

# PRINCE OR PAUPER? RELIGIOUS PROSELYTIZING AND THE FIRST AMENDMENT

KEVIN H. THERIOT, ESQ.\*

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## I. INTRODUCTION

Justice Scalia wrote in *Capitol Square Review Board v. Pinette* that “a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing.”<sup>1</sup> But some judges and commentators are beginning to treat religious proselytizing as a pauper when it comes to the Free Speech Clause.<sup>2</sup> Justices Stevens, Souter, and Ginsburg all indicated that

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\* Kevin H. Theriot is Legal Counsel for the Alliance Defense Fund. The research and editing necessary to complete this essay would not have been possible to accomplish while still maintaining a busy litigation schedule without the excellent assistance of the following law clerks: Kara Davis, Kameron Averitt, Doug Van Zanten, Daniel Blomberg, and Andrew Coleman.

1. 515 U.S. 753, 760 (1995).

2. Many may recall fondly, as I do, Mark Twain’s novel, *The Prince and the Pauper*, set in 16<sup>th</sup> century England, and depicting the adventures of two young boys who are so similar in appearance that they switch places. Because one of the boys is the Prince of Wales, son of Henry the VIII, and the other a poor waif from Offal Court, London, Twain uses the situation to decry

proselytizing speech should be less protected than other types of religious speech in their dissenting opinions in *Good News Club v. Milford Central School District*.<sup>3</sup>

The dissenters in *Good News* are in sharp contrast to the holding of the Supreme Court almost 70 years ago in the context of Jehovah's Witnesses proselytizing and criticizing the Catholic Church in a predominantly Catholic neighborhood.

To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.<sup>4</sup>

Proselytizing is an attempt to persuade others that your point of view is the right one—often within the context of religious conviction, but not necessarily. Attempts to convince one's fellow citizens of the merit of a particular idea, such as global warming or the evils of war, is just as much proselytizing as is persuasive religious speech. Both involve an attempt at conversion from one perspective to another.<sup>5</sup>

This essay reviews, in Section II, the cases holding that proselytizing religious speech is just as protected as other types of proselytizing speech. Section III identifies recent cases demonstrating proselytizing speech is under attack in America, while Section IV speculates on the reasons this well-settled law is being questioned. Finally, Section V concludes that we must do everything possible to check this erosion of our first freedom and continue to zealously guard religious speech's royal position as prince of free speech.<sup>6</sup>

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the inequality between the classes in London. So the novel is useful as a literary picture demonstrating the inequality we are beginning to see between free speech protection for religious proselytizing and all other attempts at persuasive speech.

3. 533 U.S. 98 (2001).

4. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

5. See *Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 528 (3rd Cir. 2004) (discussed in depth below).

6. This article does not attempt to address situations where proselytizing speech by private individuals may be attributable to the government, such as in the student / public school context, or legislative prayer. See Jay Alan Sekulow, James Henderson & John Tuskey, *Proposed Guidelines For Student Religious Speech And Observance In Public Schools*, 46 *MERCER L. REV.* 1017 (1995), for a discussion of this issue in schools. *Contra* Kathleen A. Brady, *The Push To Private Religious Expression: Are We Missing Something?*, 70 *FORDHAM L. REV.* 1147 (2002).

## II. THE HISTORY OF PROTECTION FOR RELIGIOUS PROSELYTIZING SPEECH AND THE RATIONALE UNDERLYING IT

Since *Cantwell v. Connecticut*, a long line of cases have recognized the importance of religious proselytizing. One of the most notable is *Murdock v. Pennsylvania*, where the Court struck down a permit fee for distributing religious literature door-to-door, holding:

This form of evangelism . . . occupies the same high estate under the First Amendment as do[es] worship in the churches and preaching from the pulpits. . . . It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.<sup>7</sup>

The defendants in *Murdock* were Jehovah's Witnesses who would ask for a certain amount of money for their religious books, but if an individual could not afford the price, a reduced price was accepted or the literature was given to them for free.<sup>8</sup> The literature was characterized by the Court as "provocative, abusive, and ill-mannered" and an "assault . . . on our established churches and the cherished faiths of many of us."<sup>9</sup> Nevertheless, the conviction of the defendants for failing to pay a licensing fee to distribute the religious literature was reversed because "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types."<sup>10</sup>

The federal courts of appeal and district courts have also specifically protected religious proselytizing speech. For instance, the Fourth Circuit held that a religious organization that organized Bible studies for children in Maryland could not be denied access to a school's literature distribution program merely because the purpose of the evangelical organization was to proselytize.<sup>11</sup> Other organizations such as the American Red Cross, the Shakespeare Theatre, the Audubon Naturalist Society, and scouting groups were permitted to distribute literature to students containing "information about community, charitable, and education-related activities, cultural and sporting events, and health issues."<sup>12</sup> The school's refusal to grant Child

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7. 319 U.S. 105, 108-09 (1943).

8. *Id.* at 106-07.

9. *Id.* at 115-16.

10. *Id.* at 110.

11. *Child Evangelism Fellowship of Md. v. Montgomery County Pub. Schs.*, 373 F.3d 589, 594 (4th Cir. 2004).

12. *Id.* at 593.

Evangelism Fellowship the same access merely because its purpose was religious proselytization was unconstitutional viewpoint discrimination.<sup>13</sup>

The Third Circuit came to a similar conclusion, finding that a school could not exclude Child Evangelism Fellowship from access to programs designed to allow community groups to communicate with students.<sup>14</sup> In an opinion authored by Judge (now Justice) Alito, the court recognized that groups such as the 4-H Club and the PTA proselytize by recruiting members. “To proselytize means both ‘to recruit members for an institution, team, or group’ and ‘to convert from one religion, belief, opinion, or party to another.’ The record shows that the school district does not reject groups that proselytize in the sense of recruiting members.”<sup>15</sup> The court then held that denying a religious organization the same rights because its proselytizing involves religious speech is viewpoint discrimination.<sup>16</sup>

The Tenth Circuit has also held that religious proselytizing speech is no less protected than other types of speech. It addressed this issue in an equal access case that involved the showing of a proselytizing film at a senior citizen center operated by the city of Albuquerque, New Mexico.<sup>17</sup> The city argued it was justified in excluding the film about the life of Christ because it concluded with an invitation to convert to Christianity. But the court held that “[t]he Supreme Court . . . has rejected the notion that speech about religion, religious speech designed to win converts, and religious worship by persons already converted should be treated differently under the First Amendment.”<sup>18</sup>

The same principle has been held to apply to student proselytizing speech. In *Slotterback v. Interboro School District*, the district court struck down a school’s ban on distribution of material “that proselytizes a *particular* political or religious belief.”<sup>19</sup> The court reasoned that “a public secondary school environment is not fully ‘educational’ where students’ personal intercommunication is restricted to particular issues. Such restrictions stunt the growth of budding citizens and budding minds and are invalid absent a legitimate constitutional justification.”<sup>20</sup>

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13. *Id.* at 594.

