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Free Speech, Terrorism, and European Security: Defining and Defending the Political Community

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Free Speech, Terrorism, and European Security: Defining and Defending the Political Community

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"[W]e are seeing an increasing use of what I call the 'T-word'—terrorism—to demonize political opponents, to throttle freedom of speech and the press, and to delegitimize legitimate political grievances."[1]

U.N. Secretary General Kofi Annan (2003)

The United States and its European allies are engaged in a global struggle against terror. While world-wide criticism of America's leadership of the "war on terror" has focused attention on America's human rights transgressions, the United States is not the only democratic state that, at times, has privileged national security over civil liberties. Just as images of the burning World Trade Center towers transformed America's domestic political dynamic and propelled then-President Bush to declare a war on terror, subsequent terrorist attacks in London[2] and Madrid[3] have raised the stakes, as well

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1. Press Release, Security Council, Menace of Terrorism Requires Global Response, Says Secretary-General, Stressing Importance of Increased United Nations Role, U.N. Doc. SC/7639 (Jan. 20, 2003), *available at* http://www.un.org/News/Press/docs/2003/sgsm8583.doc.htm.

2. *See* Alan Cowell, *Subway and Bus Blasts in London Kill at Least 37*, N.Y. TIMES, July 8, 2005, at A1.

3. *See* Elaine Sciolino, *10 Bombs Shatter Trains in Madrid, Killing 192*, N.Y. TIMES, Mar. 12, 2004, at A1.

as the human rights challenges, in Europe.

Without a doubt, both the March 2004 Madrid train bombings and the July 2005 suicide attacks on the London transit system noticeably shook European politics and reshaped Europe's counterterrorism policies, albeit in disparate ways.[4] Coupled with the assassination of Dutch filmmaker Theo van Gogh in Amsterdam in November 2004,[5] the London and Madrid bombings strongly impacted European consciousness and public opinion, stirring public fears that jihadist networks had penetrated Europe.[6] In testimony given before the United States Senate in June 2007, the Dutch Deputy National Coordinator for Counterterrorism testified that "the greatest threat to the Netherlands" was Islamic radicalism and jihadism.[7] In a report released in April 2009, the National Coordinator for Counterterrorism in the Netherlands rated the threat posed to the Netherlands by terrorism as "substantial."[8] In 2007, German Interior Minister Wolfgang Schäuble stated that "[t]here are a lot of concrete indications . . . that show that Germany has increasingly moved into the crosshairs of international terrorism."[9] The

4. *See* Narcisco Michavila, *War, Terrorism and Elections: Electoral Impact of the Islamist Terror Attacks on Madrid* 14, 31 (Real Instituto Elcano, Working Paper No. 13, 2005), *available at* http://www.realinstitutoelcano.org/documentos/186/Michavila186.pdf (arguing that the Madrid attacks triggered a backlash against the government's position on the Iraq War). *See also* First Poll on the London Bombings, http://ukpollingreport.co.uk/blog/archives/59 (July 9, 2005) (arguing that public support for government policies that restrict civil liberties rose after the attack).

5. *See* Marlise Simons, *Dutch Filmmaker, An Islamic Critic, Is Killed*, N.Y. TIMES, Nov. 3, 2004, at A5.

6. *See generally* Robert S. Leiken, *Europe's Angry Muslims*, 81 FOREIGN AFF., July-Aug. 2005, at 120.

7. ANDREA NAPHEGYI & ANTONIYA STOYANOVA, NETH. HELSINKI COMM., ANNUAL REPORT 2007, at 69 (Peter Morris trans., 2007), *available at* http://www2.nhc.nl/spaw2/uploads/files/anrep2007.pdf.

8. Letter from the Nationaal Coördinator Terrorismebestrijding [National Coordinator for Counterterrorism] to the Chairperson of the Lower House of the States General (Apr. 6, 2009), *available at* http://english.nctb.nl/ (search "Summary DTN 2009"; follow second search result "Summary DTN" hyperlink). According to the report, this means that there is a reasonable possibility that an attack will occur against Dutch interests at home or abroad. *Id.* at 2. The reasons listed in the report for placing the Netherlands on the target list is the presence of Dutch military personnel in Afghanistan as well as the perceived insult to Islam that exists in the Netherlands. *Id.*

9. *Germany Worried About Increased Terrorism Threat*,

United States cannot afford to ignore these developments as recent intelligence reports suggest that terrorist networks in Europe pose a serious threat, not only to Europe, but to the United States as well.[10]

The emergence of this "new" heightened threat prompted European governments to institute a new round of security measures. In most cases, however, the "new" counterterrorism legislation merely revised and extended existing policies.[11] As a result, Europe's response to the 2004 and 2005 attacks should be seen as part of a process that did not start with initial attacks on European soil, nor with the 9/11 attacks in 2001. The context and timing of Europe's response elucidates another key point. No "monolithic" European response to terrorism exists. Instead, Council of Europe member states have adopted a common framework approach to terrorism that accommodates differences in states' legal and political cultures. To some extent the current counterterrorism policies in place in Europe reflect each state's unique prior record to responding to domestic terrorism.[12] Despite the fact that European states are

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DEUTSCHEWELLE.COM, July 23, 2007 (F.R.G.), http://www.dw-world.de/dw/article/0,,2702203,00.html.

10. *Annual Threat Assessment of the Intelligence Community: Hearing before the S. Select Comm. on Intel.*, 111th Cong. 5 (2009) (statement of Dennis C. Blair, Director of National Intelligence), *available at* http://intelligence.senate.gov/090212/blair.pdf. *See also US Concerned About Possible Terrorist Threat From Europe*, VOANEWS.COM, Jan. 16, 2008, http://www.voanews.com/english/archive/2008-01/2008-01-16-voa45.cfm?CFID=259075030&CFTOKEN=98948008&jsessionid=de30bcb440df9e7f092037467878f2c5b474 (statement by United States Homeland Security Secretary Michael Chertoff stating that Western Europe could become a breeding ground for terrorists).

11. *See* discussion *infra* Part II(C).

12. In the past four decades, many of Europe's largest states acquired considerable experience confronting the challenge posed by domestic terrorists. While the United Kingdom leads the list with its nine-decade battle with the Irish Republican Army, the criminal codes of France (Corsican nationalists), Spain (Basque Separatists), and Germany (RAF) all carry the imprimatur of these prior responses to terrorism. The complete list of international and supranational conventions that relate to terrorism are too long to include here. The major conventions include: U.N. Security Council Resolution 1373 of 2001, S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); U.N. Security Council Resolution 1624 of 2005, S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005); the Council Framework Decision on Combating Terrorism (EU) No. 2002/475/JHA of 13 June 2002, 2002 O.J. (L 164) 3 [hereinafter Council Framework Decision 2002]; the Council Framework Decision Amending Framework Decision 2002/475/JHA on

signatories to international and supranational terrorism conventions, those conventions have been "translated" into domestic legal regimes in unique ways.

Faced with a rich vein of research topics concerning the legality of the United States' counterterrorism policies, American legal scholars have largely ceded critical analysis of European policies to European scholars and human rights groups.[13] While European government officials have joined with the media in criticizing human rights violations committed by the American government in Iraq and Guantanamo, this chorus of criticism has largely obscured publicity concerning the potential human rights pitfalls of Europe's own counterterrorism policies.[14] To be sure, the broad scope, reach, and nature of the United States' counterterrorism policy and its decision to invade Iraq have offered critics of American policy a hefty target. Moreover, because the United States is a superpower, any misstep provides fodder for critics who choose to frame their critique as part of a larger discourse against American hegemony.[15] Largely obscured behind the dark cloud of America's perceived human rights transgressions, and ongoing struggle to exit Iraq, is the extent to which

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Combating Terrorism (EU) No. 2008/919/JHA of 28 Nov. 2008, 2008 O.J. (L 330) 21 [hereinafter Council Framework Amendment 2008]; and the Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. 196.

13. Some notable exceptions, however, exist. *See* Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233 (2005); Martha Minow, *Tolerance in an Age of Terror*, 16 S. CAL. INTERDISC. L.J. 453 (2007) (assessing the governments' simultaneous overreactions and underreactions to the threats posed by terrorism); Ellen Parker, Comment, *Implementation of the UK Terrorism Act 2006—The Relationship Between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom Versus the United States*, 21 EMORY INT'L L. REV. 711 (2007) (arguing that the United Kingdom has gone further to restrict civil liberties in the area of free speech).

14. Politicians throughout Europe have criticized U.S. policy regarding the Iraq War, the treatment of detainees, and the use of torture. *See, e.g.*, Raymond Bonner & Jane Perlez, *British Report Criticizes U.S. Treatment of Terror Suspects*, N.Y. TIMES, July 28, 2007, at A6; *Chirac Questions U.S.-Led Iraq War*, BBCNEWS.COM, Nov. 17, 2004, http://news.bbc.co.uk/2/hi/middle_east/4018325.stm; *German Chancellor Criticizes U.S.'s Guantanamo Facility*, RADIO FREE EUROPE RADIO LIBERTY, Jan. 7, 2006, http://www.rferl.org/content/Article/1064501.html.

15. *See, e.g.*, Alison Brysk, *Human Rights and National Insecurity*, *in* NATIONAL INSECURITY AND HUMAN RIGHTS: DEMOCRACIES DEBATE COUNTERTERRORISM 1, 7 (Alison Brysk & Gerson Shafir eds., 2007).

European governments have followed the United States' lead in privileging national security concerns at the expense of civil liberties.[16] In particular, the Council of Europe Convention on Prevention of Terrorism was the first international instrument that called for the enactment of penal code provisions criminalizing the offense of incitement to terrorism.[17] The Convention's public provocation offense extends both to direct, as well as indirect, incitement to terrorism.[18]

Perhaps nowhere is this development so evident as in the area of free speech.[19] Throughout Europe, states have enacted anti-incitement and public disorder laws that grant states broad authority to prohibit and punish speech that may have highly attenuated links to terrorist activity.[20] A key example of

16. One exception to this statement is the widespread criticism of European complicity in the CIA's rendition program. *See* AMNESTY INT'L, STATE OF DENIAL: EUROPE'S ROLE IN RENDITION AND SECRET DETENTION (2008), *available at* http://www.amnesty.org/en/library/asset/EUR01/003/2008/en/2ceda343-41da-11dd-81f0-01ab12260738/eur010032008eng.pdf (documenting and criticizing the participation of several European states in the CIA's controversial rendition program). *See also* Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, EUR. PARL. DOC. P6_TA-PROV(2007)0032, ¶ 190 (2007), *available at* www.europarl.europa.eu/comparl/tempcom/tdip/final_ep_resolution_en.pdf (stating that "all European countries that have not done so should initiate independent investigations into all stopovers made by civilian aircraft carried out by the CIA, at least since 2001").

17. Council of Europe Convention on the Prevention of Terrorism, *supra* note 12, at art. 5, ¶ 2. *See also* ORG. FOR SEC. & COOPERATION IN EUR. ET AL., EXPERT WORKSHOP ON PREVENTING TERRORISM: FIGHTING INCITEMENT AND TERRORIST RELATED ACTIVITIES 2 (2006), *available at* http://www.libforall.org/OSCE%20Preventing%20Terrorism.pdf.

18. Council of Europe Convention on the Prevention of Terrorism, *supra* note 12, at art. 5, ¶ 1.

19. One exception to this statement is the widespread criticism of European complicity in the CIA's rendition program. *See* AMNESTY INT'L, *supra* note 16 (documenting and criticizing the participation of several European states in the CIA's controversial rendition program). *See also* Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, *supra* note 16.

20. For example, in 2003, Belgium amended its criminal code to include the crime of incitement. The provision states:

> Any person who, either by views expressed in meetings or public places or by writings, printed matter, images or emblems of any kind displayed, distributed, sold or put on sale or public view, directly provoked others to commit the crime or offence, without prejudice to the penalties imposed

the erosion of free speech occurring throughout Europe is the European Court of Human Rights's October 2008 decision in *Leroy v. France*.[21] In that case, the Court upheld the French conviction of a cartoonist who had penned and published a cartoon that linked the 9/11 attacks with America's decline.[22] *Leroy*, which will be discussed later in this article,[23] is just one example of several cases that demonstrate that legislators and judges on the other side of the Atlantic have opened the door to the broad regulation of speech. They have done so by enacting vaguely-worded legislation that grants prosecutors wide discretion in applying and enforcing the law. This trend towards criminalizing broader categories of speech raises the question as to whether measures taken by democratic governments to restrict speech in the name of preventing Islamic radicalization will undermine or strengthen the European models of democratic governance.

With the change in Administration in Washington, D.C., there has, at minimum, been a shift in tone, if not yet in substance, of American foreign policy.[24] Given the close strategic cooperation between the United States and Europe in counterterrorism policy, the time is apt for a deeper examination of the extent to which the anti-terrorism policies adopted in Europe challenge a foundational principle of liberal

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> by law on authors of provocations to commit crimes or offences, even if such provocations were not acted upon.

CODE PÉNAL [Penal Code] art. 66 (Belg.). *See also* DAVID BANISAR, SPEAKING OF TERROR: A SURVEY OF THE EFFECTS OF COUNTER-TERRORISM LEGISLATION ON FREEDOM OF THE MEDIA IN EUROPE 20 (2008), *available at* http://www.coe.int/t/dghl/standardsetting/media/Doc/SpeakingOfTerror_en.pdf (discussing the Belgian Code in English).

21. Leroy c. France [Leroy v. France], App. No. 36109/03, Eur. Ct. H.R. (2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=leroy%20%7C%20v.%20%7C%20france%20%7C%2036109/03&sessionid=41876423&skin=hudoc-en (upholding Dennis Leroy's conviction for complicity in condoning terrorism).

22. *Id.*

23. *See* discussion *infra* notes 244-55.

24. *See, e.g.*, The White House, Foreign Policy, http://www.whitehouse.gov/issues/foreign_policy/ (last visited Mar. 8, 2010) (stating that the President has ordered the closure of the Guantanamo Prison and prohibited the use of torture).

democratic governance—namely, the right to free speech.[25] It is important to acknowledge that the threat posed by terrorism is not a new challenge for democratic societies and that prior responses to terrorism crafted by some democratic states have damaged the rule of law.[26] One of the questions that this article seeks to address is whether the current threat posed by terrorists in Europe represents a categorically new type of security threat that may justify more serious intrusions on civil liberties: in the province of free speech, does the danger posed by calls to violent jihad by Islamic extremists within Europe represent such a serious threat to European security that justifies restrictions on speech?

On a cursory level, the fact that anti-terrorism legislation in Europe threatens to infringe on free speech is not surprising. In contrast to Europe, the United States' free speech jurisprudence is the most robust in the world.[27] During the past forty years, Supreme Court decisions have widened the ambit of free speech protections and elevated the level of protection afforded to political speech.[28] Critically, the state cannot restrict free speech on the basis of content unless the

25. *See generally* Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL'Y REV. 185 (2002) (discussing how counterterrorism legislation in the United States infringes on free speech).

26. *See, e.g.*, Shawn Boyne, *Law, Terrorism, and Social Movements: The Tension Between Politics and Security in Germany's Anti-Terrorism Legislation*, 12 CARDOZO J. INT'L & COMP. L. 41 (2004). *See also generally* David R. Lowry, *Draconian Powers: The New British Approach to Pretrial Detention of Suspected Terrorists*, 8 COLUM. HUM. RTS. L. REV., Fall-Winter 1976-1977, at 185 (discussing the problems in guerilla warfare and urban terrorism that challenge law enforcement in democratic states); Lynn Wartchow, *Civil and Human Rights Violations in Northern Ireland: Effects and Shortcomings of the Good Friday Agreement in Guaranteeing Protections*, 3 NW. U. J. INT'L HUM. RTS. 1 (2005) (arguing that Northern Ireland's political structure perpetuated a structure that tolerated the state's human rights abuses).

27. *See, e.g.*, *The Tongue Twisters*, ECONOMIST (London), Oct. 13, 2007, at 80.

28. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (upholding flag burning as a means of political protest despite potential offensiveness); Cohen v. California, 403 U.S. 15 (1971) (holding that an individual cannot be criminally punished for wearing an offensive article of clothing that criticized the draft); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the state may not regulate expression that advocates the use of force or the violation of law unless the advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

government regulation clears the rigorous strict scrutiny standard.[29] Attempts to restrict the content of core protected speech must be narrowly tailored to serve a "compelling state interest."[30] The stringent protections afforded to free speech in the United States stem from the "preferred position" that free speech enjoys among individual rights in the United States Constitution.[31] According to the liberal vision of the state, the government's role is to protect individual rights by keeping the public sphere relatively free of government regulation.[32] As Adrian Oldfield has written:

> The function of the political realm is to render service to individual interests and purposes, to protect citizens in the exercise of their rights, and to leave them unhindered in the pursuit of whatever individual and collective interests and purposes they might have. Political arrangements are thus seen in utilitarian terms. To the extent that they afford the required protection for citizens and groups to exercise their rights and pursue their purposes, then citizens have little to do politically beyond choose who their leaders are to be.[33]

In contrast, the European Convention on Human Rights ("ECHR"), which sets the broad framework for human rights protections in Europe, tempers the protection afforded to free

29. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 655 (1990); Sable Commc'ns, Inc. v. FCC, 492 U.S. 115, 126 (1989); Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 572-73 (1987); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); United States v. Grace, 461 U.S. 171, 177 (1983).

