffice.gov.uk/docs2/stc_report_reply.pdf.

³⁵⁷ *Secrets and Lives*, *supra* note 207.

information under its control—even documents previously released into the public domain—be removed from public scrutiny. The State Department withdrew some thirty million pages of previously unclassified information and put the brakes on another twenty million pages already declassified and due to be released. The new review system created a five-year backlog.³⁵⁸ The White House gave all federal offices until June 2002 to examine their websites for content that could be considered sensitive or pose a threat to public safety.³⁵⁹ It required federal agencies to report their progress to the Office Homeland Security. An avalanche of federal action swept documents relating to everything from environmental impact analyses to Congressional reports from the Web.³⁶⁰

The extensive use made of this non-classification classification (“sensitive but unclassified”) represents just one of many ways in which the government controls employees and information in its purview. This section focuses on confidentiality doctrines, classification, and rights of access. A series of cases involving leaked documents demonstrate significant judicial deference to the Executive for speech restrictions in this area.

³⁵⁸ *Id.*

³⁵⁹ Press Release, Computerworld, White House Orders All Federal Offices to Review Content of Their Web Sites for Sensitive—But Not Classified—Materials (Mar. 25, 2002), available at <http://fact.trib.com/1st.censor.alert.html>.

³⁶⁰ For example, the Agency for Toxic Substances and Disease Registry dropped a report critical of chemical plant security. Jay Lyman, *U.S. Pulls Information Off Web Since Attacks*, NEWSFACTOR NETWORK, Oct. 4, 2001, available at <http://www.newsfactor.com/perl/story/13936.html>; see also Sabin Russel, *Watchdog Sites Shut Down in Interest of National Security*, NEWSFACTOR NETWORK, October 5, 2001. The Department of Energy, National Transportation of Radioactive Materials site replaced its text with the note: “This site temporarily unavailable, please contact Bobby Sanchez at 505 845 5541 if you have any questions.” See Electronic Frontier Foundation, *Chilling Effects of Anti-Terrorism: “National Security” Toll of Freedom of Expression*, http://www.eff.org/Privacy/Surveillance/Terrorism/antiterrorism_chill.html (last visited July 17, 2005) [hereinafter *Chilling Effects of Anti-Terrorism*]. The Bureau of Alcohol, Tobacco, Firearms, and Explosives withdrew pages and required that anyone seeking information send a written request to the Bureau. See ATF Online, Bureau of Alcohol, Tobacco, Firearms, and Explosives, <http://www.atf.treas.gov/press/breakingnews/resources.htm> (last visited July 17, 2005). Citing increased security concerns, Congress suddenly classified three of the four Inspector General reports from the House of Representatives. See *Chilling Effects of Anti-Terrorism*, *supra*. The U.S. Geological Survey required that more than 300 public and university libraries destroy material previously issued. *Federal Officials Order Libraries to Destroy CD-ROM with a Database on Public Water Supply*, STAR-TELEGRAM, Dec. 8, 2001. Steven Atergood (who administers the Project on Government Secrecy for the Federation of American Scientists), pulled more than 200 pages off the internet—such as floor plans of NSA and CIA facilities and images of foreign nuclear weapons plants. See David McGuire, *Anti-Secrecy Website Pulls Sensitive Information*, WASHINGTONPOST.COM, Oct. 11, 2001.

1. State as Employer or Contractor: Confidentiality Doctrines

In addition to the formal classification scheme, addressed below, the state has at its disposal three ways to ensure that employees themselves tow the line with respect to terrorist-related speech. The first relates to the decision to hire (or fire) an employee based on expression outside the work environment. The government cannot deny employment to members of organizations such as the Communist Party, or to those who have refused to take an oath that they are *not* members of a “Communist front or subversive organization” simply on grounds of membership. The Supreme Court held such a stricture to be overbroad; however, if narrowed to “knowing” membership with a “specific intent to further unlawful aims,” such speech would *not* be constitutionally protected and may lead to refusal to hire for—or dismissal from—government employment.³⁶¹ Although the Court distinguished between sensitive and nonsensitive positions in considering the constitutionality of retributive action based on group membership, it left the door open to a strong enough national security interest allowing the government to deny employment to a member with *no* specific intent, even though membership itself could not be *criminally* punished.³⁶² Another way the state may refuse employment centers not on group membership, but on an individual’s refusal to answer certain questions. Here, again, the inquiry focuses on knowing membership.³⁶³ The Court upheld the state’s authority to inquire (and obtain an answer) about membership in specific organizations, the extent of an individual’s knowledge of a group’s aims, and the individual’s intent to assist in carrying the goals to fruition. The net effect means that while both knowledge *and* specific intent are necessary to deny employment, refusal to disclose may provide appropriate grounds for denying a position.

The second way in which the state controls employees relates to sanctions placed on them for publicly speaking on certain matters while in the state’s employ. Here, the state may *not* punish public employees’ speech on matters of public concern, *unless the government*

³⁶¹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 606 (1967); *see also* *Wieman v. Updegraff*, 344 U.S. 183 (1952).

³⁶² *See* *United States v. Robel*, 389 U.S. 258 (1967). This does not mean that the doctrines of overbreadth and vagueness become meaningless; on the contrary, they apply whenever a First Amendment activity attends: “[T]he Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.” *Id.* at 268 n.20.

³⁶³ *Baird v. State Bar of Ariz.*, 401 U.S. 1, 9 (1971) (Stewart, J., concurring).

*demonstrates that some urgency or need outweighs the employee's First Amendment rights:*³⁶⁴

[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.³⁶⁵

This applies equally to government contractors.³⁶⁶ If the substance of the speech, however, does *not* address a matter of public concern, such speech remains unprotected.³⁶⁷ While a case could be made that matters related to terrorism generally are of public concern, arguments regarding the state interest in protecting itself would be more likely to win the day.

The third manner in which the state controls employees' speech, the nondisclosure agreement, prevents employees from revealing information *after* they leave government service. More than two decades ago Congress resisted efforts to extend these to *all* executive branch employees, with the result that now such contractual relationships depend upon the agency or department in question.³⁶⁸ The Central Intelligence Agency (CIA) provides a good example.

In the 1970s, the CIA began to require employees to sign a document saying they would refrain from publishing "any information or material relating to the Agency, its activities or intelligence activities generally" without submitting the document to the Publications Review Board. This included "all writings and scripts or outlines of oral presentations intended for non-official publication, including works of fiction," with publication understood as "communicating information to one or more persons."³⁶⁹ Despite the fact that such guidelines would

³⁶⁴ See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

³⁶⁵ *Id.* at 568.

³⁶⁶ See *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996).

³⁶⁷ See *Connick v. Myers*, 461 U.S. 138 (1983).

³⁶⁸ The aborted effort, National Security Directive (NSD) 84, Safeguarding National Security Information, available at <http://www.fas.org/irp/offdocs/nsdd/nsdd-084.htm>, made employment where individuals had access to sensitive information conditional upon agreeing to lifetime prior review for any future publications. (The directive initially required that employees also submit to polygraphs as well, but, under strong public pressure, the Executive dropped this measure.) In 1981, Congress suspended the directive and held hearings on the subject. However, according to the GAO, at least 120,000 employees had already put their names on a lifetime censorship agreement—and to Congressional horror, many had been asked to sign it *after* Congress had suspended the NSD. In February 1984, the Executive withdrew the directive. Resultantly, instead of a blanket prohibition, individual agencies now require a nondisclosure agreement as a condition of employment.

³⁶⁹ George Lardner Jr., *CIA Defends Its Selective Censorship of Ex-Agents' Writings*, WASHINGTON POST, Apr. 6, 1980, at A10.

cover, as one civil libertarian put it, “even letters to your mother,”³⁷⁰ the Fourth Circuit considered this agreement, at least in relation to confidential documents that have not been released to the public, to be consistent with the First Amendment.³⁷¹ To implement this policy, in 1976 the CIA created a Publications Review Board. Between 1977 and 1980 the Agency reviewed more than 198 manuscripts, finding only three unacceptable. Authors withdrew an additional four manuscripts. Some portion of the controls instituted rested not on national security concerns but on public relations: On March 6, 1980 the CIA acknowledged to the House Intelligence Committee that it imposed stricter controls on its critics than on those who were part of the “old boy network.”³⁷²

The Supreme Court considers the Agency’s ability to create and enforce this program absolute and consistent with the Constitution. In 1975, for instance, Frank Snepp wrote the thriller, *Decent Interval*, which the CIA claimed breached national security. The Court ruled that “even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment.”³⁷³ What made this extraordinary was that Court said this without being presented with any evidence that the book *actually* damaged national security.³⁷⁴ Instead, it found, more broadly, that the CIA had a right to prevent publication. As Snepp had already published the manuscript, the Court ordered the \$120,000 in earnings to be turned over to the government and required Snepp to submit two manuscripts underway to the CIA.

This deference to the CIA extends, beyond pure publication and submission for review, to any requirements that the Agency may place on authors. In the early 1970s Victor Marchetti, an ex-CIA agent, submitted a co-written manuscript, *The CIA and the Cult of Intelligence*.³⁷⁵ The reviewers directed him to remove approximately fifteen to twenty percent of the work.³⁷⁶ Some of the required deletions, such as the sentence noting that Salvador Allende, a Marxist, was a central candidate in the Chilean election (prior to taking office), simply related well-known, public facts. After negotiations with Marchetti’s

³⁷⁰ *Id.*

³⁷¹ See *United States v. Marchetti*, 466 F.2d 1309, 1311, 1312 n.1 (4th Cir. 1972).

³⁷² Lardner, *supra* note 369.

³⁷³ *Snepp v. United States*, 444 U.S. 507, 510 (1980).

³⁷⁴ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 929 (2d ed. 2002).

³⁷⁵ L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55, 62 (1990); see also *Marchetti*, 466 F.2d at 1313.

³⁷⁶ Powe, *supra* note 375, at 62-63.

attorney present, the CIA dropped 200 of the required deletions, leaving 168. The trial judge concluded that only twenty-six of these warranted censorship. The Fourth Circuit reversed, however, granting the CIA a “high presumption of regularity.”³⁷⁷

2. State as Information-Holder: Classification and Rights of Access

While the federal government has extensive authority to control employment in a manner that prevents speech that supports or may be related to terrorist capabilities, it also has extensive power, outside of court documents, to control access to information already in its purview. The primary means through which it does so is the classification scheme, which centers on the concept that secrecy breeds security. A relatively recent phenomenon, executive orders—not Congressional statutes—controls it.

Historically, classification lasted only one year *unless the government made a further determination that declassification would threaten national security*. Under President Jimmy Carter, classified information included data “owned by, produced for or by, or under the control of, the United States Government, and that has been determined pursuant to this Order or prior Orders to require protection against unauthorized disclosure”³⁷⁸ Carter’s order specifically excluded “basic scientific information not clearly related to the national security,” as well as private research, conducted with open source material.³⁷⁹ Where Nixon had allowed a thirty year automatic declassification, Carter created automatic declassification after six years, extendable up to twenty years. The order also emphasized the importance of balancing the public’s right to know with identifiable damage that would be caused to national security.³⁸⁰

In 1982, President Ronald Reagan reversed the trend. Like Carter, Reagan endorsed three tiers: top secret, secret, and confidential, but in the third one he eliminated the word “identifiable” from the harm reasonably expected to follow: “‘Confidential’ shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security.”³⁸¹ The administration’s chief concern rested on not being held to the standard of identifying a specific or precise damage that may follow from the

³⁷⁷ *Id.* at 63.

³⁷⁸ Exec. Order No. 12,065, 3 C.F.R. § 190 (1978); § 6-102, 3 C.F.R. § 204.

³⁷⁹ *Id.* § 1-602.

³⁸⁰ Floyd Abrams, *The New Effort to Control Information*, N.Y. TIMES, Sept. 25, 1983, at 21, 26.

³⁸¹ Exec. Order No. 12,356, 47 Fed. Reg. 14874, § 1.1(a)(3) (Apr. 2, 1982).

information being made public.³⁸² Thus, the default for “reasonable doubt” began to weigh in favor of secrecy—not openness, as required under Carter. Reagan radically extended the period of classification from the six years established by Carter to indefinitely, subject to national security officials’ discretion.

The percentage of government documents classified appears to be increasing annually, with a particular acceleration in the past three years. The Information and Security Oversight Office reported that the government classified eleven million documents in 2002 and fourteen million in 2003.³⁸³ Although one might expect military operations to be accompanied by an increase in the information kept secret, some of the documents being included clearly violate the existing standards for what can and cannot be classified in times of war. For instance, section 1.7 of Executive Order 13292 requires that “[i]n no case shall information be classified in order to . . . conceal violations of law, inefficiency, or administrative error [or to] prevent embarrassment to a person, organization, or agency.”³⁸⁴ Yet the Taguba report on the torture of Iraqis, which found that “numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees” was classified “secret.”³⁸⁵

The most famous case dealing with classified documents suggests, though, that a claim to national security may be necessary, but not sufficient, to prevent papers from entering the public domain. A high standard of proof must still be met to satisfy the burden imposed by preventing publication.³⁸⁶ In 1971, the *New York Times* and the *Washington Post* began to publish the Department of Defense’s *History of U.S. Decision-Making Process on Viet Nam Policy*.³⁸⁷ These documents provided penetrating insight into the war and made clear where the Nixon Administration had lied to the American public about its operations overseas. The Executive branch charged the newspapers with a violation of the 1917 Espionage Act, which made it unlawful to publish, during war, any information president declared was “of such character that it is or might be useful to the enemy,” and filed for an injunction. The District Court refused to grant the request; but the Second Circuit reversed the decision.

Because of the unusual nature of the use of an injunction and the political importance of the documents, within eighteen days of the

³⁸² Ramirez, *supra* note 249, at 210-11.

³⁸³ Steven Aftergood, *Torture and Secrecy*, IN THESE TIMES, June 2, 2004, <http://www.inthesetimes.com/site/main/article/760>.

³⁸⁴ Exec. Order No. 13,292, 68 Fed. Reg. 15,315, § 1.7(a) (Mar. 25, 2003).

³⁸⁵ *Id.*

³⁸⁶ See Powe, *supra* note 375, at 58.

³⁸⁷ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

government filing, the Supreme Court held oral hearings. Four days later it handed down its decision. Six of the nine resulting opinions, and the per curiam, said the government had not met the “heavy burden of showing justification” for prior restraint on the press.³⁸⁸ For the Court, the injunction amounted to a licensing scheme. The problem was that regardless of whether it had been imposed unlawfully, its presence prevented the publisher from collateral attack—which created the odd situation that if the newspaper published the account, even if the government did not have the authority to prevent the publication, the publisher would still be held in violation of the law. While underscoring the strong presumption against prior restraints,³⁸⁹ however, the Court stopped short of creating a test tailored to the national security claim to justify such restrictions. Over the objection of two justices (Black and Douglas) to *any* kind of prior restraints, the rest of the Court suggested that it *might* be justified if the state demonstrates with *clear and convincing evidence* that there would be an immediate and inescapable effect on national security.³⁹⁰

While a sufficiently strong demonstration of harm to national security may satisfy the burden of proof related to prior restraint, a considerably lesser standard allows the state to prevent the disclosure of information relating to intelligence operations. Similarly, although the Espionage Act focused on the provision of information to foreign governments or saboteurs, instances involving information protected by security clearances falls under the statute—regardless of to whom it is given.³⁹¹ Thus, the state charged the gentleman who provided photos of classified information to *Jane’s Defense Weekly* with theft of government property and espionage.³⁹² The state must only demonstrate that the information released sufficiently “relating to the national defense.”³⁹³

³⁸⁸ *Id.* at 714 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

³⁸⁹ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

³⁹⁰ *New York Times*, 403 U.S. at 730 (Stewart, J., concurring); *id.* at 726-27 (Brennan, J., concurring).

