

2012

"All Muslims are Like That": How Islamophobia is Diminishing Americans' Right to Receive Information

Tiffani B. Figueroa

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

Recommended Citation

Figueroa, Tiffani B. (2012) "'All Muslims are Like That': How Islamophobia is Diminishing Americans' Right to Receive Information," *Hofstra Law Review*: Vol. 41: Iss. 2, Article 7.
Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol41/iss2/7>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

NOTE

"ALL MUSLIMS ARE LIKE THAT": HOW ISLAMOPHOBIA IS DIMINISHING AMERICANS' RIGHT TO RECEIVE INFORMATION

I. INTRODUCTION

Imagine a prominent Muslim scholar and academic from South Africa.¹ He frequently visits the United States and even attended a university in New York to earn his doctorate degree earlier in his career.² It is autumn of 2006, and, as is custom in his schedule, he flies into New York's John F. Kennedy Airport planning to attend academic conferences and to speak to American audiences during his visit in the country.³ His flight lands, and as he disembarks, he is apprehended and unexpectedly sent to the Homeland Security waiting room in the airport.⁴ He is interviewed for five hours straight, only to find out that the U.S. government will revoke his visa and immediately deport him.⁵ Without an explanation for the revocation of his visa, he is escorted under armed guard to a plane headed back to South Africa.⁶ Furthermore, the U.S. government decides to revoke the visas of his wife, his eleven-year-old son, and his eight-year-old son.⁷ Without any confirmation from the government as to the reasoning behind the revocation of his visa and subsequent deportation, the scholar is left wondering if he has fallen victim to "ideological exclusion."⁸ However, he is not the only victim in

1. This story recounts the incident Adam Habib and his family faced when he tried to enter the United States in Fall 2006. See Complaint for Declaratory & Injunctive Relief at 1, *Am. Sociological Ass'n v. Chertoff*, 588 F. Supp. 2d 166 (D. Mass 2008) (No. 07-cv-11796-GAO), 2007 WL 4583393, at *1.

2. See *id.*

3. See *id.* at 1-2, 2007 WL 4583393, at *1.

4. See *id.* at 9-10, 2007 WL 4583393, at *5.

5. See *id.*

6. See *id.* at 10, 2007 WL 4583393, at *5.

7. See *id.* at 12, 2007 WL 4583393, at *6.

8. See *Biography of Adam Habib*, ACLU (Oct. 9, 2008), <http://www.aclu.org/national-security/biography-adam-habib>; see also *Ideological Exclusion*, ACLU, http://www.aclu.org/SafeandFree/exclusion/passports_act/ (last visited Mar. 29, 2013) (defining ideological exclusion as the denial of visas to foreign writers and artists whose political views the government disfavors and

this scenario, or rather this reality.⁹ The government has also harmed the American citizens and legal residents that he was scheduled to speak to because they can no longer exercise their right to receive information from the scholar.¹⁰ “If our governments get in the habit of excluding academics, intellectuals, journalists, and citizens of other countries for ideological reasons, then we are on a slippery slope to the abrogation of all kinds of freedoms.”¹¹

Since the World Trade Center attacks on September 11, 2001 (“9/11”), much has changed in the United States.¹² Some changes are undoubtedly necessary for national security; however, there are also negative changes as evidenced by increased discrimination against particular individuals.¹³ In an effort to understand what was going on and in order to defend our country against terrorism, Americans needed someone to blame for the tragic events that occurred on 9/11.¹⁴ Muslims, unfortunately, often became the target.¹⁵ However, by using this over-inclusive group, certain Americans have caused more harm than good.¹⁶ Blaming Muslims for the attacks is over-inclusive because not all Muslims are terrorists or hijackers.¹⁷ The exacerbation of “Islamophobia” (the fear of Muslims or those who are perceived as Muslim) following the 9/11 attacks negatively impacted our legal system and resulted in diminished civil liberties.¹⁸ This is true not only for

explaining that ideological exclusion “denies U.S. citizens and residents access to speech and ideas that are protected by the Constitution”).

9. These facts are taken from the story of South African academic Adam Habib. See generally Complaint for Declaratory & Injunctive Relief, *supra* note 1.

10. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). Americans who would potentially be willing to “receive and consider” ideas spread through Muslims in America are prevented or discouraged from doing so because of the practice of ideological exclusion. *Id.*

11. ACLU, THE EXCLUDED: IDEOLOGICAL EXCLUSION AND THE WAR ON IDEAS 15 (2007), available at http://www.aclu.org/files/pdfs/safefree/the_excluded_report.pdf.

12. *Watch What You Say: Free Speech in Times of National Crisis* (ABC Nightline television broadcast 2001).

13. See Amardeep Singh, “We Are Not the Enemy”: Hate Crimes Against Arabs, Muslims, and Those Perceived as Arab or Muslim After September 11, 14 HUM. RTS. WATCH, no. 1, Nov. 2002, at 1, 14-15, available at <http://www.hrw.org/reports/2002/usahate/usa1102.pdf> (describing the increase in violence against people perceived as Muslim after the 9/11 attacks).

14. See MICHAEL WELCH, SCAPEGOATS OF SEPTEMBER 11TH: HATE CRIMES & STATE CRIMES IN THE WAR ON TERROR 66, 72-73 (2006) (noting the increased discriminatory targeting of Muslims and Arabs following 9/11).

15. *Id.* at 78, 80 (noting that by blaming Muslims for the cause of the 9/11 attacks, innocent individuals have suffered from unnecessary prejudice).

16. See Singh, *supra* note 13, at 15 (explaining how Americans categorized Arabs, South Asians, Sikhs, and others as Muslim, thus targeting a range of people, some of whom did not actually practice Islam).

17. WELCH, *supra* note 14, at 66.

18. BARRY VAN DRIEL, CONFRONTING ISLAMOPHOBIA IN EDUCATIONAL PRACTICE 1 (2004).

Muslims but for Americans as well due to increased discrimination against Islam and thus a curtailment of the right to receive information.¹⁹ A phobia is defined as "a lasting abnormal fear or great dislike of something."²⁰ For the purposes of this Note, a more specific definition is suitable for Islamophobia—"an irrational distrust, fear or rejection of the Muslim religion and those who are (perceived as) Muslims."²¹ This Note argues that when faced with modern day political issues, such as dealing with terrorism, our legal system has failed to uphold the principles Americans value, notably the First Amendment right to receive information.²² Islamophobia has diminished this fundamental right in America as evidenced by three types of situations: (1) Muslims now have limited free speech rights in public; (2) Muslims do not share the same nonverbal speech rights as other groups; and (3) Islamophobia limits the marketplace of ideas by rejecting Muslim foreign scholars.

Part II of this Note will discuss the right to receive information as a corollary to the right to free speech. This right is protected under the First Amendment of the U.S. Constitution, which states, "Congress shall make no law . . . abridging the freedom of speech . . ."²³ Part III will discuss the development of Islamophobia in the United States. This Part will look at the role of Muslims in the United States before 9/11 and their role and rights in the United States after 9/11. It will also discuss how the American values of the First Amendment are no longer fully afforded to that group by looking at examples of Islamophobia.

Part IV will focus on the impact Islamophobia has on the right to receive information by focusing on three types of situations. The first section reviews court decisions, which violate free speech rights for Muslims in public settings such as the Irvine 11,²⁴ and the case of Jubair Ahmad.²⁵ The second category analyzes the violation of Muslims' rights

19. Cf. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965). Islamophobia may deny Americans, who are willing to "receive and consider" ideas spread through Muslims in America, access to such information. *Id.*

20. VAN DRIEL, *supra* note 18, at x (quoting OXFORD ENGLISH DICTIONARY (1994)).

21. *Id.*

22. *Watch What You Say*, *supra* note 12.

23. U.S. CONST. amend. I.

24. *Muslim Students Face Jail for Disrupting Israeli Amb. Speech*, (Fox News television broadcast Feb. 2010), available at <http://video.foxnews.com/v/1170888454001/muslim-students-face-jail-for-disrupting-israeli-amb-speech/> [hereinafter *Muslim Students Face Jail*] (reporting the arrest of eleven Muslim students for protesting against the Israeli Ambassador).

25. Jeremy Pelofsky & Jerry Norton, *Pakistani Man Arrested on U.S. Terrorism Charges*, REUTERS, Sept. 2, 2011, <http://www.reuters.com/article/2011/09/02/us-pakistan-usa-arrest-idUSTRE7815M920110902>; see also Michael Allen, *Should Muslim Man Get 23 Years in Prison for YouTube Video?*, OPPOSING VIEWS (Sept. 5, 2011), <http://www.opposingviews.com/i/religion/islam/should-muslim-man-get-23-years-prison-youtube-video> (describing the details of a FBI arrest of Jubair Ahmad, a Muslim resident of Virginia, for a YouTube video post which he claimed was

to nonverbal speech, specifically highlighting discrimination against Muslim women who wear hijabs. In that connection, there has been an increase in discrimination claims against Muslim women in the workplace, in public, and by law enforcement.²⁶ Finally, the last category examines the limitation on the exchange of ideas. This section scrutinizes the denial of visas to Muslim scholars after 9/11. The government has used Section 411 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001 (the "USA PATRIOT Act")²⁷ to exclude foreigners if the government believes the person "used . . . position[s] of prominence within any country to endorse or espouse terrorist activity."²⁸ The result has been "ideological exclusion."²⁹

Collectively, the abovementioned issues have hampered the right of the American public to receive information.³⁰ As a solution to this problem, this Note proposes that there should be a new subcategory within First Amendment analysis to deal with cases like these. When in a time of political strife, such as dealing with terrorism, the courts should exercise a heightened awareness to protect free speech rights when there is a specific targeted group in order to give full effect to Americans' right to receive information.

II. THE FIRST AMENDMENT: RIGHT TO RECEIVE INFORMATION

The First Amendment guarantees the right of free speech.³¹ However, this right has very little value if one does not have access to speech.³² Therefore, the right to receive information is an "inherent corollary of the rights to free speech."³³ The right to receive information has evolved over time and courts now recognize the importance of this

about U.S. abuses in Abu Ghraib).

26. See WOMEN'S RIGHTS PROJECT, ACLU, DISCRIMINATION AGAINST MUSLIM WOMEN (2008), available at <http://www.aclu.org/files/pdfs/womensrights/discriminationagainstmuslimwomen11.08.pdf> [hereinafter *Discrimination Against Muslim Women*].

27. Pub. L. No. 107-56, § 411, 115 Stat. 345, 346 (codified as amended at 8 U.S.C. § 1182(a)(3)).

28. *Id.*

29. Shafiqah Ahmadi, *The Erosion of Civil Rights: Exploring the Effects of the Patriot Act on Muslims in American Higher Education*, 12 RUTGERS RACE & L. REV. 1, 9 (2011).

30. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965). Limitations following the 9/11 attacks essentially prevent Americans from accessing certain ideas, thus creating "a barren marketplace of ideas that [has] only sellers and no buyers." *Cf. id.*

31. U.S. CONST. amend. I.

32. *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (stating that the right to free speech "necessarily protects the right to receive [information]").

33. *Bd. of Educ. v. Pico ex rel. Pico*, 457 U.S. 853, 866-67 (1982).

right.³⁴ As with all free speech issues, the government may only restrict the right to receive information under limited circumstances.³⁵

A. *Evolution of the Right to Receive Information*

At the inception of First Amendment jurisprudence, courts did not acknowledge the right to receive information.³⁶ However, over time this right has developed into a fundamental one, which is extrinsically linked to the right to free speech.³⁷ In order to promote a democratic society conducive to debate, the government and the general public must keep the marketplace of ideas alive.³⁸

In *Martin v. Struthers*,³⁹ the U.S. Supreme Court first recognized the right to receive information.⁴⁰ In this 1943 case, Martin was a Jehovah's Witness who went door to door distributing pamphlets regarding her faith.⁴¹ The city issued her a fine for violating a city ordinance against the distribution of advertisements in this manner.⁴² In its discussion, the Court introduced the right to receive information:

The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature and necessarily protects the right to receive it.⁴³

Ultimately, the Court found the ordinance unconstitutional.⁴⁴ The Court further noted the importance of the role distributors play as active members of society who disseminate ideas in support of the "best tradition[s] of free discussion."⁴⁵

34. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (declaring that "[i]t is now well established that the [First Amendment] protects the right to receive information and ideas").

35. James Weinstein, *An Overview of American Free Speech Doctrine and Its Application to Extreme Speech*, in *EXTREME SPEECH AND DEMOCRACY* 83-84 (Ivan Hare & James Weinstein eds., 2009).

36. See *Martin*, 319 U.S. at 148-49 (mentioning the right to receive information for the first time in 1943 and recognizing it as a constitutional right).

37. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965).

38. *Id.*

39. 319 U.S. 141 (1943).

40. See *id.* at 141-42, 148-49.

41. *Id.* at 142.

42. *Id.*

43. *Id.* at 143 (citations omitted).

44. *Id.* at 149.

45. *Id.* at 145.

The Court subsequently mentioned the right to receive information in *Thomas v. Collins*.⁴⁶ The Court clarified the right to receive information based on facts in which Thomas, a union president, sought to inform workers about labor union membership.⁴⁷ The state enjoined Thomas from soliciting members because he did not obtain a license in the form of a labor organizer's card as required under Texas law.⁴⁸ The Court recognized both Thomas' right to speak and the public's right to hear his speech.⁴⁹ The government's attempt to limit free speech in this situation was held to be "[a] restriction so destructive of the right of public discussion, without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment."⁵⁰ Although the right to receive information was not the basis of the Court's decision to find the statute unconstitutional, this right played an essential role in the decision.⁵¹

*Lamont v. Postmaster General*⁵² reaffirmed the right to receive information.⁵³ *Lamont* was the first case in which a recipient sought to invalidate a statute based on the right to receive information.⁵⁴ The Court declared the federal statute unconstitutional because it required the Postmaster General to detain any mail categorized as "communist political propaganda" unless recipients completed an official act as a condition precedent to the full and unfettered exercise of their First Amendment rights.⁵⁵ Justice William Brennan, in concurrence, described the role of the right to receive information as a fundamental right that makes the Freedom of Speech Clause in the First Amendment meaningful.⁵⁶ Justice Brennan stated:

[T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful. I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider

46. 323 U.S. 516, 534 (1945) (noting the right to "be informed").

47. *Id.* at 520-22, 532.

48. *Id.* at 518.

49. *Id.* at 534.

50. *Id.* at 537.

51. Jamie Kennedy, Comment, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 795 (2005).

52. 381 U.S. 301, 307 (1965).

53. *Id.*

54. Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 177 (2003).

55. *Lamont*, 381 U.S. at 302, 305.

56. *Id.* at 308 (Brennan, J., concurring).

them. It would be a barren marketplace of ideas that had only sellers and no buyers.⁵⁷

Although the Constitution makes no explicit provision for a right to receive information, such a right *does* exist.⁵⁸

Case law surrounding the right to receive information continued to solidify the right in *Griswold v. Connecticut*.⁵⁹ This case evaluated the constitutionality of two Connecticut statutes, which proscribed the use and dissemination of both contraceptive information and contraception drugs or devices.⁶⁰ The appellant was the Executive Director of the Planned Parenthood League of Connecticut; this organization shared information, provided instruction, and gave advice to married couples regarding the prevention of pregnancy.⁶¹ The primary basis of the Court's holding was the right to privacy, especially within the boundaries of one's home and within the intimate relationship of marriage.⁶² The laws attempted to enter the marital relationship by preventing couples from merely receiving information regarding contraception.⁶³ As a result, the Court struck down the statutes.⁶⁴ Writing for a plurality, Justice William Douglas explained:

[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach.⁶⁵

The plurality further acknowledged the connection between the right to receive information and the right to privacy.⁶⁶ The "penumbral" right to receive information is a way to exercise the right to privacy in going about one's personal affairs.⁶⁷

*Stanley v. Georgia*⁶⁸ was the next case to use the right to receive information, elevating it to the status of a "fundamental" right.⁶⁹ The Court reviewed the constitutionality of a Georgia statute, which

57. *Id.* (citations omitted).

58. *Id.*

59. 381 U.S. 479, 482 (1965).

60. *Id.* at 480.

61. *Id.*

62. *Id.* at 485-86.

63. *See id.* at 480.

64. *Id.* at 485.

65. *Id.* at 482 (citations omitted).

66. *Id.* at 482, 485.

67. *Id.* at 484.

68. 394 U.S. 557 (1969).

69. *Id.* at 564.

prohibited the private possession of obscene matter.⁷⁰ The State of Georgia investigated Stanley for alleged bookmaking activities.⁷¹ However, during a search of his home, agents discovered an obscene film.⁷² The agents arrested Stanley and a jury found him guilty of possession of obscene material.⁷³ The U.S. Supreme Court subsequently found the Georgia statute to be unconstitutional based on the right to receive information and the right to privacy.⁷⁴ In this case, “the Court gave the right [to receive information] its strongest endorsement”⁷⁵ by stating that “[i]t is now well established that the Constitution protects the right to receive information and ideas.”⁷⁶ The Court recognized that the right to receive information is fundamental to our free society and thus the social worth of the information may be irrelevant to the constitutional analysis of speech-restrictive statutes.⁷⁷

After reviewing these cases, it is evident that the Supreme Court has solidified the role of the right to receive information as a protected right under the Constitution.⁷⁸ This right is integral to the spread of ideas and discussion regardless of whether ideas may be controversial.⁷⁹

B. Dealing with Free Speech Violations

The United States is unique because it affords great protections to many types of speech, even extreme and offensive speech.⁸⁰ The government is also not allowed to make content-based restrictions on speech.⁸¹ On the other hand, content-neutral regulations are permissible.⁸²

When determining whether there has been a violation of free speech rights, a court must first inquire whether the regulation is either content-

70. *Id.* at 558.

71. *Id.*

72. *Id.*

73. *Id.* at 558-59.

74. *Id.* at 568.

75. *See Kennedy, supra* note 51, at 799.

76. *Stanley*, 394 U.S. at 564.

77. *Id.*

78. *Id.*

79. *Id.* at 566 (“[The First Amendment’s] guarantee is not confined to the expression of ideas that are conventional or shared by a majority.” (quoting *Kingsley Int’l Pictures Corp. v. Regents*, 360 U.S. 684, 688-89 (1959))).

80. *See Weinstein, supra* note 35, at 81; *see also* THE FIRST AMENDMENT (Cambridge Educational 1998) (discussing the scope of free speech protection to include even the most violent speech short of speech which produces “imminent lawless action”).

81. *See Weinstein, supra* note 35, at 81. Content-based regulations attempt to restrict speech based on the message conveyed. *Id.*

82. *See id.* Content-neutral regulations restrict speech, not based on the message, but place limits on the time, place, or manner of the speech. *Id.*

based or content-neutral.⁸³ Depending on the answer, the court then applies the appropriate level of scrutiny.⁸⁴ If the regulation is content-based, it is subject to the highest level of scrutiny—strict scrutiny.⁸⁵ If the regulation is content-neutral and is unrelated to the content of speech, then an intermediate level of scrutiny applies.⁸⁶ Content-based regulations undergo a higher level of scrutiny because such regulations are more likely to pose a greater possibility of viewpoint discrimination than content-neutral restrictions.⁸⁷

Determinations regarding the content neutrality of regulations are not easy tasks for the courts.⁸⁸ A court looks at whether the government adopted a speech regulation because it agrees or disagrees with the message conveyed.⁸⁹ In some circumstances, it is sufficient to show that there is a discriminatory purpose behind a regulation to prove that a restriction is content-based.⁹⁰ However, the court may not require such a showing in order to ascertain whether the restriction is in fact content-based.⁹¹ Additionally, the mere assertion that a regulation has a content-neutral purpose cannot salvage a facially discriminatory content-based restriction.⁹² The general rule is: "[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."⁹³

Furthermore, content-based regulations vary; viewpoint discrimination is the most "egregious" form.⁹⁴ Viewpoint discrimination is when a regulation seeks to regulate speech based on "the specific motivating ideology or the opinion or perspective of the speaker."⁹⁵ A court has never upheld a viewpoint restriction; these types of restrictions "pose the inherent risk that the Government seeks not to advance a

83. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 55 (2000).

84. *Id.*

85. *Turner Broad. Sys., Inc. v. Fed. Comm'n's Comm'n*, 512 U.S. 622, 642 (1994).

86. *Id.*

87. *See id.* ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.") (citation omitted); *see also* Leslie Gielow Jacobs, *Clarifying the Content-based/Content-neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 599 (2003) (noting the existence of greater viewpoint discrimination dangers with content-based discrimination).

88. *Turner Broad. Sys., Inc.*, 512 U.S. at 642.

89. *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

90. *Id.*

91. *Id.*

92. *Id.* at 642-43.

93. *Id.* at 643.

94. *See Weinstein*, *supra* note 35, at 82.