30. *See, e.g.*, Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2417 (1996). *See also, e.g.*, *supra* note 29 and cases cited therein.

31. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 509 (1946).

32. *See, e.g.*, Ruti Teitel, *Militating Democracy: Comparative Constitutional Perspectives*, 29 MICH. J. INT'L L. 49, 52 (2007) (discussing different free speech regimes in the United States and in Europe).

33. Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World*, *in* THE CITIZENSHIP DEBATES 75, 76 (Gershon Shamir ed., 1998).

speech with the governmental necessity of imposing restrictions "in the interests of national security, territorial integrity or public safety, [or] for the prevention of disorder or crime."[34] This approach privileges the state's interests in preserving order and protects communitarian values such as preventing social unrest and promoting inclusiveness.[35] These broad differences between the orientation of individual and collective rights in Europe and the United States have been well-documented.[36] What is surprising is the extent to which Europe's leading democratic states have significantly circumscribed the right to free expression as part of a broader counterterrorism strategy.[37]

While scholars have extensively documented the tension that exists between national security and civil liberties, this article focuses specifically on penal code provisions designed to target individuals who encourage others to commit terrorist acts by inciting or glorifying terrorism. Section I lays out the nature of the threat that radical speech poses to democratic states as well as the difficulties inherent in crafting legislation that does not over-broadly target radical speech. Section II outlines the efforts taken at the European Community and Member State levels to criminalize speech that glorifies or tends to incite terrorism. I demonstrate that the prominent role that the concept of human dignity plays in European jurisprudence at both the supranational and national levels

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34. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, ¶ 2, Nov. 4, 1950, Europ. T.S. No. 5. Article 10 broadly protects free speech and defines it as the right to "hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." *Id.* art. 10, ¶ 1. This right is tempered by the fact that the ECHR grants member states the power to impose restrictions that "are necessary in a democratic society in the interests of national security, territorial integrity or public safety, [or] for the prevention of disorder or crime." *Id.* art. 10, ¶ 2. In addition, Article 17 of the ECHR denies citizens the "right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein." *Id.* art. 17.

35. Teitel, *supra* note 32, at 52.

36. *See, e.g.*, Jochen Abr. Frowein, *Incitement Against Democracy as a Limitation of Free Speech*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 33, 34-38 (David Kretzmer & Francine Kershman Hazan eds., 2000).

37. *See generally* BANISAR, *supra* note 20 (detailing a broad range of new restrictions on the media).

helps to explain the ease with which European states have so quickly moved to restrict speech to counter perceived terrorist threats. I argue that a key reason why some European states are moving closer to over-regulating free speech is that the political culture has never endorsed an absolutist vision of free speech. Section III draws on case decisions to prove my thesis. Moreover, I suggest that legislation that has been designed to curb radicalization by curtailing speech expands prosecutorial discretion to a degree that is unwarranted by the legislation's efficacy in fighting terrorism. Section IV concludes this article by asking whether or not the law is the appropriate tool to disrupt the radicalization process that drives individuals to join the Islamic jihad and suggesting directions for future scholarship.

There is extensive literature regarding the threat to free speech rights posed by the Government's response to terrorism in the United States.[38] Unsurprisingly, the literature that addresses the right to free speech often ignores developments on the European continent. Examining the free speech policies of European states can provide insights into the benefits and disadvantages that alternative approaches to regulating free speech may offer governments as they confront the dangers posed by Islamic fundamentalist terrorism. Moreover, this article aims to contribute to the common interest that the United States and Europe share in preserving the rule of law and in curbing the state's ability to implement law in a discriminatory manner. By exploring the responses to terrorism taken by European states, it is possible to revisit the advantages and disadvantages of our own policies and illuminate our understanding of the forces that drive terrorism policy.

I. When Speech Threatens: Looking at Terrorism-Related Speech in Europe

Europe today faces an ongoing and active threat from terrorist groups that perhaps exceeds the threat faced by the

38. *See generally, e.g.*, GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004); Donohue, *supra* note 13; Eugene Volokh, *Deterring Speech: When is it "McCarthyism"? When is it Proper?*, 93 CAL. L. REV. 1413 (2005).

United States.[39] In 2008, 515 terrorist attacks were carried out in European Union member states.[40] During that same period, law enforcement officers arrested over one thousand individuals for terrorism-related activities.[41] According to the European Police Agency (EUROPOL), law enforcement charged the bulk of the individuals arrested with the offense of suspicion of membership in a terrorist organization.[42] The remainder of the arrests included attack-related offenses, fomenting propaganda, and providing support to terrorists.[43] Despite the publicity given to al-Qaeda in the United States, the bulk of these attacks were committed by non-Islamic separatist groups in France and Spain.[44] However, only one attack in 2008, in which a United Kingdom national detonated a bomb in England, can be attributed to Islamic terrorism.[45] This dearth of attacks by Islamic extremists does not mean that intelligence experts should remove Europe from the list of states targeted by Islamic extremists. The fact that European officials have arrested scores of individuals on charges related to planning actions undertaken in Belgium, France, Spain, and other countries demonstrates that Europe still faces an active threat.[46]

There are myriad reasons why radical Islamic terrorist groups have targeted Europe. A key cause has been the emergence of home-grown terrorist cells within Europe. While

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39. Anil Dawar, *Barack Obama Warns Europe Faces Greater Threat From al-Qaeda*, GUARDIAN.CO.UK, Apr. 3, 2009, http://www.guardian.co.uk/world/2009/apr/03/obama-russia-nato-al-qaida (stating that President Obama believes that it is more likely that al-Qaeda could launch a serious terrorist attack in Europe than in the United States).

40. EUROPOL, TE-SAT 2009: EU TERRORISM SITUATION AND TREND REPORT § 4.1 (2009), *available at* http://www.europol.europa.eu/publications/EU_Terrorism_Situation_and_Trend_Report_TE-SAT/TESAT2009.pdf.

41. *Id.* § 4.2. Approximately fifty percent (501 out of 1009) of the suspects arrested were associated with a separatist organization. Government officials identified 187 individuals as linked to Islamist extremism. The remainder of the arrestees fell into the categories of left wing extremism, single issue extremism, or unspecified causes. *Id.*

42. *Id.* § 4.3.

43. *Id.*

44. *Id.* § 4.1 (explaining that there were 137 attacks committed in France and 253 committed in Spain).

45. *Id.* § 5.

46. *Id.*

al-Qaeda posed an external threat to Europe at the time of the 9/11 attacks,[47] "proselytizing . . . by radical preachers" within Europe has fuelled the emergence of home-grown groups capable of carrying out attacks on European soil.[48] Although it has become convenient to designate al-Qaeda as the prime suspect whenever a terrorist attack occurs, al-Qaeda is not a vast monolithic organization. Instead, it is a brand name used by a loosely connected network of groups that subscribe to the ideology of jihadism.[49]

Radical preachers, who propagate the doctrine of radical Salafist Islam, play a key role in spreading the message of jihad.[50] The preachers and the message they espouse pose a critical threat to Europe's democratic governments. With the financial support of the Saudi government, there has been an unprecedented increase in the number of Wahhabi/neo-Salifi mosques built in Western Europe and the United States in the last three decades.[51] This support has transformed a religion with primarily local support to a doctrine with global reach. This reach expanded significantly when Saudi Arabia elected to support American policy during the first Gulf War by allowing

47. While several of the participants in the 9/11 attacks resided in Hamburg, Germany prior to the attacks, they were not citizens of any European country. *See* TERRY MCDERMOTT, PERFECT SOLDIERS: THE HIJACKERS: WHO THEY WERE, WHY THEY DID IT, at xi-xii (2005).

48. Juan José Escobar Stemmann, *Middle East Salafism's Influence and the Radicalization of Muslim Communities in Europe*, MID. E. REV. INT'L AFF., Sept. 2006, at 1, 1, *available at* http://meria.idc.ac.il/journal/2006/issue3/Escobar.pdf.

49. *See* JASON BURKE, AL-QAEDA: CASTING A SHADOW OF TERROR 16-17 (2003).

50. The followers of radical or neo-Salafism Islam are an offshoot of the Salafi movement. That movement rejects "modern" interpretations of Islamic texts and interprets "modern" to mean any text not authored by scholars who were part of the first two generations of scholars who immediately followed the prophet Mohammed. *See* Escobar Stemmann, *supra* note 48, at 1. As fundamentalist believers, adherents of this strain of Islam reject more contemporary interpretations of the Koran. *See* Benjamin E. Schwartz, *America's Struggle Against the Wahhabi/Neo-Salafi Movement*, 51 ORBIS 107, 112-13 (2007). More specifically, proponents of Salafism desire to practice Islam exactly as it was revealed by the Prophet and they reject subsequent interpretations of Islam authored by Islamic jurists. *See* Lee Smith, *Jihad Without End*, SLATE.COM, Mar. 18, 2004, http://www.slate.com/id/2097370.

51. *See* Schwartz, *supra* note 50, at 113. Motivating the Saudi actions was a desire to counter the ideological vision advanced by Iran's Islamic revolution and new theocratic government beginning in 1979. *Id.* at 114.

American troops to be stationed on Saudi soil. This decision fueled the more extremist Salafi scholars to prosteletize a more politicized theology[52] that questioned the legitimacy of the Saudi government and called for a jihad.[53] Ironically, while Saudi Arabia's efforts to spread Wahhabism hampered the spread of Iran's influence, the institutional network created to foster that spread was susceptible to cooptation by more extremist elements.

Although moderate followers of Salafism recognize the authority of the Saudi clergy and royal family, radical Salafists propagate a clear, theological vision of Islam that aims to impose a global Islamic caliphate.[54] Accordingly, radical Salafi preachers do not acknowledge the authority of secular political figures, nor do they accept the concept of a nation-state.[55] Their goal of a supranational political religious community casts a hostile eye on Europe's political and intellectual pluralism.[56] Because this theocratic political doctrine views the concept of political and intellectual pluralism with hostility, it challenges Europe's multi-cultural goal of promoting religious tolerance. Indeed, the doctrine of Salafi jihad promoted by radical Salafists aims to counter Europe itself and to establish an Islamic state governed by Sharia law.[57]

In this religious "war," radical imams function as front line officers. This strategy was echoed by Dr. al-Qaradawi on the Arabic radio station, al-Jazeera: "Islam will return to Europe. The conquest need not necessarily be by sword. Perhaps we will conquer these lands without armies. We want an army of preachers and teachers who will present Islam in all languages

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52. *See id.* at 116 (stating that the United States' actions to defend Saudi Arabia and Saudi Arabia's rejection of al-Qaeda's offer of assistance made the United States an al-Qaeda target).

53. *See* Escobar Stemmann, *supra* note 48, at 3. Abu Muhammad al-Maqdisi published a book in 1991 entitled *Proof of the Infidelity of the Saudi State*. According to Escobar Stemmann, Abdallah Azzam's treatise, entitled *The Main Obligation of Muslims is to Defend the Land of Islam*, has helped to shape Usama bin Laden's views. *Id.* at 4.

54. *See* Schwartz, *supra* note 50, at 111-15.

55. *See* Escobar Stemmann, *supra* note 48, at 3.

56. *Id.*

57. *See* Shmuel Bar, *The Religious Sources of Islamic Terrorism: What the Fatwas Say*, POL'Y REV., June-July 2004, at 27, 29-30. *See also* Schwartz, *supra* note 50, at 111.

and all dialects."[58]

During the past decade, the presence of this army of preachers and teachers on European soil has facilitated the spread of the radical jihadist message to disaffected Muslims within Europe. Although not all mosques in Europe have been co-opted by the message of radical Salafism, estimates of the degree of "penetration" are discouraging. A 2007 study by the London *Times* found that almost half of Britain's 1,350 mosques are under the control of a hard-line sect whose leading preacher "has called on Muslims to 'shed blood' for Allah."[59] Given that the ideology of jihad has spread into mosques, prisons, and social networks throughout Europe, the appearance of home-grown terrorists in Europe is unsurprising. In fact, by 2002, the Danish intelligence service reported that radical Muslims who had been born and raised in Europe "were beginning to regard Europe as a frontline for Jihad."[60] By 2003, that same intelligence agency noted that grassroots radicalization was gaining ground in Europe.[61] The problem has only worsened. In the two-year span between 2002 and 2004, intelligence agencies throughout Europe began to shift their focus away from the external threat represented by al-Qaeda to the potential threat posed by home-grown terrorists.[62]

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58. Kristin Baker, James Mitchell, & Brian Tindall, *Combating Islamist Terrorism in Europe*, AM. DIPLOMACY, Nov. 13, 2007, http://www.unc.edu/depts/diplomat/item/2007/1012/bake/bakeretal_islameurope.html (citing Anthony Browne, *The Triumph of the East*, SPECTATOR.CO.UK, July 24, 2004, http://www.spectator.co.uk/essays/all/12424/the-triumph-of-the-east.thtml (quoting imam Dr. Al-Quaradawi, *Sharia and Life* (al-Jazeera television broadcast 1999), *translated by* the Middle East Media Research Institute)).

59. Melanie Phillips, *Denial, England: Have We Learned Nothing?*, NAT'L REV. ONLINE, Sept. 11, 2007, http://article.nationalreview.com/?q=M2I4ZTIzNGY1ZjkzYjU4ZjU5NjA3NTQ4MjBlNTk3NWQ=.

60. TOMAS PRECHT, DANISH MINTR'Y OF JUST., HOME GROWN TERRORISM AND ISLAMIST RADICALISATION IN EUROPE: FROM CONVERSION TO TERRORISM 18 (2007), *available at* http://www.justitsministeriet.dk/fileadmin/downloads/Forskning_og_dokumentation/Home_grown_terrorism_and_Islamist_radicalisation_in_Europe_-_an_assessment_of_influencing_factors__2_.pdf.

61. *Id.*

62. In 2004, the British Joint Intelligence Committee reported that the United Kingdom would face an ongoing threat from domestic terrorism over the next five years. *See id.* Germany's Ministry of the Interior published a

At its core, the battle being waged by radical Islamists is not merely an attempt to challenge Europe's secular governments, but is also an effort by the Wahhabi/neo-Salafi movement to impose its political vision on all followers of Islam.[63] To this end, jihadist organizers aim to expand the reach of the radical Salafist message throughout Europe. In 2005, writing in *Foreign Affairs*, Robert S. Leiken noted:

> Jihadist networks span Europe from Poland to Portugal, thanks to the spread of radical Islam among the descendants of guest workers once recruited to shore up Europe's postwar economic miracle. In smoky coffeehouses in Rotterdam and Copenhagen, makeshift prayer halls in Hamburg and Brussels, Islamic bookstalls in Birmingham and "Londonistan," and the prisons of Madrid, Milan, and Marseilles, immigrants or their descendants are volunteering for jihad against the West.[64]

To explain why the message of radical Islam has taken root in Europe, some scholars point to underlying societal tensions that have been several decades long in development.[65] Despite the fact that European governments and businesses opened the door to an influx of guest workers after World War II, many European citizens viewed those invitations as temporary in nature.[66] Although many first-generation Muslim immigrants have long since satisfied formalistic criteria for earning European citizenship, in the eyes of those Europeans who do not embrace the vision of a multi-cultural

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report in 2004 that estimated that there were 31,800 "members and followers" of Islamist organizations and 57,000 "potentially extremist foreigners in Germany." *See* Kathleen Ridolfo, *Europe: Growing Base for Al-Qaeda?*, TERRORISME.NET, July 7, 2005, http://www.terrorisme.net/p/article_164.shtml (internal citation omitted).

63. *See generally* Leiken, *supra* note 6.

64. *Id.* at 124 (arguing that the Wahhabi/neo-Salafi movement aims to impose its political vision on all followers of Islam including traditional Sunnis, Shiites, secular Kurds, and all other followers).

65. Jocelyne Cesari, *Islam, Secularism and Multiculturalism After 9/11: A Transatlantic Comparison*, *in* EUROPEAN MUSLIMS AND THE SECULAR STATE 39, 43-44 (Jocelyne Cesari & Seán McLoughlin eds., 2005).