³⁹¹ *See, e.g.*, *United States v. Morison*, 604 F. Supp. 655 (D. Md. 1985).

³⁹² 18 U.S.C. § 641 (2000); *see also* *United States v. Boyce*, 594 F.2d 1246, 1249 (9th Cir. 1979).

³⁹³ *Morison*, 604 F. Supp. at 660-61. The government also has a broad capacity to restrict public access to government property—and press access to the military. *See* Barbara Cochran, *America’s Free Press: Now More than Ever*, 4 THE CORNERSTONE PAPERS 1-2 (2002), http://www.mediainstitute.org/cornerstone/Reports_Papers/CornerstonePPR_4.pdf.

B. *Extreme Deference in the United Kingdom*

Like the U.S., the U.K. controls information within its purview and operates a non-statutory classification system. The two countries differ, though, in the greater deference granted the British Executive and the nature of the classification system itself. Underlying this distinction is a strong culture of secrecy,³⁹⁴ which manifests itself in various ways.

Civil servants, for instance, act under strict limits. Individuals in the “politically restricted” category are not allowed to be Parliamentary candidates, hold national office, or speak publicly on matters of national interest. Subject to the approval of the civil service department, those who do *not* speak on behalf of the government as part of their work might be allowed to participate in local (but not national) politics. Upon receipt of permission to speak, civil servants must adopt only moderate positions. Limits on expression increase with rank.

In their professional capacity, civil servants fall under the Osmotherly Rules.³⁹⁵ These bar officials from appearing before Select Committees without ministerial approval, unless the committee issues a formal order. The official may not answer in her own right, but must respond in accord with how the minister directs.³⁹⁶ The rules require that they be helpful but refuse to answer where national security may be implicated. This prevents them from providing advice, addressing political controversies, revealing inter-departmental or inter-ministerial communications, or discussing the level at which decisions have been made.

In addition to the Osmotherly Rules, upon entering, and once leaving, state employ, civil servants sign a non-legal document that outlines conditions under which they might be subject to prosecution. Violations of this agreement result in breach of confidence and contempt of court proceedings—as demonstrated by the renowned *Spycatcher* case.³⁹⁷

³⁹⁴ See, e.g., DAVID VINCENT, *THE CULTURE OF SECRECY: BRITAIN, 1832-1998* (1998).

³⁹⁵ MEMORANDUM OF GUIDANCE FOR OFFICIALS APPEARING BEFORE SELECT COMMITTEES, 1980, General Notice GEN80/38.

³⁹⁶ CABINET OFFICE, DEPARTMENTAL EVIDENCE AND RESPONSE TO SELECT COMMITTEES, 2005, paras. 40-42, available at http://www.cabinetoffice.gov.uk/propriety_and_ethics/documents/osmotherly_rules.pdf. But see 292 PARL. DEB. H.C. (6th ser.) (1997) 1046-47; 579 PARL. DEB. H.L. (5th ser.) (1997) 1057.

³⁹⁷ See *Attorney Gen. v. Newspapers Publ'g Plc.*, [1987] 3 All E.R. 276 (Ch. D); *Attorney Gen. v. Guardian Newspapers Ltd.* (No. 2), [1988] 3 All E.R. 545, 550 (Ch. D); *Attorney Gen. v. Observer, Ltd.*, 136 N.L.J. 799 (C.A. July 25, 1986); *Attorney Gen. (U.K.) v. Heinemann Publishers Austl. Ltd.*, [1987] 8 N.S.W.L.R. 341 (Austl.); *Attorney Gen. (U.K.) v. South China Morning Post Ltd.*, [1988] 1 H.K.L.R. 143 (C.A.) (H.K.); *Attorney Gen. v. South China Morning Post Ltd.*, No. 4644, [1987] H.K.E.C. 75 (S.C.) (H.K.); see also John Carvel & David Pallister, *Contempt Action on Spy Injunction*, *GUARDIAN*, Aug. 5, 1987, at 1, col. 8.

1. State as Employer or Contractor: Breach of Confidence

From 1955 to 1976 Peter Wright worked for the British intelligence services.³⁹⁸ When he joined and on his departure he signed declarations that unless MI5 granted him explicit permission, or the information already existed in the public domain, he would not reveal information obtained during employment.³⁹⁹ Wright retired and moved to Tasmania, whence he sent a memo to the Chair of the Select Committee of the House of Commons requesting an inquiry into MI5.⁴⁰⁰ He alleged the agency's involvement in an assassination attempt on the Egyptian President, efforts to undermine Harold Wilson's government, and burglaries of political party and trade union headquarters. Wright also reported that Sir Roger Hollis, the former head of MI5, was a double agent for the Soviet Union. Although this was not the first time such allegations had been made, Wright's position in the agency and the depth of details provided—as well as the timing—made the charges significant.⁴⁰¹ Parliament made only cursory motions to address these issues. Wright decided to publish an exposé.⁴⁰²

In September 1985, the British government attempted to obtain an injunction. Wright agreed to wait to publish the account until the courts decided what to do.⁴⁰³ In June 1986, the *Guardian* and the *Observer*, covering the legal proceedings, began to publicize Wright's allegations.⁴⁰⁴ The Attorney General secured an injunction against the newspapers, which the Court of Appeal upheld. The court ordered that only information already in the public arena could be published. By March 1987, when it became clear that most of the data already was public, an Australian judge dismissed the injunction against Wright.⁴⁰⁵ In the interim, in April 1987, the *Melbourne Age*, *Canberra Times*, *Independent* (London), and two more British papers published synopses of the book. In May 1987, the *Washington Post* followed suit.⁴⁰⁶ The British Attorney General immediately went after the British papers

³⁹⁸ *Attorney Gen. v. Guardian Newspapers Ltd. (No. 2)*, [1988] 3 All E.R. at 551 (Ch. D.); *Attorney Gen. v. Guardian Newspapers*, [1988] 3 All E.R. 638 (H.L.).

³⁹⁹ Philomena M. Dane, Case Comment, *The Spycatcher Cases*, 50 OHIO ST. L.J. 405, 406 (1989).

⁴⁰⁰ *Attorney Gen. v. Newspapers Publ'g Plc.*, [1987] 3 All E.R. at 279 (Ch. D.); *Attorney Gen. v. Guardian Newspapers Ltd.*, [1987] 3 All E.R. 316 (H.L.); *Attorney Gen. v. Observer, Ltd.*, 136 N.L.J. 799 (C.A.).

⁴⁰¹ For discussion of the previous public claims echoed in Wright's allegations, see *Attorney Gen. v. Guardian Newspapers (No. 2)*, [1988] 3 All E.R. at 587 (Ch. D.).

⁴⁰² See *Attorney Gen. v. The Observer Ltd.*, 136 N.L.J. 799; *Attorney Gen. v. Guardian Newspapers Ltd. (No. 2)*, [1988] 3 All E.R. at 597 (C.A. Civ. Div.).

⁴⁰³ *Attorney Gen. v. Guardian Newspapers Ltd. (No. 2)*, [1988] 3 All E.R. at 552 (Ch. D.).

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 553.

⁴⁰⁶ *Id.* at 553-54.

claiming contempt of court.⁴⁰⁷ Soon afterwards Viking Penguin announced that the full account, *Spycatcher*, would be published in the United States.⁴⁰⁸ Unable, because of the First Amendment, to go through American courts, Britain attempted to pressure the holding company that ran Viking not to publish the tract. The company refused to concede.

The Editor of Britain's *Sunday Times* bought the rights to serialize the book and arranged for its publication in Britain. The first installment came out on the evening of July 12, 1987—with a second publication the following morning—before the government could apply for an injunction. The next day, Viking published the entire work in the United States, where it became a best seller.⁴⁰⁹ Although the Thatcher administration did not attempt to prevent import of the book, it continued to pursue contempt of court proceedings against the *Sunday Times*.⁴¹⁰ A series of appeals brought the case, at last, to the House of Lords, which not only upheld the decision to maintain an injunction, but insisted that even material publicly presented in the Australian courts could be enjoined.⁴¹¹ As newspapers from Hong Kong to East Africa published excerpts, the Attorney General continued to pursue injunctions. These cases relied on the doctrine of breach of confidence and, relatedly, contempt of court.⁴¹²

The common law offence of breach of confidence dates back to the Victorian period. It focuses on publications of actual fact—not opinion. The offence initially included matters relating to a broad range of communications, such as commerce, state information, and inter-familial conversations.⁴¹³ The modern formulation provides: “If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.”⁴¹⁴ The elements include the confidentiality of the information, an obligation of confidence derived from circumstances in

⁴⁰⁷ *Id.* at 554.

⁴⁰⁸ *Id.*

⁴⁰⁹ See *Sunday Times v. United Kingdom* (No. 2), App. No. 13166/87, Eur. Ct. H. R. (1991), available at <http://www.worldlii.org/eu/cases/ECHR/1991/50.html>.

⁴¹⁰ *Attorney Gen. v. Guardian Newspapers* (No. 2), [1988] 3 All E.R. at 555 (Ch. D.).

⁴¹¹ *Attorney Gen. v. Guardian Newspapers Ltd.*, [1987] 3 All E.R. 342 (H.L.) (see particularly opinions of Lord Brandon of Oakbrook, Lord Templeman, and Lord Ackner).

⁴¹² *Observer & Guardian v. United Kingdom*, App. No. 13585/88, 14 Eur. H.R. Rep. 153, paras. 39-44 (1991); see also *Attorney Gen. (U.K.) v. South China Morning Post Ltd.*, [1988] 1 H.K.L.R. 143 (C.A.) (H.K.); *Attorney Gen. v. South China Morning Post Ltd.*, No. 4644, [1987] H.K.E.C. 75 (SC) (H.K.).

⁴¹³ Dane, *supra* note 399, at 410.

⁴¹⁴ *Saltman Eng'g Co., Ltd. v. Campbell Eng'g Co., Ltd.*, [1963] 3 All E.R. 413, Lord Greene at 414.

which the speech occurred, and breach of the obligation, without authorization, to the plaintiff's detriment.⁴¹⁵ Additionally, the information cannot already be public knowledge. Common law recognizes, however, that what might be public in some arena may nevertheless be confidential in others.⁴¹⁶ The court looks to the context to determine whether breach occurred.⁴¹⁷ Importantly, the charge does not require a formal contractual relationship.⁴¹⁸ To determine whether the offence has occurred, British courts balance the public interest in ensuring confidentiality with the public interest in having access to matters of public concern.⁴¹⁹

Wright's duty centered on the fact that MI5 employed him and national security interests required the state to prevent publications such as Wright's from reaching the public domain.⁴²⁰ The state claimed that the newspapers and publishers knew of this duty, and that they were required to meet it—making any breach a violation of their duty. Once the state enjoined the *Observer* and the *Guardian*, future efforts to publish would harm the substance of the suit, bringing such publications into contempt of court. The state's contention clearly did *not* turn on the secrecy of the information—twelve other books and three television programs previously made the same allegations.⁴²¹ Instead, the national security interest at stake was to prevent others from publishing similar tell-all accounts; it thus revolved on the services' reputation and efficiency.

The Law Lords' finding suggests that a general, long-term prejudice to the reputation of the security services suffices to meet a national security claim. The case also demonstrates that contempt of court proceedings can be instituted with devastating effect.⁴²²

⁴¹⁵ Dane, *supra* note 399, at 411.

⁴¹⁶ See, e.g., *Franchi v. Franchi* [1967] R.P.C. 149; *Exchange Tel. Co., Ltd. v. Cent. News Ltd.* [1897] 2 Ch. 48; Dane, *supra* note 410, at 399 n.65 (citing FRANCIS GURRY, *BREACH OF CONFIDENCE* 3 (1984)).

⁴¹⁷ See generally Dane, *supra* note 399, at 411-12.

⁴¹⁸ *Id.* at 412 n.69 (citing *Seager v. Copydex Ltd.*, [1967] 1 W.L.R. 923, 931 (C.A.)).

⁴¹⁹ *Id.* 413 n.84 (citing *Lion Lab., Ltd. v. Evans*, [1985] 1 Q.B. 526, 536 (C.A.)).

⁴²⁰ *Id.* at 435.

⁴²¹ *Id.* (citing *Attorney-Gen. v. Guardian Newspapers, Ltd. (No. 2)*, [1988] 2 W.L.R. 805, 822-31 (Ch. D)).

⁴²² Philomena Dane notes:

The government . . . can restrain the press from publishing information it believes should remain secret without ever having to prove that a paper breached its duty to the state. To get a temporary injunction, all the government must show is that it has an arguable case at trial. Once it makes that showing, further publication will be cut off by contempt of court proceedings regardless of how widespread any previous disclosure has been.

Id. at 431. A second, prominent case also demonstrates the extreme deference granted to the Executive on issues of national security. In 1947 the British government founded an organization roughly similar to the United States' NSA: Government Communications Headquarters at Cheltenham (GCHQ) conducts signals intelligence. By the late twentieth century GCHQ

2. State as Information-Holder: The Official Secrets Act

The British state does not maintain a classification scheme equivalent to that of the United States. Instead, it closes all government papers for thirty years. The Lord Chancellor may extend the period at the request or with the approval of the appropriate Minister. Papers also may remain closed if a guarantee of confidence accompanied their receipt.⁴²³ The central mechanisms employed to protect closed papers are contempt of court proceedings (discussed above) and the Official Secrets Act. The latter, a criminal statute, dates back to 1889. At that time, the legislation did not recognize “public good” as a defense. In 1911, on the brink of war, Westminster expanded the statute. The government rushed the bill through Parliament, and law enforcement subsequently applied the powers to individuals that had nothing to do with the introduction of the law. For instance, section one made it an offence for anyone “for any purpose prejudicial to the safety or interests of the state” to be in a military area or to obtain or communicate to anyone any information “which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy.”⁴²⁴ Although Westminster intended this section to be used to prevent espionage, law enforcement later used the powers against the Campaign for Nuclear Disarmament, which gained access to intelligence and military facilities.⁴²⁵

employed approximately 4,000 people, approximately twenty-five percent of whom conducted a one-day strike in 1981. *See* Regina v. Sec’y of State *ex parte* Council of Civil Serv. Unions, [1984] I.R.L.R. 309 (Q.B. July 17, 1984), *rev’d*, [1984] T.L.R., No. 518 (C.A.), *aff’d sub nom.* Council of Civil Serv. Unions v. Minister for the Civil Serv., [1985] A.C. 374 (1984). Although the British state did not want labor strikes to harm its intelligence functions, one small problem presented itself: it had never admitted that GCHQ conducted intelligence. In a 1983 paper the government thus made passing reference to it—paving the way for the Minister for the Civil Service to place a ban in March 1984 on people working at GCHQ to join a union. The Council of Civil Service Unions, which represented six unions at GCHQ, strenuously objected. Although the first court held that the government had to consult with the employees and their unions when rights were affected, the government won on appeal. The court’s decision centered on a separation of powers claim: Lord Chief Justice Lane asserted that although other areas of Royal Prerogative might be fair game, the court could not inquire into “any action taken . . . which can truly be said to have been taken in the interests of national security.” Charles D. Ablard, *Judicial Review of National Security Decisions: United States and United Kingdom*, 27 WM. & MARY L. REV. 753, 759 (1986) (citing [1984] T.L.R., No. 518 (C.A.)) The Law Lords upheld the decision of the lower court, saying that while normally the employees would have a legitimate expectation of consultation, under the guise of national security, the decision lay entirely in the realm of the executive.