14. *Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 528 (3rd Cir. 2004).

15. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1821 (Merriam Webster 1976)).

16. *Id.*

17. *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996).

18. 84 F.3d at 1278 (citing *Widmar*, 454 U.S. at 269 n.6; and *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)).

19. 766 F. Supp. 293 (E.D. Pa. 1991) (*italics in original*).

20. *Id.* at 293-94.

In his *Good News Club* concurrence, Justice Scalia observed that if non-religious groups are permitted to state their opinion on a particular issue—such as morality—and persuasively explain the rationale underlying their opinions, religious groups must be able to do so also. There is absolutely no reason why religious proselytizing speech should be any less protected than secular proselytizing speech. Penalizing religious groups because their persuasive speech happens to be religious is blatant viewpoint discrimination.<sup>21</sup> In other words, “A priest has as much liberty to proselytize as a patriot.”<sup>22</sup>

Protecting religious proselytizing speech the same as other persuasive speech makes sense. Everyone agrees that Al Gore’s speech in his campaign against manmade global warming is a protected expression of his views. And he is clearly attempting to convince others to adopt his views as their own. Gore’s speech is just as “proselytizing” as an attempt to convince others to convert to Christianity. By definition, “proselytizing” does not just refer to religious speech, but also includes recruiting “someone to join one’s party, institution, or cause.”<sup>23</sup> Therefore, restricting religious proselytizing without placing the same limits on other types of persuasive speech is viewpoint discrimination, plain and simple. And we leave the decision of what views should be expressed to the individual, not the government, because “use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”<sup>24</sup>

### III. THE ATTACK ON RELIGIOUS PROSELYTIZING SPEECH

But the history and common sense underlying the protection of religious proselytizing has not kept it from being placed under siege by many judges in America today. The *Good News* case illustrates the recent flirtation by some judges with the idea that religious proselytizing is sub-standard speech. *Good News* is an equal access case involving use of school facilities that had been opened up to community organizations. The defendant, Milford Central School, was a New York public school that

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21. *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. at 124-26 (Scalia, J., concurring).

22. *Id.* at 121 (Scalia, J., concurring).

23. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 15, at 1821. *See also* Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 528 (3rd Cir. 2004) (“To proselytize means both ‘to recruit members for an institution, team, or group’ and ‘to convert from one religion, belief, opinion, or party to another.’” (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1821 (Merriam Webster 1976))).

24. *Cohen v. California*, 403 U.S. 15, 24 (1971).

allowed its facilities to be used by the community for “social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.”<sup>25</sup> Stephen and Darlene Fournier asked for permission to use school facilities during non-school hours to hold meetings for a Good News Club that taught students Biblical morality. The Fourniers sued on behalf of the Club when the school denied their request.

The majority found the school violated the Free Speech Clause because it excluded the Good News Club from a limited public forum based solely on its religious views of morality. Other groups, such as scouting organizations, were permitted access to the school to teach about morality from a secular perspective.<sup>26</sup> The Court determined that the Good News Club’s speech was merely a religious view on the otherwise permissible topic of morality, even though the Club’s speech could be characterized as “evangelical.”<sup>27 28</sup>

But three Justices dissented, arguing that evangelical or “proselytizing” religious speech is less protected than other types of religious speech and could properly be excluded from the forum by the school. Justice Stevens’ dissent first divides religious speech into three categories: (1) a religious point of view about a particular topic; (2) worship; and (3) proselytizing speech, which is described as speech aimed at “inculcating belief in a particular religious faith.”<sup>29</sup> He then concludes that religious proselytizing speech may be excluded by the school because it may be “divisive.”<sup>30</sup>

In his dissent, Justice Souter, who is joined by Justice Ginsburg, characterizes the Good News Club meetings as “an evangelical service of worship calling children to commit themselves in an act of Christian conversion.”<sup>31</sup> He then agrees with Justice Stevens “that Good News’s activities may be characterized as proselytizing and therefore as outside the purpose of Milford’s limited forum.”<sup>32</sup>

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25. 533 U.S. at 102.

26. *Id.* at 108-112.

27. *Id.* at 112 n.4.

28. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 786 (Merriam Webster 1981) (defining “evangelize” as “to convert to Christianity”).

29. 533 U.S. at 130.

30. *Id.* at 131. In fairness to Justice Stevens, he also argues that attempts to recruit others to one’s political party could be excluded from a limited public forum. 533 U.S. at 131. But like religious speech, there is no reason to treat proselytizing political speech differently. Moreover, does this apply only to recruiting someone to a political party like the Democrats, or does it apply to recruiting someone to join one’s political action committee? If not, why not, and if so, how is a school official to tell the difference between an attempt to inform and an attempt to persuade? Another conundrum is discerning what is, and is not, political speech. Virtually all topics, from the artistic merit of nude dancing to Zionism, have some sort of political import.

31. 533 U.S. at 138.

32. *Id.* at 138 n.3.