95. *Id.* (citing *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”⁹⁶ These types of governmental motives are exactly what the First Amendment guards against.⁹⁷

In fact, American free speech jurisprudence is quite extensive; it also protects offensive words or symbols from content-based discrimination.⁹⁸ Nonetheless, it is undoubtedly known that freedom of speech is not absolute.⁹⁹ Thus, content-based regulations may apply to: “fighting words . . . , obscenity, child pornography, true threats and incitement to law violation that is likely to cause such conduct.”¹⁰⁰

Nevertheless, a court’s inquiry does not stop at the content-neutrality of speech.¹⁰¹ Protection against content-based discrimination also varies given the setting of the speech.¹⁰² The government’s ability to limit speech depends on the classification of the forum as set forth in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*.¹⁰³ There are three types of settings where speech can take place.¹⁰⁴

The first category is non-public forums.¹⁰⁵ The government has the most latitude to regulate speech in these settings.¹⁰⁶ This category includes government buildings and property not open to public communication either by tradition or designation, such as airport terminals, jails, or military bases.¹⁰⁷ Such property has a public purpose, but it is not open to the public for expression.¹⁰⁸ Thus, the government can make reasonable content-based restrictions on speech given the function and purpose of the property.¹⁰⁹ However, any such restriction

96. See *Turner Broad. Sys., Inc.*, 512 U.S. at 641.

97. See *id.*

98. See *Weinstein*, *supra* note 35, at 82.

99. See *Turner Broad. Sys., Inc.*, 512 U.S. at 641 (noting that the First Amendment may allow government control of speech “subject only to narrow and well-understood exceptions”).

100. *Weinstein*, *supra* note 35, at 82 (internal quotation marks omitted).

101. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983).

102. *Id.*

103. 460 U.S. 37, 44 (1983).

104. *Id.* at 45-46; see also *Forums*, LEGAL INFO. INST., CORNELL UNIV. LAW SCHOOL, <http://www.law.cornell.edu/wex/forums> (last visited Mar. 29, 2013) (describing the three types of forums: traditional public forums, limited/designated public forums, and non-public forums).

105. *Perry Educ. Ass’n*, 460 U.S. at 46.

106. See *id.*

107. *Id.*; *Forums*, *supra* note 104 (providing examples of a non-public forum).

108. *Perry Educ. Ass’n*, 460 U.S. at 46.

109. *Id.* (“[The] State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976))).

on expressive activity still cannot be made in an effort to repress speech based on the speaker's viewpoint.¹¹⁰

The intermediate category includes state-created, designated, or "limited public" forums.¹¹¹ A designated public forum is one in which the government intentionally devoted a non-traditional forum for expressive activities.¹¹² This category includes municipal theatres, libraries, and university meeting facilities.¹¹³ Citizens are permitted to use these avenues of expression, but there may be limitations.¹¹⁴ Although the government was not required to establish these forums, once they are open, the Constitution forbids certain exclusions.¹¹⁵ Restrictions may only extend to regulating a reasonable time, place, and manner of speech.¹¹⁶ Furthermore, these limitations must apply neutrally to similarly situated people.¹¹⁷ Similar to traditional public forums, any content-based restriction requires the government to show a compelling interest and that the restriction is narrowly drawn to satisfy this interest.¹¹⁸

Traditional public forums form the final category, which is afforded the most free speech protection.¹¹⁹ In these "quintessential public forums"¹²⁰ citizens are free to communicate almost any idea. Examples of such forums include parks and streets.¹²¹ The government may only implement content-based restrictions if it shows that a particular regulation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."¹²² Courts uphold content-neutral regulations as to time, place, and manner of expression if they are "narrowly tailored to serve a significant government interest, and leave

110. *Id.*

111. *Id.* at 45.

112. *Id.* at 46 n.7; *see also Forums*, *supra* note 104 (providing a description of designated public forums).

113. *Forums*, *supra* note 104.

114. *See Perry Educ. Ass'n*, 460 U.S. at 46 n.7.

115. *Id.* at 45.

116. *Id.* at 46.

117. *Id.* at 55.

118. *Id.* at 46.

119. *Id.* at 45.

120. *Id.*

121. Traditional public forums "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

122. *Id.*

open ample alternative channels of communication.”¹²³ The government has hurdles to overcome in order to limit speech in such a setting.¹²⁴

III. FREE SPEECH TREATMENT OF MUSLIM IDEAS IN THE UNITED STATES

Despite this established right, the freedom to access information has been curtailed after 9/11 due to the broad association of Muslims with terrorism.¹²⁵ There are many Muslims in America today, and as with other cultural groups, the Muslim population in the United States has increased over time.¹²⁶ Islam is now a big part of American culture and is thought to be the fastest growing religion in the United States today.¹²⁷ However, after 9/11, the treatment of Muslims in America has shifted.¹²⁸

A. History of Muslims in America

Muslims have actually been in America for quite some time now.¹²⁹ The first large group of Muslims did not come to America by choice.¹³⁰ Europeans transported Muslims, who were West African natives, as

123. *Id.*

124. *See Weinstein, supra* note 35, at 83-84. In places where public discourse is permitted, regulations as to the content of speech undergo a strict scrutiny test. *See id.*

125. WELCH, *supra* note 14, at 66; *see also* Singh, *supra* note 13, at 11 (“In the context of U.S. hate-violence, however, ‘Muslim’ has been equated with Middle Eastern or Arab.”).

126. *See* SELCUK R. SIRIN & MICHELLE FINE, MUSLIM AMERICAN YOUTH: UNDERSTANDING HYPHENATED IDENTITIES THROUGH MULTIPLE METHODS 35-37 (2008). Sirin and Fine state:

Muslim is the word given to those who belong to Islam, which in Arabic means “one who submits to God.” Muslims, like the believers of the other two Abrahamic religions, Christianity and Judaism, believe in a single god, or Allah, but they recognize Muhammad as the last prophet. They believe that their book, the Qur’an, is the word of God as told to Muhammad between 610 and 632 CE. Every Muslim adult is required to follow the five principles of faith in God and his messenger, pray five times a day, donate a portion of his or her income to the needy, fast during the holy month of Ramadan, and make a pilgrimage once in his or her lifetime to see the birthplace of Islam in Mekke (or Mecca).

Id. at 33.

127. John L. Esposito, *9/11: Five Years Later*, PRINCE ALWALEED BIN TALAL CENTER FOR MUSLIM-CHRISTIAN UNDERSTANDING, <http://acmcu.georgetown.edu/135403.html> (last visited Mar. 29, 2013).

128. Singh, *supra* note 13, at 14.

129. *See* GENEIVE ABDO, MECCA AND MAIN STREET: MUSLIM LIFE IN AMERICA AFTER 9/11 65-66 (2006). There are stories dating back to before Columbus’ “discovery” of America. *See id.* at 65; AKBAR AHMED, JOURNEY INTO AMERICA: THE CHALLENGE OF ISLAM 168 (2010). Muslims were very dedicated to science, navigation, and learning in general. ABDO, *supra*, at 64. These skills allowed them to travel to America and partake in trading with Native Americans. *Id.* at 64-65; AHMED, *supra*, at 168-69.

130. ABDO, *supra* note 129, at 65.

slaves.¹³¹ Though the numbers are not very clear, it is estimated that "tens of thousands" of Muslims comprised the total number of slaves in the United States.¹³² During this time, slave owners tried to convert Muslims to Christianity.¹³³ The Muslim slaves' belief in their faith allowed them to hold on to many teachings and practices.¹³⁴ However, even with this conviction and dedication to holding on to their religion, it was difficult for slaves to lay the foundation of Islam in America at that point in history.¹³⁵

From 1875 to 1912 another wave of Muslim immigrants entered America.¹³⁶ These people stemmed from parts of the Ottoman Empire, which consisted of modern day Lebanon, Syria, Jordan, and Palestine.¹³⁷ In order to avoid negative stereotypes of Muslim Turks, this group identified themselves as Syrians as opposed to Muslims.¹³⁸ This wave of immigrants had very little education.¹³⁹ Thus, they found work as homesteaders, unskilled laborers, and peddlers to support their families.¹⁴⁰ Several Muslim immigrants settled in the Midwest, areas such as North Dakota, Indiana, and Iowa, forming some of the first Islamic communities in America.¹⁴¹

Historians believe this group of Muslims built the first mosque in the United States in 1929 in Ross, North Dakota, but it did not last through the Great Depression and the intermingling of Muslims and Christians.¹⁴² The Muslim community in this area soon disappeared after intermarriage and conversion to Christianity.¹⁴³ However, the Muslim population survived in other areas such as Michigan City, Indiana where an Islamic center was built in 1914 to serve the community and soon expanded to form the Modern Age Arabian Islamic Society.¹⁴⁴ Similarly, the oldest American mosque still in use was built in 1934 in Cedar

131. *Id.*

132. *Id.* at 66.

133. *Id.* at 67.

134. *See id.* at 67-69 (detailing the story of Omar ibn Said, a slave brought from Senegal to America, who maintained his link to Islam despite being held by Christian owners); *see also* AHMED, *supra* note 129, at 166 (recounting how some slaves were able to hold on to Muslim beliefs: "[they] were Christian by day and Muslim by night").

135. ABDO, *supra* note 129, at 69.

136. *Id.* at 70.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 71.

142. *Id.*

143. *Id.*

144. *Id.*

Rapids, Iowa.¹⁴⁵ Though Islam thrived in these smaller communities, this religion did not spread to other areas to establish a true foundation in American society at that time.¹⁴⁶

The next group of Muslims to enter the American scene was actually comprised of African-American converts during the last century.¹⁴⁷ Elijah Muhammed headed the Nation of Islam from 1934 until 1975, creating an “Islamic awareness and passion”¹⁴⁸ while setting the Black movement in motion. As the author James Baldwin described, Muhammed managed to do what the Christian faith failed to do: “to heal and redeem drunkards and junkies, to convert people who have come out of prison and to keep them out, to make men chaste and women virtuous, and to invest both the male and female with pride and a serenity that hang about them like an unfailing light.”¹⁴⁹ However, this version of Islam also had negative aspects, such as a deep hatred for white Americans and a desire to remain secluded from other groups.¹⁵⁰ Nonetheless, leaders such as Malcolm X helped make the Nation of Islam movement popular amongst African-Americans,¹⁵¹ while people such as Imam W.D. helped shift the Muslim African-American community towards a view of American pluralism.¹⁵²

Following the increase in African-American Muslim converts, the largest influx of Muslim immigrants came after 1965 with the abolition of the 1921 National Origins Act and the Asiatic Barred Zone by President Lyndon B. Johnson.¹⁵³ Together, the National Origins Act and the Asiatic Barred Zone placed limitations on the number of immigrants who could enter the United States solely based on national origin.¹⁵⁴ Once the immigration reforms of 1965 were in effect, the flow of immigrants increased and several changes occurred.¹⁵⁵ One profound change was the “permanent introduction of Islam” into the daily lives of Americans.¹⁵⁶

145. *Id.*

146. *Id.* at 71-72.

