IMPLEMENTATION OF THE UK TERRORISM ACT 2006–THE RELATIONSHIP BETWEEN COUNTERTERRORISM LAW, FREE SPEECH, AND THE MUSLIM COMMUNITY IN THE UNITED KINGDOM versus THE UNITED STATES

When the American Colonies declared independence from Great Britain in 1776, the colonists derived the United States legal system from the British legal system. The two nations have been close allies in the “war on terror” in the new millennium. Although both the United Kingdom and the United States have taken tough stances in their fights against terrorism, the two countries have adopted differing strategies for the early interception of terrorists. The United Kingdom uses criminal law processes and has broadened the net to capture those whose speech itself glorifies terrorism. The United States reaches planning activity, as well, through the combined use of traditional criminal statutes such as conspiracy and the U.S.A. Patriot Act (“Patriot Act”), which focuses on surveillance, immigration, and terrorism financing, but steers clear of criminalizing speech. The United Kingdom enacted the Terrorism Act 2006—an Act passed after the July 2005 London bombings. Specifically, the Act outlaws statements that glorify terrorism.

1 See generally, e.g., THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).
3 See, e.g., Lawner, supra note 2; see also Wattellier, supra note 2; Chesterman, supra note 2.
4 See infra Part I–B.
5 See infra Part I.A.
7 See infra Part I.B.
8 Terrorism Act, 2006, c. 11.
Thus, despite similar legal backgrounds and similar stances on the war against terror, the United Kingdom’s counterterrorism legislation has gone much farther than the United States’ to restrict civil liberties, particularly the freedom of speech. The UK Terrorism Act 2006 (“2006 Act” or “Terrorism Act”), which would be unconstitutional in the United States, received vast criticism within the United Kingdom for violating free speech. Because its proponents overcame serious hurdles to pass the controversial 2006 Act, one would assume that the 2006 Act would be vigorously used by British authorities to prosecute terrorists. As it turns out, it is not. Perhaps the 2006 Act is so controversial that those who pushed for its passage cannot justify its usage. Still, although it remains virtually unused thus far, the 2006 Act remains a viable tool for British law enforcement authorities to begin using at their discretion. If British authorities begin employing the Act as a tool to proscribe terrorist speech, free speech throughout the United Kingdom will be constrained considerably.

Part I of this Comment describes the two systems’ terrorism laws in greater detail. Part II attributes the systems’ formal differences in legal approach to (a) different free speech constraints and (b) different Muslim cultures in the two countries, which pose contrasting levels of terrorism concerns and thus divergent approaches to counterterrorism. Part II also examines the constitutionality of the UK Terrorism Act 2006 within its framework compared to its constitutionality in the United States. Part III examines specific

10 See Terrorism Act, 2006, c. 11, pt.1, § 1(3)(a).
11 See infra Part I.A–B.
12 See infra Part II.B.3.b.
13 See infra Part III.
14 See infra Part I.A.
15 See Souad Mekhennet & Dexter Filkins, British Law Against Glorifying Terrorism Has Not Silenced Calls to Kill for Islam, N.Y. TIMES, Aug. 21, 2006, at A8.; see infra Part IV.
17 See infra Part IV.
19 See JCHR First Report, supra note 18, ch. 2, § 46 at 14.
criticisms of the British approach. Part IV looks at the failure of the United Kingdom to utilize its law and discusses the divergence between the theoretical reach of the law and its actual implementation.

I. TERRORISM LAW IN THE UNITED KINGDOM AND THE UNITED STATES

A. United Kingdom: The UK Terrorism Act 2006

The July 7, 2005 London bombings led Britain to create a new antiterrorism law that increased the “flexibility of [its] proscription regime.” The United Kingdom’s new “proscription regime” gives the government the power to prosecute individuals for encouraging terrorism or for disseminating terrorist publications, as well as to proscribe terrorist organizations that glorify terrorism. Potential punishments for violations of the new Terrorism Act include fines and imprisonment for up to seven years.

The UK Terrorism Act 2006 did not pass with ease, however. Criticism of the law led to intense national and international debate. Although Tony Blair announced his intention to create the new legislation shortly after the July 7 bombings in August 2005 and the Act’s debate history stressed the need for haste in passing the Act, Parliament did not pass the legislation until March 2006.