Judges in lower courts are also increasingly willing to cabin religious proselytizing speech into a different, less protected category. For instance, in *Chandler v. James*, the Eleventh Circuit does an excellent job of explaining why student religious speech in public schools is protected, striking down an injunction requiring school administrators to prohibit student religious speech during all school events.<sup>33</sup> But the court inexplicably concludes its opinion by stating: “[t]he Constitution requires that schools permit religious expression, not religious proselytizing. . . . Proselytizing speech is inherently coercive and, the Constitution prohibits it from the government’s pulpit.”<sup>34</sup>

The court cites *Lee v. Weisman* for this proposition, but that case does not even mention proselytizing speech—much less hold that it is “inherently coercive.”<sup>35</sup> The Eleventh Circuit completely fails to explain how religious proselytizing speech is any more coercive than, say political, environmentalist, or animal rights proselytizing speech. Its logic dictates that the student in a school assembly recruiting students to join the environmental club to work toward outlawing Sport Utility Vehicles is protected, but the school must censor the student that opines, “One of the first commandments God gave to mankind was to take care of the Garden of Eden, so those of you who drive SUVs are being disobedient to God. I invite you to convert to Christianity so that we can take better care of the Earth.”

The Ninth Circuit issued a similar ruling in *Hills v. Scottsdale Unified School District* where it addressed a school’s discrimination against a summer camp because it offered classes on the Bible.<sup>36</sup> The court struck down the school’s policy allowing community groups to advertise summer camps through the school’s literature distribution system, but prohibited Mr. Hills from telling students and parents about the Bible classes offered at his summer camp. After correctly finding this resulted in impermissible discrimination against religious views, the court felt compelled to limit its holding by saying that the school could exclude literature that “contains proselytizing language.”<sup>37</sup> So the school could censor Mr. Hills’ brochure that says, “Did you know that if a child does not come to the knowledge of JESUS CHRIST, and learn the importance of Bible reading by age 12, chances are slim that they ever will in this life? We think it is important to start as young as possible!”<sup>38</sup> But it is highly unlikely that the court would allow the school to censor the brochure of a summer camp that says, “Did

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33. 180 F.3d 1254 (11th Cir. 1999), *judgment vacated in* *Chandler v. Siegelman*, 530 U.S. 1256 (2000), *but reinstated in* *Chandler v. Siegelman*, 230 F.3d 1313 (2000).

34. *Id.* at 1265 (citations omitted).

35. 505 U.S. 577 (1992).

36. 329 F.3d 1044 (9th Cir. 2003).

37. *Id.* at 1052-1053.

38. *Id.* at 1052.

you know that if a child does not develop a good understanding of ecology and conservation habits by the age of 12, chances are slim they ever will in this life?”

A classic example of how some judges view religious proselytizing as less protected than secular proselytizing is found in *Ridley v. Massachusetts Bay Transportation Authority*, where the First Circuit considered the messages of two speakers: one advocating the legalization of marijuana and the other a particular religious belief that rejected all organized religions.<sup>39</sup> Surprisingly, the court allowed the governmental entity to censor the religious speech, but not the pro-drug message.

*Ridley*'s facts provide no rationale for this distinction. The Massachusetts Bay Transportation Authority (“MBTA”) opened its vehicles up for speech for a fee. Change the Climate was a non-profit organization that sought to “generate debate” about the criminalization of marijuana by running an ad saying, “Police are too important . . . too valuable . . . too good . . . to waste on arresting people for marijuana when *real* criminals are on the loose.”<sup>40</sup> The First Circuit found that the MBTA’s rejection of this ad was impermissible viewpoint discrimination because other ads encouraging compliance with drug laws were allowed.<sup>41</sup>

Andre Ridley, a self-described prophet, also sought access to advertise in the MBTA program with an ad stating that organized religions such as Catholicism and Islam are false, and she is sent by God to tell the truth. MBTA rejected this ad because it violated its rule prohibiting advertising that “demeans or disparages an individual or group of individuals.”<sup>42</sup> The First Circuit found this did not constitute viewpoint discrimination even though an ad stating that Islam is a true religion would have been allowed. The court reasoned that no one was permitted to denigrate another’s religion—even Ms. Ridley’s—so there was no viewpoint discrimination.<sup>43</sup>

The court completely ignored the fact that some religious views—no matter how positively stated—may be deemed “demeaning” or “disparaging” to some, and censored on that basis. For instance, in *Focus on the Family v. Pinellas Suncoast Transit Authority*, the Transit Authority rejected advertising for an event on homosexual behavior saying, “Love Won Out: Addressing, Understanding and Preventing Homosexuality in Youth,” because it might be “offensive.”<sup>44</sup> The official rejecting the ad testified that “the notion that homosexuality is preventable is highly controversial and potentially offensive.”<sup>45</sup> Such an ad would be rejected

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39. 390 F.3d 65 (1st Cir. 2004).

40. *Id.* at 72-73 (italics in original).

41. *Id.* at 88.

42. 290 F.3d at 95.

43. *Id.* at 91.

44. 344 F.3d 1263 (11th Cir. 2003).

45. 377 F.3d at 1270.

under the MBTA rules because it may be demeaning to those engaged in homosexual behavior. This clearly would be discrimination based on the view expressed—not the way it was expressed—and completely legal under the First Circuit’s opinion in *Ridley*. Thus, the First Circuit allows advocates for the legalization of marijuana to proselytize on public transportation buses, even though the views expressed may be disparaging of police officers by suggesting it is silly to place their lives at risk to enforce the law. But proselytizing religious views that might be disparaging are prohibited.

These opinions reflect a distinct effort to pauperize religious proselytizing speech as compared to other types of persuasive expression, despite the well-established protection of it in this country.

#### **IV. THE SOURCE OF DISCRIMINATION AGAINST RELIGIOUS PROSELYTIZING SPEECH: EMERGING “HATE SPEECH” BANS IN AMERICA**

With all the authority strongly protecting religious proselytizing, it is only natural to wonder about the source of the recent trend to give it less protection. Why is a category of speech that has enjoyed so much protection for so long now being viewed as “low value” speech that is undeserving of full First Amendment safeguards? The answer is increasing social disapproval of speech that may be perceived as offensive, or “hate speech.”

In *R.A.V. v. City of St. Paul*, the Supreme Court reviewed the conviction of a teenager for burning a cross under a St. Paul, Minnesota ordinance that provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.<sup>46</sup>

The Court observed that:

[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. . . .

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46. 505 U.S. 377, 379 (1992).