147. SIRIN & FINE, *supra* note 126, at 37.

148. AHMED, *supra* note 129, at 171-72.

149. *Id.* at 172.

150. *Id.*

151. *See id.*; SIRIN & FINE, *supra* note 126, at 37.

152. AHMED, *supra* note 129, at 174.

153. *See* ABDO, *supra* note 129, at 62-63.

154. *Id.* at 62 (explaining that there was little to no opposition in the passage of this bill which would abolish the ban on immigrants because no one thought the number of immigrants would change severely; the Senate approved the bill 76 votes to 18, while in the House of Representatives the bill passed with 318 votes to 95).

155. *See id.* at 63.

156. *Id.* (stating that Islam is now the third great monotheistic religion in America); *see also*

There are an estimated two to seven million Muslims in America today.¹⁵⁷ About two-thirds of Muslims in America are foreign born: 34% are South Asian, 26% are Arab, and 7% are African.¹⁵⁸ Muslim-Americans occupy a very prosperous position in society.¹⁵⁹ They are better educated, earn a greater living, and are younger compared to the nation as a whole.¹⁶⁰

This last group of Muslim immigrants and the generations to follow held the resources necessary to solidify the role of Islam in America's "social, economic, and theological marketplace."¹⁶¹ The members in this group stemmed from middle-class professionals fleeing the developing world in search of education and economic success in America.¹⁶² The use of their financial and organizational resources allowed this group to open mosques and Islamic centers, bring in Islamic leaders from their home countries, and form associations.¹⁶³ Unlike the African-American Muslims in the United States at the time, the new Muslim immigrants did not focus on defending themselves from white Americans.¹⁶⁴ Instead, the focus was on traditional concerns associated with Muslims in their home country: defending their religion and family, following their cultural practices, and establishing the Islamic faith in their new home.¹⁶⁵

Though the exact number of Muslims in America is unclear, the abovementioned groups helped introduce Islam into the American culture and ultimately established a permanent presence in the United States.¹⁶⁶

MUSLIMS IN AMERICA: ISLAM IN EXILE (Vital Visuals 2001), *available at* <http://digital.films.com.ezproxy.hofstra.edu/PortalViewVideo.aspx?xtid=29943> (explaining that Islam is growing at a fast rate through three avenues: immigration, procreation, and conversion).

157. See SIRIN & FINE, *supra* note 126, at 38; *see also* ABDO, *supra* note 129, at 82 (noting that the Census Bureau is prohibited from inquiring about religious affiliation in its surveys); MUSLIMS IN AMERICA: ISLAM IN EXILE, *supra* note 156 (showing that the number of reported Muslims in America actually varies considering there are no government statistics focused on religious affiliation); *Religion Statistics and Publications*, U.S. CENSUS BUREAU, <http://www.census.gov/prod/www/religion.htm> (last visited Mar. 29, 2013) (explaining that Public Law Number 94-521 prohibits the Census Bureau from asking mandatory questions regarding religious affiliation in its surveys).

158. ABDO, *supra* note 129, at 63-64 (using these statistics from a study conducted by Georgetown University).

159. *Id.* at 64.

160. *Id.* (stating that the college graduation rate for Muslim-Americans is double the national average, about half the number of Muslims have an annual income at \$50,000 or more, and 75% of Muslim adults are younger than fifty years old).

161. *Id.* at 81.

162. *Id.* at 81-82.

163. *Id.* at 82.

164. *Id.*

165. *Id.*

166. *See supra* Part III.A.

B. Development of Islamophobia

Although, Muslims have an established place in America now, 9/11 changed things with the increase of Islamophobia.¹⁶⁷ A phobia is defined as “a lasting abnormal fear or great dislike of something.”¹⁶⁸ Generally, Islamophobia is defined as “an irrational distrust, fear or rejection of the Muslim religion and those who are (perceived as) Muslims.”¹⁶⁹ Directly following 9/11, anti-Muslim violence, hate crimes, and discrimination increased in the United States.¹⁷⁰

Indeed, Islamophobia is not a new phenomenon springing directly from the 9/11 attacks.¹⁷¹ Professor Christopher Allen stated, “Islamophobia is undeniably ‘rooted’ in the historical inheritance of a conflictual relationship that has developed over many centuries involving the overlap of religion, politics and warfare.”¹⁷² There has been a constant conflict between the “West” and Islam.¹⁷³ This conflict spans over several events including the threat to Christendom prior to the eleventh century, followed by the Crusades and colonialism.¹⁷⁴

However, contemporary Islamophobia in the United States presented itself as early as the 1990s.¹⁷⁵ A report prepared for the UN Commission on Human Rights in 1999 showed that Muslims in America “felt there was both latently and openly a form of Islamophobia and racial and religious intolerance in American society.”¹⁷⁶ Hostility led to “stereotyped and distorted” portrayals of Islam in the news prompted by events like the 1990 Gulf War against Iraq and the bombing of the World Trade Center in 1993.¹⁷⁷ Some Muslims felt the worst discrimination emerged from entertainment media, which depicted Muslims as terrorists.¹⁷⁸ Furthermore, Muslims reported several

167. See *supra* note 156 and accompanying text.

168. VAN DRIEL, *supra* note 18, at x.

169. *Id.*

170. ABDO, *supra* note 129, at 85 (stating that the FBI’s Hate Crimes Unit reported an increase of attacks on Muslims from 28 in 2000 to 481 in 2001; nine months following 9/11 the Council on American-Islamic Relations reported more than 1715 incidences against Muslims).

171. CHRISTOPHER ALLEN, ISLAMOPHOBIA 25 (2010).

172. *Id.*

173. *Id.* 25-26 (defining the West as “countries of Western Europe and North America, the societies that function on the principles of bourgeois liberal democracies and the market economies, historically generated in Europe”).

174. See *id.* at ch. 2 (discussing the history of interaction between the West and Islam).

175. Farhan Haq, *Religion Bulletin: UN Report Shows Mixed Picture on US Muslims*, INTER PRESS SERVICE, Mar. 21, 1999, <http://www.ipsnews.net/1999/03/religion-rights-un-report-shows-mixed-picture-on-us-muslims/>.

176. *Id.*

177. *Id.*

178. *Id.*

incidents of hate crimes during 1996 and 1997: the American-Arab Anti-Discrimination Committee reported twenty-two incidents of hate crimes, fifty-five cases of workplace discrimination, and twenty-two cases of discrimination relating to government agencies.¹⁷⁹

Nonetheless, Islamophobia became more prevalent following the 9/11 attacks.¹⁸⁰ In response to the attacks, President Bush launched the "war on terror," which he described as a crusade.¹⁸¹ This characterization presented the issue in a religious light and negatively portrayed Islam.¹⁸² Muslims or those perceived as Muslim, mainly Sikhs and South Asians, became scapegoats for 9/11 because people viewed this group as having a shared nationality or religion with the hijackers and Al-Qaeda members.¹⁸³ This was very easy to do since Muslims in America are generally structurally excluded, due to lack of representation in government, and are culturally viewed as outsiders.¹⁸⁴

Though Muslim-Americans, like many cultural groups in the United States, faced discrimination since they settled in the United States,¹⁸⁵ it was particularly true after 9/11 that a drastic increase in hate crimes occurred.¹⁸⁶ As Armardeep Singh wrote:

What distinguishes a bias or hate crime from others is not the act itself—e.g. murder or assault—but the racial, ethnic, religious, gender, or sexual orientation animus that propels its commission. While typically directed at a particular individual—often randomly chosen—hate crimes are motivated by anger toward an entire community distinguished by specific shared characteristics. While the bias that motivates a hate crime may be unusual in its ferocity, it is rooted in a wider public climate of discrimination, fear, and intolerance against targeted communities, which may also be echoed in or enhanced by public policy.¹⁸⁷

179. *Id.*

180. WELCH, *supra* note 14, at 66.

181. *Id.* at 47; see ABDO, *supra* note 129, at 83.

182. See WELCH, *supra* note 14, at 64.

183. *Id.* at 66; see also Singh, *supra* note 13, at 11 ("‘Muslim’ has been equated with Middle Eastern or Arab.”).

184. WELCH, *supra* note 14, at 63-64 (explaining that Muslims are viewed as outsiders because many people overlook condemnation of prejudice towards them).

185. See *id.* at 66; Singh, *supra* note 13, at 11 (noting that, long before 9/11, Arabs and Muslims were stereotyped as terrorists leading to prejudice and hate crimes at times).

186. Singh, *supra* note 13, at 17 tbl. (showing the dramatic increase in the number of anti-Arab and anti-Muslim hate crimes from year 2000 to 2001).

187. *Id.* at 5-6.

Provided this definition, it becomes clear that people targeted as Muslims faced an intense and extensive backlash because of the 9/11 attacks.¹⁸⁸

Americans exhibited Islamophobic acts not only through violence, but through non-criminal ways as well.¹⁸⁹ After 9/11, the Equal Employment Opportunity Commission experienced a spike in discrimination claims.¹⁹⁰ By May 2002, this agency received 488 employment discrimination complaints stemming from 9/11, and of that number, 301 dealt with a person being fired.¹⁹¹ Racial profiling also increased significantly.¹⁹² For example, the Department of Transportation received numerous complaints from airline passengers who were either forced to undergo security screening or prohibited from boarding a plane due to their "ethnic or religious appearance."¹⁹³

As for violent attacks on Muslims or those perceived as Muslim, these assaults came in various forms from cutting off a little girl's hair in class, knowing her hair was kept for religious purposes, to shooting a man with a turban who actually was not Muslim, but who was a Sikh.¹⁹⁴ This hatred extended to attacks on buildings and the vandalism of mosques and Islamic Centers.¹⁹⁵ Although these horrific acts varied, the bottom line was essentially the same: if you looked Muslim, you no longer blended into the melting pot.¹⁹⁶

The importance of establishing a "unique social and political identity" became essential to battle the rise in discrimination,

188. See *id.* at 15 (reviewing the increase in the number of violent attacks on perceived Muslims).

189. *Id.* at 16.

190. See *id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. See About this Project: *Unheard Voices of 9/11*, UNHEARD VOICES OF 9/11, <http://unheardvoicesof911.org/about/> (last visited Mar. 29, 2013) (providing an outlet, either through video or writing, for those who were discriminated against in response to the 9/11 attacks); *Hair Cut Off by Classmate*, UNHEARD VOICES OF 9/11, <http://unheardvoicesof911.org/index.php?ajax=true&width=630&height=350&id=viewstory&sid=112> (last visited Mar. 29, 2013); *Shot to Death*, UNHEARD VOICES OF 9/11, <http://unheardvoicesof911.org/index.php?ajax=true&width=630&height=350&id=viewstory&sid=67> (last visited Mar. 29, 2013); see also Lee Romney, *Attack on Sikh Men Triggers Outcry in Elk Grove, Calif., and Beyond*, L.A. TIMES, Apr. 11, 2011, <http://articles.latimes.com/2011/apr/11/local/la-me-0411-sikhs-20110411> (detailing the murder of Surinder Singh and mentioning how Sikhs have been randomly attacked after being mistaken for Muslims).