66. Leiken, *supra* note 6, at 121-22.

Europe, Muslims have not—and perhaps cannot—satisfy unstated cultural criteria. As a result, for many Muslims living in Europe today, citizenship is a hollow shell that does not extend to social, cultural, and political realms. Although Muslim leaders in Europe have become increasingly engaged with the State and civil society, many European citizens continue to view Muslim claims for public recognition as threats to European culture and society.[67]

Thus, in addition to their deep-seated religious faith, Europe's home-grown terrorists share a sense of alienation from European society as well as a hatred of Western culture.[68] In large part, this alienation can be tied to the stagnant social and economic position and high unemployment of many Muslim immigrants.[69] Many remain trapped in menial jobs with little chance of advancement.[70] In contrast to the United States where Muslim immigrants have largely integrated themselves within America's diverse society, many second and third generation Muslim "immigrants" in Europe reside in largely poor, separate geographic communities that are ethnically and religiously homogeneous.[71] These separate communities are a natural recruitment ground for radical Islamists.[72]

There is yet an additional political component to the radicalization problem. Many Europeans have come to reject the multi-cultural vision advanced by elite-level policy-makers.[73] Throughout Europe, attitudes towards Muslim citizens hardened after the 9/11 attacks.[74] Some opinion

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67. Jocelyne Cesari, *Introduction*, *in* EUROPEAN MUSLIMS AND THE SECULAR STATE, *supra* note 65, at 1, 4.

68. PRECHT, *supra* note 60, at 9.

69. *Id.* at 44.

70. *Id.*; David Rieff, *An Islamic Alienation*, N.Y. TIMES MAG., Aug. 14, 2005, at 11, 11.

71. *See* Posting of Perrspective, Homegrown Terrorism in the U.S. and Europe, http://www.perrspectives.com/blog/archives/000451.htm (Aug. 13, 2006, 12:40 EST).

72. Leiken, *supra* note 6, at 123.

73. *Id.* at 123.

74. *See, e.g.*, Olof Åslund & Dan-Olof Rooth, *Shifts in Attitudes and Labor Market Discrimination: Swedish Experiences After 9-11*, 18 J. POPULATION ECON. 603, 605-07 (2005) (suggesting that Swedish attitudes towards immigrants may have created a lasting shift in negative attitudes towards immigrants).

leaders have felt increasingly less constrained in promoting platforms that would curtail immigration.[75]

Although these socio-political factors help to create favorable conditions that may spur some disaffected individuals to turn to violence, there is no single path to becoming a violent extremist.[76] Unfortunately, many democratic states have constructed anti-radicalization policies based on the premise that such a singular path exists. Many states' counterterrorism policies are based on the premise that the path to becoming a terrorist begins with the individual's embrace of conservative Salafi interpretations of the Koran.[77] Accordingly, governments such as the United Kingdom have implemented policies that aim to suppress the spread of the conservative Salafi message.[78] While some members of the counterterrorism community celebrate this proactive approach, there are significant problems with these "counter-radicalization" programs. As Dr. Jeffrey Stevenson Murer points out:

> One of the most significant problems with most of the European 'counter-radicalisation' programmes, . . . is the frequent conceptualisation of radicalisation as a singular position, within a singular community, leading toward a singular trajectory. Explicitly this translates as a road toward 'terrorist violence', which begins with the adoption of conservative Salafi interpretations of the Koran within the—again singularly conceived—Muslim community, which may lead to involvement in suicide bombings.[79]

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75. *See* Terri E. Givens, *Immigrant Integration in Europe: Empirical Research*, 10 ANN. REV. POL. SCI. 67, 68, 75-76 (2007).

76. Jeffrey Stevenson Murer, *Radical Citizenship*, 19 PUB. SERVICE REV.: HOME AFF. 42, 42 (2009) (internal citation omitted).

77. *See id.*

78. *See, e.g.*, *U.K. to Shift Anti-Terror Strategy*, BBCNEWS.COM, Feb. 16, 2009, http://news.bbc.co.uk/2/hi/uk_news/7889631.stm (stating that the United Kingdom would now target violent extremists who voice disapproval of democracy and state institutions).

79. *See* Stevenson Murer, *supra* note 76, at 42.

If it is true that individuals become radicalized in a variety of ways, counterterrorism strategies premised on a singular path to radicalization rest on faulty empirical assumptions.[80] If radicalization is indeed a dynamic process that includes both individual-specific and macro-level factors, then governments that prosecute radical speech risk implementing overbroad prohibitions that will undermine democratic debate without seriously disrupting the radicalization process.[81] This fact creates a problem for policy-makers. As evidence suggests that the radicalization process is occurring more widely and anonymously in the internet age,[82] it has become more difficult to target groups of individuals participating in that process. Although radical mosques have played a key role in recruitment efforts in the past, that role is now declining as Islamic recruitment efforts have been driven underground.[83] Moreover, despite the abundance of scholarship and conjecture that points to religious doctrine as being the wellspring of inspiration for terrorist violence in Europe today, a 2009 study published by the United Kingdom's counter-intelligence and national security agency, MI5, discovered that individuals who are more likely to engage in violence are typically not religious zealots.[84]

An additional consideration that complicates counterterrorism policy is the fact that mere exposure to extremist ideology will not, by itself, lead an individual to adopt radical beliefs. In fact, data collected from hundreds of case studies demonstrates that "no one becom[es] a terrorist

80. In this context, I have adopted Precht's definition of radicalization, which defines it as "a process of adopting an extremist belief system and the willingness to use, support, or facilitate violence and fear, as a method of effecting changes in society." PRECHT, *supra* note 60, at 16.

81. *See* Edwin Bakker, *Jihadi Terrorists in Europe and Global Salafi Jihadis*, *in* JIHADI TERRORISM AND THE RADICALISATION CHALLENGE IN EUROPE 69, 79-84 (Rik Coolsaet ed., 2008); PRECHT, *supra* note 60, at 32-44, 79-81; MITCHELL D. SILBER & ARVIN BHATT, N.Y. CITY POLICE DEP'T, INTELLIGENCE DIV., RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 19 (2007), *available at* http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf.

82. PRECHT, *supra* note 60, at 6.

83. EUROPOL, *supra* note 40, at 19.

84. *See* Stevenson Murer, *supra* note 76, at 42.

overnight."[85] Individuals must come in personal contact with other individuals who are members of violent extremist networks.[86] Indeed a 2008 report released by MI5 goes further, stating that "[w]hat is different about those who ended up involved in terrorism is that they came into contact with existing extremists who recognised their vulnerabilities (and their usefulness to the extremist group)."[87] Once an individual joins a group, psychological factors such as the reward of belonging, enhanced self-esteem, and a sense of security bind the individual to the group.[88] While online extremist website communities do not, by themselves, radicalize individuals, they create opportunities for "virtual" social interaction that may precede or supplement benefits received from person-to-person contact.[89]

Although this research argues in favor of law enforcement policies that target recruitment networks, to an increasing extent, "terrorist" activity in Europe is taking place outside known terrorist networks. According to a 2008 EUROPOL report, law enforcement authorities could not link over two-thirds of the individuals arrested in Europe on suspicion of involvement in Islamic terrorism to affiliations with known terrorist groups.[90] The elusiveness of terrorist groups in Europe has frustrated law enforcement. While it may be difficult to identify and track down terrorist cells, it is easy to enact legislation that criminalizes speech that may "incite" terrorism. Unfortunately, the research discussed above suggests that that it is unlikely that such legislation will play an effective role in deterring terrorism. Instead, since many individuals who listen to "radicalized" messages do not become terrorists, legislation that solely targets the messages will over-broadly curtail speech. Not only will some of the speech that this legislation targets never lead individuals to join terrorist

85. Alan Travis, *The Making of an Extremist*, GUARDIAN.CO.UK, Aug. 20, 2008, http://www.guardian.co.uk/uk/2008/aug/20/uksecurity.terrorism.

86. *Id.*

87. *Id.*

88. *Id.*

89. SILBER & BHATT, *supra* note 81, at 20, 37. *See also* Todd C. Helmus, *Why and How Some People Become Terrorists*, *in* SOCIAL SCIENCE FOR COUNTERTERRORISM: PUTTING THE PIECES TOGETHER 71, 79-81 (Paul K. Davis & Kim Cragin eds., 2009).

90. EUROPOL, *supra* note 40, at 19.

groups, but the legislation will also catch some individuals in its net who never intended to even indirectly incite violence.

While the grave nature of the threat that radical Islamic terrorism poses to Europe may explain European lawmakers' motivations in criminalizing a broader range of speech, it does not explain why such regulations are considered constitutionally permissible. Section II sets forth the constitutional framework that protects the right to free speech in Europe. I then show why courts in most cases have condoned efforts that have been taken at the European Community and Member State levels to criminalize incitement-related speech.

II. Targeting Speech in a Time of Terror: Europe's Constitutional & Legislative Framework

A. *European Convention on Human Rights*

The right to free speech is a fundamental right common to democratic societies. Although liberal democracies differ in the degree of protection that they grant free speech, the right of citizens to criticize their own government is an indispensable pillar of free societies that distinguishes them from authoritarian regimes. When the degree of constitutional protection accorded to free speech in the United States and Europe is examined, however, it is apparent that the socio-political construction of "free speech" doctrine differs dramatically.[91] The primary point of divergence is that many post-war European constitutions, as well as European Community instruments, have accorded the concept of human dignity prominent constitutional status.[92] The profound devastation caused by World War II crippled the continent and hardened the continent's post-war commitment to preserving norms of democratic governance.[93] In countries such as Germany, an essential pillar of that commitment is the doctrine of "militant democracy," which grants governments

91. Georg Nolte, *European and US Constitutionalism: Comparing Essential Elements*, *in* EUROPEAN AND US CONSTITUTIONALISM 3, 9 (Georg Nolte ed., 2005).

92. *Id.*

93. *See id.*

the affirmative power to sanction speech aimed at overthrowing the democratic order.[94] In stark contrast to the high value placed on individual liberty in the United States, European courts in general place a high value on human dignity and grant the state the power to curtail speech that harms the dignity of individuals and groups within society.[95]

European history has played a crucial constitutive role in shaping the constitutional enshrinement of the principle of human dignity. Not only is the principle known as the "watermark" of the ECHR,[96] but it is explicitly recognized in the constitutions of Austria,[97] Belgium,[98] Germany,[99] Finland,[100] Estonia,[101] Greece,[102] Hungary,[103] Ireland,[104] Italy,[105] Latvia,[106] Lithuania,[107] Poland,[108] Portugal,[109] Slovenia,[110] the Slovak Republic,[111] and Spain.[112] Moreover, decisions of the European Court of Justice underscore the fact

94. *See* Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1558 (2004).

95. *See* John C. Knechtle, *Holocaust Denial and the Concept of Dignity in the European Union*, 36 FLA. ST. U. L. REV. 41, 58 (2008).

96. Charter of Fundamental Rights of the European Union, art. 1, Dec. 18, 2000, 2000 O.J. (C 364) 1, 10 ("Human dignity is inviolable. It must be respected and protected.").

97. BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution], art. 4 (Austria).

98. BELG. CONST. art. 23.

99. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 1 (F.R.G.).

100. SUOMEN PERUSTUSLAKI [Constitution] arts. 1, 7, 19 (Fin.).

101. EST. CONST. art. 10.

102. 1975 SYNTAGMA [SYN] [Constitution] arts. 7, 106 (Greece).

103. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 54 (Hung.).

104. Ir. CONST. [Constitution], 1937, pmbl., *available at* http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20Ireland.pdf.

105. CONSTITUZIONE [Cost.] [Constitution] arts. 3, 41 (Italy).

106. SATVERSME [Constitution] art. 95 (Lat.).

107. LIETUVOS RESPUBLIKOS KONSTITUCIJA [Constitution] art. 21 (Lith).

108. TEKST KONSTYTUCJI RZECZYPOSPOLITEJ POLSKIEJ [Constitution] ogłoszono w Dz.U. 1997, NR 78 poz. 483, pmbl., arts. 30, 41 (Pol.).

109. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [Constitution] arts. 1, 13, 26, 59 (Port.).

110. USTAVA REPUBLIKE SLOVENIJE [Constitution] arts. 21, 34 (Slovn.).

111. Ústava Slovenskej Republiky [Constitution] arts. 12, 19 (Slovk.).

112. CONSTITUCIÓN [C.E.] [Constitution] pmbl., arts. 10, 47 (Spain).

that human dignity is a general principle of European law.[113]

The preeminent role accorded to human dignity is a key difference between the construction of free speech rights in the United States and Europe. Although the United States Supreme Court has referred to the term "human dignity" in its jurisprudence, those references are limited.[114] Without a doubt, the concept of human dignity is a more robust source of rights protections in European constitutional jurisprudence than in the United States.[115] The level of constitutional protection accorded to human dignity necessarily restricts the scope of free speech protections. Accordingly, under the ECHR, free speech is a "qualified right" rather than an "absolute right."[116] Consequently, it is permissible for a state to restrict the right "if it is necessary in a democratic society to do so and . . . there is a legal basis for such limits."[117]

The value that the European community places on human dignity ensures that the right to free speech in some cases may be subordinated to the protection of human dignity. In the German hierarchy of constitutional rights, for example, human dignity, free development of one's personality, and protection of personal honor rank higher than free speech in the Basic Law's hierarchy of values.[118] The privileged position that human dignity and other values enjoy in the German Basic Law is not unique. The shared history of the Holocaust led many European countries to restrict hate speech.[119] In fact, one could argue that Europe's post-war criminalization of hate speech,

113. *See, e.g.*, Case C-377/98, Neth. v. Parliament, 2001 E.C.R. 1-7079 (upholding German restrictions on the marketing of laser video games on the grounds that they violated human dignity).

114. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the execution of individuals with mental retardation violates the Eighth Amendment). *See also, e.g.*, R. George Wright, *Dignity and Conflicts in Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527 (2006) (arguing that the concept of dignity can help explain and resolve conflicts between free speech and equal protection).

115. *See* Nolte, *supra* note 91, at 17.

116. KEIR STARMER, FRANCESCA KLUG, & IAIN BYRNE, BLACKSTONE'S HUMAN RIGHTS DIGEST 2 (2001).

117. ORG. FOR SEC. & COOPERATION IN EUR., COUNTERING TERRORISM, PROTECTING HUMAN RIGHTS: A MANUAL 67 (2007), *available at* http://www.osce.org/publications/odihr/2007/11/28294_980_en.pdf.

118. Krotoszynski, *supra* note 94, at 1553-54.

119. Craig S. Smith, *Free Speech and Hate Speech: French Ruling Roils the Waters*, N.Y. TIMES, June 27, 2005, at A6.

and the body of judicial decisions upholding those proscriptions, explains the ease with which European states have so quickly elected to use speech-related prosecutions to counter radical Islamic speech. While it is beyond the scope of this article to trace the post-war implementation of hate speech legislation to the nation-state level in Europe, in many ways the road to the criminalization of terrorism-related speech was paved by pre-existing prohibitions on hate speech.[120]

To understand the protection that the European community affords free speech, we must examine community law. The starting point for understanding the status of laws regulating free speech and incitement is the European Convention on Human Rights. The key provisions of the ECHR are Articles 10 and 17. Article 10, which broadly defines free speech, states:

> Everyone has the right to freedom of expression. [T]his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
>
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[121]

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120. The International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), which entered into force in 1969, played a profound role in spurring the development of anti-hate speech legislation in Europe. *See* Knechtle, *supra* note 95, at 46-48.

121. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 34, at art. 10, ¶¶ 1-2.

Although the ECHR was enacted in 1950, it was not until the late 1990s that the European Court of Human Rights ("ECtHR") articulated a coherent doctrine that weighed state safety concerns and the freedom of expression.[122] Since that date, the ECtHR has developed an analytical framework that it applies to alleged Article 10 violations. In that framework, freedom of expression enjoys an inferior status, as it is merely a "qualified right."[123] Member states may restrict free speech when it is "necessary in a democratic society" to further "the interests of national security, territorial integrity or public safety, [or] for the prevention of disorder or crime."[124] When the ECtHR evaluates alleged Article 10 infringements, it begins by determining whether or not the restriction fulfils a "pressing social need" such as preserving public safety.[125]

On its face, Article 10 appears to open the door to widespread state restrictions on speech. The mere presence, however, of a "pressing social need" does not justify broad state restrictions on speech. If a particular restriction does fulfil a "pressing social need," the ECtHR will next examine whether or not the government infringement is both necessary and proportionate.[126] The ECtHR does not conduct this analysis in

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122. Stefan Sottiaux, TERRORISM AND THE LIMITATION OF RIGHTS: THE ECHR AND THE US CONSTITUTION 88 (2008).