The rationale of the general prohibition, after all, is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.<sup>47</sup>

The Court went on to clarify that this proscription applies to viewpoint discrimination even if the speech is traditionally less protected like fighting words, defamation, and obscenity. The Court compared the ability to restrict fighting words—to which the Minnesota Supreme Court had limited the ordinance—to regulating the noise of a sound truck. “As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.”<sup>48</sup>

Another example the Court notes involves commercial speech.

[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection . . .), is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.<sup>49</sup>

So St. Paul’s ordinance prohibiting insulting speech based on race, color, creed, religion or gender, but allowing it on all other topics, was unconstitutional viewpoint discrimination.

One could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion.’ St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.<sup>50</sup>

One would think that this case effectively prohibits governmental entities from censoring religious proselytizing that may be considered insulting or hate speech by some based on race, religion, sex, sexual orientation, and so on. But government officials and even some courts simply have not received—or choose to ignore—the message the Supreme Court sent in *R.A.V.* As might be expected, restricting insulting or offensive speech appears to be occurring most frequently in venues like schools and government workplaces where speech is somewhat less protected than in public places such as sidewalks and parks.

For example, in *Harper v. Poway School District*, the Ninth Circuit held that school officials are permitted to censor the “negative” side of a debate on homosexual behavior if the views expressed may be considered

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47. *Id.* at 382 and 387 (citations and quotation marks omitted).

48. 505 U.S. at 386.

49. *Id.* at 388-89 (citations omitted).

50. *Id.* at 391-92.

“demeaning” or “derogatory.”<sup>51</sup> The court held that this viewpoint censorship is justified because the speech infringes upon the rights of other students, citing *Tinker v. Des Moines Independent School District*.<sup>52</sup> This novel First Amendment theory means that students may express their view that homosexual behavior should be approved, even encouraged, but students holding the contrary view can—and arguably must—be censored.

*Tinker* held that a high school student’s expression of opposition to the Vietnam War by wearing a black armband could not be censored by officials because it did not “materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others.”<sup>53</sup> In *Harper*, the Ninth Circuit latched onto the “invasion of the rights of others” language as authority for school officials to censor any student speech that may be perceived by other students as demeaning or derogatory.<sup>54</sup> Thus, students who are offended or feel demeaned can censor the speech of other students—a “heckler’s veto.”

This is a very troubling holding because “[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.”<sup>55</sup> *Harper* runs contrary to Supreme Court precedent holding that “[s]peech cannot be . . . punished or banned, simply because it might offend a hostile mob.”<sup>56</sup>

The First Amendment rights of religious speakers are also increasingly coming under attack in the government workplace. More and more cases are being filed because of a government bias against persuasive speech that happens to be religious. Like any workplace, government employers allow employees to talk about non-work related issues so long as they are not disruptive and the employees are still able to get their work done.<sup>57</sup> But when religious employees join the conversation on issues of the day such as abortion and homosexual behavior, they are sometimes penalized for their religious views.

For example, *Lister v. Defense Logistics Agency* was brought by a federal employee who wanted to express his religious views on an employee bulletin board that had been opened up to all types of speech.<sup>58</sup>

51. 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 127 S.Ct. 1484 (2007).

52. 393 U.S. 503 (1969).

53. *Id.* at 513.

54. 445 F.3d at 1181. The holding in *Harper* directly conflicts with the Third Circuit’s opinion in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001), which held that a high school speech policy which prohibited negative, demeaning, and derogatory speech was unconstitutional.

55. *Tinker*, 393 U.S. at 508-09.

56. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (addressing restriction based on adverse listener reaction to, *inter alia*, a demonstration in opposition to Martin Luther King Day).

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

58. 482 F.Supp.2d 1003 (S.D. Ohio 2007).

The government employer—a federal agency—allowed employees to post items “of general interest” such as flyers seeking donations for inner city service projects and the Combined Federal Campaign. Other flyers advertised family wellness training, social, physical, mental, and spiritual assistance programs, and information about “Blacks in Government” meetings and a “Blacks in Government” social.<sup>59</sup> One of the few items that could not be posted was speech indicating a “religious preference.”<sup>60</sup>

Mr. Lister decided to post a flyer communicating his religious view that it is a mistake to give undesignated money to the Combined Federal Campaign—a program for non-profits like the United Way to solicit money from federal employees—because it could be used to support abortion, sexual promiscuity, the homosexual agenda, and new age mysticism.<sup>61</sup> The flyer was not allowed to be posted because “employees are not permitted to pursue religious or ideological agendas or campaigns during work hours.”<sup>62</sup> Thus, “an employee may post a notice for a political rally, demonstration, school activity, etc. Yet, an employee is prohibited from advertising a Christmas play, or lectures at a synagogue or meetings at a mosque.”<sup>63</sup> The Court properly rejected this blatant viewpoint discrimination, holding: “Once the government creates a board open for posting by employees of virtually any noncommercial message, it may not exclude those messages of a religious nature. The policies applicable to the bulletin board in this case unreasonably restrict the Plaintiff’s rights under the First Amendment.”<sup>64</sup>

Lister’s experience is not an isolated incident. For example, the Standards of Conduct for Federal Aviation Administration (“FAA”) employees provide: “the making of disparaging remarks, expressing stereotypical views or displaying and/or distributing offensive material are prohibited in the workplace.”<sup>65</sup> Such policies allow government employers to discriminate against views on controversial subjects like religion and homosexual behavior that they deem “offensive” or “stereotypical.” The FAA has in fact applied this policy in such a manner. In 2006, an FAA employee filed suit in federal district court over discipline he was given because he expressed to a co-worker his view that homosexual behavior conflicts with Biblical teachings. No action was taken against the co-

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59. *Id.* at 1005-06.

60. *Id.* at 1008.

61. *Id.* at 1006.

62. *Id.* (quotation marks omitted).

63. *Id.* at 1010.

64. 482 F.Supp.2d at 1011.