⁴²³ Public Records Act, 1967, c. 44; Public Records Act, 1958, 6 & 7 Eliz. 2, c. 51; *see also* STANLEY A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 489-90 (Rodney Brazier ed., 6th ed. 1989).

⁴²⁴ Official Secrets Act of 1911, c. 28, § 1 (U.K.).

⁴²⁵ *See, e.g.*, Chandler v. DPP, [1964] A.C. 763, [1962] 3 All E.R. 142, (H.L.).

Section two of the 1911 Act earned itself a place of notoriety. It specified that any person *having information* in her possession by virtue of a contractual or employment relationship with the Crown could not communicate such information without authorization to anyone outside the person to whom state interests created a duty of disclosure. This section applied to *all* civil servants. So, for instance, telling one's spouse the type of biscuits consumed at work qualified as an "official secret." The employee *and* the spouse would be in violation of the statute. While this might seem to be an outrageous example, the Law Reports show that national security does *not* have to be directly implicated for an individual to be found guilty.⁴²⁶ From 1945 to 1971 the state used the OSA somewhat sparingly, with twenty-three prosecutions, thirty-four defendants, and twenty-seven convictions.⁴²⁷ Gradually, the charge fell into disrepute. However, in 1978 the state renewed its efforts, and over the next nine years, twenty-nine prosecutions and five pending prosecutions resulted.⁴²⁸ It proved to be both over-inclusive and inefficient, as the measure blocked important information from reaching MPs.

Several cases brought under the OSA demonstrated that the state frequently used its powers to save the government from embarrassment. For instance, in October 1983, Sarah Tisdall, a clerk at the Ministry of Defence, gave the *Guardian* a memo that reported the date on which American cruise missiles would reach the Royal Air Force Base at Greenham Common.⁴²⁹ Although the court considered the *Guardian's* defense—that the 1981 Contempt of Court Act laid out a "source protection law" which allowed the public release of information in the interests of national security, it ultimately rejected the claim on the grounds that someone had stolen the property to put it into the newspaper's hands.⁴³⁰ The *Guardian* appealed. The House of Lords recognized that the actual memo carried little value and did not represent an attempt to undermine national security.⁴³¹ Nevertheless, three of the five Law Lords found that the evidence met the burden of necessity. Their decision drew heavily from the government's affidavit, which asserted, *inter alia*, that while *this* memo might not have represented a direct threat to national security, it would undermine allies' future confidence in the United Kingdom.⁴³² This claim,

⁴²⁶ See EWING & GEARTY, *supra* note 102, at 138.

⁴²⁷ *Id.* at 138-39.

⁴²⁸ *Id.* at 139.

⁴²⁹ *Sec'y of State v. Guardian Newspapers, Ltd.*, [1983] T.L.R., No. 765 (Ch. Dec. 16, 1983), *aff'd on other grounds*, [1984] 1 Ch. 156 (C.A. 1983), *aff'd*, [1985] A.C. 339 (1984).

⁴³⁰ *Troubled History of Official Secrets Act*, BBC NEWS, Nov. 18, 1998, <http://news.bbc.co.uk/1/hi/uk/216868.stm>; see also Contempt of Court Act, 1981, c. 49, §10.

⁴³¹ *Sec'y of State v. Guardian Newspapers, Ltd.*, [1985] A.C. at 357 (Lord Fraser).

⁴³² Para. 6 of government affidavit, *reprinted in* EWING & GEARTY, *supra* note 102, at 142.

however, somewhat contradicted the substance of the memo, which was the blatant recognition of the political nature of the information and the recommendation that the date of arrival be kept secret—even from Parliament—until after the United States delivered the missiles.

A second case underscored the use of the OSA to hide state debacles and prevent Parliamentarians from obtaining information. During the 1982 Falklands War, the British Navy sunk the *General Belgrano*, an Argentinian cruiser, killing 360 people.⁴³³ An internal Ministry of Defence document showed that, contrary to the government's claim, the ship was *leaving* the exclusion zone when the Navy attacked. In May 1983, Tom Dalyell, MP, questioned Michael Heseltine, Secretary of State for Defence, about the incident. But Heseltine refused to provide any information. Clive Ponting, who worked at the Ministry of Defence, gave the document to Dalyell. Ponting, who at the tender age of thirty-eight had already been awarded an OBE, said, "I did this because I believe that ministers within this department were not prepared to answer legitimate questions from a member of Parliament about a question of considerable public concern, simply in order to protect their own political position."⁴³⁴

The government initially prosecuted Ponting under the 1911 Official Secrets Act. But part way through the trial, after admitting that the document did not compromise national security, the state switched to a claim of breach of confidentiality. Heavy politics plagued the proceedings: For example, the Special Branch vetted more than sixty potential jurors—a process where, what Ewing and Gearty accurately refer to as, "dangerously independent minded persons" were removed from service.⁴³⁵ During the trial, Merlyn Rees, former Secretary of State for Northern Ireland, supported Ponting, saying that civil servants' ultimate duty was to Parliament. The trial judge, McCowan, disagreed. He directed the jury that Ponting's duty was to the Minister and did not extend to Parliament. He further suggested that whatever the government *claimed* to be an issue of national security *made* it national security.⁴³⁶ Jurors, disgusted by the government's actions, acquitted.

The final case that bears mention in this context came to be known as the Zircon affair. In 1987 the BBC Documentary series, *The Secret Society*, revealed that the Ministry of Defence neglected to mention to Parliament the introduction of a new £500 million electronic surveillance program.⁴³⁷ The BBC, under government pressure, pulled

⁴³³ R. v. Ponting, [1985] Crim. L.R. 318.

⁴³⁴ EWING & GEARTY, *supra* note 102, at 144.

⁴³⁵ *Id.* at 144-45.

⁴³⁶ FELDMAN, *supra* note 7, at 894-95.

⁴³⁷ The following account is drawn from *The Times* (London), between January and April 1987. See also EWING & GEARTY, *supra* note 102, at 147-52.

the film. Although the filmmaker, Duncan Campbell, arranged for it to be shown in Parliament, at the last minute, the government pressured the Speaker, who intervened to cancel the showing and referred the case to the Committee on Privileges. The opposition was irate, but Hell hath no fury like a Government scorned. Prime Minister Thatcher obtained an injunction against Campbell. But he went on the run, and before he could be served, full details of the film appeared in the *New Statesman*. Thatcher was furious: “Unfortunately, there seem to be people with more interest in trying to ferret out and reveal information of use to our enemies, rather than preserving the defence interest of this country, and thus the freedom which we all enjoy.”⁴³⁸ The Special Branch raided Campbell’s home, the *New Statesman*, the home of a researcher working on the film, and the BBC—ostensibly for violation of the OSA. It also confiscated the remaining five films in the series, although the state did not allege that these other documentaries breached the OSA.

The state responded to these cases with actions to underscore that civil servants’ first responsibility was to the government in power, *not* to Parliament or the public: In 1985, Sir Robert Armstrong, the Cabinet Secretary, issued *The Duties and Responsibilities of Civil Servants in Relation to Ministers*.⁴³⁹ Then, in 1989, the government wrote a new Official Secrets Act. Seen by one member of the House of Lords as rather “too much to obsessive resentment at the outcome of the *Spycatcher* and *Ponting* cases,”⁴⁴⁰ the statute provided *criminal* sanctions for national security violations falling under any of the following classes of information: security and intelligence, defense, international relations, crime, or special investigation powers. It also outlawed any actual *or* potential harm to state interests—as determined by the government of the day. Although mere receipt of information became insufficient to establish a violation of the law, further disclosure—either by an employee or by a member of the public—became illegal.⁴⁴¹ The state again used extraordinary procedures: After only two days in committee, the government guillotined this legislation.⁴⁴²

David Feldman, in his exhaustive review of British civil liberties, raises concern that the new Official Secrets Act runs afoul of ECHR Article 10. Recall that under European law, for interference to be justified, the state must demonstrate the necessity of the measure in a democratic state. A two-prong test applies. First, the response must be proportionate to a pressing social need to pursue a legitimate aim under

⁴³⁸ EWING AND GEARTY, *supra* note 102, at 149.

⁴³⁹ 74 PARL. DEB., H.C. (5th ser.) (1985) 128-30.

⁴⁴⁰ EWING & GEARTY, *supra* note 102, at 207 (quoting Lord Jenkins of Hillhead).

⁴⁴¹ Official Secrets Act, 1989, c. 6.

⁴⁴² FELDMAN, *supra* note 7, at 795-97.

Article 10(2) (which includes national security). Second, it must be compatible with liberal, democratic values.⁴⁴³ Feldman notes the importance in a liberal, democratic state of holding public officials accountable. Further, the 1989 OSA does *not* actually require that national security be damaged. It also prevents the defendant from demonstrating that his or her actions reflected a legitimate public interest. Feldman points to this as evidence that the statute does *not* balance rights and interests in a matter compatible with the ECHR. The domestic statute, though, captures *anything* in an individual's possession, regardless of whether it is still confidential. Feldman highlights the underlying concern that such legislation simply becomes a tool for state power: "[S]uccessive governments have made selective use of secrecy obligations, authorizing disclosure, usually on a non-attributable basis, of information they wanted to be made public, and prosecuting when a disclosure disadvantaged them politically."⁴⁴⁴

Feldman's analysis appears accurate. The *Spycatcher* case *did* go to the European Court of Human Rights, where a unanimous decision held against the United Kingdom. As Lord Lester of Herne related to the House of Commons, the European court ruled that the government's actions constituted a violation of Wright's right to free expression: The "restriction imposed by the British courts was not necessary in a democratic society, was disproportionate, was not reasonably proportionate to protect the legitimate aim of the state."⁴⁴⁵

The House of Lords recently considered a case that brought the relationship between the 1989 OSA and the 1998 HRA into sharp relief. David Michael Shayler, a member of the Security Service from November 1991 to October 1996, signed an OSA declaration recognizing the sensitive nature of the information to which he was privy. Upon his departure, he signed a second OSA statement and swore that he had turned over all documents acquired during his service. Over the next year, however, Shayler made documents that ranged from "classified" to "top secret" available to the *Mail on Sunday*. In August 1997, Shayler fled Britain for Paris, and soon thereafter the paper published a series of articles by him and by journalists who had had the opportunity to read the sensitive documents. France refused extradition. Three years later, he returned to Britain to claim that his disclosures had been in the public and national interests. He stated, "I . . . rely on my right of freedom of expression as guaranteed by the common law, the

⁴⁴³ *Id.* at 890.

⁴⁴⁴ *Id.* at 871.

⁴⁴⁵ Select Committee on Public Administration, Minutes of Evidence, HC Question 220 (29 June 29, 1999), available at <http://www.publications.parliament.uk/pa/cm199899/cmselect/cmpubadm/570/9062903.htm> (evidence given by Lord Lester of Herne Hill, QC).

Human Rights Act and Article 10 of the European Convention on Human Rights.”⁴⁴⁶

The House of Lords, upholding the lower courts’ decisions, announced that the defendant could *not* rely on the claim that disclosure served the national interest. Sections 1(1) and 4 of the 1989 OSA did not permit this defense. Nor did this claim burden the prosecution to demonstrate that the release of the information *was* in the public interest. The 1989 OSA restrictions echoed the objectives of Article 10(2) of the ECHR: The limits were prescribed by law, directed to the protection of national security (a legitimate aim), and necessary for a democratic society to operate.⁴⁴⁷ In determining the latter, in accordance with the European Court’s decision in *Shayler*, the Lords looked to proportionality—whether “the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it [were] relevant and sufficient under article 10(2).”⁴⁴⁸ Lord Bingham wrote, “The acid test is whether, in all the circumstances, the interference with the individual’s convention right prescribed by national law is greater than is required to meet the legitimate object which the state seeks to achieve.”⁴⁴⁹ Lord Hope of Craighead noted the special place of terrorism in the calculus of proportionality:

Long before the horrific events of 11 September 2001 in New York and Washington it was recognised by the European Court of Human Rights that democratic societies are threatened by highly sophisticated forms of espionage and by terrorism. The court held that they have to be able to take measures which will enable them to counter such threats effectively. But it stressed in the same case that it must be satisfied that there exist adequate and effective guarantees that such measures will not be abused.⁴⁵⁰

⁴⁴⁶ *R. v. Shayler* [2002] UKHL 11, [2003] 1 A.C. 247 (quoting David Michael Shayler’s statement at the Charing Cross Police Station in response to the charge on August 21, 2000).

⁴⁴⁷ The Lords cited the following European cases to support the claim to secrecy for efforts related to counterterrorism, criminal activity, hostile activity and subversion: *Engel v. The Netherlands*, App. No. 5100/71, 1 Eur. H.R. Rep. 647, paras. 100-03 (1976); *Klass v. Federal Republic of Germany*, App. No. 5029/71, 2 Eur. H.R. Rep. 214, para. 48 (1978); *Leander v. Sweden*, App. No. 9248/81, 9 Eur. H.R. Rep. 433, para. 59 (1987); *Hadjianastassiou v. Greece*, App. No. 12945/87, 16 Eur. H.R. Rep. 219, paras. 45-47 (1992); *Esbester v. United Kingdom*, 18 Eur. H.R. Rep. CD 72, CD 74 (1994); *Brind v. United Kingdom*, 18 Eur. H.R. Rep. CD 76, CD 83-84 (1994); *Murray v. United Kingdom*, 19 Eur. H.R. Rep. 193, para. 58 (1994); *Vereniging Weekblad Bluf! v. The Netherlands*, App. No. 16616/90, 20 Eur. H.R. Rep. 189, paras. 35-40 (1995); *Shayler*, [2002] UKHL 11 at para. 26. According to the Lords, these decisions “insist on adequate safeguards to ensure that the restriction does not exceed what is necessary to achieve the end in question.” *Shayler*, [2002] UKHL 11 at para. 26.

⁴⁴⁸ *Shayler*, [2002] UKHL 11 at para. 23.