123. ANDREW LE SEUR, JAVAN HERBERG, & ROSALIND ENGLISH, PRINCIPLES OF PUBLIC LAW 364 (2d ed. 1999).

124. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 34, at art. 10, ¶ 2.

125. *See* Donohue, *supra* note 13, at 261-63, 308-310. States may also justify speech restrictions under Article 17 of the Convention. Article 17 denies citizens the right to "engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth . . . in the Convention." Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 34, at art. 17. Thus, in addition to the power granted under Article 10, states may attempt to invoke Article 17 to justify the need for state intervention that circumscribes speech. Any speech that encourages or incites citizens to disrupt the democratic process may not enjoy Article 10 protection because the speech transgresses the bounds of Article 17.

126. *See, e.g.*, Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) at 170-71 (1986) (finding a breach of Article 10 because the government's interference with the defendant's exercise of freedom of expression was not "necessary in a democratic society . . . for the protection of the reputation . . . of others" and that it was "disproportionate to the legitimate aim pursued"); Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 737 (1976) (holding that no breach of Article 10 occurred because the government's interference with the

a hermetic vacuum. It will examine the surrounding context and will consider a state's historical circumstances in making an assessment of the necessity of state action.[127] In several decisions, the ECtHR has determined that the context surrounding the particular speech "act" reduced or enhanced the impact of the speech on national security.[128] It has also held that states may lawfully derogate from Convention rights when necessary to combat the threat posed by terrorism as long as restrictions on Convention rights satisfy the proportionality requirement.[129] By analyzing the link between a particular speech act and its potential impact on the surrounding socio-political environment, the ECtHR makes an implicit calculus of the degree of risk that the speech posed to the state. One can see how the ECtHR conducts this calculus in two cases discussed below involving Turkey.

Turkey's ongoing struggle against the Kurdistan Workers' Party ("PKK") and the government's multiple attempts to restrict speech made on the group's behalf have produced a rich vein of Article 10 jurisprudence. As an analytical starting point, the ECtHR has, on several occasions, determined and reiterated that the PKK poses a security threat to the Turkish government.[130] This determination, standing alone, has not led the ECtHR to sanction all government attempts to proscribe political speech. Instead its rulings have hinged upon a close examination of the context and the import of the speech itself. The 1997 decision in *Zana v. Turkey* underscores this point.[131] In that case, the ECtHR upheld Turkey's conviction of the

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defendant's freedom of expression had a legitimate aim and was necessary).

127. Rekvényi v. Hungary, 1999-III Eur. Ct. H.R. 519, 521 (noting that Hungary's totalitarian history should be considered in weighing the constitutionality of restrictions placed on the freedom of expression of police officers).

128. *See, e.g.*, Polat v. Turkey, App. No. 23500/94, at ¶ 47 (1999) (Eur. Ct. of H.R.), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=polat%20%7C%20turkey&sessionid=42559112&skin=hudoc-en.

129. *See* Jeremie J. Wattellier, Note, *Comparative Legal Responses to Terrorism: Lessons From Europe*, 27 HASTINGS INT'L & COMP. L. REV. 397, 405–08 (2004) (stating that Art. 5 permits such derogations under certain circumstances).

130. *See, e.g.*, Zana v. Turkey, App. No. 18954/91, 1997-VII Eur. H.R. Rep. 667, 688.

131. *Id.*

former mayor of Diyarbakir. While incarcerated in a military prison, the ex-mayor made several statements to journalists that were later published in a national daily newspaper. In the statements the ex-mayor voiced his support for the PKK's national liberation movement.

Although Zana, the former mayor, qualified his remarks by stating that he did not support the massacre of women and children, a Turkish court convicted him under Articles 168 and 312 of the Turkish Criminal Code.[132] The ECtHR denied Zana's petition after examining the political and security circumstances that existed at the time that the interview was published. Critically, the Court noted that the interview had coincided with deadly PKK attacks on civilians in south-east Turkey.[133] On the basis of that fact, the ECtHR reasoned that it was likely that the ex-mayor's statements could have exacerbated the region's already explosive situation. For that reason, the Court concluded that the sanction that Turkey imposed on the petitioner could be considered as addressing a pressing social need.

To pass muster under the Court's Article 10 analysis, however, state action to restrict speech must be both *proportional and necessary* to preserve public safety. The source of the "necessity" standard is the language in Article 10 that states that a restriction must be "necessary in a democratic society."[134] Restrictions that are merely desirable or reasonable do not satisfy the necessity standard.[135] On its face, the "necessary and proportional" language used by the ECtHR appears to be strikingly similar to the "narrow tailoring" requirement of the United States Supreme Court's strict scrutiny test.[136] Similarly, the requirement that

132. *See id.* at 675 (Article 168 punishes individual membership in an armed gang or organization, while Article 312 declares that it is a crime to "publicly . . . praise or defend an act punishable by law as a serious crime or to urge the people to disobey the law," or to "publicly . . . incite hatred or hostility between the different classes in society, thereby creating discrimination based on membership of a social class, race, religion, sect or region").

133. *Id.* at 672.

134. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 34, at art. 10, ¶ 2.

135. *See, e.g.*, Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 679 (1976).

136. *See supra* note 30 and accompanying text.

government interference fulfil a social need on the magnitude of public safety seems analogous to the "compelling government interest" prong of strict scrutiny.[137] Crucially, however, it is important to recognize that courts situated in different legal cultures may use similar language to express doctrinal tests applied differently in practice.[138]

In Europe's constitutional jurisprudence, government restrictions on speech will only satisfy the proportionality requirement if two conditions are satisfied. First, the objective of the interference must provide sufficient justification.[139] Second, there must be "a rational connection between the objective and the restriction in question and the means employed."[140] A key component of this analysis is a due process notice requirement. According to that requirement, state restrictions on speech must be prescribed by law in advance of the government's enforcement actions.[141] States must set forth restrictions on speech in advance of potential violations as well as define those restrictions with sufficient precision so that citizens may adjust their conduct accordingly.[142] As Roger Errera points out, these two requirements parallel prohibitions in American jurisprudence against overbreadth and vagueness.[143]

To determine whether or not the government's interference is necessary, the ECtHR closely examines the nature of the audience. Echoing the decision in *Zana v. Turkey*, the ECtHR's evaluation of the legality of government action has turned on the specific nature of the audience as well as the timing of the speech act. In decisions that address actions undertaken by Turkey, the Court's reasoning indicates that the mere fact that the PKK is operating in Turkey has not been a sufficient

137. *See supra* note 30 and accompanying text.

138. I owe thanks to George Wright for pointing this out.

139. Roger Errera, *Freedom of Speech in Europe*, *in* EUROPEAN AND US CONSTITUTIONALISM, *supra* note 91, at 23, 31. *See also* D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 443-44 (2d ed. 2009); Nolte, *supra* note 91, at 9.

140. STARMER, KLUG, & BYRNE, *supra* note 116, at 9.

141. Larissis v. Greece, App. Nos. 23372/94, 26377/94, 26378/94, 1998-I Eur. H.R. Rep. 329, 356. This requirement is consistent with one of the core principles of the rule of law-the principle of legality.

142. *See* Errera, *supra* note 139, at 31.

143. *Id.*

ground, standing alone, that necessitated government restriction of speech. For example, in *Incal v. Turkey*, the ECtHR held that Turkey had overstepped its bounds when it convicted an individual for distributing a pamphlet that criticized the actions taken by local authority against small-scale illegal trading and squatters' camps.[144] In contrast to the circumstances surrounding the speech act in *Zana*, in *Incal* the ECtHR determined that criticism of specific government action, which was unrelated to the PKK-incited unrest, was unlikely to provoke the population. The Court stated explicitly that nothing in the leaflet could be regarded as incitement to violence, hostility, or hatred between citizens.[145] In the Court's eyes, mere criticism of a government that is unlikely to provoke a strong public reaction does not justify government interference. In determining the necessity of restrictions designed to protect public safety, the ECtHR considers whether or not the speech is likely to incite a broad, as opposed to a local, reaction. The Court has tended to discount government restrictions on inflammatory speech where that speech is likely to reach only a small audience.[146] Looking specifically at decisions which address incitement-related speech, it appears that the ECtHR will only uphold an Article 10 restriction if there is a risk that the incitement will trigger the use of violence, an uprising, or an armed resistance.[147]

An important counterweight to the need to preserve public order is the public's "right to know" information important to public debate. The public's right to know weighs heavily in the ECtHR's calculations when the subject matter is a matter of general importance.[148] This right to know, and the importance

144. *See* Incal v. Turkey, App. No. 22678/93, 1998-IV Eur. H.R. Rep. 449, 481.

145. *Id.* at 487.

146. *See, e.g.*, Karatas v. Turkey, 1999-IV Eur. Ct. H.R. 81 (striking down restrictions on poems that were aggressive in tone because their limited distribution substantially reduced their potential impact on national security).

147. *See* Dirk Voorhoof, Terrorism and Freedom of Expression: Impact on Media and Journalism, Presentation at the Council of Europe's Forum on Anti-Terrorism Legislation and its Impact on Freedom of Expression and Information (May 27, 2009), http://www.coe.int/t/dghl/standardsetting/media/confantiterrorism/contributions_27may09_en.asp (follow hyperlink after "Dirk Voorhoof").

148. *See, e.g.*, Tromsø v. Norway, 1999-III Eur. Ct. H.R. 289, 324-25.

of public debate to the democratic process, are key themes in the Court's jurisprudence. Given the importance of human dignity in European jurisprudence, however, the scope of debate is not unlimited. The constitutional right to human dignity has a speech-restrictive effect on the terms of public debate as it is bounded by such community values as "pluralism, tolerance, and broadmindedness."[149] The norms of democratic governance in the European community promote debate, but it is a debate that favors the protection of individual and group dignity.

As a general rule, the ECtHR imposes a stiff proportionality standard on government restriction of discussions on matters of general public concern.[150] For example, in *Thorgeirson v. Iceland*, the Strasbourg Court found that Iceland had violated Article 10 when it convicted a writer who had written several articles criticizing police brutality on defamation charges.[151] The Court concluded that the content of the articles was a matter of general public concern because Thorgeirson was pushing for the appointment of an independent commission to investigate complaints of police brutality.[152] The mere invocation of public concern however, does not confer an unlimited right to free speech. States may regulate speech that addresses matters of general public concern if the character of the speech may incite violence.[153]

In sum, the ECHR establishes a framework within which states must operate as they seek to balance liberty and security. To survive an Article 10 challenge, government restrictions on speech must serve an urgent social need. Where the Court has found government actions to be neither necessary nor proportionate to the goal of maintaining public safety, the ECtHR has held that those restrictions have violated Article 10. The Court's approach is consistent with the fact that Article 10 is a qualified rather than an absolute right.

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149. Errera, *supra* note 139, at 30 (quoting Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 754 (1976)).

150. Thorgeir Thorgeirson v. Iceland, 239 Eur. Ct. H.R. (ser. A) at 25 (1992).

151. *Id.*

152. *Id.* at 25-28.

153. *See* Michael O'Boyle, *Right to Speak and Associate under Strasbourg Case-Law with Reference to Eastern and Central Europe*, 8 CONN. J. INT'L L. 263, 276 (1993).

One key final point is that the ECtHR does not enjoy the same power of review as enjoyed by the United States Supreme Court. The ECHR grants member states a wide latitude of flexibility, essentially establishing only a minimum floor of rights protections. While the fundamental rights set out in the Convention serve as general principles that are binding on member states, the free speech protections enjoyed throughout the European community are not monolithic. The ECHR grants a "margin of appreciation" to national authorities.[154] Accordingly, member states may interpret and implement the Convention in accord with their own national constitutional frameworks and domestic legislation.[155] To understand how domestic counterterrorism legislation challenges the protections established in the ECHR, it is necessary at this point to turn to actions taken by the Council of Europe to coordinate member states' responses to terrorism.

B. *European Union Council Framework Decisions on Combating Terrorism of 2002 & 2008*

In response to the threat posed by international terrorism, the forty-seven member states of the Council of Europe have adopted two key directives known as the Framework Decisions on Combating Terrorism of 2002[156] and 2008.[157] These Framework Decisions are binding actions that aim to outline the direction of action undertaken by member states within the European Union's third pillar.[158] While the devastating

154. *See, e.g.*, Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976). *See also* Janneke Gerards & Hanneke Senden, *The Structure of Fundamental Rights and the European Court of Human Rights*, 7 INT'L J. CONST. L. 619, 645-51 (2009) (discussing how the European Court of Human Rights applies the margin of appreciation doctrine).

155. J.P. Loof, Remarks at the Dutch Section of the International Commission of Jurists Conference ("NJCM"): Combating Terrorism with Human Rights (Apr. 8, 2005). *See also* Casado Coca v. Spain, 285-A Eur. Ct. H.R. (ser. A) at 20-21 (1994); Barfod v. Denmark, 149 Eur. Ct. H.R. (ser. A) at 12-14 (1989); Markt Intern Verlag GmbH v. Germany, 165 Eur. Ct. H.R. (ser. A) at 19-20 (1989).

156. Council Framework Decision 2002, *supra* note 12.

157. Council Framework Amendment 2008, *supra* note 12.

158. While Framework Decisions are binding on member states as to the result that they seek to achieve, they leave the "choice and method" of the specific action undertaken by a Member state up to the Member state itself.

attacks on American soil in 2001 led the Council to act, it was the nature of the terrorist threat itself that necessitated and triggered a region-wide response. Specifically, the initial Framework Decision pointed to the emergence of international terrorist networks that could deliver lethal and devastating attacks as the key impetus behind the 2002 Decision.[159] The lack of borders within the European Union as well as the inadequacy of traditional police and judicial responses in combating terrorism have also played a role in shaping the Council's response.[160]

For purposes of this article, the key provisions of the 2002 instrument include the provisions that define "terrorist offences" and "terrorist groups." This instrument defines a terrorist group as "a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences."[161] The Decision defines "terrorist offences" as offenses under national law that,

> [G]iven their nature or context, may seriously damage a country or an international organisation where committed with the aim of:
>
> - seriously intimidating a population, or
> - unduly compelling a Government or international organisation to perform or abstain from performing any act, or
> - seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.[162]

The principal advantage of the 2002 Decision is that it harmonized the definitions of terrorism and terrorist groups

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See Jolande Prinssen, *Domestic Legal Effects of EU Criminal Law: A Transfer of EC Law Doctrines?*, *in* INTERFACE BETWEEN EU LAW AND NATIONAL LAW 311, 314 (D. Obradovic & N. Lavranos eds., 2007).

159. Memorandum from the Comm'n of the European Cmtys. Proposal for a Council Framework Decision on Combating Terrorism 3 (Sept. 19, 2001), *available at* http://www.statewatch.org/news/2001/sep/terrorism.pdf.

160. *Id.* at 8.

161. Council Framework Decision 2002, *supra* note 12, at art. 2(1), 2002 O.J. (L 164) at 4.

162. *Id.* at art. 1(1), 2002 O.J. (L 164) at 4.

used by Member States and established a structure of appropriate sanctions and penalties for individuals convicted of terrorism-related offenses. Although no provisions of the 2002 instrument explicitly circumscribe the freedom of expression, critics have charged that governments might use the document to enact and justify legislation that could target demonstrations and protests.[163] For our purposes here, it is worthwhile to note that the main danger of these provisions is that they may be, and indeed have been, combined with subsequent provisions to greatly circumscribe the ambit of free speech protections.

In the wake of the 2004 Madrid bombings, the Council of Europe called for and subsequently drafted and enacted amendments to the 2002 Decision that called on Member States to criminalize "offences linked to terrorist activities" with the aim of "reducing the dissemination of those materials which might incite persons to commit terrorist attacks."[164] The United Nations Security Council gave efforts to criminalize a wider range of speech a boost when it issued a non-binding resolution in September 2005.[165] The resolution called upon States to "to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to . . . [p]rohibit by law incitement to commit a terrorist act or acts."[166]

Given that British Prime Minister Tony Blair played a key

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163. *See, e.g.*, Statewatch News Online, *EU to Adopt New Rules on Terrorism,* http://www.statewatch.org/news/2001/sep/14eulaws.htm (last visited Jan. 12, 2010) (alleging that Article 3 of the 2002 Framework Decision could embrace a range of demonstrations and protests).