65. National Air Traffic Controllers Association, Standards of Conduct, *available at* [http://nwp.natca.org/Documents/LR\\_Stuff/ER\\_4.1\\_Standards\\_of\\_Conduct.pdf](http://nwp.natca.org/Documents/LR_Stuff/ER_4.1_Standards_of_Conduct.pdf) (last visited Aug. 11, 2008).

worker who expressed the opposing view because her speech was not considered offensive or stereotypical by management.<sup>66</sup>

These attempts to censor offensive speech seen in *R.A.V.*, *Harper*, and by the FAA policy above are part of a movement within the United States and elsewhere to eliminate “hate speech.” For instance, Justice White’s concurrence in *R.A.V.* is concerned that the majority opinion “legitimizes hate speech as a form of public discussion.”<sup>67</sup> But what is hate speech? Justice White infers that it is limited to fighting words which are “directed against individuals to provoke violence or to inflict injury.”<sup>68</sup>

But other judges have not limited it this way—defining hate speech to include speech that conveys any idea that is merely offensive. Chase Harper’s statement that “Homosexuality is Shameful - Romans 1:27” was clearly not directed against an individual to provoke violence or inflict injury, but was expressing his view that homosexual behavior is morally wrong, in response to statements in support of homosexual behavior made by other students. Nevertheless, in his concurrence to the denial of rehearing en banc in *Harper*, Judge Gould labels it “hate speech.”

Hate speech, whether in the form of a burning cross, or in the form of a call for genocide, or in the form of a tee shirt misusing biblical text to hold gay students to scorn, need not under Supreme Court decisions be given the full protection of the First Amendment in the context of the school environment, where administrators have a duty to protect students from physical or psychological harms.<sup>69</sup>

So under Judge Gould’s view, if an idea may be interpreted as holding another to scorn, that is hate speech and not subject to the full protection of the First Amendment that students expressing the opposing view receive. This view licenses government officials to censor any speech that is perceived by some as being scornful. Thus, the speech of animal rights activists who hold those who use animals for experimentation in scorn could be censored. Likewise, any disagreement with religious speech that opines that the religious teachings of others are wrong could be censored. Surely the anti-Catholic speech of Mr. Cantwell subjected Catholic folks to scorn and could have been banned under this hate speech exception to the First Amendment. Chief Judge Kozinski said it very well in his dissent in the *Harper* case:

All manner of other speech, from the innocuous to the laudable, could also be banned or punished under the school’s hate speech policy. May a student wear a Black Pride t-shirt, or does this denigrate white and Asian students? May a student wear a t-shirt

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66. Alliance Defense Fund, Press Release, *available at* <http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=3785> (last visited Aug. 1, 2008).

67. 505 U.S. at 402.

68. *Id.* at 401.

69. 455 F.3d 1052, 1053-54 (9th Cir. 2006).

saying, “I love Jesus,” or will this make Jews, Muslims and Druids feel it’s an attack on their religions? May a student wear a t-shirt saying, “Proud to be a Turk,” or will this cause bad vibrations for the Greeks and Armenians in the school? Will a student be disciplined for disruption if, during a lunch-time discussion, he argues forcefully that the State of Israel oppresses Palestinians and, when called on it, defends himself, saying: “I said it because I’m proud to be a Muslim”?<sup>70</sup>

Despite the obvious use of hate speech prohibitions as a poorly disguised excuse for viewpoint discrimination, commentators continue to urge the withdrawal of hate speech from protection by the First Amendment. For example, Professor Owen M. Fiss, in response to the Supreme Court’s decision in *R.A.V.*, says that cities should be able to outlaw some racist speech—such as burning crosses—because it discourages others from speaking. “It . . . interferes with their speech rights. It discourages them from participating in the deliberative activities of society. They feel less entitled and less inclined to voice their views in the public square and more inclined to withdraw unto themselves.”<sup>71</sup> This view transforms “freedom of speech” into “freedom not to be discouraged from speaking freely” and allows enforcement of this new freedom against purely private parties by an authoritarian, speech-stifling government. Here, in the name of freedom, freedom is crushed.

Of course the government should be able to restrict conduct that actually prohibits equal access to forums open to others, but what Professor Fiss suggests is something akin to a heckler’s veto. So speech rights would depend on the relative sensitivity and intestinal fortitude of the listener— or more accurately, what a government official or judge perceives them to be. This is really no different than the outright censoring of offensive speech.

Professor Fiss also suggests that encouraging freedom of speech should not necessarily be any more important to a free society than ensuring equality.<sup>72</sup> Professor Vicki Jackson elaborates on this suggestion, and argues that the more recent amendments—such as the Thirteenth and Fourteenth—should be considered first when interpreting the First Amendment. “My suggestion is that in resolving interpretive questions we try instead (or rather, in addition) to begin with the more recent amendments and what they stand for and read these more contemporaneous constitutional commitments back into the older portions.”<sup>73</sup> Her rationale is that these later amendments more accurately reflect the current views of the

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70. 445 F.3d at 1206-07 (Kozinski, J., dissenting).

71. Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 287 (1995).

72. *Id.* at 286-87.

73. Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, And Fiss-Ian Freedoms*, 58 U. MIAMI L. REV. 265, 266-67 (2003).

populace, thus elevating the importance of feeling equal above freedom of speech in certain circumstances.<sup>74</sup> She opines:

[H]ate speech is not only of very low value in terms of any plausible First Amendment interests, but it also inflicts high injuries to the equal human dignity of its victims. The First Amendment's capacity to protect dissent and disagreement may not be well served by expanding the scope of its coverage to areas of very low value speech, like racial insults.<sup>75</sup>

Jackson relies primarily upon the constitutions and court rulings of other countries such as Canada and Germany<sup>76</sup> for this subjection of freedom of expression to feeling equal.<sup>77</sup>

The threat to speech freedom by reliance on foreign methodologies, such as those of Canada or Germany, is demonstrated by the views of Professor Michael Rosenfeld, who argues that:

[s]o long as the pluralist contemporary state is committed to maintaining diversity, it cannot simply embrace a value neutral mindset, and consequently it cannot legitimately avoid engaging in some minimum of viewpoint discrimination. . . .