195. See UNIV. OF CAL. BERKLEY, CTR. FOR RACE & GEND. & THE COUNCIL ON AM.-ISLAMIC RELATIONS, SAME HATE, NEW TARGET: ISLAMOPHOBIA AND ITS IMPACT IN THE UNITED STATES 34-35 (2009-2010), available at <http://pa.cair.com/files/CAIR%20Islamophobia%20Report%20-%20Same%20Hate,%20New%20Target.pdf> [hereinafter CAIR REPORT].

196. See *supra* text accompanying notes 187-99.

harassment, and racism against Muslims that came with the commencement of the war on terror.¹⁹⁷ However, Muslim-Americans are still combating the continued discrimination they face.¹⁹⁸ As they continue to fight, Americans continue to suffer as well as their right to receive information becomes more constricted.

IV. THE IMPACT OF ISLAMOPHOBIA ON FREE SPEECH

The backlash against Muslims following 9/11 has not only resulted in free speech violations for Muslims, but the erosion of the right to receive information for all Americans.¹⁹⁹ Americans should have access to information emanating from different cultures because this knowledge: (1) provides insight into beliefs of different groups; (2) presents a different view on important matters such as how others view the United States; and (3) broadens the pool of viewpoints available to citizens as they search for the "truth."²⁰⁰ People are supposed to be free to spread their views, free to disagree, free to be different.²⁰¹ As the philosopher John Stuart Mill said:

Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; . . . those who dissent from the opinion, still more than those who hold it.²⁰²

To stifle one's expression, limits society's exposure to divergent views.²⁰³ Islamophobia has this limiting effect and thus restricts Americans' right to receive information as evidenced by three types of situations: (1) Muslims have limited free speech rights in public; (2) Muslims do not share the same nonverbal speech rights as other groups; and (3) Islamophobia limits the marketplace of ideas by rejecting foreign scholars.²⁰⁴

197. ABDO, *supra* note 129, at 83.

198. See CAIR REPORT, *supra* note 195, at 23-24 (discussing the continued prejudice against Muslims in the United States following 9/11).

199. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). American citizens have a right to receive information, which is protected under the First Amendment. *Id.*

200. See JOHN STUART MILL, ON LIBERTY 29-30 (The Floating Press 2009) (1859); Ahmadi, *supra* note 29, at 32-34.

201. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (supporting the idea of a free marketplace of ideas).

202. MILL, *supra* note 200, at 29.

203. See generally *id.* at ch. 2 (discussing the importance of exchanging opinions and discussion generally in society).

204. Cf. *Lamont*, 381 U.S. at 308 (1965). Americans who should be free to "receive and

A. Islamophobia and Speech in Public

Public settings, like traditional forums and limited or designated forums, welcome dialogue and serve as an outlet to successfully spread ideas.²⁰⁵ As discussed earlier, it is very difficult for the government to curtail speech in a setting traditionally left open to the public.²⁰⁶ But much has changed since 9/11, including the legal system's stance on speech in these forums.²⁰⁷

In February 2010, the University of California at Irvine invited Israeli Ambassador Michael Oren to give a speech.²⁰⁸ During his speech, eleven Muslim students who were members of the Muslim Student Union, shouted phrases in opposition to the Israel-Palestine conflict, interrupting Mr. Oren at different points during his speech.²⁰⁹ The students interjected "disciplined, organized statements of protest," such as, "[p]ropagating murder is not an expression of free speech" and "[y]ou, sir, are a . . . criminal."²¹⁰ Campus police then peacefully escorted them out of the event.²¹¹ The students and the Muslim Student Union were subsequently disciplined by school authorities: the school suspended the Muslim Student Union for one year, the school placed the organization on probation after suspension, and the members had to complete community service.²¹² Most students would think the incident ended there.²¹³ However, the District Attorney of Orange County took this situation somewhere the Irvine 11 did not anticipate—to court.²¹⁴

consider" ideas spread through Muslims in America are prevented or discouraged from seeking such information, especially because of these limitations after 9/11. *See id.*

205. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

206. *Id.*

207. *See Muslim Students Face Jail*, *supra* note 24 (discussing the Irvine 11's protest against the Israeli ambassador during a college campus event and their subsequent legal punishment).

208. Amy Taxin, *Irvine 11 Verdict: Muslim Students Guilty of Disrupting Speech*, HUFFINGTON POST, Sept. 23, 2011, http://www.huffingtonpost.com/2011/09/23/irvine-11-guilty_n_978408.html.

209. *Muslim Students Face Jail*, *supra* note 24 (providing a recording of part of the Irvine 11's protest).

210. *Id.*; Zainab Cheema, *Orange County's Islamophobic Judgment on the Irvine 11*, CRESCENT INT'L, (Oct. 2011), <http://www.crescent-online.net/2011/10/orange-countys-islamophobic-judgment-on-the-irvine-11-zainab-cheema-3018-articles.html>.

211. *Muslim Students Face Jail*, *supra* note 24.

212. Letter from Lisa Cornish, Senior Exec. Dir., Student Hous., to Muslim Student Union 12 (May 27, 2010) (on file with University of California, Irvine Student Housing), *available at* http://files.onset.freedom.com/ocregister/Oren_Decision_Document.pdf.

213. Lauren Williams et al., *Students Guilty of Disrupting Speech in 'Irvine 11' Case*, L.A. TIMES, Sept. 24, 2011, <http://articles.latimes.com/print/2011/sep/24/local/la-me-irvine-eleven-20110924> (noting that several people thought the school's punishment was sufficient and that the District Attorney crossed the line when he decided to bring criminal charges against the students).

214. *Muslim Students Face Jail*, *supra* note 24 (discussing the outcome of the case against the Irvine 11).

The Irvine 11 were convicted of one count of conspiring to interrupt Mr. Oren's speech and one count for actually disrupting the speech.²¹⁵

The school's actions and the court's decision to punish the Irvine 11 affects American students' ability to receive information regarding a certain viewpoint.²¹⁶ The idea of "free ideological exchange" is engrained in the collegiate setting.²¹⁷ The university invited Ambassador Oren to present his view of the Israel-Palestine conflict, and he even acknowledged the role of university campuses as a place open to the "exchange [of] ideas," stating:

We have an opportunity here to exchange ideas. You have an opportunity to hear a different perspective. This is why you have come to this campus as students. You haven't come to this campus to hear one idea. You've come to hear a multiplicity of ideas. It's a humble suggestion. It is one of the inestimable values of education in this country that you have that opportunity. Don't squander the opportunity.²¹⁸

Yet, campus administration frowned upon the Irvine 11's peaceful and organized protest, which is a noted method of exchanging ideas.²¹⁹ The manner in which the school, members of the community, and the District Attorney dealt with the Irvine 11 case, foreclosed other students from receiving an opposing view to the ideas Ambassador Oren presented.²²⁰ These actions and the ultimate decision of the court are linked to the Islamophobia phenomenon present throughout the United States; this correlation is evidenced by the comments of the audience and the

215. Taxin, *supra* note 208.

216. *See id.*; *see also* Kristen Ess Schurr, *The Irvine 11: Islamophobia Is Alive and Well*, AL JAZEERA, Sept. 24, 2011, <http://english.aljazeera.net/indepth/opinion/2011/09/201192493240548858.html> (discussing how some view the Irvine 11 case as a practice of "selective and discriminatory" prosecution of Muslim students because of their faith).

217. Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 482-83 (2005); *see also* *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (stating that the danger to First Amendment rights "is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) ("This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[V]igilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))).

218. Letter from Lisa Cornish to Muslim Student Union, *supra* note 212, at 8.

219. JAMES M. JASPER, *THE ART OF MORAL PROTEST: CULTURE, BIOGRAPHY, AND CREATIVITY IN SOCIAL MOVEMENTS* 5 (1997) (describing protests as a source for providing a moral voice in society since it gives people "an opportunity to plumb [their] moral sensibilities and convictions, and to articulate and elaborate them").

220. *See* Taxin, *supra* note 208.

severity of the punishment for a simple act of organized protest.²²¹ As the students left the event, audience members shouted statements such as: “[d]o the world a favor, become a suicide bomber” and “[y]ou are animals and primates.”²²² These comments exemplify the “irrational distrust, fear or rejection of the Muslim religion and those who are (perceived as) Muslims.”²²³ This reaction led to an attempt to silence the Irvine 11 and thus resulted in a violation of other students’ right to receive the information the Irvine 11 sought to disseminate.

Another example of the effects of Islamophobia in a public setting occurred in September 2011 when the FBI arrested Jubair Ahmad, a Pakistani native and legal resident of Virginia, for a YouTube video post.²²⁴ The FBI announced Ahmad’s indictment for “providing material support to . . . a designated foreign terrorist organization,” in this case Lashkar-e-Taiba (“LeT”).²²⁵ Ahmad claimed that his five-minute video displayed photographs of U.S. abuses against Muslims in Abu Ghraib, footage of exploding armored trucks, and prayer messages from LeT’s leader concerning “jihad.”²²⁶

The FBI reported the video as including “a number of terrorist logos” and its affidavit stated that “based on [Ahmad’s] training and experience, it is evident that the video . . . is designed as propaganda to develop support for LeT and to recruit jihadists to LeT.”²²⁷ This information was gathered from a series of events: the FBI said Ahmad spoke with Talha Saeed, the son of a LeT leader concerning the contents of the video, Ahmad attended a LeT camp as a teenager in Pakistan, he denied posting the video when the FBI questioned him, and apparently Ahmad revised the video and reposted it in October 2010 upon the request of Talha Saeed.²²⁸

Though these facts may be true, Ahmad may still have the freedom of expression as protected under the First Amendment.²²⁹ Moreover, even if the court deems the video to advocate violence, an argument can be made that the video can still be viewed as expressing a political view that Americans should be able to access.²³⁰ Extreme speech, which

221. Cheema, *supra* note 210.

222. *Id.*

223. VAN DRIEL, *supra* note 18, at x.

224. Allen, *supra* note 25; Pelofsky & Norton, *supra* note 25.

225. Pelofsky & Norton, *supra* note 25.

226. Allen, *supra* note 25.

227. *Id.* (alteration in original).