164. Council Framework Amendment 2008, *supra* note 12, 2008 O.J. (L 330) at 21.

165. S.C. Res. 1624, ¶ 1(a), U.N. Doc. S/RES/1624 (Sept. 14, 2005). The resolution called upon states to "to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to . . . [p]rohibit by law incitement to commit a terrorist act or acts." *Id.* While the members of the Security Council condemned any attempts to glorify and incite terrorist acts, the resolution also reminded states of their duty to protect the freedom of expression under both Article 19 of the Universal Declaration of Human Rights, G.A. Res. 217A, at 74-75, U.N. GAOR, 3d Sess., 183rd plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), and Article 19 of the International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 55, U.N. GAOR, 21st Sess., 1496th plen. mtg., U.N. Doc. A/6316 (Dec. 16, 1966).

166. S.C. Res. 1624, *supra* note 165, at ¶ 1(a).

role in drafting the Security Council resolution, it is unsurprising that the Council of Europe quickly directed its energies towards adopting a similar measure. The proposed original Amendment to the 2002 Framework Decision called for a wide range of incitement-related provisions. In particular, the proposal called for legislation that would criminalize speech that included "public expressions of support for terrorist offences and/or groups"; "the instigation of ethnic and religious tensions which can provide a basis for terrorism"; "the dissemination of 'hate speech' and the promotion of ideologies favourable to terrorism."[167] In its final form, the Amendment was slightly narrower in scope. The Amendment requires member states to enact legislation that criminalizes the acts of "public provocation to commit a terrorist offence[,] recruitment for terrorism[, and] training for terrorism."[168]

The Amendment's strength is that it directs member states to criminally target individuals who transmit specific knowledge and expertise such as bomb-making information—information which has a large potential to lead to significant harm. However, the Amendment has serious flaws as well. Considered in conjunction with each other, the Framework Decision and the Decision's Amendment open the door to significant state regulation of speech. There are three main problems with the Council of Europe's approach. First, the legislation potentially criminalizes legitimate democratic discourse. Second, the instrument dramatically attenuates the previously required link between speech and conduct. Finally, the instrument allows Member States to demonstrate only a tenuous link between the speech act and the subsequent violent conduct before sanctioning the speech.

The starting point for analyzing these three problems is the European Union's definition of terrorism set forth in the initial Framework Decision.[169] To begin, the definition should

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167. Ben Hayes, *Criminalising Free Speech*, SPECTREZINE, Oct. 28, 2008, http://www.spectrezine.org/europe/Hayes2.htm.

168. Council Framework Amendment 2008, *supra* note 12, at art. 1(2)(a)-(c), 2008 O.J. (L 330) at 23. *See also* Press Release, Council of Eur., Amendment of the Framework Decision on Combating Terrorism (Apr. 18, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/255.

169. Council Framework Decision 2002, *supra* note 12, at art. 1(1), 2002 O.J. (L 164) at 4.

be seen as a step forward because it contains both subjective as well as objective elements. The definition's objective element includes language that relates to a series of specific actions such as bombings, attacks against shipping and aircraft, hostage-taking, attacks involving nuclear material, and attacks against internationally protected persons.[170] Standing alone, the catalogue restricts the scope of government discretion with respect to the list of crimes that may qualify as a terrorist act. Unfortunately the catalogue of acts does not stand alone as the definition includes a subjectively drawn "motive" element that possesses the power to transform an ordinary criminal act into an offense committed by a terrorist. Those motives include "seriously intimidating a population" and "unduly compelling a Government or international organisation to perform or abstain from performing any act."[171] These subjective elements open the door to a wide range of potential actions that may be subsumed within the definition. Indeed, depending on a prosecutor's motives, the potential list of free speech activities that fall within the ambit of those definitions could include, for example, protests against the World Trade Organization and the G8, as well as calls for the withdrawal of troops from Iraq and Afghanistan. The key problem is that the provision grants prosecutors a wide berth in identifying what speech "seriously intimidates a population." By necessity, the process of determining what speech falls within this category involves a subjective process of interpretation. Consequently, law enforcement personnel may presume the motive or intent of the speaker based on identifying characteristics of the speaker such as religion or race.

The problems with the Amendment are most apparent when the definition of terrorism detailed in the Framework Decision is read in conjunction with the Amendment. The Amendment mandates that Member States enact penal code provisions criminalizing the act of "public provocation to commit a terrorist offence."[172] It defines provocation as the:

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170. *Id.*

171. *Id.*

172. Council Framework Amendment 2008, *supra* note 12, 2008 O.J. (L 330) at ¶ 9.

> [D]istribution, or otherwise making available, of a message to the public with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.[173]

The pivotal problem with the definition of provocation is that it does not require the offending conduct be directly linked with the advocacy of terrorist offences. As a result, it is possible that an individual's written or oral support for causes, such as the Palestinian resistance against Israeli occupation, could fall within the Council's definition of public provocation of terrorism.[174] The International Commission of Jurists has alleged that this provision will allow Member States to

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173. *Id.* at art. 1(1), 2008 O.J. (L. 330) at 22 (amending Council Framework Decision 2002, *supra* note 12, at art. 3(1)(a)). The offenses listed in Article 1(1)(a) through (h) include:

> (a) attacks upon a person's life which may cause death;
> (b) attacks upon the physical integrity of a person;
> (c) kidnapping or hostage taking;
> (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
> (e) seizure of aircraft, ships or other means of public or goods transport;
> (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
> (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; [and]
> (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life . . . .

Council Framework Decision 2002, *supra* note 12, at art. 1(1)(a)-(h), 2002 O.J. (L 164) at 4.

174. *See* Hayes, *supra* note 167.

criminalise "legitimate political debate."[175] Just as seriously, the Council's decision to target content that may be linked with terrorism could lead government law enforcement agencies to monitor press activity, work to identify protected sources, and monitor journalists' research activities.[176] These problems are not merely speculative. As demonstrated in earlier research, prosecutors responding to domestic political unrest have previously used the cover of terrorism to prosecute the political opposition.[177] In 2007, the Council of Ministers themselves cautioned that governments might be tempted to impose undue restrictions on the exercise of the principle of freedom of expression.[178] The Council warned states not to "use vague terms when imposing restrictions of freedom of expression and information in times of crisis."[179]

The second major problem with the Amendment is that it dramatically broadens the criminal definition of incitement. Specifically, the Amendment removes any requirement that the conduct directly incite the commission of terrorist acts. The absence of a requirement of a direct link between speech and conduct drastically curtails the ambit of speech protection. In contrast, the American incitement standard defined in *Brandenburg v. Ohio* requires the state to show that the advocacy "is directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action" before the state may regulate expression that advocates the use of

175. INT'L COMM'N OF JURISTS, BRIEFING PAPER: AMENDMENT TO THE FRAMEWORK DECISION COMBATING TERRORISM—PROVOCATION TO COMMIT A TERRORIST OFFENCE 2 (2008), *available at* http://www.icj.org/IMG/FD2007-650.pdf.

176. Letter from Max von Abendroth, Dir. of Commc'n & Sustainability, European Fed'n of Magazine Publishers, to Maria del Carmen Guilleu-Sanz, European Comm'n (Feb. 9, 2007), *available at* http://www.faep.org/upload/FAEP%20position%20on%20Combating%20Terrorism%2009022007.pdf.

177. *See* Boyne, *supra* note 26, at 81 (maintaining that German prosecutors used anti-terrorism statutes to prosecute squatters).

178. Eur. Consult. Ass'n, *Guidelines of the Committee of Ministers of the Council of Europe on Protecting Freedom of Expression and Information in Times of Crisis*, 117th Sess., Doc. No. CM/Del/Dec(2007)1005/5.3/appendix11E, pmbl. ¶ 3 (2007), *available at* http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/2_adopted_texts/Guidelines%20media%202008%20E.pdf.

179. *Id.* ¶ 19.

force or violation of law.[180]

Thirdly, an additional risk that accompanies incitement-to-violence statutes is situated in the specific context of terrorism. These statutes run the risk that the link between speech and subsequent violent conduct will be neither immediate nor direct, but extremely tenuous. Because many governments now consider that terrorism will pose a threat far out into the future, the fight against terrorism may last a lifetime.[181] Viewed in this light, one can imagine that a prosecutor could charge a speaker under these provisions for a communication made five years prior to a particular terrorist act.

These problems demonstrate how the Amendment's incitement-related provisions enlarge the sphere of state interference with speech. The major flaw with the Amendment, however, is that it expands prosecutorial discretion to a degree that is unwarranted by the legislation's efficacy in fighting terrorism. The research presented in the first section of this Article demonstrates that there are many paths to becoming a radical Islamic terrorist. Merely reading or listening to radical speech does not by itself transform an individual into a terrorist. Thus, efforts to criminalize provocation are likely to restrict speech over-broadly with little chance of crippling the radicalization process. Legislation at the member state level that criminalizes indirect speech-related incitement will not put a meaningful stop to radicalization. Instead, it is likely that the anti-provocation provisions will merely drive speech underground to places that are more difficult for governments to monitor. Ironically, it is the success of counterterrorism efforts themselves that has diffused the impact of incitement-related speech. For example, one reason that the internet has come to play a more prominent role in the recruitment process is that police stepped

180. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

181. From 1917 to 1969, there was a major debate in the United States concerning the problem of organized anti-government conspiracies that might smolder over time. *See generally* Peter Knight, *Making Sense of Conspiracy Theories*, *in* CONSPIRACY THEORIES IN AMERICAN HISTORY: AN ENCYCLOPEDIA 15, 17-24 (Peter Knight ed., 2003) (discussing the historical role conspiracy theories have played in the cultural and political framework of American history). In the wake of 9/11, this debate has reignited. *See, e.g.*, Tom Squitieri, *Top General: War on Terror Will Last Lifetime*, USA TODAY, June 16, 2004, at 8A.

up their surveillance of radical mosques. Evidence suggests that police surveillance of radical mosques has caused radicalizers to direct potential recruits to stay away from mosques.[182]

The research on radicalization suggests that attempts to criminalize speech that only has an indirect or tenuous relationship with a violent terrorist act will greatly expand governments' power to punish speech with little impact on counterterrorism efforts. Despite the fact that the provocation-related legislation runs the risk of chilling debate, the majority of Member States have adopted legislation in compliance with the Amendment. Before examining the shift in the jurisprudence of the ECtHR, the legislative action that several Member States have taken to comply with the Amendment to the Common Framework Decision on Terrorism will be briefly explained.

C. *The Legislative "Response" by Member States*

Though the Council of Europe's Member States adopted the Framework Amendment following the London and Madrid bombings, a number of states enacted incitement-related provisions prior to the Council's actions. In particular, France and Spain had enacted legislation criminalizing the advocacy and glorification of terrorism well before 9/11. The date of the French legislation reaches all the way back to 1881,[183] while the original Spanish provisions date back to 2000.[184] Moreover, in those states that had not adopted legislation that specifically criminalized incitement to terrorism, prosecutors used existing statutes that criminalized the incitement of general crimes to achieve similar purposes.[185] The major sea change that

182. HOUSE OF COMMONS, REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005, 2005-6, H.C. 1087, at 31 (U.K.), *available at* http://www.official-documents.gov.uk/document/hc0506/hc10/1087/1087.pdf.

183. *See infra* note 188 and accompanying text.

184. *See infra* note 191 and accompanying text.

185. ANNA OEHMICHEN, TERRORISM AND ANTI-TERRORISM LEGISLATION: THE TERRORISED LEGISLATOR? 238 (2009) (describing the adoption of anti-organized crime acts in Germany in the early 1990s, which were simultaneously applied in the prosecution of terrorists). *See also* JAMES BECKMAN, COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND

occurred after the London bombings was that Europe as a whole aimed to shift the focus of its counterterrorism strategy to preventive measures. Those measures included more comprehensive deportment and detention policies, as well as policies specifically designed to disrupt the radicalization and recruitment process.[186] The true import of these criminalization statutes can only be understood against this backdrop. When statutory language grants prosecutors wide discretion, and when prosecutors exercise that discretion against a backdrop of broad public support for the state's counterterrorism policies, the door is open for prosecutorial overreaching.

The extent and character of that overreaching depends on the shape of a particular state's legislation. Despite the fact that the 2008 Amendment requires Member-States to criminalize the incitement to terrorism, states have enjoyed great latitude in choosing how to translate those requirements into domestic legal regimes.[187] European prosecutors who seek to criminally punish individuals who engage in incitement-related speech now possess a plethora of penal code provisions to facilitate that task. As of this date, many European penal codes contain provisions that criminalize speech that glorifies or intends to incite terrorism. Some of those provisions are detailed in Table 1 below:

ANTI-TERRORISM 55 (2007) (discussing how the U.K. initially used traditional criminal offenses to combat terrorism).

186. BANISAR, *supra* note 20, at 8, 10.

187. Rory Brady, *Terrorism and the Rule of Law: A European Perspective*, 48 VA. J. INT'L L. 647, 655 (2008) (pointing out that each state enjoys a liberal margin of appreciation in shaping its response to terrorism in its territory).

TABLE 1: LEGISLATION THAT CRIMINALIZES SPEECH

State	**Provision**	**Language**
France	Article 24 of the French Press Act of 1881	Punishes incitement and glorification of terrorism[188]
Germany	Section 140 of the Penal Code Section 129 of the Penal Code	Punishes statements that approve of unlawful acts[189]

188. Loi du 29 juillet 1881 sur la liberté de la presse [Law on Liberty of the Press of July 29, 1881], Journal Officiel de la République Français [J.O.] [Official Gazette of France], July 29, 1881, p. 125, at art. 24 (Fr.), *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=20090723 ("Seront punis des peines prévues par l'alinéa 1er ceux qui, par les mêmes moyens, auront provoqué directement aux actes de terrorisme prévus par le titre II du livre IV du code pénal, ou qui en auront fait l'apologie.") (translated by author). This Act prohibits the advocacy of terrorism by means of:

> [S]peeches, shouts or threats proffered in public places or meetings, or by written words, printed matter, drawings, engravings, paintings, emblems, pictures or any other written spoken, or pictorial aid, sold or distributed, offered for sale or displayed in public places or meetings, either by posters or notices displayed for public view, or by any means of electronic communication.

Id. at art. 23 ("discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication au public par voie électronique") (translated by author).

189. Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Bundesgesetzblatt, Teil I [BGBl.I] [Federal Law Gazette I] 945, 3322, § 140, ¶ 2 (F.R.G.), *available at* http://www.iuscomp.org/gla/statutes/StGB.htm (stating that whoever "publicly, in a meeting or through dissemination of writings . . . , and in a manner that is capable of disturbing the public peace, approves of one of the unlawful acts named in Sections 138 . . . , after it has been committed or attempted in a punishable manner" shall be punished (translation provided by the German Federal Ministry of Justice)). The crimes that qualify pursuant to Section 138 include preparation for a war of aggression, high treason, counterfeiting of money, human trafficking, and murder, manslaughter or genocide. *Id.* § 138, ¶¶ 1-9 (translation provided by the German Federal Ministry of Justice).

		Punishes individuals who support or recruit for certain types of organizations[190]
Spain	Article 578 of the Penal Code	Prohibits glorification of terrorism as well as the "commission of acts tending to discredit, demean, or humiliate the victims of terrorist offences or their families." [191]

190. *Id.* § 129a, ¶ 1(1) (stating that "[w]hoever forms an organization, the objectives or activity of which are directed towards the commission of . . . murder, manslaughter, or genocide . . . ; crimes against personal liberty . . . ; or crimes . . . dangerous to the public . . . shall be punished with imprisonment from one year to ten years") (translation provided by the German Federal Ministry of Jusice); *id.* § 129a, ¶ 3 (stating that "[w]hoever supports an organization indicated in subsection (1) or recruits for it, shall be punished with imprisonment from six months to five years") (translation provided by the German Federal Ministry of Justice).

191. Código Penal [C.P.] [Penal Code] art. 578 (Spain) ("o la realización de actos que entrañen descrédito, menosprecio o humillación de las víctimas de los delitos terroristas o de sus familiares") (translated by author), *available at* http://www.searchsystems.net/frame.php?id=7e48b4dd816f468eb66edf976bb16d29&delay=true&nid=1215. The Spanish Penal Code defines provocation as the "direct incitement, through the press, radio or any other similarly effective means of publicity, or before a group of individuals, to the perpetration of the offence." *Id.* art. 18(1) ("La provocación existe cuando directamente se incita por medio de la imprenta, la radiodifusión o cualquier otro medio de eficacia semejante, que facilite la publicidad, o ante una concurrencia de personas, a la perpetración de un delito.") (translated by author). The Code defines *apologie* as:

> The expression, before a group of individuals or by any other means of communication, of ideas or doctrines that extol crime or glorify the perpetrator therof. Apologie shall be criminalized only as a form of provocation and if its nature and circumstances are such as to constitute direct incitement to commit an offense.