[A]t a minimum contemporary pluralist democracy ought to institutionalize viewpoint discrimination against the crudest and most offensive expressions of racism, religious bigotry and virulent bias on the basis of ethnic or national origin.<sup>78</sup>

This argument is facially attractive within the context of racist speech—especially in Germany where propaganda was used by the Nazis to facilitate the Holocaust. But there certainly is a difference between governmental racist speech and racist speech by private individuals. And when the same principles are applied to religious proselytizing speech, the results are alarming. Such application is contemplated by Rosenfeld, who defines hate speech as “speech designed to promote hatred on the basis of race, *religion*, ethnicity or national origin.”<sup>79</sup>

In light of the abhorrence of viewpoint discrimination in our jurisprudence, the examples of viewpoint discrimination that Rosenfeld says should be permissible are shocking. He maintains that “black hate speech ought not be penalized—or at least not as much as otherwise—if it occurs in the course of a spontaneous reaction to a police shooting of an

74. *Id.* at 278.

75. *Id.* at 309.

76. *Id.* at 285-92.

77. See John O. McGinnis, *Foreign to our Constitution*, 100 NW. U. L. REV. 303 (2006) for a persuasive analysis of why relying on foreign jurisprudence to overturn longstanding laws in this country is very dangerous and a threat to our sovereignty.

78. Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1561-62 (2003).

79. *Id.* at 1523 (emphasis added).

innocent black victim in a locality with widespread perceptions of racial bias within the police department.”<sup>80</sup> It is especially troubling when compared with hate speech that Rosenfeld believes is permissible.

[S]trong criticism of the Pope for his opposition to contraception and to homosexual relationships as being “indifferent to human suffering caused by overpopulation and an enemy of human dignity for all” may be highly offensive to Catholics, but even in a country where Catholics are a religious minority should clearly not be officially censored, punished or characterized as hate speech.<sup>81</sup>

Rosenberg justifies sanctioned viewpoint discrimination by arguing that fostering equality and human dignity is as important—if not more important—than freedom of expression, as is the case in Canada and Germany.<sup>82</sup>

Germany treats freedom of expression as one constitutional right among many, rather than as paramount or even as first among equals. Whereas under the Canadian Constitution, freedom of expression is limited by constitutionally mandated vindications of equality and multiculturalism, under the German Basic Law, freedom of expression must be balanced against the pursuit of dignity and group-regarding concerns.<sup>83</sup>

But these countries do not have the long history and social fabric that requires that freedom of expression, including insulting speech, be paramount. In fact, our system is premised on the idea that free speech is necessary to a free people, making Rosenberg’s proposal anathema. His idea simply cannot work in a country where people are truly free. As Justice Cardozo observed in 1937 while discussing which of the guarantees in the Bill of Rights should be incorporated or “absorbed” into the Fourteenth Amendment so as to apply to the States:

the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.<sup>84</sup>

Freedom of speech is “the very essence of a scheme of ordered liberty,” and is a right “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>85</sup>

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80. *Id.* at 1528.

81. *Id.* at 1564-65.

82. *Id.* at 1541.

83. *Id.* at 1548.

84. *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937) (internal citations omitted), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969).

85. *Id.* at 325 (quotation marks omitted).

The protection of not just speech, but offensive and insulting speech, is vital to our way of life in the United States. An excellent example of this is *Terminiello v. City of Chicago*, which was decided in 1949 during an era when fear of Communism ran rampant, and the evils of Fascism were still fresh in everyone's mind.<sup>86</sup> Father Terminiello was a Catholic priest who belonged to a group called the Christian Veterans of America, which was vehemently anti-communist, but definitely had fascist leanings—though Father Terminiello denied that he was fascist.<sup>87</sup>

The case arose from a fine levied against Father Terminiello for a speech he delivered to members of his group in Chicago. The speech included references to the Bible, was very anti-communist, and anti-Semitic. A crowd of over one thousand people gathered outside the building and was very unruly, so Terminiello was fined \$100 because “his speech stirred people to anger, invited public dispute, or brought about a condition of unrest.”<sup>88</sup> Despite the fact that his views would almost certainly be categorized as hate speech in today's world, the Supreme Court reversed, and explained its decision as follows:

The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge v. Oregon*, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.<sup>89</sup>

Twenty years later and in the context of an anti-war protest in a public school (where speech freedom is necessarily somewhat restricted), the Supreme Court cited *Terminiello* and observed that:

[a]ny departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this

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86. 337 U.S. 1 (1949).

87. *Id.* at 22 (Jackson, J., dissenting) (Justice Jackson outlines the facts and Terminiello's speech in detail).

88. *Id.* at 5.

89. *Id.* (internal citations omitted).

risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.<sup>90</sup>

So while Professors Fiss, Jackson, and Rosenfeld are certainly correct in asserting that equality is a very important aspect of our freedom—indeed the Declaration of Independence asserts that all men are created equal—equality does not require censorship. “Equality” means that all parties have the same free speech rights, not that some speakers’ views can be banned simply because others may perceive them as insulting and feel less equal. This is very significant for all speech that may be offensive to others, but especially so for religious proselytizing speech. An attempt to persuade another that one’s religious views are correct often necessarily implies theirs are not, and therefore are less equal. Equality requires that the listener gets to reject views disagreed with, and attempt to persuade the speakers that they are wrong. The interest in fostering equality must not be allowed to censor speech.

#### A. COMMUNITARIAN VERSUS LIBERTARIAN VALUES

One common theme amongst those advocating for what is essentially a hate speech exception to the First Amendment is that we should be fostering communitarian values rather than libertarian.<sup>91</sup> But who determines what is “communitarian?” Is it that the majority, or possibly elite judges, decrees what is or is not orthodox for the American people? This position mandates the “orthodoxy” that the Supreme Court says government officials are prohibited from prescribing in *West Virginia State Board of Education v. Barnette*.<sup>92</sup>

In *Barnette*, the Supreme Court addressed the refusal by several Jehovah’s Witness students to recite the pledge of allegiance because it violated their religious convictions. On January 9, 1942—just one month after the attack on Pearl Harbor—the West Virginia State Board of Education adopted a resolution requiring students to salute the flag and recite the Pledge of Allegiance in public schools.<sup>93</sup> The plaintiffs were Jehovah’s Witness students and their parents who alleged that the new resolution conflicted with their religious beliefs and violated the right to, *inter alia*, the freedom of speech and religion.<sup>94</sup> The State, adopting a communitarian approach, argued that this intrusion on First Amendment rights was justified by its interest in “fostering and perpetuating the ideals,

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90. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508-09 (1969) (citing *Terminiello*, 337 U.S. 1).