⁴⁴⁹ *Id.* at para. 26.

⁴⁵⁰ *Id.* at para. 67 (citation omitted).

The 1989 OSA did not completely restrict freedom of expression—rather, it only banned the release of the information in the absence of lawful authority to the contrary. Under the legislation, Shayler could have disclosed the information to a staff counselor, the Attorney General, the Director of Public Prosecutions, the commissioner of Metropolitan Police, the Prime Minister, or other ministers. If any one of these individuals had not taken effective steps to redress the grievance, Shayler could have sought official authorization to make available to a wider audience. If he had been refused without appropriate justification, he could have sought judicial review. The 1989 OSA had been designed to prevent unlawfulness or irregular behavior from going unreported. But employees had to go through these steps first—they could not just jump to public disclosure.

The extreme deference given to the Executive in cases involving national security echoes a common refrain between these cases: “In the paradigm national security case the outcome of a governmental application to restrain publication is likely to be a foregone conclusion in favour of the government.”⁴⁵¹ As Lord Diplock commented, action required to ensure national security “is, par excellence, a non-justiciable question.”⁴⁵² In other words, if the British government makes a content-based national security claim, the judicial track record suggests it will enjoy a high likelihood of success.⁴⁵³

C. *Freedom of Information*

Countervailing legislation appears in part to provide a check on the American and British strictures on employee speech and information held by the state. Both countries’ Freedom of Information Acts (FOIA), however, allow for significant national security exceptions. With the breadth of challenge posed by possible terrorist acquisition of CBNRW, such exceptions can be expected to expand, rather than recede, in the coming years.

The American FOIA dates back to 1966.⁴⁵⁴ It is based on concepts of transparency, accountability, and limits on disclosure to serve rival government interests. Every person has a court-enforced right to seek federal agency records. Although the legislation created nine categories

⁴⁵¹ *Attorney-Gen v. Guardian Newspapers Ltd. (No 2)*, [1988] 3 All E.R. 594, 629 (C.A. Civ. Div.).

⁴⁵² Fairley, *supra* note 328, at 438 (citing Lord Diplock in *CCSU v. Minister for the Civil Serv.*, [1985] A.C. 374, 412).

⁴⁵³ *Id.* at 437.

⁴⁵⁴ Pub. L. No. 89-487, 80 Stat. 250 (1966).

for exemption, agencies can avail themselves of “discretionary disclosure” to release information in these areas. In 1974, 1976, 1986, and 1996 Congress amended FOIA.⁴⁵⁵ Most of the changes reflected procedural alteration, exemption expansion, and electronic reporting requirements. Currently, some twenty-five federal agencies receive over ninety-seven percent of FOIA requests.

Following 9/11, the Bush Administration took a series of steps to limit public access to government information. Where Janet Reno, as Attorney General, established a “strong presumption of disclosure,”⁴⁵⁶ and allowed for discretionary disclosures to ensure the “maximum responsible disclosure,”⁴⁵⁷ on October 12, 2001, Attorney General John Ashcroft issued a new memo that reversed this presumption.⁴⁵⁸ He directed agencies to consider national security, effective law enforcement, and personal privacy. Ashcroft also weakened the standard under which the Department of Justice would defend other agencies’ decisions to withhold information. Where Reno required that for an agency to be defended by the Justice Department in court it *must reasonably foresee* that the disclosure would harm an interest that was protected by an exemption⁴⁵⁹ (this overturned the 1981 guidelines that the DOJ would defend only if there were a “substantial legal basis”⁴⁶⁰ for doing so), Ashcroft indicated that Justice would defend it if *any sound legal basis* existed.⁴⁶¹ A second memo in March 2002, from the Bush Administration’s Assistant to the President and Chief of Staff to all heads of federal departments and agencies, further restricted the reach of FOIA.⁴⁶² The missive directed that the recipients safeguard *all* information relating to homeland security.⁴⁶³ A joint memo, issued by

⁴⁵⁵ Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561, 1563, 1564 (1974); Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976); Pub. L. No. 99-570, tit. I(N), §§ 1802, 1803, 100 Stat. 3207-48, 3207-49 (1986); Pub. L. No. 104-231, §§ 3-11, 110 Stat. 3049 (1996).

⁴⁵⁶ Memorandum from Attorney General Janet Reno to the Heads of All Individual Components of the Department of Justice on the Subject of Freedom of Information Act Backlog Reduction Within the Department, *available at* http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm (last visited Sept. 11, 2005).

⁴⁵⁷ Memorandum from Attorney General Janet Reno to Heads of Departments and Agencies on the Subject of the Freedom of Information Act (Oct. 4, 1993), *available at* http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm [hereinafter Reno Memorandum].

⁴⁵⁸ Memorandum from Attorney General John Ashcroft to the Heads of All Federal Departments and Agencies on the Subject of The Freedom of Information Act (Oct. 12, 2001), *available at* <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm> [hereinafter Ashcroft Memorandum].

⁴⁵⁹ Reno Memorandum, *supra* note 457.

⁴⁶⁰ *Id.*

⁴⁶¹ Ashcroft Memorandum, *supra* note 458.

⁴⁶² Memorandum from Chief of Staff Andrew Card to the Heads of Executive Departments and Agencies on the Subject of Action to Safeguard Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002), *available at* <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm>.

⁴⁶³ *Id.*

the National Archives' Information Security Oversight Office and the DOJ's Office of Information and Privacy, accompanied the letter and provided additional guidance on safeguarding restricting data.⁴⁶⁴

In November 2002, the new Homeland Security Act⁴⁶⁵ further dried up the information flow by including secrecy provisions to allow businesses to designate information supplied to the government as "critical infrastructure information" (CII). The statute exempted private industry from any FOIA requests or private lawsuits and imposed criminal penalties for anyone revealing information designated CII.⁴⁶⁶ The Administration interpreted this in a later rule to mean that "any information voluntarily supplied to any government agency is protected . . . and therefore not subject to FOIA—if it is passed along to the Department of Homeland Security."⁴⁶⁷ The argument that this information somehow protects the state from terrorism appears somewhat spurious: Confidential trade information and sensitive data already enjoyed an exemption under FOIA. Both liberal and conservative commentators faulted this provision.⁴⁶⁸

In the National Defense Authorization Act for Fiscal Year 2004,⁴⁶⁹ Congress made further provision to allow the NSA *automatically* to refuse citizens' requests for information about how the agency works—the "operational files." The Bush Administration justified the measure not in terms of security, but in terms of efficiency: "There's a better use of (the agency's) time and effort—the war on terrorism and so forth—than searching for records that are going to be denied anyway."⁴⁷⁰ An impressive array of opponents lined up against the legislation: the Federation of American Scientists, the American Library Association, the American Society of Newspaper Editors, and the Electronic Privacy Information Center.⁴⁷¹ While FOIA provided a previous exemption to

⁴⁶⁴ Memorandum from Laura Kimberly, Acting Director of the Information Security Oversight Office, Richard Huff & Daniel Metcalfe, Co-Directors of the Office of Information and Privacy, Department of Justice to Departments and Agencies on the Subject of Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Records Related to Homeland Security (Mar. 19, 2002), *available at* <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm>.

⁴⁶⁵ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

⁴⁶⁶ Sarah Leshner, *Senators Attempt to Close 'Secrecy' Hole: Watchdog Groups Worry Too Much Can be Made Secret*, THE HILL, July 8, 2003, *available at* <http://foi.missouri.edu/federalfoia/senators.html>.

⁴⁶⁷ *Id.*

⁴⁶⁸ *See, e.g., id.* (quoting Tim Edgar, legislative counsel to ACLU and Mark Tapscott, director of media services of the Heritage Foundation).

⁴⁶⁹ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

⁴⁷⁰ Ariel Sabar, *Bill Would Tighten Cloak of NSA Secrecy, Critics Say: Spy Agency Says Proposal Would be Labor-Saver on Requests Routinely Denied*, BALTIMORE SUN, May 16, 2003, at 3A.

⁴⁷¹ *Id.*

the CIA (in 1984), public hearings accompanied the decision.⁴⁷² The National Imagery and Mapping Agency (NIMA) and the National Reconnaissance Office (NRO) also have exceptions.⁴⁷³ What concerns some observers about this move in regard to the NSA, is that the organization is already notoriously difficult to penetrate.⁴⁷⁴ A long history of secrecy led to extraordinary abuses within the NSA—including, for instance, operation MINARET (which tapped the phones of anti-war leaders in the United States from 1967 to 1972) and participation in COINTELPRO (which compiled information on more than 300,000 U.S. citizens by virtue of their membership in, inter alia, the NAACP, Democratic “dissident” organizations such as Students for a Democratic Society (SDS) and the Student Non-Violent Coordinating Committee (SNCC), and “Black Nationalist” groups, such as the Nation of Islam), as well as for leadership roles in women’s liberation and the Civil Rights movements.⁴⁷⁵

The immediate effect of the change in policy meant that information previously in the public domain simply disappeared. And, across the board, the rate of denial of FOIA applications increased. This affected not just national security areas, but efforts to find out information with significant environmental repercussions.⁴⁷⁶ A GAO Report found that approximately one-third of federal FOIA officers noticed a decrease in discretionary disclosures. Most of the FOIA officers responding to the survey (seventy-five percent) attributed this to Ashcroft’s policy.⁴⁷⁷

The United Kingdom only recently joined the FOIA trend. For most of the country’s history, the policy largely centered on releasing information whenever the government deemed public access appropriate.⁴⁷⁸ As the campaign for freedom of information gained

⁴⁷² *Id.*

⁴⁷³ Press Release, The National Security Archive, Spy Agencies Abuse Freedom of Information Exemptions but Congress May Grant New One to Intercepts Agency (June 11, 2003), <http://www.gwu.edu/~nsarchiv/news/20030611/>.

⁴⁷⁴ See Sabar, *supra* note 470.

⁴⁷⁵ *The National Security Agency and Fourth Amendment Rights: Hearings Before the Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, 94th Cong. (1976); *Federal Bureau of Investigation: Hearings Before the Select Committee to Study Government Operations With Respect to Intelligence Activities of the United States Senate*, 94th Cong. (1976); SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., FINAL REPORT ON SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS (1976).

⁴⁷⁶ Comment, *What’s in the Water?: New Rules Make it Harder for Reporters (Or Anyone Else) to Find Out*, COLUM. JOURNALISM REV., Mar.-Apr. (2003), available at <http://www.cjr.org/issues/2003/2/comment.asp>.

⁴⁷⁷ U.S. Gen. Accounting Office, Freedom of Information Act: Agency Views on Changes Resulting From New Administration Policy 2 (2003), available at <http://www.gao.gov/new.items/d03981.pdf>.

⁴⁷⁸ FELDMAN, *supra* note 7, at 782.

momentum in the late twentieth century, and the Major Government came under increasing criticism for its secrecy, in 1994, John Major adopted a Code of Practice on Access to Government Information.⁴⁷⁹ The measure had no legal force and multiple loopholes. Nevertheless, its flexible procedures did produce some information. In 1997, Labour published a white paper and vowed to introduce legislation.⁴⁸⁰ The document recognized that

[u]nnecessary secrecy in government leads to arrogance in governance and defective decision-making. The perception of excessive secrecy has become a corrosive influence in the decline of public confidence in government. Moreover, the climate of public opinion has changed: people expect much greater openness and accountability from government than they used to.⁴⁸¹

The government left implementation to Jack Straw, Home Secretary, who, in November 1999, introduced a watered-down Freedom of Information Bill. Westminster added more protections, but, like its American counterpart, the legislation includes a number of exceptions.

What makes the statute remarkable is that it establishes openness—not secrecy—as a general rule. Restrictions placed on the government fall under justiciable standards, with enforcement mechanisms to alleviate grievance. At a minimum, officials must respond in writing to all requests—either with an answer or an explanation as to why the information will not be provided—within twenty days of the original request.⁴⁸² Exceptions, though, prove troublesome.⁴⁸³ It specifically excludes any information supplied directly or indirectly by—or relating to—security, intelligence, criminal intelligence services and tribunals handling complaints about them, as well as any information a Minister certifies requires exemption for reasons relating to national security.⁴⁸⁴ It excludes information related to defense.⁴⁸⁵ In a direct response to the rather public scandals that marked the previous decades, it also excludes

⁴⁷⁹ Parliamentary Ombudsman, Access to Official Information: Monitoring of the Non-Statutory Codes of Practice 1994-2005, http://www.ombudsman.org.uk/improving_services/special_reports/aoi/aoi_1994_2005/foreword.html (last visited Sept. 29, 2005). For the 1997 version of the code, see CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION (1997), available at <http://www.cfoi.org.uk/coptext.html>.

⁴⁸⁰ See Patrick Birkinshaw & Alan Parkin, *Freedom of Information*, in ROBERT BLACKBURN & RAYMOND PLANT, CONSTITUTIONAL REFORM: THE LABOUR GOVERNMENT'S CONSTITUTIONAL REFORM AGENDA 173-201 (1999); R. Austin, *Freedom of Information: The Constitutional Impact*, in JEFFREY JOWELL & DAWN OLIVER, THE CHANGING CONSTITUTION 319-71 (4th ed. 2000).

⁴⁸¹ FELDMAN, *supra* note 7, at 782.

⁴⁸² *Id.* at 783.

⁴⁸³ *Id.* at 783-85.

⁴⁸⁴ Freedom of Information Act, 2000, c. 36, §§ 23, 24, 25 (Eng.).

⁴⁸⁵ *Id.* § 26.

information provided in confidence.⁴⁸⁶ The statute gives the Information Commissioner—also in charge of protecting data—the responsibility of encouraging public authorities to act well, educate the public, and arbitrate the authorities’ claims to exemptions.⁴⁸⁷ If, however, the Commissioner directs an officer to comply with the Act, the civil servant can avoid doing so by obtaining a national security certificate directly from the Secretary of State or one of her designated proxies.⁴⁸⁸ The certificate simply states that there are reasonable grounds to refuse the request. Either party can appeal the information commissioner’s decision to a Tribunal established under the act.⁴⁸⁹

In summary, when the state bears a special relationship to the speech in question, the United States and United Kingdom maintain extensive authority to prevent information that might be considered harmful to the state’s counterterrorist efforts from seeing light of day. I turn now to measures that do not directly target free expression, but which carry a substantial secondary effect on free speech within the state.

III. PROVISIONS WITH A SECONDARY EFFECT ON FREE SPEECH

Focus on *Brandenburg* and outright speech restrictions, in some sense, has the feeling of fighting the previous battle. There are a host of provisions used to counter terrorism that do not directly target speech, but which nonetheless have a significant impact on free expression within the state. The most significant may be those related to executive detention, proscription, and evidentiary rules. Additional initiatives affecting immigration, legislative inquiries and loyalty oaths, surveillance, and informal state pressure add to the mix. This section briefly delves into the first three areas to provide examples of how American and British non-speech-specific counterterrorist provisions impact the right to free expression.

A. *Executive Detention*

The United States has thrice implemented widespread executive detention.⁴⁹⁰ Following 9/11, Attorney General John Ashcroft initiated

⁴⁸⁶ *Id.* § 41.