228. Pelofsky & Norton, *supra* note 25; Allen, *supra* note 25.

229. See Weinstein, *supra* note 35, at 88.

230. See *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (“[The First Amendment] guarantee is not confined to the expression of ideas that are conventional or shared by a majority.” (quoting

publicly threatens violence, is still protected speech as determined in *Brandenburg v. Ohio*.²³¹ In this case against a Ku Klux Klan leader, the Court held that:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.²³²

It should also be noted that, hypothetically, if Ahmad's video actually did concern the United States' violation of human rights, Americans should most certainly have access to the video to establish an informed opinion on the issue of what was occurring in Abu Ghraib.²³³ However, heightened feelings of Islamophobia may lead to government restrictions, such as the removal of the video.²³⁴ Americans should not be limited only to the information the government pushes forward because these restrictions stifle discussion of opposing opinions and obstructs attaining the truth if the government's view is wrong.²³⁵

Additionally, the effects of Islamophobia in the public extend further past school settings and YouTube videos to include television programs.²³⁶ Recently the television network The Learning Channel ("TLC") aired a reality show entitled "All American Muslim," which was supported by ads from the company Lowe's.²³⁷ After pressure from

Kingslev. Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959))).

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

232. *Id.*; see also *Noto v. United States*, 367 U.S. 290, 297-98 (1961) (explaining that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action").

233. See MILL, *supra* note 200, at 35. Mill stated that:

[T]he only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind.

Id.

234. The government's prosecution of Jubair Ahmad has led to a sentence of twelve years; however, his attorney argued that "[u]nder normal circumstances . . . Ahmad's advocacy for [LeT] would be constitutionally protected free speech. The only reason it's criminal is because he produced it at [LeT's] request, in consultation with Saeed." See Matthew Bakarat, *Jubair Ahmad, Virginia Man Accused of Aiding Pakistani Terrorists, Sentenced*, HUFFINGTON POST, Apr. 13, 2012, http://www.huffingtonpost.com/2012/04/13/jubair-ahmad-pakistan_n_1423078.html.

235. See *supra* text accompanying notes 200-04.

236. See, e.g., Karen King, Commentary, *Lowe's Cancellation of Muslim-American TV Show is Sad, Disappointing*, YAHOO! NEWS, Dec. 16, 2011, <http://news.yahoo.com/lowes-cancellation-muslim-american-tv-show-sad-disappointing-232900045.html> (discussing the show "All American Muslim").

237. *Id.*

groups like the Florida Family Association, Lowe's pulled its funding.²³⁸ Ironically, the reality show aimed to "enlighten[] viewers about the fact that Muslim-American families are like other American families. The program hope[d] to breakdown walls and debunk stereotypes."²³⁹ The Florida Family Association argued that the show did "not accurately depict Muslims because it shows families who are not extremists."²⁴⁰

This show had a goal of challenging Islamophobia, yet Islamophobes challenged the program for apparently presenting a peaceful side to Islam.²⁴¹ Should citizens choose to exercise their right to receive information by watching the show, the program has the potential to educate Americans about Muslim families and ideals.²⁴² Shockingly, there are several other reality shows of questionable value that the Florida Family Association and others choose not to challenge such as: "Little Miss Perfect," which people can argue objectifies young girls, or "The Bad Girls Club," which encourages drinking and sex.²⁴³ Islamophobia is most likely the key factor triggering the reaction and subsequent actions of the Florida Family Association. In fact, access to such a show could significantly combat future Islamophobic tendencies.²⁴⁴ Although the show is not representative of all Muslims, the fact that people have challenged the show and tried to take it off air raises First Amendment concerns and evidences the ongoing problems of Islamophobia.²⁴⁵

These examples of Islamophobia elucidate how the hatred of Muslims or those perceived as Muslim affects Americans' right to receive information. Speech in a public setting is supposedly protected if it is a traditional setting or a designated or limited setting; however, due to the backlash against Islam after 9/11, the government has permitted such violations of the right to receive information.²⁴⁶

238. *Id.*

239. *Id.*

240. Jaweed Kaleem, *Lowe's 'All-American Muslim' TV Show Ad Controversy Continues to Ignite Emotions*, HUFFINGTON POST, Dec. 13, 2011, http://www.huffingtonpost.com/2011/12/13/lowes-all-american-muslim-tv-show-ad-controversy_n_1146025.html.

241. *Id.*

242. See *Red Lion Broad. Co. v. Fed. Comm'n's Comm'n*, 395 U.S. 367, 390 (1969) (acknowledging Americans' right to access programs since "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here").

243. King, *supra* note 236.

244. See *id.*

245. Cf. VAN DRIEL, *supra* note 18, at 3.

246. Cf. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

B. Islamophobia and the Limitation on Nonverbal Expression

Nonverbal expression, including signs, symbols, and acts are also protected under the First Amendment.²⁴⁷ Yet, discrimination against Muslim women who wear hijab has increased.²⁴⁸ Discrimination rose after 9/11 and women who wear hijab are one of the easiest targets because of their outward appearance.²⁴⁹ Hijab, a head covering, is representative of several things in the Muslim religion and culture.²⁵⁰ The practice is prescribed in the Qur'an²⁵¹ and calls for modesty in both character and appearance.²⁵² However, to outsiders it signifies that a woman identifies as a Muslim, she holds certain beliefs, and her view may differ on various issues because of her religion.²⁵³ Nonetheless, the legal system has failed to adequately address discrimination and protect free speech in such cases.²⁵⁴

In *Khatib v. County of Orange*,²⁵⁵ the police arrested Souhari Khatib after revoking her probation for a violation of California welfare law.²⁵⁶ While detained, police officers forced her to remove her headscarf for supposed security concerns; Khatib pled with the officers explaining that her religion forbids her from exposing her head or neck

247. See David L. Hudson, Jr., *First Amendment Protects More than Just Words*, FIRST AMENDMENT CENTER (Sept. 23, 2011, 11:07 AM), <http://www.firstamendmentcenter.org/first-amendment-protects-more-than-just-words>.

248. See *Discrimination Against Muslim Women*, *supra* note 26 (demonstrating how Muslim women who wear hijab have been discriminated against including harassment, termination from jobs, and denial of access to public places).

249. See *id.* (explaining that Muslim women wearing hijab are more likely to experience discrimination than those who do not: "69% of women who wore hijab reported at least one incident of discrimination compared to 29% of women who did not wear hijab").

250. See Aliah Abdo, Note, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 448-50 (2008). The word hijab stems from hajaba, which means "to prevent from seeing." *Id.* at 448. Women wear hijab as a sign of modesty, privacy and morality. *Id.* at 449-50.

251. *Id.* at 448-49. There are two verses in the Qur'an which refer to the practice of hijab: (1) "And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw veils over their bosoms and not display their beauty;" and (2) "O Prophet, tell your wives and your daughters and the women of the believers to draw their cloaks close round them. That will be better, so that they may be recognized and not annoyed. Allah is ever Forgiving, Merciful." *Id.* (quoting *Al-Qur'an* 24:31, 33:59).

252. See *id.* at 449.

253. *Id.*

254. See *Discrimination Against Muslim Women*, *supra* note 26.

255. 639 F.3d 898 (9th Cir. 2011).

256. *Id.* at 901, 907 (rejecting the lower court's dismissal of the case and finding that a Muslim woman who is forced to remove her head covering in front of strangers "may feel shame and distress").

to men outside of her family.²⁵⁷ Though Khatib filed suit for the violation of her rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), her nonverbal expression of wearing a hijab is protected by the First Amendment freedom of speech as well.²⁵⁸ The police officers' actions in *Khatib*, the lower court's support of their actions, and similar discrimination in the work setting and schools violate Americans' right to receive information regarding the Muslim faith since nonverbal speech is protected as held in *Spence v. Washington*.²⁵⁹

In *Spence v. Washington*,²⁶⁰ the Court established a two-part test to determine whether the First Amendment protects expressive conduct.²⁶¹ The first part requires that the speaker intends to convey a particular message.²⁶² Second, others must reasonably understand the expression.²⁶³ This standard can apply to Muslim women wearing hijabs as these women intend to convey a message of modesty and identity and this message is clear to others.²⁶⁴ Several people may not even understand the meaning behind the hijab, but allowing Muslim women to partake in this symbolic expression opens the door for Americans to exercise their right to receive information.²⁶⁵ As discussed earlier, it is important that society is open to a wide array of ideas and not only those promoted by the majority or by the government.²⁶⁶ Such acts of discrimination against Muslim women who practice hijab are tied to Islamophobia. As long as the government continues to allow employers, schools, law enforcement, and others to place restrictions on the practice of hijab, Americans' right to receive information suffers.

257. *Id.* at 901.

258. *Id.*; Hudson, *supra* note 247.

259. Hudson, *supra* note 247.

260. 418 U.S. 405 (1974).

261. Hudson, *supra* note 247.

262. *Spence*, 418 U.S. at 410-11.

263. *Id.*

264. Abdo, *supra* note 250, at 448-49 (noting that the practice of hijab is by choice and such a practice "sends a message that [a woman] is a Muslim, has respect for herself, and expects to be treated respectfully, especially by the opposite sex").

265. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (explaining the scope of the right to receive information, including the right to inquire, which Americans are also free to do when faced with Muslim ideas).

266. *Id.* ("[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.").

C. Islamophobia and Access to Foreign Scholars

One of the clearest examples of the effect of Islamophobia on Americans' right to receive information is the denial of visas to foreign scholars.²⁶⁷ Following 9/11, the government increasingly marginalized Muslim scholars.²⁶⁸ On October 26, 2001, President George W. Bush signed into law the USA PATRIOT Act.²⁶⁹ This Act sought to provide the government with the necessary powers to deal with the threat on national security following 9/11.²⁷⁰

According to the Department of Justice, the USA PATRIOT Act "Improves Our Counter-Terrorism Efforts in Several Significant Ways."²⁷¹ First, the Act allows investigators to use preexisting tools for counter terrorism that were used to investigate organized crime and drug trafficking, such as electronic surveillance tools, roving wiretaps, delayed notification search warrants, and access to business records.²⁷² Second, the Act facilitates "information sharing and cooperation among government agencies" to better coordinate their work in protecting Americans.²⁷³ Third, the Act revised the law to account for new technologies and new threats.²⁷⁴ Fourth, the Act increased the penalties applied to people who commit crimes such as: a prohibition against harboring terrorists, an increase in the maximum punishment for crimes terrorists are likely to commit, an increase in various conspiracy penalties, punishment against terrorist acts on mass transit systems, punishment against bioterrorists, and the elimination of the statute of limitations for some terrorism crimes as well as lengthening the statute of limitations for other crimes.²⁷⁵

This legislation is complex and has several sections, but one section in particular has infringed upon the right to receive information.²⁷⁶ The government has used Section 411 of the Act to exclude foreigners if the government determines that the person "used positions of prominence to endorse or espouse terrorist activity."²⁷⁷ With this power, the

267. Ahmadi, *supra* note 29, at 7-8.

268. *Id.* at 8-9 (providing examples of the practice of ideological exclusion of scholars).

269. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

270. *The USA PATRIOT Act: Preserving Life and Liberty*, DEP'T. OF JUSTICE, http://www.justice.gov/archive/ll/what_is_the_patriot_act.pdf (last visited Mar. 29, 2013).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. Ahmadi, *supra* note 29, at 7-8.

277. *Id.*

government has essentially practiced “ideological exclusion.”²⁷⁸ When the government refuses to allow foreign scholars to enter the United States to give speeches and presentations, this directly affects Americans’ ability to access the information the scholar seeks to present.²⁷⁹

Tariq Ramadan serves as a prime example of restricting access to information.²⁸⁰ Mr. Ramadan, a prominent Islamic thinker, was named as one of *Time* magazine’s top 100 most important innovators of the twenty-first century.²⁸¹ Some people even view him as the modern Martin Luther King with his hopes of a Western Islam.²⁸² He advocates for Islamic reform through the use of Muslim traditions and values within a modern pluralistic world.²⁸³ This renowned writer and lecturer was born to Egyptian parents in Geneva, Switzerland.²⁸⁴ He received a classical Islamic education and has an M.A. in Philosophy and French literature as well as a Ph.D. in Arabic and Islamic Studies from the University of Geneva.²⁸⁵ He is a Professor of Contemporary Islamic Studies at Oxford University, a member of the Faculty of Theology at Oxford, and a visiting professor in Qatar amongst other things.²⁸⁶ Mr. Ramadan has published over twenty books and 700 contributions and articles mostly dealing with the Muslim identity within the Western world.²⁸⁷ Needless to say, Mr. Ramadan is a well-known scholar around the world.

Between 2000 and 2004, Mr. Ramadan visited the United States almost thirty times to give lectures, attend conferences, and meet other scholars.²⁸⁸ Since he is a Swiss citizen, the U.S. government did not

278. *Id.* at 9. The government essentially denies a foreigner entry into the country based on his or her differing political views. *Id.*

279. *Id.* at 31 (“The Patriot Act arguably infringes on . . . freedom by constraining free speech, association, inquiry and ideological exchange . . . by limiting the ability of international scholars and students to access and interact with American[s].”).

280. Tariq Ramadan, *Why I’m Banned in the USA*, WASH. POST, Oct. 1, 2006, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/29/AR2006092901334.html>.

281. *Tariq Ramadan: Biography & Resources*, ENLIGHTENNEXT, <http://www.enlightennext.org/magazine/bios/tariq-ramadan.asp> (last visited Mar. 29, 2013).

282. Steve Paulson, *The Modern Muslim*, SALON (Feb. 20, 2007, 1:06 PM), http://www.salon.com/2007/02/20/ramadan_5/.

283. *Tariq Ramadan: Biography & Resources*, *supra* note 281.

284. Paul Donnelly, *Tariq Ramadan: The Muslim Martin Luther?*, SALON (Feb. 15, 2002, 8:00 PM), http://www.salon.com/2002/02/15/ramadan_2/.

285. *Id.*; *Biography*, TARIQ RAMADAN (Aug. 22, 2004), <http://www.tariqramadan.com/spip.php?article11&lang=en>.

286. *Biography*, *supra* note 285.

287. *Tariq Ramadan: Biography & Resources*, *supra* note 281.

288. *Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d 400, 406 (S.D.N.Y. 2006) [hereinafter *Ramadan Case*].

require him to apply for a temporary nonimmigrant visa in order to enter the country when attending these various lectures and conferences.²⁸⁹ In January 2004, Ramadan accepted a position as a tenured professor at the University of Notre Dame in Indiana.²⁹⁰ On behalf of Ramadan, the University of Notre Dame submitted a visa petition, which the government accepted on May 5, 2004.²⁹¹ His family made arrangements to move to Indiana, but these plans never went into effect.²⁹² On July 28, 2004, a week before his scheduled date to move, the U.S. Embassy in Switzerland notified Ramadan of his visa revocation.²⁹³ The consular officials provided no reason for the revocation.²⁹⁴ Later, the Department of Homeland Security said the revocation was based on Section 411 of the USA PATRIOT Act.²⁹⁵ However, the government later explained that this reason was erroneous, without providing alternative grounds for the revocation.²⁹⁶

The University of Notre Dame reapplied for a new visa on October 4, 2004.²⁹⁷ Yet, even by December 2004, the Department of State made no decision regarding Mr. Ramadan's visa and even told the University that it would make no decision in the near future.²⁹⁸ Mr. Ramadan thus resigned from his position at the University of Notre Dame.²⁹⁹ The revocation also meant that he could no longer take advantage of the visa-waiver program he normally used when entering the United States for short periods.³⁰⁰ Several organizations within the United States urged Mr. Ramadan to reapply for a visa.³⁰¹ He submitted a different application and attended an interview on December 20, 2005 where he was asked questions regarding both his political views and associations.³⁰² He was told that he would receive a decision in at least two days but no more than two years.³⁰³ However, this attempt was also unsuccessful since Mr. Ramadan had yet to receive a visa in 2006.³⁰⁴

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 416.

297. *Id.* at 407.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 408.

304. *Id.*

Mr. Ramadan believes the United States barred him for a very simple reason, stating that “[i]t doesn’t care for my political views. In recent years, I have publicly criticized U.S. policy in the Middle East, the war in Iraq, the use of torture, secret CIA prisons and other government actions that undermine fundamental civil liberties.”³⁰⁵ Others believe the government rejected his application because Hasan Al-Banna, the founder of the Muslim Brotherhood, is his grandfather.³⁰⁶ This organization is connected to several assassinations and militant activity, and pushed for the use of the Qur’an as the basis for the constitution in Egypt.³⁰⁷ Although he is the grandson of this leader, Mr. Ramadan has denounced many activities of the Muslim Brotherhood, and he is openly against violent activism, terrorism, and radicalism.³⁰⁸

Nonetheless, Tariq Ramadan is not the only Muslim scholar that the United States refused to permit into the country; Adam Habib serves as another example.³⁰⁹ He is a South African scholar, a Muslim of Indian descent, and the Executive Director of the Human Science Research Council’s Program on Democracy and Governance.³¹⁰ He has been very vocal in his criticism of the war in Iraq as well as other U.S. decisions in relation to the war on terror.³¹¹ Prior to 2006 when the United States government denied Mr. Habib’s visa application, he visited this country on several occasions without any trouble; Mr. Habib even lived in New York when he attended the City University of New York to earn his Ph.D. in Political Science.³¹²

The government revoked Mr. Habib’s visa on October 21, 2006 when he arrived at John F. Kennedy Airport in New York for a series of scheduled meetings; he was detained at the airport and interrogated about terrorism and his views.³¹³ Despite many attempts and inquiries by Mr. Habib, South African officials, and organizations in the United States, the U.S. government never provided an explanation as to why the government revoked his visa.³¹⁴ The government even extended the

305. Ramadan, *supra* note 280, at B1.

306. Deborah Sontag, *Mystery of the Islamic Scholar Who Was Barred by the U.S.*, N.Y. TIMES, Oct. 6, 2004, at A1, available at <http://www.nytimes.com/2004/10/06/international/europe/06ramadan.html>.

307. *Id.*

308. *Id.*

309. See *Am. Sociology Ass’n v. Chertoff*, 588 F. Supp. 2d 166, 168 (D. Mass. 2008).

310. *ACLU Rebukes U.S. Government for Failing to Act on Visa Request of South African Scholar*, ACLU (Aug. 10, 2007), <http://www.aclu.org/national-security/aclu-rebukes-us-government-failing-act-visa-request-south-african-scholar>.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

revocation to include his wife and two young children.³¹⁵ Perhaps his visa was revoked because of his involvement in demonstrations against the Iraq War in 2003, or photographs taken while he spoke at a rally in South Africa.³¹⁶ He acknowledged that he was very critical of American foreign policy in both Africa and the Middle East.³¹⁷ However, as Mr. Habib stated, "[i]f our governments get in the habit of excluding academics, intellectuals, journalists, and citizens of other countries for ideological reasons, then we are on a slippery slope to the abrogation of all kinds of freedoms."³¹⁸

Mr. Habib's statement is squarely on par with the arguments of this Note. These government actions directly affect Americans' right to receive information.³¹⁹ The scholars were invited to share their knowledge with American audiences, yet they were denied entry into the country because of their ideological beliefs.³²⁰ If the government did, in fact, revoke Mr. Ramadan and Mr. Habib's visas because of their ideology, these decisions may fail the test established in *Kleindienst v. Mandel*,³²¹ which dealt with the admission of a foreigner into the United States in relation to the right to receive information.³²² In *Kleindienst*, the Court determined that if a decision to exclude a foreigner was based on "a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."³²³ However, Congress's and the Executive's power over immigration is not without bounds.³²⁴

315. *Id.*

316. Complaint for Declaratory & Injunctive Relief, *supra* note 1, at 7-8.

317. *Id.*

318. ACLU, *supra* note 11, at 15.

319. *Kleindienst v. Mandel*, 408 U.S. 753, 764-65 (1972) (recognizing the implication of the First Amendment right to receive when dealing with visa denials); *see also* Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 125 (2d Cir. 2009) (finding that Americans can "assert[] a First Amendment claim to have a visa applicant present views in this country"); Am. Sociology Ass'n v. Chertoff, 588 F. Supp. 2d 166, 169-70 (D. Mass. 2008) (noting that visa denials may be reviewable under a limited exception if there is a First Amendment violation).

320. *Ideological Exclusion*, ACLU, <http://www.aclu.org/national-security/ideological-exclusion> (last visited Mar. 29, 2013).

321. 408 U.S. 753 (1972).

322. *Id.* at 770.

323. *Id.*

324. *See, e.g., Ramadan Case*, 463 F. Supp. 2d 400, 414-15 (S.D.N.Y. 2006). The Supreme Court held:

Nonetheless, there are limitations: "The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts . . . to say where those statutory and constitutional boundaries lie."