Id. ("Es apología, a los efectos de este Código, la exposición, ante una concurrencia de personas o por cualquier medio de difusión, de ideas o

Turkey	2006 Counterterrorism Law	Sanctions those who "make propaganda for a terrorist organization or for its aims."[192]
United Kingdom	Anti-Terrorism Act 2006	Criminalizes statements that may be understood as encouraging or glorifying terrorism[193]

Many of the problems with the 2008 Amendment detailed in the preceding Section have not been corrected at the member state level. For example, legislation introduced in several states allows the state to convict an individual of encouragement or incitement to terrorism where the encouragement is merely indirect. Where statutes criminalize mere indirect encouragement, a prosecutor need not show a cause-and-effect relationship between the speech act in question and the preparation for or commission of a specific act of terrorism. Proof for this premise can be seen in the United Kingdom's Terrorism Act of 2006. The Act, which prohibits the

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doctrinas que ensalcen el crimen o enaltezcan a su autor. La apología sólo será delictiva como forma de provocación y si por su naturaleza y circunstancias constituye una incitación directa a cometer un delito.") (translated by author).

192. Law to Fight Terrorism, No. 3713, art. 7(2) (1991), *amended by* No. 5532, art. 6 (2006) (Turk.). *See also* BANISAR, *supra* note 20, at 21.

193. Terrorism Act, 2006, c. 11, § 1(3) (Eng.).

> For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism . . . include every statement which—
> (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and
> (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

Id.

indirect encouragement of the preparation or commission of terrorist acts, includes statements that:

> (a) glorif[y] the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and
> (b) [are] statement[s] from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.[194]

According to the language of this statute, it would appear that a statement that in any way commented positively on a past terrorist act would fall under the statute's scope. It is conceivable that a statement to the effect, for example, that "the London bombers executed a near flawless plan," might rise to the level of glorifying terrorism under this statute.[195] Critics of the legislation have raised concerns that the statute will restrict reporting.[196]

The broad scope of these provisions has drawn criticism from human rights organizations as well. The United Kingdom-based human rights organization, the National Council for Civil Liberties ("Liberty"), has questioned whether these provisions will "inhibit[ ] legitimate freedom of expression."[197] Liberty has charged that the provision that criminalizes the encouragement and glorification of terrorism goes "far beyond what the Convention require[s]."[198] Unlike

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194. *Id.*

195. Eric Barendt, *Threats to Freedom of Speech in the United Kingdom?*, 28 U. N.S.W. L.J. 895, 896 (2005).

196. IAN CRAM, TERROR AND THE WAR ON DISSENT: FREEDOM OF EXPRESSION IN THE AGE OF AL-QAEDA 103-05 (2009) (discussing the effect of the United Kingdom's Terror Act of 2006 dissemination provision on news broadcast organizations, academic institutions, and libraries).

197. JAGO RUSSELL & ETHAN HUNT, NAT'L COUNCIL FOR CIVIL LIBERTIES, LIBERTY'S RESPONSE TO THE JOINT COMMITTEE ON HUMAN RIGHTS: COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM 3 (2006), *available at* http://www.liberty-human-rights.org.uk/pdfs/policy06/council-of-europe-convention-on-terrorism.pdf.

198. *Id.* at 4. Liberty argues that the Terrorism Act of 2006 created broad new offenses that "have had a disproportionate impact on . . . rights and freedoms." *Id.*

the Convention, the Terrorism Act of 2006 does not require that a person who makes a statement or publishes a document actually "intend to incite the commission of a terrorist offence."[199] Thus, statements that only indirectly encourage terrorism, including statements made by speakers who did not specifically intend to incite or glorify a terrorist act, fall within this statute's ambit.[200] What is more, the legislative language allows the government to criminally sanction statements that merely glorify terrorist acts or the preparation for those acts. As a result, this new legislation has definitively widened the scope of the law prohibiting incitement by eviscerating any intent requirement, and by widening the scope of the law to include glorification.[201]

Spain has joined the United Kingdom at the forefront of efforts to broaden the application of its penal code to speech-related conduct.[202] Spain's enactment of provisions related to incitement and glorification of terrorism is unsurprising given the nature of the Spanish government's ongoing battle with ETA.[203] In considering the scope of the Spanish legislation, it is also important to note that Spain's experience with democratic governance and toleration of political dissent is a relatively recent one. The Spanish provisions allow the government to punish support or encouragement of a criminal offense.[204] On their face, these provisions appear to be even more susceptible to overbreadth problems than the United Kingdom's provisions. The terms of the Spanish code criminalize "any praise or justification of terrorist offenses or of those involved in committing them through any form of public

199. *Id.* at 5.

200. *See id.* at 5-6.

201. *See* Ben Saul, *Speaking of Terror: Criminalising Incitement to Violence*, 28 U. N.S.W. L.J. 868, 870-71 (2005) (Austl.).

202. *See* Código Penal [C.P.] [Penal Code] art. 18.1 (Spain); *supra* note 191 (discussing the relevant content of the Código Penal).

203. The Euskadi Ta Askatasuna ("ETA"), a Spanish separatist organization founded in 1959 and currently classified as a terrorist organization by Spain, the United States, and other countries, has been responsible for numerous acts of terrorism for the past four decades. *See* PREETI BHATTACHARJI, COUNCIL ON FOREIGN RELATIONS, BASQUE FATHERLAND AND LIBERTY (ETA) (SPAIN, SEPARATISTIS, ESUKADI TA ASKATASUNA) (2008), *available at* http://www.cfr.org/publication/9271;%20Who%20are%20Eta?; http://news.bbc.co.uk/2/hi/europ/3500728.stm.

204. *See* C.P. art. 18.1; *supra* note 191.

expression or broadcast."[205] Notably, the law grants the government the power to criminally sanction *any* praise or justification of terrorist offenses or of the perpetrators of terrorist offenses through *any* form of public expression. The ambit of speech that may fall under this provision is especially broad because Spain's definition of terrorist offenses includes acts that are typically categorized as common offenses.[206] Spanish law even goes so far as to prohibit speech that insults victims of terrorist acts or their families.[207] The potentially broad reach of this statute was underscored when the government attempted to use it to prosecute a punk band on the grounds that their lyrics glorified terrorism and degraded victims.[208]

Ironically, in 1995, Spain had moved to restrict prosecutions under the Spanish crime of apology by implementing a requirement that forced prosecutors to show that the speech in question qualified as a direct and intentional incitement. This move towards greater protection of speech lasted a mere five years.[209] Concerned about the ETA's obstinacy, Spain reintroduced the crime of exalting terrorism in the Organic Act of 2000.[210] The violent resurgence of ETA in 2000, which began with the end of a fourteen month ceasefire in December 1999, played a key role in opening the government to criticism that it had not acted aggressively enough towards the organization.[211] Seen in this context, it is unsurprising that

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205. José Luis de la Cuesta, *Anti-Terrorist Penal Legislation and the Rule of Law: Spanish Experience*, 2007 ELECTRONIC REV. INT'L ASS'N PENAL L. 1, 7 (follow link for article "A-03") http://www.penal.org/?page=mainaidp&id_rubrique=41&id_article=158.

206. Those acts include "arson and criminal damage, causing loss of human life, causing serious bodily harm, abduction and unlawful detention." *Id.* at 6. *See also* C.P. arts. 571, 572.1, 572.3, 573.

207. C.P. art. 578. *See also* BANISAR, *supra* note 20, at 21; *supra* note 191 and accompanying text.

208. BANISAR, *supra* note 20, at 21.

209. *See* PEDRO TENORIO, THE IMPACT OF ANTITERRORISM LEGISLATION IN THE FREEDOM OF SPEECH IN SPAIN 16-20, http://www.coe.int/t/dghl/standardsetting/media/confantiterrorism/Spain_PTENORIO_dec.pdf (last visited Mar. 3, 2010).

210. Organic Law 7/2000 of Dec. 22, 2000 (codified at C.P. art. 578), *amending* Organic Law 10/1995 of Nov. 23, 1995.

211. Frank Griffiths, *ETA Violence in 2000: A Year in Review*, SUITE101.COM, Jan. 16, 2001, http://www.suite101.com/article.cfm/spanish_politics/57590/1.

the Spanish government's tolerance of critical speech narrowed in 2000.

France's legislation criminalizing incitement and advocacy of terrorism dates back to the Act of 28 July 1881 on the press and media.[212] The French legislature has enacted amendments to this act that impose criminal penalties on offenders who incite hatred or violence.[213] While the act's language requires that the speech constitute a direct incitement, the definition of the types of speech that may qualify under this statute is so broad that it could well include works of art. One can see this by looking at the code itself. The code specifically states that the incitement must have been communicated via:

> [S]peeches, shouts or threats proffered in public places or meetings, or by written words, printed matter, drawings, engravings, paintings, emblems, pictures or any other written, spoke or pictorial aid, sold or distributed, offered for sale or displayed in public places or meetings, either by posters or notices displayed for public view, or by any means of electronic communication.[214]

In the French system, which reflects a legal tradition dating back to the Napoleonic era, investigating magistrates wield broad powers in conducting terrorism investigations.[215] While the investigative judges have largely concentrated their efforts on individuals involved in Islamic, Basque, and Corsican separatist terrorist causes, their broad prevention-oriented powers raise due process concerns. In particular, magistrates

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212. Loi du 29 juillet 1881 sur la liberté de la presse, J.O., July 29, 1881, p. 125, at art. 24 (Fr.). *See also supra* note 188.

213. *See, e.g.*, Law of July 28, 1991, J.O. at art. 24 (Fr.), *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=19910728#LEGIARTI000006419712 (imposing correctional penalties on "those who, by any of the means referred to in article 23, incite to hatred or violence against a person or group of persons on account of their origin or membership or non-membership of a particular ethnic group, nation, race or religion") (translated by author).

214. Loi du 29 juillet 1881 sur la liberté de la presse, J.O., at art. 23. *See also supra* note 188.

215. *See* Craig Whitlock, *French Push Limits in Fight on Terrorism*, WASH. POST, Nov. 2, 2004, at A1.

possess the power to detain terrorism suspects on the mere suspicion that they are associated with a group formed to commit terrorist acts.[216] Human rights groups have alleged that French authorities are using this statute not to prosecute individuals but rather "to gather evidence about possible future attacks."[217] Given that French investigators have exploited the vague language used in this statute to proactively detain suspects, it is not surprising that the similarly ambiguous language in the anti-incitement legislation has led to similar overreaching.

This has proven to be the case with the enforcement of anti-incitement related provisions in the French immigration code. A law enacted in 2004 allows French authorities to use administrative measures to expel non-citizens who are found to have engaged in "incitement to discrimination, hatred or violence against a specific person or group of persons."[218] French authorities have relied on this provision to expel non-citizens on the basis of unsigned intelligence reports that disclose neither the source of the information nor the method used to obtain the information. As the 2008 Human Rights Watch report states:

> In practice . . . the lack of precision of the legal concept of a threat to public order, the comparatively low standard of proof in the system of administrative justice, and the benefit of the doubt most judges accord the intelligence

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216. *See* Code Pénal [C. PÉN] [Penal Code] art. 421-2-1 (Fr.), *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=33&r=3794#art16571. Legislation enacted in January 2006 makes participation in an association formed for the purposes of committing a terrorist act that could lead to the death of one or more persons a felony offense punishable by up to 20 years imprisonment. *Id.* at art. 421-2-2. The statute punishes "[t]he participation in any group formed or association established with a view to the preparation, marked by one or more material actions." *Id.* at art. 421-2-1.

217. *See* UNITED KINGDOM PARLIAMENT JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: PROSECUTION AND PRE-CHARGE DETENTION ¶ 92 (2006), *available at* http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/240/24005.htm (follow "Offence of 'Association of Wrongdoers'").

218. *See* HUMAN RIGHTS WATCH, IN THE NAME OF PREVENTION: INSUFFICIENT SAFEGUARDS IN NATIONAL SECURITY REMOVALS 56-64 (2007), *available at* http://www.hrw.org/en/reports/2007/06/05/name-prevention-0 (follow "Download this report").

> reports, make it difficult for a person effectively to contest the expulsion.[219]

In contrast to the actions taken by Spain, the United Kingdom, and France, Germany has walked away from plans to introduce a specific "glorification of terrorism" offense. Nor has Germany introduced legislation that specifically criminalizes the act "incitement to terrorism." Notwithstanding these decisions, the German government still has plenty of tools in its arsenal to target radical speech. These tools include provisions that criminally sanction the incitement of racial hatred.[220] Under that provision, it is a crime to "incite[ ] hatred against segments of the population or [to] call[ ] for violent or arbitrary measures against them."[221] The government may also ban groups that operate "against the idea of international understanding" contained in the German Constitution.[222] After 9/11 Germany stiffened existing legislation and enacted new provisions regarding the offense of recruitment for terrorist organizations, and has convicted individuals for incitement-related activity under the statutes. For example, in 2008, a German court convicted Ibrahim Rashid for violations of Sections 129(a) and 129(b) for posting videos of car bombings and sniper attacks with supportive commentary.[223]

Taken as a whole, a key problem with the legislation enacted in many European states is that prosecutors need not establish an evidentiary link between speech and subsequent harm to obtain a conviction. For example, under French law, speech-related incitement is punishable even if it does not

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219. *Id.*

220. Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Bundesgesetzblatt, Teil I [BGBl.I] [Federal Law Gazette I] 945, 3222, § 130 (F.R.G.), *available at* http://www.iuscomp.org/gla/statutes/StGB.htm.

221. *Id.* § 130, ¶ 1(1) (translation provided by the German Federal Ministry of Justice).

222. *Id.* § 85, ¶ 1(2) (translation provided by the German Federal Ministry of Justice).

223. For a detailed discussion of that case, see Shawn Marie Boyne, *The Criminalization of Speech in an Age of Terror: Casting a Wide Net for Evildoers*, *in* RIGHTS, CITIZENSHIP, AND TORTURE: PERSPECTIVES ON EVIL, LAW AND THE STATE 193 (John Parry & Welat Zeydanlioglu eds., 2009).

incite the commission of a criminal offense.[224] The omission of any link thus allows prosecutors and courts to punish individuals on the basis of mere speculation that the speech could incite a terrorist act. Under the United Kingdom's 2006 Terrorism Act, the state has criminalized general acts of "encouragement" of terrorism that are not tied to specific acts of terrorism.[225] Under this provision, individuals who make statements recklessly may face criminal sanctions.[226] The danger with incitement legislation is that every idea taken to its extreme may constitute incitement.[227] Under Germany's doctrinal framework, the link between speech and harm must be more direct. As German legal scholar Abin Eser points out, a mere "indirect exhortation," such as a general call for murder, "fall[s] within the ambit of protected expression" under German law.[228]

Standing alone, this catalogue of legislative provisions does not accurately portray the state of freedom of expression in Europe. In states that have enacted specific provisions, their presence does not guarantee that convictions will survive the scrutiny of a state's highest court. For example, in December 2007, a lower court judge in the United Kingdom convicted the so-called "lyrical terrorist" for violating Section 58 of the Terrorism Act of 2000 for possessing information useful to a person committing or preparing an act of terrorism [229] Samina Malik's crimes included the fact that she wrote and posted on

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224. *Implementation of United Nations Security Council Resolution 1624: Report of France in Response to the Questions of the Counter-Terrorism Committee*, *in* Letter from Ellen Margrethe Løj, Chairman, Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism, to the President of the Security Council app. at 3, U.N. Doc. S/2006/547 (July 19, 2006) (submitted on behalf of France by Jean-Marc de La Sablière, Permanent Representative of France to the United Nations).

225. Terrorism Act, 2006, c. 11, § 1(3) (Eng.). *See also supra* notes 193-94 and accompanying text.

226. *See* Raphael F. Perl, Head of the Org. for Sec. & Cooperation in Eur. Action Against Terrorism Unit, Remarks at the Second International Forum on Information Security (Apr. 7-10, 2008), *available at* http://www.osce.org/documents/cio/2008/04/30594_en.pdf.

227. *See* BECKMAN, *supra* note 185, at 19.

228. Albin Eser, *The Law of Incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY, *supra* note 36, at 119, 133.

229. Regina v. Malik [2008] EWCA (Crim) 1450, [1], [4], [15] (Eng.).

websites poetry that glorified terrorism and also possessed materials that could be helpful to terrorists.[230] In June 2008, however, the Court of Appeal quashed her conviction on the grounds that it "was unsafe."[231] Ultimately, in the realm of the criminal courts where appellate processes exist, the scope of enforcement is shaped by judicial action.