91. See Reichman at 98, n.87.

92. 319 U.S. 624 (1943).

93. *Id.* at 626.

94. *Id.* at 630.

principles, and spirit of Americanism.”<sup>95</sup> The Court later distilled this argument: “National unity is the basis of national security, . . . and hence . . . compulsory measures toward ‘national unity’ are constitutional.”<sup>96</sup> But the Court found that there is a significant difference between government coerced conformity and fostering unity “by persuasion and example.”<sup>97</sup> The Court elaborates on this principle in a passage that is remarkably relevant to the issue of hate speech and forced conformity to the majority’s notions of equality today.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies.<sup>98</sup>

The “present totalitarian enemies” referred to by the Court were the Axis powers. Ironically, or tellingly, one of these was Germany, which is now being held out as a model for how to censor hate speech by some commentators. But in the United States, unlike Germany, “[a]uthority here is to be controlled by public opinion, not public opinion by authority.”<sup>99</sup> This is one of our foundational and most cherished principles. And it is completely contrary to the more elitist and communitarian view that the masses really are not capable of governing themselves and require the fetters of civil government to restrain them.

Despite repeated abuses and repudiations, this elitist view will not die. For instance, the Canadian Supreme Court cited in support of its approval of restrictions on hate speech a parliamentary study which found:

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95. *Id.* at 625.

96. *Id.* at 640.

97. *Id.*

98. *Id.* at 640-41.

99. *Id.* at 641.

The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.<sup>100</sup>

Once again, the majority opinion in *Barnette* proves to be incredibly insightful on the issue of whether American citizens are rational enough to make their own decisions about how to foster community.

[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.<sup>101</sup>

The Court then goes on to conclude: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>102</sup>

Forced conformity to what the government views as communitarian is not only futile, it is completely contrary to our governing structure. More importantly, it is dangerous. "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."<sup>103</sup>

#### B. THE ROLE OF FOREIGN JURISPRUDENCE

A second theme common to arguments endorsing a hate speech exception to the First Amendment is reliance on foreign law. Restricting religious proselytization is certainly nothing new in other countries.<sup>104</sup> Some Muslim countries actually outlaw conversion from Islam to other religions and consequently prohibit all attempts to persuade others to do so.<sup>105</sup> Non-Muslim countries also ban proselytizing, sometimes because national culture is built around a particular religion, so proselytizing is seen

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100. *Regina v. Keegstra*, [1990] 3 S.C.R. 697, 747.

101. *Barnette*, 319 U.S. at 641-42.

102. *Id.*

103. *Id.* at 641.

104. *See generally*, Natan Lerner, *Proselytism, Change of Religion and International Human Rights*, 12 EMORY INT'L L. REV. 477 (1998).

105. Lerner, *supra*, at 522-24.

as an attack on national identity.<sup>106</sup> For example, Greece had a long standing provision in its constitution and statutes that specifically prohibited religious proselytization, which was struck down by the European Court of Human Rights in *Kokkinakis v. Greece*.<sup>107</sup> The court recognized that the prohibition was an attempt to protect adherents to the Eastern Orthodox Church because of the Church's profound impact on Greek society. "The Christian Eastern Orthodox Church, which during nearly four centuries of foreign occupation symboli[z]ed the maintenance of Greek culture and the Greek language, took an active part in the Greek people's struggle for emancipation, to such an extent that Hellenism is to some extent identified with the Orthodox faith."<sup>108</sup>

Another reason religious proselytizing speech may be viewed differently than other forms of persuasive speech is that it has on occasion actually taken the form of forced conversion,<sup>109</sup> or targeted individuals who are susceptible to deception. For instance, Greece defended its ban on proselytizing by noting that it was originally instituted to protect against the targeting of schoolchildren by evangelical groups.<sup>110</sup> Thus, any current attempt to convince others to convert—no matter how benign—is viewed with suspicion.

Of course, the good news is that the European Court of Human Rights recognized that proselytizing is an important part of religious freedom in *Kokkinakis*, and struck down Greece's ban. The facts of that case involved Jehovah's Witness members, Minos Kokkinakis and his wife, who visited the home of Mrs. Kyriakaki, and talked with her about their beliefs. They also attempted to convince her to change her Orthodox beliefs. Mrs. Kyriakaki's husband happened to be the cantor at the local Orthodox Church, and he informed the authorities, who later arrested Mr. and Mrs. Kokkinakis.<sup>111</sup> The Court found that the ban on religious proselytization violated Article 9 of the Human Rights Convention which states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance."<sup>112</sup>

Unfortunately, European courts have severely limited Article 9's protection of proselytizing by interpreting subsection 2 of the Article to allow for banning any speech that may be offensive to others—effectively codifying a heckler's veto. Subsection 2 of Article 9 provides: "Freedom to

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106. Lerner, *supra*, at 528-29.

107. 17 Eur. Ct. H.R. 397, 403-03 (1994).

108. *Id.* at 403.

109. Lerner, *supra*, at 505-6.

110. 17 Eur. Ct. H.R. at 403.

111. *Id.* at 399-400.