⁴⁸⁷ *Id.* § 47.

⁴⁸⁸ *Id.* § 53.

⁴⁸⁹ *Id.* § 57.

⁴⁹⁰ First, during the Civil War, Lincoln oversaw more than 38,000 detentions, many executed on the basis of otherwise protected First Amendment activities. STONE, *supra* note 12, at 124.

the third and most recent program. Arab males, aged eighteen to thirty-five, from a list of seventeen different countries, became the target. In total, the Department of Justice detained more than 5000 non-US citizens—some for up to three years. The FBI began making regular visits to mosques, and the Department of Homeland Security obtained a breakdown of all Arab-Muslims in the United States by zip code.⁴⁹¹ While not outright prohibitions on free speech, these measures impacted the ability of individuals to express themselves without fear of state action. Looking to *Brandenburg* in this context as a guarantee of free speech seems somewhat misplaced.

This paper does not seek to analyze the efficacy of the post-9/11 measures. However, it is worth noting that as of August 2005, no terrorist convictions had resulted from the detentions. Those charged with crimes tended to have minor visa violations such as holding two jobs instead of the one allowed under the terms of their residence. Others had been students in the U.S. and stayed on following school in violation of their visa. The DOJ nevertheless cited subsequent deportations as evidence of its statistical success in the war on terror. These detentions and deportations may indeed have had some effect on

Second, in June 1940, the FBI initiated plans for the second major detention of American citizens. The Custodial Detention Program drew from a list of people arrested during the national emergency. The Executive branch detained 9,121 people. By Presidential proclamation, all enemy aliens *not* interned—some 890,000 Italian, German, and Japanese nationals—suffered restrictions on their freedom of movement and could not own radios, cameras, or weapons. STONE, *supra* note 12, at 285-86. Following the attack on Pearl Harbor, Executive Order 9066 provided the military with the authority to “designate . . . military areas” from which “any or all persons may be excluded.” Exec. Order No. 9,066, 3 C.F.R. E.O. 9066 (1942). Over the next eight months, the army transferred more than 120,000 people of Japanese ancestry, two-thirds of whom were U.S. citizens, to concentration camps. Although initially upheld by the courts, the racism that motivated this action—particularly in light of the lack of evidence of any threat posed by those interned—became a blight on American history. *See Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Endo*, 323 U.S. 283 (1944); *see also* STONE, *supra* note 12, at 305-07. In 1976, President Ford issued Presidential Proclamation No. 4417, recognizing the error of E.O. 9066. STONE, *supra* note 12, at 305. In 1983, Congress’s Commission on Wartime Relocation and Internment of Civilians concluded that “race prejudice, war hysteria and a failure of political leadership” drove the relocations. A joint Congressional Resolution recognized the “grave injustice . . . done” and apologized for exclusion, removal, and detention. *Id.* at 305-06. The judiciary took the unusual step of granting writs of error *coram nobis*—to set aside convictions for “manifest injustice” to Fred Korematsu and Kiyoshi Hirabayashi. The courts found that the government knowingly and intentionally failed to disclose vital information that would have exonerated the detainees. *Id.* at 307-08. In 1988, the Civil Liberties Act deemed the internment a “grave injustice . . . carried out without adequate security reasons,” without any documented acts of “espionage or sabotage.” Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988). A presidential apology and reparations for discrimination, loss of liberty, loss of property, and personal humiliation followed. STONE, *supra* note 12, at 307.

⁴⁹¹ Interview with Helal Omeira, Council on American Islamic Relations, in San Francisco, Calif. (Sept. 2004). Zip code information was obtained by a Freedom of Information Act request and is available at www.eff.org.

sleeper cells in the United States—either through interrupting them or causing al Qaeda adherents to leave the country to avoid being caught in the sweep. One would have expected, though, at least a handful of terrorism convictions to follow. What is clear is that the measures had a significant impact on the ability of Arab and Islamic people within the United States to speak their minds openly. Discussions held at the Social Science Research Council in Autumn 2004 with prominent leaders in the Arab and Islamic communities underscored the degree to which both citizens and non-citizens of certain ethnic or religious persuasions felt afraid to voice their views. The consequence of doing so would mean the possible incarceration of themselves, their families, and their friends.

The United Kingdom also has made use of widespread detention. In Northern Ireland, for instance, between 1922 and 1972, internment occurred on four occasions. Its final introduction, Operation Demetrius, led to the incarceration of hundreds of innocent people. It so enraged the communities in Northern Ireland that violence in the province spiraled out of control, forcing Westminster to suspend the northern parliament. For the fifty years preceding this event, however, it served as a constant reminder of the awesome power of the state—and, again, had a significant chilling effect on speech. The point to be made here—in regard to both countries—is that, while detention itself does not target speech, its exercise affects speech outside the bounds of *Brandenburg* or the free expression provisions of the European Convention of Human Rights.

B. *Proscription*

The United States and United Kingdom also maintain authority to declare organizations unlawful. At first glance this may seem at odds with freedom of association—a right read into the First Amendment and embodied in the ECHR. The Supreme Court has held though, that the government *can* punish membership of a group—even when an individual does not engage in illegal activities on behalf of the entity—when the person is active with the organization, knows its illegal aims, and intends to further them.⁴⁹²

Although constitutional limits accompany measures relating to *domestic* groups and organizations, the U.S. maintains a system of designated *foreign* terrorist organizations. In the 1970s, the state made its initial forays into this area with its proscription of the Palestinian Liberation Organization. Following the Oklahoma City bombing, the

⁴⁹² *Scales v. United States*, 367 U.S. 203 (1961).

1996 Anti-terrorism and Effective Death Penalty Act⁴⁹³ empowered the Secretary of State to “designate” foreign-based organizations engaged in terrorist activity. Placement on the list made it illegal for a person in the U.S. or subject to American jurisdiction to provide funds or other material. Representatives and certain members could be denied visas or be excluded. American financial institutions became obliged to block foreign terrorist organization funds and file a report with the Office of Foreign Assets Control in the Department of the Treasury. As of April 2005, some forty organizations graced this list.⁴⁹⁴ In *People’s Mohjahedin Org. v. United States*,⁴⁹⁵ the D.C. Circuit held that the judicial system could review the Secretary of State’s determinations as far as the foreign nature of the organization was concerned and whether it engaged in terrorist activity, but not whether the organization proved a national security threat. The circuits are split though over how far to take this. The Ninth Circuit, for instance, held that “targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had the specific intent to pursue illegal group goals.”⁴⁹⁶

Until implementation of the HRA in October 2000, no such corresponding right of association existed in English law. For centuries, the state maintained legislation proscribing membership even in domestic organizations. For instance, in 1799 and 1817 the United Kingdom suppressed secret societies.⁴⁹⁷ The Republican movement in France and the Irish rebellion across the sea provided the context—events that many in the British establishment believed were linked. A 1799 statute blacklisted the United Englishmen, United Scotsmen, United Britons, United Irishmen, and London Corresponding Society.⁴⁹⁸ It noted that members took unlawful oaths, used secret signs, and operated in stealth. The legislation claimed it was “expedient and necessary that . . . all societies of the like nature should be utterly suppressed and prohibited.”⁴⁹⁹ An 1817 statute similarly marked political unrest.⁵⁰⁰ These provisions remained in place until the late nineteenth century.

⁴⁹³ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

⁴⁹⁴ U.S. DEPARTMENT OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2004, at 92 (2005), available at <http://www.state.gov/documents/organization/45313.pdf>.

⁴⁹⁵ 182 F.3d 17 (D.C. Cir. 1999).

⁴⁹⁶ *Am.-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367, 1376 (1997), vacated, 525 U.S. 471 (1999).

⁴⁹⁷ Seditious Meetings and Assemblies Act, 1817, 57 Geo. 3, c. 19; Corresponding Societies Act, 1799, 39 Geo. 3, c. 79.

⁴⁹⁸ Corresponding Societies Act, 1799; 39 Geo. 3, c. 79.

⁴⁹⁹ *Id.*

⁵⁰⁰ Seditious Meetings and Assemblies Act, 1817, 57 Geo. 3, c. 19.

Prior to the formation of Northern Ireland, the British government also proscribed a number of organizations in Ireland. These bans, instituted under the Defence of the Realm Acts, remained in place through adoption of Regulation 14 of the Restoration of Order in Ireland Act, and then Regulation 24 of the original schedule to the 1922 Special Powers Act.⁵⁰¹ Regulation 24 made it an offence for individuals sharing the objects of a listed organization to act to further those views, or to possess any document relating to the affairs of the organization. The burden of proof lay on the defendant, in whose quarters such documents may be found, to demonstrate that he was not associated with the group. Within days of the introduction of this regulation, the government expanded it to make it an offence to be a member of an unlawful association or to act to promote the objects of either an unlawful association or of a “seditious conspiracy.”⁵⁰² As with the earlier regulation, under Regulation 24A possession of documents provided sufficient proof of membership. A third regulation, 24B, further augmented proscription, making it illegal to refuse to recognize the court or to claim membership of an illegal organization during judicial proceedings.⁵⁰³ Although the government withdrew Regulations 24 and 24B in 1949 and 1951, respectively, Regulation 24A remained on the books until the prorogement of Stormont. Throughout this time, the Northern Executive periodically expanded the number of organizations to include both republican and left-wing organizations.⁵⁰⁴ In 1966, the Northern Executive banned its first (and penultimate) Loyalist organization: the Ulster Volunteer Force. At the time of partition, eleven organizations remained on the list—nine of which were republican in character.⁵⁰⁵ These measures created an atmosphere that

⁵⁰¹ 1920 S.R. & O. 1920/1530 (promulgated under the Restoration of Order in Ireland Act, 1920, 10 & 11 Geo. 5, ch. 31 (Eng.)); 1922 S.R. & O. 1922/33 (promulgated under the Civil Authorities (Special Powers) Act, 1922, 12 & 13 Geo. 5, c. 5, (N. I.)).

⁵⁰² 1922 S.R. & O. 1922/25

⁵⁰³ 1933 S.R. & O. 1933/11 (promulgated in B.G., Jan. 20, 1933).

⁵⁰⁴ Such organizations include, for example, the Irish Republican Brotherhood, Irish Republican Army, Fianna na hÉireann, Cumann Poblachta na hÉireann, Saor Uladh, Sinn Féin, Fianna Uladh, Saor Éire, the National Guard Friends of Soviet Russia, the Irish Labour Defence League, the Workers’ Defence Corps, the Women Prisoners’ Defence League, the Workers’ Revolutionary Party (Ireland), the Irish Tribute League, the Irish Working Farmers’ Committee and the Workers’ Research Bureau. DONOHUE, *supra* note 109, at 100-03.

⁵⁰⁵ *See id.* at 103. In 1969, the application of these powers reached the highest court. The previous year Michael Francis Forde, an RUC district inspector, named John McEldowney as a member of the Slaughtneil Republican Club. Regulation 24A of the 1922-1943 SPAs outlawed republican clubs. The state did not provide any evidence that the organization threatened peace, law and order in the province. The police admitted that they were unaware of anything seditious in this particular club’s pursuits. McEldowney claimed that under the SPAs, the criterion for banning an organization was *not* a general category (*i.e.*, “republican clubs”) but rather its purpose and the activities. The magistrate, agreeing with the defendant, dismissed the complaint. Forde appealed and the case reached the House of Lords. The majority found generic descriptions acceptable under the 1922-1943 SPAs. Lord Hodsdon wrote:

made people afraid to associate with particular groups—even for legitimate political or professional reasons: Sinn Féin recognized that “Section 31 is not only a bar or distorting factor on news reporting, it helps generate the atmosphere in which people are afraid to be seen as associated with Sinn Féin.”⁵⁰⁶

Section 19 of the 1973 Emergency Powers Act (EPA) incorporated all of Regulation 24A’s powers of proscription and added to it a measure that made it illegal for any person to solicit membership or funds for a proscribed organization. By making recruiting and fundraising an offence, instead of simply stifling any contrary speech at the Unionist government had done, Westminster tried to separate paramilitary organizations from the communities whence they derived. Section 23A of the new legislation made it illegal for an individual to dress or behave in public “in such a way as to arouse reasonable apprehension that he is a member of a proscribed organization.” The sectarian application of proscription aroused concern in reviews of emergency legislation.⁵⁰⁷ The government initiated 107 prosecutions in 1980, 71 in 1981, 137 in 1982 and 108 in 1983.⁵⁰⁸ However, the provision acted mainly to express outrage “at the barbarous acts of these organizations, and the revolting glee with which they claim responsibility for the organization, usually with personal anonymity, together with their public displays in particular areas.”⁵⁰⁹ It thus represented as much an effort to demonstrate moral disgust as a way to prevent breaches of the peace.

I cannot escape the conclusion that in its context, added to the list of admittedly unlawful organisations of a militant type, the word ‘republican’ is capable of fitting the description of a club which in the opinion of the Minister should be proscribed as a subversive organisation of a type akin to those previously named in the list of admittedly unlawful organisations. The context in which the word is used shows the type of club which the Minister had in mind and there is no doubt that the mischief aimed at is an association which had subversive objects.

McEldowney v. Forde, [1971] A.C. 632, at 645.

⁵⁰⁶ Cynthia L. Irvin, *Terrorists’ Perspectives: Interviews*, in *TERRORISM AND THE MEDIA* 62, 70 (David L. Paletz & Alex P. Schmid eds., 1992) (citing 1986 internal Sinn Féin document).

⁵⁰⁷ See, e.g., REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND (GARDINER REPORT), 1975, Cmnd. 5847. The 1973 EPA outlawed Sinn Féin, the IRA, Cumann na mBan, Fianna na hÉireann, Saor Éire, and the Ulster Volunteer Force. By 1984, the British government had added the Red Hand Commandos, the Ulster Freedom Fighters, and the Irish National Liberation Army to the list. Northern Ireland (Emergency Provisions) Act, 1978 (Amendment) Order 1979 (S.K.I. 1979, No. 746). For discussion of the orders proscribing the INLA, see 969 PARL. DEB., H.C. (5th ser.) (1979) 925-1070; 971 PARL. DEB., H.C. (5th ser.) (1979) 741-70.

⁵⁰⁸ SECRETARY OF STATE FOR NORTHERN IRELAND, REVIEW OF THE OPERATION OF THE NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT 1978 (BAKER REPORT), 1984, Cmnd. 9222, para. 412.

⁵⁰⁹ *Id.* at para. 414.