Even Turkey's Constitutional Court has started to push back on Turkey's Counterterrorism Law of 2006, which an expert committee of the Council of Europe has criticized as being "ambiguous and written in wide and vague terms."[232] While the Turkish government has repeatedly sought to punish political opponents and non-incitement-related speech, in a January 2008 decision, Turkey's Constitutional Court, by a single vote, struck down a government ban on the pro-Kurdish Democratic Society Party ("DTP"), stating that "statements about the Kurdish problem fall within the boundaries of free speech."[233] However, in a separate ruling issued in December 2009, the Court reversed itself and unanimously banned the party for its alleged links with the outlawed Kurdistan Workers' Party ("PKK"). In announcing the ruling, the court's President, Hasim Kilic, stated that "[i]t has been decided the DTP will be closed under Articles 68 and 69 of the Constitution and the Political Parties Law given that actions and statements made by the party became a focal point for terrorism against the indivisible integrity of the state."[234]

The absence of specific provisions that criminalize incitement or glorification of terrorism does not mean that prosecutors have not indicted individuals for incitement or

230. *Id.* [5], [15].

231. *Id.* [3].

232. EUR. PAR. ASS'N, COMM. OF EXPERTS ON TERRORISM, *Information on Other Activities of the Council of Europe*, 12th Meeting, at 21 (2007), *available at* http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/3_codexter/working_documents/2007/CODEXTER%20(2007)%2014%20E%20PACE.pdf.

233. Constitutional Court Decision No. 2008/1, 29/01/2008, 7 Jan. 2008, Official Gazette of Turkish Republic, Serial No. 26925 (Turk.). *See also* HUMAN RIGHTS WATCH, WORLD REPORT 2009: EVENTS OF 2008, at 418 (2009), *available at* http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf.

234. Constitutional Court Decision No. 2009/4, 11/12/2009, 14 Dec. 2009, Official Gazette of Turkish Republic, Serial No. 27432 (Turk.). *See also Turkey Shuts Down Kurdish Political Party*, ASBAREZ.COM, Dec. 11, 2009, http://www.asbarez.com/74747/turkey-shuts-down-kurdish-political-party/.

glorification related conduct using other provisions of a state's legal codes. For example, the German government has banned the activities of the radical Islamic group Hizb ut-Tahrir on the ground that the group violated "the concept of international understanding."[235] While there is no evidence that the group issued calls to immediate violence in Germany, according to some commentators, the group's rhetoric is "evocative of jihad."[236]

In sum, the aforementioned provisions may have troubling political connotations for democratic governance in the Council of Europe member states. Anxious to hand prosecutors more tools to fight terrorism, many states have ignored the fact that these increased government powers could be abused and used to target political opponents. Depending on the lens through which a government views the existing domestic political order, some governments might recast complaints voiced by the political opposition as threats to public order. The broad definition of terrorism present in state-level legislation increases the likelihood that anxious governments might affix the terrorist label to the political opposition. While this prospect may be less likely in a state with a strong post-war record of democratic governance, it is a real concern in states such as Armenia, Russia, Turkey, and the Ukraine.[237] The

235. Sophie Lambroschini, *Germany: Court Appeal by Hizb Ut-Tahrir Highlights Balancing Act Between Actions, Intentions*, RADIO FREE EUROPE RADIO LIBERTY, Oct. 26, 2004, http://www.rferl.org/content/article/1055527.html.

236. *Id.*

237. *See* RUSSELL & HUNT, *supra* note 197, at 8-9 (arguing '[t]here is a vast difference between proscribing groups involved in violence and terror and non-violent political groups"). *See also, e.g.*, POLITICAL PARTIES AND TERRORIST GROUPS 10 (Leonard Weinberg, Ami Pedahzur, & Arie Perliger eds., 2d ed. 2009) (indicating the political support of terrorism dating back to 1902 with the Social Revolutionary Party); Jonathan Head, *Turkey Jails Kurdish Newspaper Editor*, BBCNEWS.COM, Feb. 10, 2010, http://news.bbc.co.uk/2/hi/europe/8509455.stm (discussing the ramification of the criminal penalty imposed on a newspaper editor for publishing material sympathetic to the outlawed PKK political party); Clifford J. Levy, *For Kremlin, Ukraine Vote Cut 2 Ways*, N.Y. TIMES, Feb. 8, 2010, at A1 (discussing Ukraine's political turmoil following the unsuccessful political bid of Viktor F. Yanukovich in the 2004 Orange Revolution); Press Release, Council of Eur., Commissioner Hammarberg Calls on the Armenian Government to Lift Emergency Measures, Ensure Media Freedom and Initiate an Impartial Investigation into Recent Violent Acts, (Mar. 18, 2008), *available at*

language of current anti-incitement statutes gives government officials the ability to censor political viewpoints, should they elect to use it.[238] These problems led the Council of Europe's Committee of Ministers in September 2007 to caution European Union member states against using "vague terms" such as the words "incitement" and "glorification" to limit freedom of expression.[239] In 2008, the United Nations Human Rights Committee criticized the United Kingdom's "encouragement of terrorism" provisions noting that they were "broad and vague" and lacked an intent requirement.[240]

This Section argues that, although some European states enacted new legislation after the attacks on London and Madrid that was hostile to freedom of expression, because the anti-incitement and glorification statutes of some states pre-dated those events, the ECtHR had already developed a doctrinal roadmap that, in some cases, privileged national security concerns. Thus, for the most part, the ECtHR has not needed to drastically reshape that roadmap to accommodate this new wave of legislation; a roadmap was already in place that allowed states to privilege national security at the expense of freedom of expression without infringing upon Article 10 restrictions when states could justify those restrictions on national security grounds. Section III will show how that opening has widened.

III. Widening the Door to Discretion: Reconsidering the "Margin of Appreciation" in a Time of Terror

As shown in Section II, through the "margin of appreciation" doctrine, the ECHR grants Member States a wide

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https://wcd.coe.int/ViewDoc.jsp?id=1263815&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679.

238. *See* RUSSELL & HUNT, *supra* note 197, at 8-9 (alleging Section 21 of the Terrorist Act of 2006 extends governmental power to censorship of non-violent political groups and views.).

239. *See* BANISAR, *supra* note 20, app. at 39, ¶ 19.

240. U.N. Human Rights Comm. [UNHRC], *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, ¶ 26, U.N. Doc. CCPR/C/GBR/CO/6 (July 30, 2008), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/433/42/PDF/G0843342.pdf?OpenElement.

degree of flexibility in complying with the Convention. This flexibility is reflected in the ECtHR's pre-Madrid and London bombings' Article 10 jurisprudence. In a post-London and Madrid world, one would expect that margin of appreciation to grow even wider in deference to heightened national security concerns.[241] Although the ECtHR developed free speech jurisprudence prior to 9/11 that sought to balance national security concerns with free speech, one would expect that the unique characteristics of the threat posed by Islamic fundamentalist-inspired terrorism might provide the Court with the basis to privilege national security even further. The diffuse nature of al-Qaeda's structure and the emergence of home-grown terrorists on European soil differentiate the threat posed by radical Islamic terrorism in comparison with domestic groups such as the Irish Republican Army ("IRA") and the ETA.[242] A second critical difference stems from the frequency with which al-Qaeda inspired groups use suicide bombers. The widespread resort to suicide bombings has increased the overall percentage of civilian casualties in contrast with the domestic terrorism that European states have experienced in the past.[243] Finally, al-Qaeda's threat to use weapons of mass terror such as nuclear, biological, or chemical weapons categorically elevates the threat posed by terrorist groups inspired by Islamic fundamentalism.[244]

The hypothesis that the ECtHR will expand the margin of appreciation granted to states in the aftermath of Madrid and London has so far been borne out by the Court's decision in *Leroy v. France*.[245] In that 2008 decision, which has been

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241. Colm Campbell, *Northern Ireland: Violent Conflict and the Resilience of International Law*, *in* NATIONAL INSECURITY AND HUMAN RIGHTS: DEMOCRACIES DEBATE COUNTERTERRORISM, *supra* note 15, at 56, 71.

242. *Id.* (arguing that al-Qaeda's diffuse structure poses a unique threat to Europe).

243. *Id.*

244. Graham Allison, Op-Ed., *Nuclear Terrorism Poses the Gravest Threat Today*, WALL ST. J. (Eur.), July 14, 2003, at A10, *available at* http://belfercenter.ksg.harvard.edu/publication/1271/nuclear_terrorism_poses_the_gravest_threat_today.html?breadcrumb=%2Fpublication%2Fby_type%2Fop_ed%3Fgroupby%3D0%26filter%3D2003%26page%3D2.

245. Leroy v. France, App. No. 36109/03, Eur. Ct. H.R. (2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=leroy%20%7C%20v.%20%7C%20france%20%7C%2036109/03&

condemned by human rights groups,[246] the Court upheld the conviction of a French cartoonist who had penned and published an anti-American cartoon two days after the attacks.[247] The facts of *Leroy* are starkly dissimilar to the way that incitement to terror is most commonly imagined in the modern age. When asked to think of examples of speech that might incite terrorism, one might imagine an internet website that features videotaped images of actual terrorist attacks coupled with a call to join the jihad. Against that backdrop, it is difficult to see how a French court convicted cartoonist Denis Leroy of complicity to incite terrorism for drawing a cartoon that was published in a weekly paper. The cartoon portrayed the terrorist attacks on the World Trade Center with the caption "We have all dreamt of it . . . . Hamas did it."[248] Published by the Basque weekly newspaper *Ekaitza* just two days after the attacks, the cartoon provoked an outpouring of critical letters and emails and led a French public prosecutor to file incitement charges against the cartoonist.[249] Surprisingly, the prosecutor filed the charges even after the cartoonist publicly attempted to distance himself from more provocative interpretations of the cartoon. One week after the cartoon's publication, the cartoonist explained that the purpose of the cartoon was not to glorify violence but rather to communicate his anti-Americanism through the use of satire and to underscore the decline of American imperialism.[250] Both the French courts, as well as the ECtHR, concluded that the cartoon condoned and glorified terrorism.[251] The Pau Court of Appeal explained its decision to uphold Leroy's conviction in

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246. *See* Sandy Coliver, *Incitement to Racial and Religious Hatred vs. Freedom of Expression*, HUM. RTS. ADVOC. (Human Rights Advocates, Berkeley, Cal.), Winter 2008-2009, at 5, 5-6, *available at* http://www.humanrightsadvocates.org/images/HRA_vol52.pdf (addressing Leroy v. France's overly broad application of UN Security Council resolution 1624 to suppress legitimate speech).

247. *Leroy*, App. No. 36109/03, at ¶¶ 5-8.

248. *Id.* ¶ 6 (translated by author).

249. *Id.* ¶¶ 4-10.

250. *Id.* ¶ 27. *See also* Dirk Voorhoof, European Court of Human Rights: Where is the "Chilling Effect"? 3 (May 27, 2009), *available at* http://www.coe.int/t/dghl/standardsetting/media/ConfAntiTerrorism/ECHR_en.pdf.

251. *See Leroy*, App. No. 36109/03, at ¶ 43.

this manner:

> [B]y making a direct allusion to the massive attacks on Manhattan, by attributing these attacks to a well-known terrorist organisation and by idealising this lethal project through the use of the verb 'to dream', [the cartoonist] unequivocally prais[ed] an act of death . . . and justif[ied] the use of terrorism . . . [and] indirectly encourage[ed] the potential reader to evaluate positively the successful commission of a criminal act.[252]

Although Leroy appealed his conviction to the ECtHR, the Court held that the prosecution was consistent with the purposes of Article 10, paragraph 2.[253]

There has been some debate among commentators as to whether this decision signals a new direction in the Court's free speech jurisprudence.[254] Scholars such as Georg Nolte maintain that the decision is a logical extension from prior jurisprudence. Nolte has argued that because the Court has previously held that governments may place limits on media coverage of racist or right-wing activities, this decision does not represent a departure for the Court.[255] Other scholars have not been so sanguine about the decision's impact, arguing that the

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252. Voorhoof, *supra* note 250, at 1 (quoting and translating the text of *Leroy*, App. No. 36109/03, at ¶ 42).

253. *See Leroy*, App. No. 36109/03, at ¶ 44.

254. *See generally* Voorhoof, *supra* note 250. *But see* Peter Noorlander, Media Legal Def. Initiative, Address Before the Plenary Conference at the First Council of Europe Conference of Ministers Responsible for Media and New Communication Services (May 29, 2009), *available at* http://www.mediapolicy.org/peter-noorlander-on-media-and-terrorism-reykjavik (alleging a growing trend among European governments to use anti-terrorism laws to curb free speech and media freedom); Dick Voorhoof, Reflections on Some Recent Restrictive Trends, Seminar on the European Protection of Freedom of Expression at the Court of Human Rights (Oct. 10, 2008), *available at* http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Voorhoof_Final_conclusions.pdf (identifying a restrictive trend in case law governing the breadth of freedom of expression in Europe).

255. Nolte, *supra* note 91, at 12-13 (identifying the logical extension of the historical role of European courts to restrict freedom of speech-a position which has been adopted by the European Court of Human Rights).

decision is part of a "restrictive trend" in the Court's recent freedom of expression jurisprudence.[256]

The decision in *Leroy,* however, is difficult to square with the ECtHR's decisions in numerous cases involving alleged state interference with the freedom of expression in Turkey.[257] To be sure, 9/11 represented a new type of terrorist attack that spawned a near crippling fear in western democracies in the weeks following the attacks. It is also now clear that the United States Government deliberately manipulated intelligence, political imagery, and public fear for political gain.[258] At the time of the 9/11 attacks, there was no evidence that France itself was an al-Qaeda target. Moreover, since France was not a member of the North Atlantic Treaty Organization ("NATO") at the time of the attacks, NATO's subsequent decision to invoke Article 5 of the NATO Treaty did not make France a target.[259] Moreover, the opinion expressed in the cartoon coincided with French opinion: over seventy-five percent of French voters stated that they felt that "U.S. foreign policy was . . . [partially] responsible for the rise of Islamic

256. Voorhoof, *supra* note 254 (noting that the other contributions to the Seminar have shown this trend).

257. *See, e.g.*, Karataş v. Turkey, 1999-IV Eur. Ct. H.R. 81.

258. *See* AL GORE, THE ASSAULT ON REASON 23-24 (2007).

259. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. Article Five states:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
>
> Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Id.

extremism."[260]

In contrast, in cases such as *Karatas v. Turkey*[261] and *Zana v. Turkey*,[262] the Turkish Government had concrete reasons to fear that speech voiced in support of the PKK could incite further acts of violence by separatist forces within Turkey. The PKK initiated a campaign of armed violence within Turkey beginning in 1984. The threat that the PKK represented was not merely speculative. For these reasons, it is difficult to explain why the Court condemned the actions of the Turkish Government in *Karatas* and *Zana* on Article 10 grounds while upholding the actions of France in *Leroy*, unless the Court's jurisprudence has taken a less restrictive turn.

The ECtHR's decision in *Leroy* was followed by another troubling decision in which the Court refused to overturn the Turkish Government's decision to convict the owner and editor-in-chief of a newspaper on charges of publishing the declarations of terrorist organizations. In *Saygili (No. 2) v. Turkey*,[263] the applicants alleged that the Turkish Security Court had violated Articles 6 and 10 of the Convention when the Court criminally punished the applicants for publishing statements by prisoners who opposed a new prison system in the newspaper *Yeni Evrensel*.[264] In the statements, detainees who had been convicted or charged with supporting left-wing armed organizations threatened to commence a hunger strike and warned the government that they would refuse to enter newly constructed cells.[265] Among their demands, the detainees had requested that the government abolish "F" type prison cells, reinstate prisoners' rights, repeal the anti-terrorism law, abolish state security courts, and file charges

260. Rémy Davison, *French Security After 9/11: Franco-American Discord*, *in* EUROPEAN SECURITY AFTER 9/11, at 69, 79 (Peter Shearman & Matthew Sussex eds., 2004) (discussing the results of a poll).

261. *Karatas*, 1999-IV Eur. Ct. H.R. 81.

262. Zana v. Turkey, App. No. 18954/91, 1997-VII Eur. H.R. Rep. 667.

263. Saygili v. Turkey (No. 2), App. No. 38991/02, Eur. Ct. H.R. (2009), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=847384&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

264. *Id.* ¶¶ 5-6, 10 (explaining that the Turkish prosecutor brought charges under section 6/2 of Law no. 3713, section 2/1 of Law no. 5680, and Article 36 of the former Criminal Code).