20 Terrorism Act, 2006, c. 11.
23 See infra Part I.A.1.
24 See infra Part I.A.2.
25 See infra Part I.A.3.
28 See, e.g., Stone, supra note 21, at E3. Opponents and critics included some members of Parliament, the media, artists, civil liberties organizations, the Muslim community, and the United Nations High Commissioner for Human Rights. See, e.g., Riding, supra note 21, at 3; see generally Alan Cowell, Seeking Moderate Support, Blair Meets Muslim Leaders, N.Y. TIMES, July 20, 2005, at 10.
29 See Stone, supra note 21, at 17.
30 In a debate on November 21, 2005, Baroness Scotland of Asthal stressed that the United Kingdom could not “afford any complacency in [its] response” to the July 7 terrorist attacks, and that it must respond with “anti-terrorism legislation [that is] as comprehensive and up-to-date as possible.” 675 PARL. DEB., H.L. (5th ser.) (2005) 1384, available at http://www.publications.parliament.uk/pa/ld199910/ldhansrd/pdvn/ld65/text/51121-04.html#51121-04_head2. Parliament “dispense[d] with formal pre-legislative scrutiny,” and the “Committee stage, unusually, took place on the Floor of the House so that all Members could participate. The Report stage was extended by the Government to allow extra time for debate, and, [also] unusually, there was
The House of Lords twice rejected the "glorification" provisions in the bill passed by the House of Commons. The House of Lords finally acquiesced and passed the bill on its third vote after the then-home secretary promised to reconsider all terror legislation the following year.

1. The Encouragement of Terrorism Offense

In a September 15, 2005 letter from the United Kingdom Home Secretary to House of Commons members who opposed the bill, the Secretary explained that the drafters of the Terror Act wanted to make certain that the government would be capable of prosecuting those who glorify terrorism.

Specifically, the UK Terrorism Act 2006 prohibits "[e]ncouragement of terrorism," which applies to any statement "likely to be understood . . . as a direct or indirect encouragement" of terrorism. Drafters intended the indirect encouragement offense to "capture the expression of sentiments which do not amount to direct incitement to perpetrate acts of violence, but which are uttered with the intent that they should encourage others to commit . . . terrorist acts." Debate history of the bill also explains that because the United
Kingdom already has an offense of direct incitement,\textsuperscript{38} the encouragement of terrorism offense “deal[s] with those who incite terrorism [in more of a roundabout way than through direct aid,] but who nevertheless contribute to creating a climate in which impressionable people might believe that terrorism was acceptable.”\textsuperscript{39}

According to the text of the 2006 Act, a person may be charged with the encouragement of terrorism offense for making a statement that glorifies or encourages a) terrorism in general,\textsuperscript{40} or b) a particular act of terrorism\textsuperscript{41}—a past, present, or future act—that “members of the public could reasonably be expected to infer that what is being glorified . . . should be emulated by them.”\textsuperscript{42} As for the requisite mens rea, a person may be charged with the offense if he “intends”\textsuperscript{43} to encourage or if he is merely “reckless”\textsuperscript{44} as to whether members of the public would be encouraged by the statement to commit terrorism.\textsuperscript{45}

Section four of the offense explains that the inquiries into “how a statement is likely to be understood” and “what members of the public could reasonably be expected to infer from it” must be determined by looking at both the

\begin{footnotesize}
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\item[\textsuperscript{38}] Terrorism Act, 2006, c. 11, pt. 1, § 1(2)(a–b). The 2006 Act includes “indirect” encouragement of terrorism because the United Kingdom already has an offense for direct incitement to commit a violent or criminal act. First Home Secretary Letter, supra note 37.
\item[\textsuperscript{39}] 675 PARL. DEB., H.L. (5th ser.) (2005) 1385.
\item[\textsuperscript{40}] See Terrorism Act, 2006, c. 11, pt. 1, § 1(5)(a).
\item[\textsuperscript{41}] See id. § 1(3)(a).
\item[\textsuperscript{42}] Id. § 1(3)(b). The Terrorism Act also makes it clear that it applies to statements published electronically, i.e. through the internet. See id. § 3(1)(a–b).
\item[\textsuperscript{43}] Id. § 1(2)(b)(i). The debate history of the 2006 Act indicates that there was “lengthy debate on the question of intent and, as a consequence, the Government brought forward amendments” on the intent requirement. 675 PARL. DEB., H.L. (5th ser.) (2005) 1385.
\item[\textsuperscript{44}] Terrorism Act, 2006, c. 11, pt. 1, § 1(2)(b)(ii).
\item[\textsuperscript{45}] Id. § 1(2)(a–b). A person commits an offence if
\begin{itemize}
\item[(a)] he publishes a statement to which this section applies or causes another to publish such a statement; and
\item[(b)] at the time he publishes it or causes it to be published, he-
\begin{itemize}
\item[(i)] intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or
\item[(ii)] is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.
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“contents of the statement as a whole” and the “circumstances and manner of its publication.” Additionally, a person may be charged for encouraging terrorism even if no member of the public is actually induced to commit terrorism after hearing the statement. The Act deems it “irrelevant” whether anyone is “in fact encouraged or induced” to commit terrorism.