The British government also made organizations in Great Britain illegal: Like the EPA, the 1974 Prevention of Terrorism Act (PTA) provided for proscription. Here, though, almost the sole purpose was to reflect the moral opprobrium of society. Roy Jenkins sought to avoid seeing the “men of violence” gloat over the latest attack: “I have never claimed, and do not claim now, that proscription of the IRA will of itself reduce terrorist outrages. *But the public should no longer have to endure the affront of public demonstrations in support of that body.*”⁵¹⁰ Consequently, the British state only outlawed Republican organizations. The 1974 PTA also prohibited dress that indicated membership of a proscribed organization. Possession of objects indicating membership shifted the onus to the defendant to prove that they were *not* a member of the group. As recognized in the House of Commons, “the open panoply of IRA activities was such an affront to our people that it had to be banned for that purpose.”⁵¹¹ Most recently, the 1998 Criminal Justice (Terrorism and Conspiracy) Act also allowed for proscription.⁵¹²

C. Evidentiary Rules Based on Speech and Expression

A different geopolitical situation holds today than it did in the early-to mid-twentieth century: Assuming that al Qaeda presents the most serious terrorist threat, the United States again faces an international movement. However, this time, the strength in numbers relates to individuals *outside* the United States. The more likely

⁵¹⁰ 882 PARL. DEB., H.C. (5th ser.) (1974) 636 (emphasis added).

⁵¹¹ *Id.* at 746.

⁵¹² Criminal Justice (Terrorism and Conspiracy) Act, 1998 (Eng.). Recall Article 11 of the European Convention on Human Rights: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others.” European Convention for the Protection of Human Rights & Fundamental Freedoms, art. 11, Nov. 4, 1950, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/English_Anglais.pdf. This measure limits restrictions that can be placed on the exercise of these rights, “other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.” *Id.* art. 11(2). Despite the national security exception, this provision may have a dampening effect on proscription measures in the U.K.. In 1998, for instance, Strasbourg considered Turkey’s dissolution of the Communist Party, and the transfer of the party’s assets to the state treasury, to be a violation of Articles 10 and 11 of the ECHR. *United Communist Party of Turkey v. Turkey*, 26 Eur. Ct. H.R. 121 (1998); *see also Socialist Party v. Turkey*, 27 Eur. Ct. H.R. 51 (1998). The court suggested that the right to vote in Article 3 of the ECHR would be meaningless without the free formation and participation of political parties. “[O]nly convincing and compelling reasons” would justify inroads into Article 11. *Socialist Party v. Turkey*, 27 Eur. Ct. H.R. at 86. While authorities could challenge associations that jeopardized the state institutions, a pattern of subversive action would be necessary. *See GEARTY, supra* note 150, at 46-47. The organizations currently proscribed by the U.K., however, include militant groups, in regard to which the standard for limits on freedom of association would likely be met.

concern inside state bounds is that the organization will try to recruit members from generally inaccessible communities. Throwing pamphlets from the top of a tenement building is thus less likely to be a concern—or, indeed, even punished. Instead, the government is more likely to use conspiracy provisions which address person-to-person persuasive speech and less advocacy to unknown swathes of the population. But it is not at all clear—from either the original decision or from subsequent case—what the relationship between *Brandenburg* and conspiracy law is. Moreover, for the most part, the free speech doctrine does not deal with solicitation of crime. Yet, as Frankfurter noted in his concurrence in *Dennis*, advocacy of crime frequently attaches to political opposition.⁵¹³ As terrorist networks seek to become established and move away from politics and large groups, the law likely to be applied to them moves away from *Brandenburg*. Here, Congress has steadily weakened standards required by criminal law.

The relaxation of the bilateral requirement in conspiracy law and the introduction and expanded use of the Racketeer Influenced and Corrupt Organizations Act (RICO) provide two examples.⁵¹⁴ In relation to the first, although traditionally conspiracy required that two or more people agree in order for at least one conviction to follow, more recently a unilateral view of conspiracy emerged: Whether the other person had any intention of fulfilling that purpose proves irrelevant as long as the first person intends to fulfill it if possible.⁵¹⁵ The second relates to a statute Congress passed in 1970, which weakened federal conspiracy standards. Its use quickly went beyond the mafia world for which Congress created it. RICO forbids the investment or “laundering” of racketeering profits in interstate commercial businesses, even where the business has a legitimate purpose wholly independent of racketeering activity.⁵¹⁶ It also bars the infiltration of legitimate enterprises by means of bribery, extortion, or other predicate acts, or the corruption of a legitimate enterprise from within.⁵¹⁷ Congress wrote RICO to make personal involvement unnecessary. Law enforcement expanded on the concept of “enterprise” to include non-commercial enterprises. The court agreed with this interpretation, and held that the enterprise need not have an economic motive. Although the statute requires two predicate acts, virtually simultaneous actions appear to suffice: In one mafia hit case, for example, three assassinations performed at once

⁵¹³ *Dennis v. United States*, 341 U.S. 494, 533-39 (1951) (Frankfurter, J., concurring).

⁵¹⁴ Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 9 U.S.C. §§ 1961-68 (2000)).

⁵¹⁵ MODEL PENAL CODE § 5.03(1) (1962).

⁵¹⁶ RICO, § 1962(a), 84 Stat. 942.

⁵¹⁷ *Id.* § 1962(b)-(c), 84 Stat. 942-43.

established a pattern of behavior sufficient to satisfy RICO.⁵¹⁸ Once law enforcement makes the decision to pursue a case under the more expansive criminal law measures, the *Brandenburg* test can do little to guarantee the protections it claims.

Evidentiary rules writ large also present a difficulty. Although the American judiciary, as a whole, prevents juries from imposing liability based on First Amendment activity, the state can introduce such activity as evidence of something else—e.g., that the witness is lying, that the defendant has a bad character, or that co-conspirators have a previous association.⁵¹⁹ The First Amendment only enters the scene when speech tightly connects to what is being punished—not when used more generally as evidence of some mental state or past actions.⁵²⁰ With regular rules of evidence “strongly weighted in favor of admission,” defendants can thus *indirectly* be punished for First Amendment-protected activity.⁵²¹ This practice may chill some otherwise protected expression. It also may lead people to plea bargain or give up their right to a jury trial.⁵²²

Arguments in favor of the burden as currently written note that speech and expressive conduct helps to establish and ascertain motive and evidence of conduct. Individuals may be more likely to act on something they have said. In the atmosphere of fear that accompanies acts of terror, though, otherwise innocuous activity takes on special meaning. Here, the majoritarian bias traditionally attributed to juries works against the innocent and pressures those not currently on the docket to cease and desist otherwise protected activities. Because of this bias, the courts transferred the burden of proof to the state to demonstrate advocacy to overthrow the government, and meet the standard of “clear and convincing” evidence.⁵²³

Solutions to this situation exist. For instance, First Amendment activity can be distinguished from other forms of evidence and granted a stricter standard for admission.⁵²⁴ By holding it presumptively prejudicial—unless its probative value significantly exceeds the prejudice so incurred—the courts would go some ways towards alleviating this concern.⁵²⁵ A less aggressive solution might be simply

⁵¹⁸ *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (en banc).

⁵¹⁹ Robert P. Faulkner, *Evidence of First Amendment Activity at Trial: The Articulation of a Higher Evidentiary Standard*, 42 UCLA L. REV. 1, 4-5 (1994).

⁵²⁰ EUGENE VOLOKH, *THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS* 340 (2001).

⁵²¹ Faulkner, *supra* note 519, at 9; *see also* FED. R. EVID. 401-02.

⁵²² Faulkner, *supra* note 519, at 11.

⁵²³ *Speiser v. Randall*, 357 U.S. 513, 523-24 (1958); Peter E. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg*, 86 YALE L.J. 1622, 1651 (1977) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)).

⁵²⁴ *See, e.g.*, Faulkner, *supra* note 519; Quint, *supra* note 523.

⁵²⁵ Faulkner, *supra* note 519, at 6.

to exclude such evidence until the state demonstrates that it “substantially outweighs its prejudicial dangers.”⁵²⁶ While outright prohibitions on speech might not be allowed, risks attend allowing evidence based on First Amendment activity in through the back door.

Outside of America’s use of Military Tribunals, which allow “confessions” obtained during torture to be admitted as evidence of guilt, the most dramatic example of lowering evidentiary rules specifically to generate terrorist convictions is provided by the United Kingdom: Following the 1998 Omagh bombing, the Terrorism and Conspiracy Act allowed the decision to remain silent in the face of questioning to be used as evidence of guilt. This measure brought Britain into line with Irish legislation to the same effect. Another provision in British counterterrorist law makes an accusation of a police officer evidence of membership of a terrorist organization.⁵²⁷ The combined effect of these provisions is that if a police officer asks someone whether they are a terrorist, and they remain silent—and the officer, in court, asserts that an individual is a terrorist, these two bits of evidence are sufficient to demonstrate membership of a terrorist organization.

Executive detention, proscription, and evidentiary rules only begin to skim the surface of the types of counterterrorist measures that have a significant impact on free speech. The freezing of assets may make people afraid to contribute to charitable organizations. Restriction and exclusion orders may make individuals afraid to question state actions. Legislative inquiries, such as those seen in the United States at the height of the McCarthy Era, may similarly stifle expression. Arguments for and against these propositions are beyond the scope of this article. However, the point to be made for the current inquiry is that appeal to cases like *Brandenburg* or the commitment to free expression in the ECHR says little about counterterrorist provisions that do not directly target but which nonetheless affect this freedom. What is perhaps ironic is that some commentators, quite willing to give up other liberties directly entailed in counterterrorist measures, nevertheless draw the line at free speech. For instance, Floyd Abrams writes:

One thing I am not prepared to even begin to compromise about is the First Amendment. In fact, as we give the government more power, it is all the more important that the press be utterly free to criticize the manner in which the government exercises that power and (more controversially) to be knowledgeable about what the government has done.⁵²⁸

⁵²⁶ Quint, *supra* note 523, at 1662.

⁵²⁷ Criminal Justice (Terrorism and Conspiracy) Act, 1998, c. 40.

⁵²⁸ Floyd Abrams, *The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST.

Yet once these other liberties begin to erode, a detrimental effect on free speech and expression becomes all but inevitable.

IV. POLICY CONSIDERATIONS

The previous sections address the legal and historical development of restrictions on speech. I turn now to a brief discussion of the policy arguments that attend contemporary counterterrorist provisions that target persuasive political speech, knowledge-based speech and classification.

A. *Persuasive Political Speech*

In the realm of political speech, strong arguments exist against a blanket media ban. In order to address, more narrowly, the possibility of terrorist organizations using the media to communicate with its cells, informal conventions could be developed regarding the direct transmission of pre-prepared statements and film.

Douglas Hurd's 1988 media ban presents the most recent effort by either state to place a broad restriction on persuasive terrorist speech. His concern centered on preventing offense to those suffering at the hands of the IRA. While apparently consistent with the ECHR, substantial drawbacks accompany such a policy and resonate in both countries under consideration. The order underestimated the public's ability to recognize terrorist propaganda.⁵²⁹ In so doing, it undermined state interests. Prior to the ban, politicians who appeared on television who tried to justify recent, violent attacks tended to suffer a significant *drop* in support.⁵³⁰ Media coverage forced organizations to justify their positions and to develop positive agendas. It gave movements the opportunity to air different views to allow them to move to nonviolent methods. The ban undermined the position of those who left the violent wings of paramilitary movements to join in political dialogue.⁵³¹ It also assumed that media coverage was either neutral or somehow assisted terrorist organizations. But terrorist organizations often abhor the media. For instance, one Sinn Féin internal document noted, "While always remembering that in the main the media are hostile to our position, and therefore less likely to honestly and objectively record our views, it is of great benefit if one can build up a personal relationship

L. 1, 8 (2002).

⁵²⁹ EWING & GEARTY, *supra* note 102, at 245.

⁵³⁰ *Id.* at 244.

⁵³¹ *Id.* at 250.

with journalists.”⁵³² They spend considerable amounts of time attempting to counter media reports:

Complaining about bad media coverage is a vital part of the process of getting good media coverage A letter of factual correction, or one pointing out unfairness, is not going to convert sloppy and/or right-wing reporters into paragons of radical, painstakingly accurate journalism; but it will sow seeds of doubt that will make them a bit more careful in the future about republican stories.⁵³³

Not just nationalist, separatist organizations have this difficulty: Leftist organizations claim that the media serves as a tool of the capitalist state that perpetuates the current structure. Finally, the ban itself proved somewhat ineffective, as the media found and exploited the loophole on written material, leading to sub-titling and then voiceovers.⁵³⁴

There appears to be a curious disconnect between the reluctance of the national security apparatus to allow expression as a way to mitigate terrorist threats and social scientists’ observations about the nature of terrorist challenge. What connects free speech intimately to terrorism is not just that it may be a motivating factor for individuals to engage in violence, but that this *particular* form of political violence gains strength from communities’ inability to express dissatisfaction with the *status quo* and to agitate for changed political, economic, and social circumstances. This is not to say that all those who choose to engage in

⁵³² Irvin, *supra* note 506, at 67 (citing 1986 internal Sinn Fein document).

⁵³³ *Id.*

⁵³⁴ While these arguments suggest that the ban might have failed on some grounds, there is an argument to the contrary that does not delve into the realm of the right not to be offended. Here I address the issue of hidden messages within transmissions. Following 9/11, U.S. National Security Advisor, Condoleezza Rice, urged network executives to review statements by Osama bin Laden for “inflammatory language or potential hidden messages.” Similar concerns haunted the British government with regard to PIRA. This is a difficult issue that may become increasingly prominent as the primary terrorist organizations faced by the U.S. and U.K. maintain their main base of support outside domestic bounds. With other communication routes closely guarded, the media may provide one of few means to communicate with sleeper cells inside the target country.

To meet the harm caused by such speech, it may be possible for the state more narrowly to tailor media restrictions to prevent messages from being transmitted word-for-word, or image-by-image, within a state. This may get around the issue of encrypted messages, while still allowing the media to report political developments. However, it also may have little or no impact: Communications has become a global trade, and news sources around the world—many of which compete with domestic media—might not be under any similar such restrictions. The information would thus be available to sleeper cells that monitor foreign publications. Moreover, hidden signals may have more to do with the setting, backdrop, or repose of the individual featured in the broadcast—or who is speaking—making it irrelevant whether or not the tape itself is edited in a different order or in a manner that omits certain phrases or expressions. On the other hand, it might make it more difficult to communicate with cells in the target country. The real question is to what degree legitimate discourse might be stifled, versus the threat posed by allowing unedited tapes to be aired. As CBNRW proliferates, the balance rather shifts to the latter. Nevertheless, the considerations of the former, particularly for counterterrorism, are important ones.

this form of violence would trade in weapons for a quill; but it does underscore that terrorists, who depend on constituents in order to survive, expand their base of support as the state introduces strictures in this area. Even if such speech seeks to persuade individuals to take up arms, by having the concept addressed openly, countervailing arguments may prevail.

An immediate example presents itself: Al Qaeda offers an interpretation of the Qu'ran that contradicts a number of religious leaders' views. By instituting provisions that end up restricting political speech—such as widespread detention—the United States impacts the ability of the Islamic community to explore the allegation made by the fringe organization. Indeed, by excluding liberal Islamic leaders from entering the U.S. on the basis of their religion, the Bush Administration limited the community's opportunity to challenge those views—and to develop an alternative concept of *ihjtihad*.