265. *Id.* ¶¶ 6-7.

against torturers and perpetrators of massacres.[266] In a 5-2 decision, the Court held that the state's action did not violate Article 10.[267] The two dissenting judges stated:

> The majority considers that the message conveyed by the newspaper was "*not a peaceful one*" and that it went beyond "*a mere criticism*" of the new prison system (§28). Such a consideration is disquieting. 'Watchdogs' are not meant to be peaceful puppies; their function is to bark and to disturb the appearance of peace whenever a menace threatens. A new and, in our view, a dangerous threshold in the protection of free speech has been reached if expression may be suppressed, lawfully, because it is neither "*peaceful*" nor confined to "*mere criticism*". Such qualifications are new conditions precedent to the right to exercise such freedom and are not reflected in this Court's case law.[268]

Despite the Court's decisions in those two cases, it has not yet adopted the expansive interpretation of incitement adopted by Turkish courts. In another 2008 decision, *Yalçin Küçük v. Turkey (No. 3)*, the ECtHR struck down a separate attempt by Turkey to punish a private citizen's political speech.[269] In that case, Turkish prosecutors filed charges against a university professor and writer who had spoken and written frequently on the Kurdish question.[270] In 1999, a Turkish court convicted the professor on charges of inciting hatred and hostility, publishing separatist propaganda, and belonging to and assisting an armed group.[271] The factual basis for the charge of assisting an armed group was a television interview that the professor had

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266. *Id.* ¶ 6.

267. *Id.* ¶¶ 31, 34.

268. *Id.* app. (Power, J. & Gyulumyan, J., dissenting).

269. Küçük (nº 3) c. Turquie [Küçük v. Turkey (No. 3)], App. No. 71353/01, Eur. Ct. H.R. (2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=K%FC%E7%FCk%20%7C%20turkey%20%7C%2071353/01&sessionid=43078696&skin=hudoc-en.

270. *See id.* ¶¶ 4-19.

271. *Id.* ¶ 27.

conducted with the PKK leader Abdullah Öcalan, in which Küçük referred to Öcalan with the term "Mister President."[272] In its decision, the Court reasoned that, although some of the statements made by Küçük were hostile in tone, only one of the statements advocated the use of violence, armed resistance, or uprising.[273] While the Court found only one speech that contained a single sentence constituting an incitement to violence, the Court's finding condemned Küçük's conviction on necessity and proportionality grounds.[274]

What conclusions can be drawn from *Leroy* and *Saygili* with respect to the ECtHR's post-London direction? First, because of the complexity of the Court's analysis, it may be too early to determine whether the Court has indeed altered its course. The balancing analysis that the Court engages in to determine whether states may limit freedom of expression to prevent terrorism is complex.[275] Restrictions on free expression in the name of national security or public order must still satisfy the aforementioned tests of legality, necessity, and proportionality. Second, the Court enjoys substantial discretion when it interprets whether or not there is a link between speech and harm. For instance, in its decision in *Leroy v. France*, the Court based its decision on its own determination that the cartoon could lead the viewer to determine that the 9/11 attacks were justifiable acts. The Court reached this determination despite the fact that it is unclear whether the cartoonist himself intended that this post-attack questioning of United States policies would directly lead to further terrorist attacks. Moreover, the Court's analysis did not hinge on the cartoonist's intent to incite, but rather its own post-event speculation of the potential impact of the cartoon. The purpose of this speculation was merely to determine whether the actions taken by the French Government against the cartoonist were both necessary and proportionate. Because the Court allows each state a margin of appreciation based on

272. *Id.* ¶ 22.

273. *Id.* ¶ 58.

274. *Id.* ¶¶ 59-60.

275. OFFICE FOR DEMOCRATIC INSTS. & HUMAN RIGHTS, HUMAN RIGHTS CONSIDERATIONS IN COMBATING INCITEMENT TO TERRORISM AND RELATED OFFENCES 7 (2006), http://www.osce.org/documents/odihr/2006/10/21814_en.pdf.

its domestic circumstances as well as its own unique legal and cultural history, the Court grants states wide latitude when it determines what is necessary and proportionate. In the aftermath of 9/11, France's large Muslim population and past history of domestic terrorism may have been sufficient to sway the Court.

In *Saygili (No. 2)*, the ECtHR again rested its holding on its assessment of the speech's potential impact. The judges presumed that the publication of the inmate's letters was capable of inflaming discontent within the prison system. The majority stated:

> [T]he problem results from the wording of the overall message given to the readers, where their authors state that they will rather die than enter the cells and call on others to take action in order to support their general resistance and not to content themselves with mere declarations. It is clear that the message given is not a peaceful one and cannot be seen as a mere criticism of the new prison system. While it is true that the applicants did not personally associate themselves with the views contained in these declarations, they nevertheless provided their writers, who expressed their affiliation to illegal armed groups, with an outlet to stir up violence and hatred. Accordingly, the content of these declarations must be seen as capable of inciting violence in the prisons by instilling an irrational reaction against those who introduced or were in charge of the new incarceration system.[276]

When the ECtHR's analysis of necessity rests on its evaluation of possible incitement, tenuous causality between speech and harm, or unclear intent, the danger exists that the Court will open a wide door permitting broad state action to

276. Saygili v. Turkey (No. 2), App. No. 38991/02, ¶ 28, Eur. Ct. H.R. (2009), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=847384&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

proscribe speech. What is especially troubling about these two cases is that the Court upheld government restrictions on the press, the institution that plays a critical role in informing the public and sparking debate. In *Saygili (No. 2)*, the state convicted the publisher and owner of the newspaper who had merely published the letters and not written them. To determine whether it was necessary for the government to impose a restriction to satisfy a pressing social need, the Court based its analysis on the existence of a "possible" social need rather than a pressing one.[277] Moreover, the Court's decision in *Leroy* runs against its conclusion in *Handyside v. United Kingdom*.[278] In *Handyside*, the Court held that even in a context of political violence, Article 10 protects ideas that may "offend, shock or disturb the State or any section of the population."[279] A strong argument can be made that the cartoon in *Leroy* fell into the category of offensive speech that the Court previously protected in *Handyside*.

Still, the decisions in *Leroy* and *Saygili (No. 2)* do not by themselves show that the ECtHR has abandoned its commitment to protecting speech. Notably, the Court's decision in *Saygili (No. 2)* does not seem to indicate that the European judges have grown more accommodating of Turkey's repeated attempts to restrict speech under the guise of protecting public order. Recent decisions of the Court have struck down Turkish restrictions in several cases. In these cases Turkey attempted to proscribe speech that included references to the Kurdish independence movement or actions of the PKK,[280] criticisms of the military,[281] non-violent political

277. *See id.* app. (Power, J. & Gyulumyan, J., dissenting).

278. Handyside v. United Kingdom, 1 Eur. Ct. H.R. (ser. A) 737, 754 (1976).

279. *Id.*

280. İmza c. Turquie [İmza v. Turkey], App. No. 24748/03, Eur. Ct. H.R. (2009), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=845756&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

281. Kayasu c. Turquie (nº 1) [Kayasu v. Turkey, (No. 1)], App. Nos. 64119/00 & 76292/01, Eur. Ct. H.R. (2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=843093&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

appeals,[282] and interviews with PKK members,[283] as incitement-related speech that justified government interference. In comparing the ECtHR's decisions in *Leroy* and *Saygili (No. 2)* to this string of cases in which the Court found Article 10 violations, the 2008 Turkish cases appear to set the boundaries beyond which the Court has concluded that the link between speech and potential incitement is too attenuated and indirect.[284] For example, in *İsak Tepe v. Turkey*, Turkey indicted an individual on charges of making separatist propaganda after he delivered speeches in which he referred to "the heroes in the mountain" and "the liberation of a nation."[285] The Court condemned Turkey's actions and reasoned that statements made by the applicant did not, by themselves, incite violence.[286] Additionally, the Court found several grounds to condemn Turkey's restrictions on Article 10 in *Kanat v. Turkey*.[287] In that case, a Turkish court convicted the editor and owners of the monthly magazine, *Voice of the Free Woman*, on the charge of publishing a statement by a leader of an illegal organization.[288] In the published statement, the PKK leader

282. Özer c. Turquie [Özer v. Turkey], App. Nos. 35721/04 & 3832/05, Eur. Ct. H.R. (2009), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=850149&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

283. Demirel v. Turkey (No. 3), App. No. 11976/03, Eur. Ct. H.R. (2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=844063&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

284. Press Release, Eur. Ct. H.R., Chamber Judgments Concerning Hungary, Italy, Poland, Romania, and Turkey (Oct. 21, 2008), *available at* http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=27590213&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=44639&highlight=.

285. Tepe c. Turquie [Tepe v. Turkey], App. No. 17129/02, ¶ 6, Eur. Ct. H.R. (2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=842342&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (translated by author).

286. *Id.* ¶ 24.

287. Kanat c. Turquie [Kanat v. Turkey], App. No. 13799/04, Eur. Ct. H.R. (2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=842380&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

288. *Id.* ¶¶ 5-8.

argued that steps should be taken to improve the education of women.[289] The Court held that, standing alone, the fact that a member of an illegal organization had made statements did not justify the government's interference with the newspaper's right to freedom of expression, since the statements did not incite recourse to violence, armed resistance or insurrection.[290] Moreover, the Court found that because the applicants' convictions had been disproportionate to the aims pursued, their prosecutions were not "necessary in a democratic society."[291]

Taken as a whole, the ECtHR's recent jurisprudence does not suggest that the Court has radically altered the shape of its Article 10 reasoning process in the post-Framework era. The Court's analysis continues to be bound by a common core of basic principles. State interference on speech must be justified by a pressing social need, as well as be both necessary and proportionate. How the Court elects to apply those principles to a particular case depends on its analysis of the unique facts of each case. In some sense, the weakness in the Court's ability to protect free speech stems from the Court's own weak position: it can only guide state decision-making within the rather wide boundaries set by the margin of the appreciation doctrine. The weakness of the Court's position is underscored by the ongoing number of petitions that the Court fields from Turkish citizens. Despite the plethora of Court opinions that fail to uphold Turkey's attempts to sanction speech, the Court's decisions as a whole appear to have had little effect in moderating Turkey's ongoing attempts to circumscribe speech on the Kurdish question.

Moreover, the ECtHR possesses wide discretion to discern that speech possesses the potential to incite violence. From an American perspective, it appears that the Court strains to find a potential link to possible violence. However, Europe's commitment to the government's affirmative role in protecting communitarian values and human dignity suggests a different interpretation. Perhaps it would be more accurate to state that the Court is extremely sensitive to the potential that speech

289. *Id.* ¶ 7.
290. *Id.* ¶ 19. *See also* Press Release, *supra* note 284.
291. *Id.* ¶¶ 20-21.

possesses to roil the community and to undermine human dignity.

IV. Conclusion: Law, Terrorism, and the Changing Nature of Democratic States

The attacks on London and Madrid rocked Europe. The presence of "home grown" terrorists led policymakers to take aggressive steps to implement a prevention-oriented counterterrorism policy, one focus of which was to interrupt the radicalization process. The Council of Europe's 2008 Amendment to the Framework Decision, which instructed states to implement anti-incitement legislation, is evidence of this shift.

One would expect that the enactment of this legislation would signal a shift in how Member States balance the values of protecting national security and preserving public order with the right to freedom of expression. At first glance, the reasoning behind such laws is understandable. Having recovered from the initial shock of damage caused by radical Islamic terrorism, governments throughout Europe have shifted counterterrorism strategies in the direction of prevention. In order to stop terrorists before they cause civilian casualties, law enforcement must interrupt attack-planning and recruitment. Some percentage of individuals who hear the terrorists' messages will someday engage in violent action.

However, the direction of the Framework Decision and subsequent state legislation is problematic. In an effort to broadly target speech that may lead to incitement, many states have implemented legislation that does not require that the link between speech and incitement be direct. In some states, the individual responsible for the speech need not have actually intended to incite violence. In these cases, this legislation has awarded prosecutors and magistrates the power to criminally sanction speech that has little chance of inciting violence. Moreover, the legislation's efficacy in stopping recruitment is questionable. The research cited in this article indicates that there are many paths to becoming a terrorist. As a result, the Framework Amendment has propelled states to waste scarce legal and prosecutorial resources as they attempt to go after

speech, rather than action. Where governments use their new-found power to prosecute individuals already on the societal periphery, they may do more harm than good. Publicity generated by such prosecutions may destroy civic goodwill in certain segments of the population who will view the cases through a lens of political and religious persecution.

While magistrates and prosecutors appear to have endorsed the anti-incitement and glorification legislation shift by instigating investigations and prosecutions under these provisions, that shift has been somewhat tempered by the decisions of national courts. Still, the expanded scope of government action, such as the use of anti-incitement legislation to deport non-citizens in France, proceeds unaffected by judicial review. Moreover, individuals caught in the net of these provisions require time and resources to fight back.

While some commentators have suggested that the ECtHR has shifted direction in the past decade towards upholding more state intrusions on speech, it is difficult to determine that such a premise is true. The critical doctrinal features of the Court's Article 10 jurisprudence, namely the requirement that the restriction serve a pressing social need as well as be both necessary and proportionate, were in place before the Amendment's adoption. Moreover, the Court's jurisprudence in effect merely sets the outer boundaries of that balance. Under the margin of appreciation doctrine, states have the power to fine tune the balance between security and free speech in accord with their own unique legal and cultural histories. When compared to the United States Supreme Court, the ECtHR has far less power to set the boundaries of freedom of expression. As Elisabeth Zoller has noted, while the Supreme Court grants American states almost no margin of judgment, the ECtHR lacks the same degree of control over European states.[292] There is no definitive European standard that defines the scope of freedom of expression; instead a plethora of national definitions exist. Those standards must fall within the wide boundaries set by Strasbourg. With robust power, the Supreme Court has rigorously defended freedom of expression

292. Elisabeth Zoller, *Freedom of Expression: "Precious Right" in Europe, "Sacred Right" in the United States?*, 84 IND. L.J. 803, 807 (2009).

in the United States by imposing what Zoller has described as "categorical and rigid rules."[293]

The history of free speech protections in Europe is far different than the direction taken by the United States in the past four decades. There are wide variations in those traditions throughout Europe. Until the passage of the Human Rights Act of 1998, for example, England took little notice of freedom of expression.[294] While the Act raised public consciousness as well as established the British court's obligations to protect the freedom of expression, that consciousness is also seared by the imprint of the London bombings. More importantly, the high value that European jurisprudence places on human dignity necessarily prevents free speech from assuming a privileged constitutional position. The barbarous actions taken by Germany's Nazi regime spurred Europe's post-war governments to take aggressive action targeting hate speech. These actions in many ways paved the way for the current round of anti-incitement and glorification of terrorism legislation.

Although the ECtHR has underscored the importance of the free flow of information in a democratic society, the preeminent role accorded to human dignity created a doctrinal legacy that severely tempered that flow of information. The high value that some European states place on promoting the dignity of the community places limits on the content of civil discourse that many Americans would be unwilling to tolerate. Still, that same communitarianism may open the door to government action in the name of counterterrorism policy that may pose a threat to democratic governance.

The degree to which a society tolerates anti-democratic speech may reflect the government's confidence in the health of the democracy. Governments throughout Europe are confronting dilemmas posed by the increasing diversity of Europe's population. States such as Germany, France, and the United Kingdom are home to large unintegrated Muslim communities, which challenge the notion of an integrated national community itself. As European states make

293. *Id.*

294. Eric Barendt, *Freedom of Expression in the United Kingdom under the Human Rights Act 1998*, 84 IND. L.J. 851, 851 (2009).

judgements about what speech is acceptable in an age of terror, lurking in the background is the question, *acceptable to whom*? As courts make judgments about the potential that particular speech has to incite violence, those determinations run the risk of protecting the majority's vision and criminalizing the views of minority populations. Viewed in this light, it is possible that European states will use these new anti-incitement and glorification provisions to censor certain political viewpoints in an attempt to preserve traditional visions of homogenous European states. By placing these powerful tools in the hands of the state, legislatures and citizens run the risk that prosecutors see the danger of terrorism everywhere and will seek to over-broadly regulate speech and undermine democratic discourse. In an era in which governments can so easily manipulate each terrorist attack to stoke public fears and justify the further aggrandizement of state power, the risk that these statutes pose to democratic governance may be too high given the fact that the efficacy of the provisions is questionable.

While the emergence of home-grown terrorism on European soil constitutes a real threat to European security, Europe's recent steps further privilege security over speech. Due to their overbreadth, they constitute an equally serious threat to democratic governance. The steps that Europe has taken to regulate speech lowers the burdens placed on governments to justify those restrictions so drastically that they raise the spectre that governments will use the regulations to merely target speech that is offensive. The constitutional struggle to find the proper balance between endowing governments with sufficient power to protect citizens and protecting civil liberties is an ongoing one that reflects a political community's self-understanding.[295] The contours of those policies, particularly how they protect security and human rights, define the foundations of the democratic state. As Europe struggles to protect itself from terrorism, it is equally important that Europe pay attention to the norms of democratic debate itself.

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295. Nolte, *supra* note 91, at 4.