2. Dissemination of Terrorist Publications Offense

The drafters of the Terrorism Act created the dissemination of terrorist publications offense in an effort to “tackle dissemination of radical written material by [Islamic] extremist bookshops” that is “clearly designed to encourage others to [commit] terrorist acts.” This offense makes it unlawful to distribute, circulate, give, sell, loan, or electronically transmit a terrorist publication, or to possess such a publication with a plan to do so. Whether a publication is a “terrorist publication” will be determined “in relation to particular conduct” a) “at the time of that conduct” and b) considering the publication’s contents as a whole and the circumstances in which such conduct occurs.

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46 Id. § 1(4)(a–b).
47 Id. § 1(5)(a–b).
48 Id. Section five explains that it is “irrelevant:”
   (a) whether anything mentioned in those subsections relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally; and,
   (b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.
Id. (emphases added).
49 Id. § 2.
50 Second Home Secretary Letter, supra note 35, at 2.
51 Terrorism Act, 2006, c. 11, pt. 1, § 2(2)(a–f). A person violates this section if he or she:
   (a) distributes or circulates a terrorist publication;
   (b) gives, sells or lends such a publication;
   (c) offers such a publication for sale or loan;
   (d) provides a service to others that enables them to obtain, read, listen to or look at such a publication, or to acquire it by means of a gift, sale, or loan;
   (e) transmits the content of such a publication electronically; or
   (f) has such a publication in his possession with a view to its becoming the subject of conduct falling within any of paragraphs (a) to (e).
Id.
52 Id. § 2(5)(a–b).
Like the encouragement of terrorism offense, a person commits a dissemination of terrorist publications offense if, at the time he engages in such conduct, a) he intends to directly or indirectly encourage terrorism or b) “he is reckless as to whether his conduct” encourages or assists in the commission of terrorism.\footnote{Id. § 2(1)(a), (c). A person violates this section if (a) he intends an effect of his conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism; (b) he intends an effect of his conduct to be the provision of assistance in the commission or preparation of such acts; or (c) he is reckless as to whether his conduct has an effect mentioned in paragraph (a) or (b).}

The definition of a “terrorist publication” in the dissemination offense is similar to the definition of “statement” in the encouragement offense.\footnote{Id. § 2(3)(a–b).} A publication is a “terrorist publication” if it is likely “to be understood . . . as a direct or indirect encouragement . . . of terrorism.”\footnote{Id. § 2(3)(a). The full definition of a terrorist publication is a publication that is likely: (a) to be understood, by some or all of the persons to whom it is or may become available as a consequence of that conduct, as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism; or (b) to be useful in the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them.} Subsection four defines “matter that is likely to be understood . . . as indirectly encouraging” terrorism as any matter which a) glorifies terrorist acts and which, b) under the circumstances, “could reasonably be expected” to cause a person to believe that he should “[emulate]” the glorified acts of terrorism.\footnote{Id. § 2(4)(a–b).}

Like the encouragement offense, the dissemination offense considers whether the publication glorifies specific act(s)—as opposed to general act(s)—of terrorism to be irrelevant, as well as whether any person was actually encouraged by the publication to commit acts of terrorism.\footnote{See id. § 2(7–8).} However, the Act creates a defense to the offense of dissemination of terrorist publication and “makes it clear that those who simply transmit material which does not reflect their views” will not be convicted.\footnote{See 675 PARL. DEB., H.L. (5th ser.) (2005) 1386; Terrorism Act, 2006, c. 11, pt. 1, § 2(9)(a–b).} A person claiming this defense must show that “it was clear, [under] all the circumstances,” that the
publication in question “neither expressed his views nor had his endorsement.”

Debate history shows that this defense attempts to prevent prosecutions against academics or librarians, as well as “a substantial inhibition to free and open expression in instruction, teaching, discussion and debate.”

3. Proscription of Terrorist Organizations

The UK Terrorism Act 2006 supplements the UK Terrorism Act 2000, which originally bestowed upon the government the power to proscribe terrorist organizations. The UK Terrorism Act 2006 expands the government’s ability to proscribe terrorist organizations that “[promote] or [encourage] terrorism.” The 2000 Act addresses the “promot[ion] or encourage[ment] [of] terrorism” by organizations in a one-lined subsection; the 2006 Act expands upon the 2000 Act by adding an entire section regarding the “glorification” of terrorism by terrorist organizations. Debate history of the 2006 Act shows that because it created a new encouragement of terrorism offense for individuals, Parliament felt that “it [made] sense for the proscription . . . [of Terrorist Organizations offense] to mirror it.” Before introduction of the initial bill, the Home Secretary explained that the 2000 Act “concentrate[d] only on those groups that [the home secretary] believe[ed to be] involved in or concerned in terrorism.” The 2006 Act excluded groups that did not commit terrorism, but still provided support to terrorism and radicalization. The Home Secretary explained that the 2006 Act makes it unacceptable for an organization to foster a climate of terrorism glorification.