The risk that open discourse runs, of course, is that by allowing discussion, *more* support will be generated for those pursuing al Qaeda's aims. It may not be just liberal clerics who enter the nation, but illiberal advocates of political violence. However, by forcing these ideas underground, the state increases their importance—when reasoned debate in the open light of day may demonstrate faults in al Qaeda's interpretations and give more progressive elements an opportunity to counter the Islamist dialogue. And here, I believe, there is an important distinction to be drawn between actors like Adolph Hitler and Osama bin Laden. Where Hitler had a state apparatus behind him that could augment underlying prejudice with coercive power, bin Laden—indeed, any sub-state terrorist leader—lacks a similar tool for dominating the domestic population.

Although entirely obvious, it is necessary to add that al Qaeda is not the only organization willing to use violence against American and British interests. The U.S., for instance, is riddled with fiercely libertarian militia organizations. The U.K. continues to grapple with Republican and Loyalist violence. The day may yet come when Middle East organizations move their operations to draw attention to their cause. Each successive world trade summit sees growing dissatisfaction with multi-national corporations and international agreements that sacrifice the rights of the individual for the sake of larger goals. And environmentalists, disillusioned at the lack of concern exhibited by political leaders at the destruction of the earth's natural resources, are angry. The language of these and other organizations may be extremely vitriolic; but this is no reason to prevent it from being aired. Chaffee reflected, "you cannot limit free speech to polite criticism, because the greater a grievance the more likely men are to get excited about it, and

the more urgent the need of hearing what they have to say.”⁵³⁵ This is *particularly* true for terrorism. As Supreme Court Justice Charles Hughes wrote:

The greater the importance to safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.⁵³⁶

B. *Knowledge-Based Speech*

Neither *Brandenburg* nor the ECHR tell us a tremendous amount about expressions that go beyond pure advocacy. Where a sufficiently grave threat presents itself—as demonstrated in the U.S. by the Invention Secrecy Act, the Atomic Energy Act, and the *Progressive* case, and in the U.K. by the Export Control Act, or informally by the Voluntary Vetting Scheme and D Notice System, the state may limit knowledge-based speech.⁵³⁷ For nuclear weapons, such protections may have made sense; but biological speech presents something different in kind. Where broader efforts to prevent teaching about explosive devices rest ultimately on political persuasion, they run afoul of basic concepts of justice and fairness. In addition, although a difficult issue, where knowledge-based assertions form a sort of public shaming forcing the state to protect vulnerabilities, such speech plays an important role in *protecting* the state and its citizens.

1. Biological Speech as Different in Kind

Speech restrictions introduced at the advent of the Cold War bought the U.S. time to establish an international non-proliferation regime. These strictures may well have been appropriate. The bomb had just been discovered, and it was in the national interest to prevent other actors from acquiring it. A short-term monopoly was possible. The invention’s primary use was as a weapon. The science involved

⁵³⁵ Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 961 (1919).

⁵³⁶ *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

⁵³⁷ *But see* *New York Times Co. v. United States*, 403 U.S. 713, 719 (Black, J., concurring).

was complex and its application limited. The stakes were high, and little would be gained by making the information widely available.⁵³⁸

Biological speech, however, and the issues surrounding it, are different in kind.⁵³⁹ It is not possible to establish a monopoly on biological and chemical research. Microbiology remains too ubiquitous, too fundamental to the improvement of global public health, and too central to the international development of industries such as pharmaceuticals and plastics. While it is in the national interest to prevent terrorist organizations from obtaining biological weapons, it is *not* in the national interest to stunt research into (more likely) naturally-occurring disease. The science involved, in contrast to the atomic project, is incremental—and far-reaching considerations ride on each progression. While the stakes may be high with biological weapons, they are equally high or higher when one restricts the information. And unlike nuclear weapons, much may be *gained* by making the data widely available.

Naturally-occurring diseases wreak havoc on an extraordinary scale. In 1918, a natural outbreak of the flu infected one fifth of the world's population and, within two years, killed more than 650,000 Americans. Twenty-five percent of the United States population—some twenty million people—caught the virus, with a resultant ten-year drop in the average lifespan of an American citizen.⁵⁴⁰ Every year, 5000 people in the United States die from food-borne pathogens.⁵⁴¹ An extraordinarily large number of diseases exist, for which no treatment, much less a cure, has been found.⁵⁴² Broad limits on research, or

⁵³⁸ The atomic issue has not gone away. The British and American governments claim that al Qaeda is developing nuclear capabilities. In November 2001, U.S. Special forces recovered documents from an al Qaeda house in Kabul that provided information on how to build nuclear weapons. A May 2003 unclassified report issued by the CIA Intelligence Directorate asserted that extremist organizations associated with al Qaeda “have a wide variety of potential agents and delivery means to choose from for chemical, biological and radiological or nuclear (CBRN) attacks.” Central Intelligence Agency, Terrorist CBRN: Materials and Effects, http://www.cia.gov/cia/reports/terrorist_cbrn/terrorist_CBRN.htm (last visited Sept. 11, 2005); see also Bill Gertz, *CIA Says al Qaeda Ready to Use Nukes*, WASH. TIMES, June 3, 2003, available at <http://www.washtimes.com/national/20030603-122052-2698r.htm>. In January 2003 British officials showed members of the BBC material obtained from undercover agents in Afghanistan, who indicated that al Qaeda was obtaining radioactive isotopes from the Taliban to help construct a dirty bomb. Frank Gardner, *Al-Qaeda “was making dirty bomb”*, BBC NEWS WORLD EDITION, Jan. 31, 2003, available at http://news.bbc.co.uk/2/low/uk_news/2711645.stm. The continued operation of nuclear restrictions may thus make sense. But to extend them to biology is to apply them to something different in kind.

⁵³⁹ See Laura K. Donohue, *Censoring Science Won't Make Us Any Safer*, WASH. POST, June 26, 2005, at B5.

⁵⁴⁰ 147 CONG. REC. S12379 (daily ed. Dec. 4, 2001) (statement of Sen. Lieberman).

⁵⁴¹ *Secrets and Lives*, *supra* note 207.

⁵⁴² A partial listing includes: clostridium botulinum toxin, botulism; francisella tularensis, tularaemia; Ebola hemorrhagic fever, Marburg hemorrhagic fever, Lassa fever, Junin, Argentine hemorrhagic fever; Coxiella burnetii, Q fever; brucella species, brucellosis; burkholderia mallei, glanders; Venezuelan encephalomyelitis, eastern and western equine encephalomyelitis, epsilon

publication of research, on the most deadly of these might limit the information available to terrorist groups and organizations bent on destruction. But it would also prevent legitimate research into natural health threats. More than two decades ago the American National Academy of Sciences recognized the unique, international character of biological research: Informal global communication networks, such as circulation of material prior to publication, discussions at meetings, special seminars, and personal conversations, characterize the discipline.⁵⁴³ Microbiology, perhaps more than any other scientific discipline, is both international *and* incremental; each advance depends upon the others' findings and access to their method of research.

Perhaps the best example remains the one highlighted in Part IB: mousepox. *Because* the research entered the public domain, and was *not* limited to just the Australian military and political realm (as it was initially), it allowed scientists around the world to begin working on the vulnerability. In November 2003, St. Louis University announced that it had uncovered an effective medical defense against a pathogen similar to, but more deadly than, that created in Australia. Funded by a grant from the American National Institute of Allergy and Infectious Diseases, the project used mousepox and cowpox to determine what sort of genetic alteration to the human smallpox virus would make it more lethal to humans.⁵⁴⁴ *New Scientist*, a British magazine, reported the new research.⁵⁴⁵

The idea that states are *more* likely to find solutions to vulnerability through free speech is not new. In the early 1980s a joint Panel on Scientific Communication and National Security, created by the American National Academy of Sciences, National Academy of Engineering, and Institute of Medicine, addressed precisely this issue. After three classified briefings and numerous presentations from government and academia, the panel concluded that "security by secrecy" was untenable. Their report called instead for "security by

toxin of clostridium perfringens, staphylococcus entretoxin B, salmonella species, shigella dysenteriae, escherichia coli 0157:H7, vibrio cholerae, cryptosporidium parvum, nipah virus, hantaviruses, tickborne hemorrhagic fever viruses, tickborne encephalitis virus, and yellow fever. 147 CONG. REC. S12379 (daily ed. Dec. 4, 2001) (statement of Sen. Lieberman).

⁵⁴³ PANEL ON SCIENTIFIC COMMUNICATION AND NATIONAL SECURITY, NATIONAL ACADEMY OF SCIENCES, SCIENTIFIC COMMUNICATION AND NATIONAL SECURITY 2 (1982), available at <http://www.nap.edu/openbook/0309033322/html/2.html> [hereinafter SCIENTIFIC COMMUNICATION AND NATIONAL SECURITY].

⁵⁴⁴ William J. Broad, *Bioterror Researchers Build a More Lethal Mousepox*, N.Y. TIMES, Nov. 1, 2003, at A8.

⁵⁴⁵ Debora MacKenzie, *US Develops Lethal New Viruses*, NEW SCIENTIST, Oct. 29, 2003, available at <http://www.newscientist.com/article.ns?id=dn4318>.

accomplishment”—ensuring American technological strength through advancing scientific research.⁵⁴⁶

One response to this concern might be to attempt to narrowly tailor restrictions in such a manner as to impose a small burden on legitimate research, but significant burdens on would-be terrorists. This approach could, for instance, adopt a “type of disease” framework: Certain viruses might be fair game, whereas information related to diseases selected by countries as part of their weaponization programs—such as smallpox—could be limited. Restrictions might center on a “purpose of research” distinction: Microbiologists seeking cures may be allowed to proceed, while those undertaking research for offensive biological weapon would be restricted from publishing (and perhaps conducting) their research. Restrictions also could adopt a “type of research” approach: Genetic engineering, where the same could not be found in nature, for instance, might be restricted.

Each of these approaches, though, assumes a compartmentalization in microbiology that does not exist. There might be extremely valuable information learned, for instance, by studying particularly virulent diseases. Often, because existing viruses are so devastating, states attempt to weaponize them. With the exception of smallpox, the continued presence of these diseases in nature means that the threat from natural sources may outweigh the actual use of the disease by a group intent on causing harm. Similarly, the attempt to isolate “purpose of research” fails to reach the most basic of findings—figuring out how a disease works. This could be used either to find a cure, or to figure out how to prevent it from being stopped. Perhaps the most promising test might be to adopt a type of research approach—but here, too, it would seem somewhat short-sighted to assume that certain approaches to disease yield only bad results. It may be, for instance, that genetic manipulation represents something unlikely to occur naturally; however, stopping research in this area because of national security considerations may impact a state’s ability to ensure the general health of its population.

What frequently falls off the table in consideration of counterterrorist provisions is that, although terrorism attracts a great deal of attention, the actual threat is bounded. Fewer terrorist organizations than one otherwise might think have the intent, knowledge, and capability to execute an attack using a weapon of mass destruction. Moreover, there are limits on even these groups’ ability to use such weapons. Terrorist groups have constituents on whom they depend to survive. They must constantly justify their use of violence to legitimate their actions. Immediately following 9/11, for instance,

⁵⁴⁶ SCIENTIFIC COMMUNICATION AND NATIONAL SECURITY, *supra* note 543, at 4.

Osama bin Laden issued a video tape explaining the group's aims and grievances. International regimes against the use of CBNRW place their use beyond the Pale. It would take an extremely aggressive state action to spur the use of such instruments—because any group using them would have to justify it to the community within which it seeks protection. While, then, terrorism using CBNRW remains a low probability/high consequence event, any number of other threats—not least of which is naturally-occurring outbreaks of disease—represent high probability/high consequence threats. By cutting off research in microbiology, the state limits its ability to fend off possibly more likely, and just as devastating, disease.

If history provides any evidence, the people who will be caught by such provisions may well be non-terrorist scientists—this, indeed, has been the only group found to run afoul of the strictures on handling of controlled substances under the USA PATRIOT Act.⁵⁴⁷ In contrast, terrorist organizations—some exceedingly well-funded—continue to conduct research. They have access to information developed elsewhere. Even atomic information, tightly controlled in the United States, ended up being distributed.⁵⁴⁸ And this preceded the Internet.⁵⁴⁹

This concern might be addressed, in part, by trying to limit the restrictions to the most dangerous biological material. Not all medical research would be impacted—rather, only that relating to possible weapons. This may buy time for the state to address its vulnerability.

⁵⁴⁷ Pub. L. No. 107-56, 115 Stat. 272 (2001); see, e.g., David Malakoff, *Bioterrorism: Student Charged With Possessing Anthrax*, 297 SCIENCE MAGAZINE 751, 751-52 (2002) (discussing the case of Thomas Foral, 26, a graduate student who moved anthrax from one freezer to another); Charles Piller, *A Trying Time for Science: Bioterrorism-Related Charges are Sending a Noted Researcher Into Court for His Handling of Plague Vials*, L.A. TIMES, Oct. 28, 2003, at A1 (addressing the case of Thomas Butler, Chief of Infectious Diseases at Texas Tech, who was prosecuted for failing to report that he destroyed his samples of bubonic plague).

⁵⁴⁸ Despite AEA's efforts to prevent the H-Bomb article from being published in the *Progressive*, for example, Chuck Hansen's letter to Senator Charles Percy circulated widely. Edward Teller, one of the creators of the weapon, published a similar article in *Encyclopedia Americana*. Powe, *supra* note 375, at 70.

⁵⁴⁹ As Mary Cheh writes:

[S]ecrets often leak or, if they are important enough, are stolen. More fundamentally, however, basic scientific information about how nuclear fission or fusion occurs, like any other basic information about the physical world, can not really be "secret." If someone discovers a certain scientific principle or phenomenon, he can not truly keep it secret because others remain free to discover the very same principle or phenomenon In all but a few highly exceptional cases . . . *rediscovery of basic scientific and technological advances can be expected either simultaneously or in a very short period.* This is so because virtually all science and technology is an extension of discoveries previously made and because the general principles underlying any particular development are likely to be widely known In most cases, therefore, the most that can be gained from keeping a scientific discovery "secret" is a small time advantage over a nation's competitors.

Cheh, *supra* note 256, at 204 n.268 (emphasis added).

But here, again, the difficulties of trying to compartmentalize microbiology abound. Measures attempting to stimulate certain forms of research by providing for secrecy in others may also carry negative economic effects by shifting burden into other areas. For instance, the extended patent terms offered in Senator Lieberman's latest attempt to woo the pharmaceutical industry means that insurance companies and the health care system bear the burden, as the time to market of less expensive, generic versions of medicine increases. Similarly, the increased mortality rates caused by stunted research in microbiology with dual use applications to naturally-occurring disease may increase mortality rates across society.