112. *Id.* at 411-14.

manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." On its face, this seems reasonable. But application of this principle has proven to be disastrous for religious speech. For example, in a United Kingdom case, *Hammond v. Department of Public Prosecutions*, the court found that Mr. Hammond was properly prosecuted and convicted for breach of the peace because of the negative reactions of folks in the street to his sign saying that homosexual behavior is immoral.<sup>113</sup>

Mr. Hammond, of Bournemouth, England, was a committed Christian who felt compelled to share his religious beliefs with others. Accordingly, he carried a sign to the square in Bournemouth that said, "'Stop Immorality, Stop Homosexuality and Stop Lesbianism.'"14 The sign also said, "Jesus is Lord" in each of the four corners.<sup>115</sup> A crowd of approximately 30 or 40 people gathered, many of whom were personally insulted and became upset and angry. Two constables arrived and "found the crowd to be agitated, angry and insulted."<sup>116</sup> Some of them "expressed outrage" that Mr. Hammond had not been arrested, and attempted to take his sign from him, caused him to fall down, and poured water on him.<sup>117</sup> Mr. Hammond was then arrested, charged with breach of the peace, and convicted.<sup>118</sup> The Act he was charged with violating stated in part: "A person is guilty of an offence if he . . . (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."<sup>119</sup>

On appeal, the court recognized that "the Article 9 freedom to manifest one's religion is not only exercisable in the community of others, in public and within the circle of whose faith one shares, but can also be exercised alone and in private. Furthermore, it includes, in principle, the right to try to convince one's neighbour, for example through teaching."<sup>120</sup> The court also recognized that Article 10, the free speech provision of the Convention, "applies whether or not a speech is shocking, offensive or disturbing," and acknowledged the defendant's argument that restricting his speech because of hostility from the crowd to his views amounted to a heckler's veto.<sup>121</sup>

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113. [2004] EWHC (Admin.) 69 (Eng.).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

Nevertheless, the appeals court upheld the conviction because people were insulted by Mr. Hammond's speech. The court found that, under the Convention, in order to restrict Mr. Hammond's speech, it must be shown that "it was for a legitimate aim, and it is not challenged that the magistrates found that the restriction had a legitimate aim of preventing disorder . . . [and] the restriction was necessary in a democratic society."<sup>122</sup> The court of appeals accepted the trial court's four reasons submitted to meet these requirements:

[First], that the words on the sign were directed specifically towards the homosexual and lesbian communities, implying that they were immoral; secondly, that there was a need to show tolerance towards all sections of society; thirdly, that the sign was displayed in the town centre on a Saturday afternoon provoking hostility from members of the public; and fourthly, Mr. Hammond's behavior went beyond legitimate protest and was provoking violence and disorder and it interfered with the rights of others.<sup>123</sup>

This willingness to allow censorship of religious proselytizing because it may be offensive can be seen outside Western Europe also. For instance, the Supreme Court of Israel upheld the conviction of a young woman who was sentenced to jail for three years for violating a statute that prohibits hurting the "religious feelings of others."<sup>124</sup> Tatyana Suszkin was arrested and convicted for being in possession of posters depicting Mohammed as a pig. While Ms. Suszkin did not appear to be attempting to communicate any particular teaching of her Jewish faith, the statute is so broad that it could be read to prohibit such statements as "the Jews are the chosen people and are therefore 'superior,' the Jews have sinned for not accepting Jesus, [and] Muhammad is the bearer of truth and the last prophet that ought not be ridiculed."<sup>125</sup> Professor Reichman analyzes the *Suszkin* case in depth in his article, and concludes that, at least in Israel, "Speech, or an expressive act that humiliates Muslim worshipers, therefore, has a weaker claim to heightened constitutional protection . . . because that very speech violates other aspects of the right of human dignity, such as a Muslim's right to be free from dignitary harm on account of their religious beliefs."<sup>126</sup> Professor Reichman opines that the rationale underlying this suppression of speech in Israel and in other countries like Canada is that the right to "human dignity" is just as important as the right to freedom of speech.<sup>127</sup>

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122. *Id.*

123. *Id.*

124. CrimC (Jer) 436/97 Israel v. Suszkin, [1997] IsrDC 97(5) 730.

125. Amnon Reichman, *The Passionate Expression of Hate: Constitutional Protections, Emotional Harm and Comparative Law*, 31 *FORDHAM INT'L L.J.* 76, 112 (2007).

126. *Id.* at 91.

127. *Id.* at 90-91. Also described are numerous other differences between Israel and the U.S. possibly affecting the outcome in *Suszkin*, including the lack of separation of church and state in Israel, which he suggests explains why the government is not viewed with mistrust by its citizens.

Of course, the speech treated as a pauper in *Hammond* and in *Suszkin* sounds exactly like the kind of speech the Supreme Court of the United States has said is esteemed like a prince in this country. For example, in *Cantwell v. Connecticut*, the defendant's speech was directed toward the Catholic community, implying that they were evil, and Mr. Cantwell was speaking on the public sidewalk in a predominantly Catholic area and provoked hostility from others.<sup>128</sup> Yet the Supreme Court reversed his conviction for breach of the peace. This is because free speech is actually a vital aspect of the dignity for all that is trumpeted so forcefully in the Declaration of Independence. The Supreme Court has recognized that the protection of freedom of expression is based on "the belief that no other approach would comport with the premise of individual *dignity* and choice upon which our political system rests."<sup>129</sup>

*Hammond* and *Suszkin* demonstrate the marked difference between religious expression in other countries, and application of the First Amendment in the United States. Simply put, speech that may be insulting or offensive (i.e., hate speech) is precisely the kind of speech the First Amendment was designed to protect.<sup>130</sup> Indeed, if the speech gives no offense, there is little need for it to be protected at all. Thus, the very creation of speech protections suggests that the speech sought to be sequestered from government regulation is exactly the type which would give offense.

## V. CONCLUSION

The threat to religious proselytizing speech can be boiled down to an attempt to depose liberty and replace it with community. But like any coup, the change in leadership that appears attractive at the outset often results in anarchy or oppression that has disastrous repercussions for years to come. Forbidding religious persuasive speech in an effort to avoid offending those who may disagree strikes at the very core of our social and legal foundations in the United States. As the Supreme Court sagely pointed out in *Barnette*, forced conformity to an ideal meant to facilitate a sense of community does not work, and leads to a totalitarian regime where the views of a few are imposed upon the many.<sup>131</sup> The small, but growing effort to relegate religious proselytizing speech to a status of minimal First Amendment protection should be viewed for what it is—blatant viewpoint

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128. 310 U.S. at 301-303.

129. *Cohen*, 403 U.S. at 24 (emphasis added).

130. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (same).

131. *Barnette*, 319 U.S. at 640-41.

discrimination justified by a misguided attempt to protect listeners from feelings of offense. The royal pedigree of religious speech as the prince of First Amendment jurisprudence should not be so lightly cast aside.