The government may exclude aliens only within constitutional limitations.³²⁵ Accordingly, one court found that:

Only where the Government is unable to provide a facially legitimate and bona fide reason for excluding the alien, thereby revealing that the true reason for exclusion was the content of the alien's speech, may a court remedy the constitutional infirmity by enjoining the Government from excluding the alien in contravention to the First Amendment.³²⁶

Exclusion based on the beliefs or ideology instilled in the speech of a foreigner should not fall within the bounds of the Constitution.³²⁷

Nonetheless, the government revoked the visas of both Mr. Ramadan and Mr. Habib without justification, and thus these decisions led people to believe the government's "true reason for exclusion was the content of the alien's speech."³²⁸ Such action is a violation of Americans' right to receive information.³²⁹ Merely stating national security as the basis for excluding foreign scholars may fail the *Kleindienst* test as some courts are prepared to reject this reason since it would give the Executive total discretion "even when the First Amendment rights of American citizens are at stake."³³⁰ Granting the government such power is something the Supreme Court has long rejected because a major purpose of the First Amendment is to protect free discussion of governmental affairs.³³¹ Islamophobia and the unwillingness of the government to tolerate views contrary to its position on various issues has led to ideological exclusion and an unjustified violation of Americans' right to receive information.

V. A SOLUTION TO DEAL WITH FREE SPEECH VIOLATIONS IN THE FACE OF ISLAMOPHOBIA: THE EFFECTS TEST

As discussed above, the fear of Muslims or those perceived as Muslim has resulted in the government's failure to protect Americans' First Amendment right to receive information.³³² The strict scrutiny test

Id. (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986)).

325. See *Zadvyadas v. Davis*, 533 U.S. 678, 695 (2001) (noting that the political branch's plenary power is "subject to important constitutional limitations"); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 940-41 (1983) (recognizing that Congress's plenary power over immigration must be carried out by "constitutionally permissible means").

326. *Ramadan Case*, 463 F. Supp. 2d at 415.

327. *Id.* at 415 n.17 (explaining that facially legitimate and bona fide reason within the context of the First Amendment means "a reason unrelated to the alien's speech").

328. *Id.* at 415.

329. *Id.* at 418-19.

330. *Id.*

331. *Id.* at 419.

332. Courts, when confronted with issues dealing with speech and Muslim plaintiffs, have not

that courts normally employ when assessing the content-neutrality of a regulation on speech has not been effective in light of the increased development of Islamophobia.³³³ Following the 9/11 attacks, Islamophobia has impacted the free speech rights of Muslims and the mobility of foreign scholars, as well as the right to receive information for all Americans.³³⁴ "In an age of official insecurity and anxiety, the most difficult constitutional problem may not be controlling arbitrariness in permitting, but compensating for a chronic tendency to overestimate the likelihood of any damage to public security from public exercises of freedom of speech."³³⁵ Given the current state of events and the vulnerability of the right to receive information, a new standard to deal with the right to receive information in times of political controversy is required.

In order to resolve this issue of dealing with national security and the right to receive information, courts should adopt a specific test under First Amendment speech analysis where: (1) there is a political conflict and (2) there is a clear group that society and the government targets because of the conflict. As discussed earlier, the government may restrict the content of speech in certain situations; however, it cannot favor one viewpoint over another.³³⁶ The test will essentially focus on the effects of a regulation on speech when a specific group is targeted by the government action.³³⁷ Once the court determines there is a disparate impact on a certain group, the court will then resolve the issue as to whether the government has curtailed the right to receive information through this disproportionate treatment of the specified group.

By first looking at the effects of a government action, courts will provide a framework for which they can work through their First Amendment analysis.³³⁸ When dealing with political conflicts, such as

assessed the impact their decision has on the right to receive information. *See supra* notes 211-16, 258-59 and accompanying text.

333. Although courts normally apply the strict scrutiny test to free speech issues, speech violations have not been a huge issue in the wake of Islamophobia and when speech is at issue the outcome has not been favorable for speakers. *See supra* notes 83-86, 215-20 and accompanying text.

334. *See supra* Part IV.

335. R. George Wright, *Content-based and Content-neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 347 (2006).

336. *See supra* notes 88-97 and accompanying text.

337. Courts have looked at the effects of state regulations in past cases. *Biddulph v. Mortham*, 89 F.3d 1491, 1500 (11th Cir. 1996) (explaining that courts should be concerned when a state's actions have a disparate impact on particular views, since this may amount to viewpoint discrimination); *N.A.A.C.P., W. Region v. Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984) (stating that the court must be careful of the disproportionate effects of laws on different groups' viewpoints); *see Dan V. Kozlowski, Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL'Y 131, 177 (2008).

338. Michael Hill, Note, *United States v. Fullmer and the Animal Enterprise Terrorism Act*:

the war on terror, there are often certain groups that are discriminated against through practices that seem constitutional. Such discrimination is not only overlooked, but it has a subsequent effect on all Americans who are willing to explore different ideas other than those the government makes readily available.³³⁹ The government's actions discussed above, such as dealing with speech at a protest,³⁴⁰ forcing a woman to remove her hijab in prison,³⁴¹ and revoking the visas of foreign scholars³⁴² serve as examples. These actions appear to be neutral; however, the effects of the actions unevenly target one particular group: Muslims and those perceived as Muslim.³⁴³ It is important that the courts look beyond the language of the laws or government actions in order to gauge whether the government is in fact practicing viewpoint discrimination and violating the First Amendment right to receive information for Americans.³⁴⁴ When looking at the effects of government actions:

A law [may] not discriminate against a particular viewpoint on its face, and there [may be] no evidence of an improper legislative purpose in enacting the law. Within that framework of facial neutrality, however, we must examine restrictions on speech with particular care when their effects fall unevenly on different viewpoints and groups in society.³⁴⁵

Looking at the effects of regulation on speech is something that the Supreme Court itself has taken into consideration when looking at the right to receive information.³⁴⁶ As determined in *Martin v. Struthers*,³⁴⁷ the Court explained that, "[i]n considering legislation which thus limits the dissemination of knowledge, we must 'be astute to examine the effect of the challenged legislation' and must 'weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation.'"³⁴⁸ Courts have taken a similar stance in other cases.³⁴⁹ The

"True Threats" to Advocacy, 61 CASE W. RES. L. REV. 981, 1032 ("Where a disparate impact falls on bearers of a specific viewpoint, the threat to free speech is enormous, and courts must be especially exacting in their analysis of the legislative judgment behind the statute.").

339. See *supra* Part IV (discussing examples of discrimination after an increase in Islamophobia following the 9/11 attacks).

340. See *supra* notes 208-16 and accompanying text.

341. See *supra* notes 255-59 and accompanying text.

342. See *supra* notes 290-305, 313-16 and accompanying text.

343. See *supra* Part IV.

344. See N.A.A.C.P., W. Region v. Richmond, 743 F.2d 1346, 1356 (9th Cir. 1984).

345. *Id.*

346. *Martin v. Struthers*, 319 U.S. 141, 144 (1943).

347. 319 U.S. 141 (1943).

348. *Id.* (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)).

349. See, e.g., *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 12-14 (1986) (plurality opinion) (finding an instance of viewpoint discrimination where there was an order to include a certain consumer group's newsletter in a public utility's billing envelope because it did "not equally

bottom line is: courts must look at the effects of government regulations because laws that have a disparate impact on one viewpoint run the risk of being viewpoint-based.³⁵⁰

As in the case of Islamophobia, it is easy to target a specific group because some Americans automatically associated the 9/11 hijackers with all Muslims and those perceived as Muslim.³⁵¹ Similarly, in the interest of national security, the government at times partook in practices that people may view as discriminatory. The government failed to protect the free speech rights of Muslims as a targeted group, and these actions subsequently harmed the right to receive information for Americans. Although the government's purpose in enforcing the laws discussed in this Note was not to close off Muslim ideas, the effects may show otherwise.³⁵² Justice Antonin Scalia stated, "[t]he vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes."³⁵³ "Unavoidable targeting" stemming from a government regulation is included within this "vice of content-based legislation." This phenomenon may shine light on what has occurred following the 9/11 attacks. By employing an effects test in the First Amendment analysis, courts will more efficiently investigate whether there is viewpoint discrimination affecting the right to receive information since the courts must first establish if a government action falls disproportionately on a specific group.³⁵⁴

constrain both sides of the debate about the utility regulation"); *Grace United Methodist Church v. Cheyenne*, 235 F. Supp. 2d 1186, 1204 (D. Wyo. 2002) ("The Court would obviously be concerned about Grace United's free speech and associational rights if Cheyenne enacted a zoning regulation that: (1) was content-based; (2) had a disparate impact on certain religious viewpoints; or (3) although facially neutral, was applied in a discriminatory manner.").

350. Wilson R. Huhn, *Assessing the Constitutionality of Laws that Are Both Content-based and Content-neutral: The Emerging Constitutional Calculus*, 79 IND. L. J. 801, 848 (2004).

351. See WELCH, *supra* note 14, at 72-73.

352. See *supra* Part IV.

353. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 794 (1994) (Scalia, J., concurring in part and dissenting in part); see also *Hill v. Colorado*, 530 U.S. 703, 743-44 (2000) (Scalia, J., dissenting) (arguing that assessing the law's effects indicated it would disproportionately restrict one type of speech—anti-abortion speech; the regulation in this case applied at the entrance of medical facilities and "operate[d] only on speech that communicate[d] a message of protest, education, or counseling . . . [and thus was] a means of impeding speech against abortion").

354. See *supra* text accompanying notes 337-45.

VI. CONCLUSION

Surely, the government has a highly supported interest in protecting the United States at all times. However, protection should not ensue at the expense of severely limiting civil liberties and substantially restricting the marketplace of ideas. In times of political strife, such as facing terrorism today, the courts' current approach to dealing with First Amendment violations of the right to receive information fails to protect civil liberties. By looking at the discriminatory effects of regulations on speech, the court can protect a thriving marketplace of ideas.

*Tiffani B. Figueroa**

* J.D. candidate, 2013; Hofstra University School of Law. I would like to thank Professor Rose Villazor for her guidance and feedback throughout my note-writing process. Likewise, I would like to thank the editors of *Hofstra Law Review* Volumes 40 and 41 for their assistance in editing this piece. I would especially like to acknowledge: Dave Gerardi, Rebecca Sklar, Stephen Piraino, Ana Getiashvili, Jonathan Nasca, Michael Kohanim, and Katie Porter for their help. I would also like to thank my friends, especially Tyler Van Put; their acts of kindness and support contributed to my accomplishment in immeasurable ways. And finally, a special thanks goes out to my family—the group of individuals encouraging me to be my best, do my best, and give my all. Specifically, thank you to my mother, Median Jordan, for always supporting me and listening to my sobbing at any time of day; thank you to my sisters, Mariah Jordan and Brittani Figueroa, for reminding me to laugh each day; and thank you to my grandmother, Luz Figueroa, for making me remember each of my goals every time we speak. I love you all beyond measure; without you guys I would not be who I am.