Initiatives restricting speech may also *negate* other efforts to improve national security. For instance, the continued high number of patent secrecy orders in the U.S. work against other patent incentives to develop new counter-terrorist technologies: Although the crash of TWA 800 in 1996 did not result from terrorist attack, a new Patent and Trademark Office provision created in response to the event instituted a fast track application for inventions aimed to improve the United States' counterterrorism efforts. The special category, like those created for HIV, AIDS, cancer, superconductivity, recombinant DNA research, and nuclear energy, jumps applicants to the front of an otherwise eighteen-month queue.⁵⁵⁰ Technologies useful for counterterrorism include "systems for detecting/identifying explosives, aircraft sensors/security systems, and vehicular barricades/disabling systems."⁵⁵¹ Between 1996 and October 2001, inventors submitted fewer than 100 applications in this category. Their substance ranged from communications technologies and identification systems to weapons and blast-resistant construction materials. The number of applications for counterterrorism denied under secret orders remains shielded from public scrutiny. Organizations afraid to run afoul of strictures imposed on research may be less likely to attempt to accelerate research to gain swift patent approval and thus contribute to increased national security.

One of the problems with restrictions on knowledge-based speech is that it ends up catching perfectly legitimate communication in its purview. In advocating for limited restrictions on "crime-facilitating speech," Eugene Volokh suggests that people will just have to "trust the government"—yet when the cloak of national security becomes wrapped around government transparency history shows significant abuses of government power. Volokh's effort to limit restrictions only to a small number of cases would, with the lack of transparency that

⁵⁵⁰ See Chartrand, *supra* note 245.

⁵⁵¹ *Id.* (quoting the *Manual of Patent Examining Procedure*, section 708.02, XI).

accompanies such exceptions, be difficult to police—risking the inappropriate application of such measures.⁵⁵²

2. Access to Bombmaking Information

What about efforts to limit bombmaking information more broadly? Constitutional issues aside, the DOJ's suggestion that "improper intent" be the key element in a crime raises some thorny policy issues. Intent tests appeal to many people, and they are not obviously political discrimination. One could convincingly argue to restrict speakers who intend to cause harm. However, attaching such tests to political beliefs raises questions about fairness and equal protection under the law. There appears to be something unjust about allowing a Republican to publish bomb diagrams on the Internet, while denying the same venue to an anarchist. The intent test here punishes political belief—not the manner in which someone uses information. If the state exhibits concern about the availability of the information, then neither ought to be allowed to place the data in the public domain. And this gets to the heart of the problem in trying to prevent knowledge-based speech: The dual use nature of such information makes it inevitable that in many instances the state *will* want the information available. But audiences cannot be neatly defined in terms of the political views of those *posting* the information. CNN or al Jazeera readers range from moderate to extreme. The fact that the host web page has a particular orientation does not guarantee that only certain individuals will access the data. On the grounds of intent alone, the state may fail in preventing the information from circulating as well as in preventing particular groups or organizations from gaining access to harmful knowledge. But prohibiting scientific speech based on content will, on the other hand, risk society's ability to pursue any number of other aims that bear no relationship to terrorism and that may present a higher more likely and equally devastating threat.

⁵⁵² An additional consideration attends: Restrictions on biological speech may generate a brain drain and increase distrust between scientists and the state. Yet advancement within the discipline depends upon publication, and discovery depends upon being able to share research. Other countries may not be so hostile to progress: Singapore, for instance, has just announced the creation of Biopolis—an entire city dedicated to biological sciences. In the face of censorship, scholars may simply move. America or Britain may lose expertise it needs in order to counter both naturally-occurring outbreaks of disease and the real and growing terrorist threat.

3. State Vulnerabilities

Thus far, the conversation largely has centered on scientific research; however, what about publications highlighting state vulnerabilities? On October 31, 2001, the FBI obtained uncorroborated information about a threat to suspension bridges in the Western United States. The Bureau immediately informed California Governor Grey Davis, who took the unusual step of making the information public. Davis specified four likely targets: the Golden Gate and Bay Bridge, both in San Francisco, the Vincent Thomas Bridge at the Port of Los Angeles, and the Coronado Bridge in San Diego.⁵⁵³ One local paper immediately printed a story about the Bay Bridge, with a special section pulled out to illustrate the *one bolt* that, if blown up, would bring down the entire structure. Although the bridge warning turned out to be not credible, al Qaeda *has* demonstrated a clear interest in blowing up bridges.⁵⁵⁴ And al Qaeda is not the only game in town. Should information on state vulnerabilities be allowed into the public domain?

Here I suggest that while such articles may at times be irresponsible, where produced by private actors and not government employees of contractors working in a classified realm, they ought not be illegal. There are many instances, for example, where it is *only* through public shaming that government institutions may have the incentive to increase physical security. Points of vulnerability may be strengthened from immediate—or future attacks. This information also provides an important civic function as not just putting more minds to work on possible vulnerabilities (and thus ultimately improving a state's long-term security), but by providing a check on the distribution of state resources. The cost (making the state's Achilles' heel obvious to those intent on inflicting harm) may take some time to accrue. But states have more resources available to them than terrorist organizations and can thus act quickly to redress the vulnerability. And there are significant incentives to respond to terrorist threat. Governments have other advantages over terrorist organizations: they do not suffer from the same communication difficulties as clandestine groups. Planning an attack takes time. Terrorist organizations cannot easily do it without attracting the attention of law enforcement or intelligence. To be sure, bureaucratic structures hamper the state—and terrorist organizations

⁵⁵³ *Davis Defends Public Warning About California Bridges*, CNN, Nov. 2, 2001, available at <http://archives.cnn.com/2001/US/11/02/inv.bridge.threat/index.html>; Kim Curtis, *Western States on Alert After FBI Warning of Bridge Threat*, available at <http://multimedia.belointeractive.com/attack/investigation/1102westcoast.html> (last visited Sept. 29, 2005).

⁵⁵⁴ See Christiane Amanpour, *Mysterious, Ominous Documents*, CNN, Nov. 16, 2001, available at <http://archives.cnn.com/2001/WORLD/asiapcf/central/11/16/ret.amanpour.ots/index.html>.

have the advantage of being small, flexible, and on the offensive. But the weight of resources and benefits accrued for civic society favors the state.

In some ways points of particular vulnerability are similar to traditionally-protected information, such as troop movements, the identity of intelligence officers, the location of ships or submarines, and targeting plans. However, as terrorist organizations target urban and rural civilian structures, such information may increasingly be related to civil concerns—where legitimate public interests demand that information be widely available. This may, in turn, impact the state’s ability to respond to other threats—such as environmental degradation and the attendant health issues involved. The state’s tendency to err on the side of caution here is important. The U.S. placed secrecy orders on items of dubious urgency. The U.K. placed civil sanctions on information even the D Notice system regarded as harmless. This tendency can be seen in spades with the Atomic Energy Act,⁵⁵⁵ whose *default* was to censor nuclear information, unless specifically released from government control. As Thomas Emerson opined, “The function of the censor is to censor.”⁵⁵⁶ The danger of overbroad restrictions increases as the scope of possible targets expands.

C. *Classification and Freedom of Information*

As previously noted, the state acts in a stronger position when it stands in a privileged position to speech, as opposed to when it acts as sovereign. And good arguments exist for the classification of some of this information. Revealing battle plans—or the movement of troops in battle—would threaten the success of the state in war. Documents detailing intelligence sources may lead to the drying up of information necessary to protecting the state. But these are very specific types of data. The problem with using a “national security” designation writ large as a basis for classification is that information even tangentially related may well become caught in the net. In brief, a general national security exception, applied in any realm, is simply too broad.

The history of both countries demonstrates the tendency of the national security claim to cast the net wide and highlights the deleterious effect of such broad classification. The 9/11 Panel, for instance, found that too many documents had been deemed secret—and that this undermined the state’s ability to respond effectively to growing

⁵⁵⁵ Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919.

⁵⁵⁶ Thomas Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS 648, 659 (1955).

national security threats.⁵⁵⁷ As more information falls under the veil of secrecy, the system suffers disrepute. This gives birth to a contrary dynamic, where leaks become *more*—not less—likely. The head of the Information Security Oversight Office, J. William Leonard, described this phenomenon in June 2004, when he voiced his concern about the effect of this dynamic on U.S. national security.⁵⁵⁸ Not only has the formal classification scheme witnessed a significant expansion in the number of documents kept secret, but the government increasingly uses the “sensitive but unclassified” designation to prevent information from entering the public domain. Owing to the lack of clarity in what, exactly, this means, government agencies tend to be conservative in retaining data. This has led to experts calling for clear formal lines to be drawn between classified and unclassified research owing to concern that the withholding of vital data retards vital research.⁵⁵⁹ The United Kingdom, for its part, considers even completely innocuous information—or deliberate efforts by the Executive to mislead Parliament—to fall under national security protections. While, again, there are strong arguments that breaking confidentiality harms national interests, a line needs to be drawn.

Concealing certain information may be critical to ensuring state security. One could convincingly argue, for instance, that a request for the design of nuclear weapons ought to be denied. But broad exemptions—such as those created for “homeland security”—catch within their remit information that needs to be made public in order to ensure government accountability. Even with expanded exemptions, a lower threshold for refusing data, and augmented Executive power, FOIA requests granted in the U.S. post-9/11 demonstrate abuse of state power. An American Civil Liberties Union request in 2004 yielded data on some 20,000 American citizens placed on a “no-fly” list in such a haphazard manner that internal government emails joked that it would be better not to fly in the civil aviation system. Political opponents of the Executive Branch, such as Senator Edward Kennedy, and Professor David Cole of Georgetown Law School, and leaders in the anti-war movement, found themselves subject to lengthy delays in travel because of their inclusion. An Electronic Frontier Foundation request the same year revealed that the Census Bureau had provided the Department of Homeland Security the distribution of Arab Americans in the United States by location and zip code.

⁵⁵⁷ Lance Gay, *9/11 Panel Says Too Many Documents Stamped Secret*, SCRIPPS HOWARD NEWS SERVICE, May 14, 2004, available at <http://foi.missouri.edu/classdeclass/911panelsays.html>.

⁵⁵⁸ Jack Shafer, *Too Many Secrets, Says Secrecy Czar: J. William Leonard Frets About the Breakdown of the Classification System*, MSN.COM, June 23, 2004, available at <http://foi.missouri.edu/classdeclass/toomanyscrts.html>.

⁵⁵⁹ Alberts & May, *supra* note 341, at 1135.

In the context of the surveillance abuses throughout the twentieth century, and the use of census data to round up more than 114,000 Japanese Americans during World War II and place them in concentration camps, such information is hardly innocuous. Moreover, it violates census bureau policy. A broad range of requests are being denied even where the information sought has only a tangential relationship to national security. Simply because an argument could be made that the information implicates national interests does not mean that a stronger argument can not be made that the information should be made available. Democracy requires an informed populace—not least of which is to ensure that elected leaders are acting well on behalf of the people.

CONCLUSION

Commentators frequently look to changes in the law—particularly, the *Brandenburg* decision in the U.S. and the 1998 HRA in the U.K.—as evidence that free speech enjoys more protections now than previously. But we ought to be careful about what we take from these events, however remarkable they may be when examined against what came before. In the current environment, three issues suggest that the state of free expression in the United States and United Kingdom rests on rockier shoals than one otherwise might expect.

First, both guidelines incorporate exceptions. The advancement of technology and proliferation of CBNRW may make it easier to meet *Brandenburg*. The Supreme Court has *not* sufficiently distinguished between different kinds of advocacy—an issue central to the threat posed by fundamentalist terrorism. And, while *Brandenburg* overturned *Whitney*, it stopped short of overturning *Schenck*, *Dennis*, or *Yates*. These cases go to the heart of what constitutes a “clear and present danger”—a test that is possibly more fitting in the coming geopolitical environment. For its part, the European Court of Human Rights does base consideration on what is necessary in a liberal, democratic state. While this offers some protection, the concern here centers on the magnitude of the threat. An organization with the capacity to use, for instance, biological, nuclear, or radiological weapons, would pose a substantial threat to the state itself. And so speech strictures may meet requirements established by the ECHR.

Second, and perhaps most importantly, these shifts only apply to *persuasive speech when the government acts as sovereign*. Some strictures on free speech thus escape the limits established in this first category. The legacy of the atomic age suggests that limits on

knowledge-based speech would be allowed under the American Constitution. In the U.K., informal schemes—such as the D Notice system—implicate free expression, but they do not appear to violate the ECHR.

The state's latitude becomes more pronounced where it acts in a *privileged* position in relation to the speech or expression. In both states, the judiciary demonstrates great deference to the executive. While the Pentagon Papers case (and, more weakly, *Snepp* and the *Progressive* case) attempted to balance the First Amendment with national security, no clear standard of review emerged. It will be difficult to construct one in the face of the next, possibly more lethal, terrorist attack.

Confidentiality doctrines emphasize the authority of the state to maintain tight control over employees even after they leave government service. Simultaneously, the classification system, particularly since 9/11, is rapidly expanding—with the growing use of the relatively unknown “sensitive but unclassified” standard preventing the dissemination of ideas. In the U.K., the state appears increasingly willing to pursue breach of confidence through the courts—an approach that reflects the broad controls as manifest in the Official Secrets Act.

What makes these alterations of concern is the concurrent limitation of freedom of information. Ashcroft's memo in October 2001, the November 2002 Homeland Security Act, Bush's Chief of Staff's memo in March 2002, and the Defense Authorization Act for Fiscal Year 2004 signal this shift. Across the Atlantic, Straw's disappointing Freedom of Information Act, introduced in 2000 and not yet in effect, includes multiple exemptions, sets a low threshold for refusing information, and concentrates power in the hands of the Executive.

Third, the types of counterterrorist measures likely to be adopted lay outside traditional free speech controls. Detention, proscription, and rules of evidence prove instructive. Other measures follow suit, such as financial provisions, immigration measures, legislative inquiries, and surveillance. In part these alterations derive from a shift in the type of threat posed: No longer do the countries face a battle of ideas within their own populations, such as that presented during the anarchist movement in the early twentieth century, or the communist movement in the early- to mid-twentieth century. The states are thus not afraid of the publication of “seditious” material that might sway the masses. Instead, they fear the advent of *technology* where a small number of people pose a direct threat to the state. This means that communication between individuals becomes a threat. Thus, the governments are more likely to adopt broader surveillance authorities—and to bring charges of conspiracy. And in these areas, unlike in the persuasive speech realm,

increasingly *weak* standards dominate. There are strong arguments for the use of these measures; however, their impact on free expression cannot be ignored.

Important policy concerns accompany the growth of strictures in these new areas. In the realm of political speech, blanket media bans may backfire in the counterterrorist realm. Voluntary efforts to limit terrorist organizations' ability to communicate with supporters via the media, however, may meet with more success. In the knowledge-based realm, while it may have made sense to prevent the transfer of atomic information, biological speech is different in kind. Where general teaching of dangerous information becomes tied to political views, the state ought to be slow to legislate, with information related to public vulnerabilities welcomed and acted upon accordingly. Finally, in the realm of classification, the national security exception, as currently drawn, appears too broad.

If anything, the gradual spread of CBNRW underscores the importance of carefully evaluating the ways in which counterterrorism may well affect free speech. The historical failure of both states to incorporate this liberty into a concept of national security led to the use of such powers against non-violent opposition. The consequent stifling of ideas and discussion and inefficient use of state resources undermines state security. This creates a particular risk in the context of terrorism writ large. As we stand on the precipice of a new age, marked by advanced weaponry, the stakes could not be higher for avoiding the pitfalls of the past.