59 Terrorism Act, 2006, c. 11, pt. 1, § 2(9)(a). The defense is proven by showing:

(a) that the matter by reference to which the publication in question was a terrorist publication neither expressed his views nor had his endorsement . . . ; and

(b) that it was clear, in all the circumstances of the conduct, that that matter did not express his views and . . . did not have his endorsement.

60 676 PARL. DEB., H.L. (5th ser.) (2005) 620.
62 See Terrorism Act, 2000, c. 11, pt. 2, § 3.
63 Terrorism Act, 2006, c. 11, pt. 2, § 21(5A).
64 See Terrorism Act, 2000, c. 11, pt. 2, § 3(5)(c).
67 Second Home Secretary Letter, supra note 35.
68 Id.
69 Id.
The 2006 Act’s additions to the 2000 Act make the glorification of terrorism by a terrorist organization unlawful.\textsuperscript{70} The 2006 Act defines “glorification”\textsuperscript{71} of terrorism by a terrorist organization as “any form of praise or celebration” that may be “communication without words consisting of sounds or images or both.”\textsuperscript{72} Based on the text of the Act, an organization may not only be proscribed if its activities glorify terrorist acts, but also if it acts in a manner that causes it to be “associated” with statements that glorify terrorism.\textsuperscript{73}

4. The Definition of “Terrorism”

The 2006 Act starts with the 2000 Act’s definition of terrorism\textsuperscript{74} but slightly broadens the 2000 Act’s definition.\textsuperscript{75} The 2006 Act defines terrorism actions as those that:

(a) [involve] serious violence against a person,
(b) [involve] serious damage to property,
(c) [endanger] a person’s life, other than that of the person committing the action,

\textsuperscript{70} Terrorism Act, 2006, c. 11, pt. 2, § 21(5B)(a–b). A statement by a terrorist organization may result in that organization’s proscription:

if there are persons who may become aware of it who could reasonably be expected to infer that what is being glorified, is being glorified as:

(a) conduct that should be emulated in existing circumstances, or
(b) conduct that is illustrative of a type of conduct that should be so emulated.


\textsuperscript{72} Terrorism Act, 2006, c. 11, pt. 2, § 21(5C).

\textsuperscript{73} Id. § 21(5A)(a–b). An organization may be proscribed from the United Kingdom if its activities:

(a) include the unlawful glorification of the commission or preparation (whether in the past, in the future, or generally) of acts of terrorism; or
(b) are carried out in a manner that ensures that the organisation is associated with statements containing any such glorification.

\textsuperscript{74} Id. pt. 1, § 20(1–2). The 2006 Act says that “expressions used in [Part 1 of the Act] and in the Terrorism Act 2000 (c. 11) have the same meanings in this part as in that Act,” and that in Part 1 “‘act of terrorism’ includes anything constituting an action taken for the purposes of terrorism, within the meaning of the Terrorism Act 2000.” Id. (citing Terrorism Act, 2000, c. 11, pt. 1, §1(5)).

\textsuperscript{75} See id. pt. 2, § 34(a).
In order for an action to fall within the definition of terrorism, “the use or threat” must be “designed to influence the government or to intimidate the public or a section of the public” and “made for the purpose of advancing a political, religious, or ideological cause.”

B. United States: Traditional Criminal Statutes and the U.S.A. Patriot Act

1. Traditional Criminal Statutes

The United States often charges and convicts individuals for planning terrorism with violations of criminal statutes that are not exclusively for terrorism-related crimes. In the five years following September 11, the charge of fraud and false statements has been the most commonly used charge for terrorism criminal convictions, followed closely by two other forms of fraud offenses. Conspiracy to commit offense or defraud the United States is another commonly used tool to charge and convict individuals for terrorism. Terror suspects are in addition charged under terrorism-related statutes, such as providing material support to terrorists or the general terrorism criminal statute.

2. The U.S.A. Patriot Act

In the wake of September 11, Congress passed the Patriot Act, which is “aimed at ‘domestic terrorism.’” In March 2006, President Bush signed the U.S.A. Patriot Improvement and Reauthorization Act of 2005 to renew the

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76 Terrorism Act, 2000, c. 11, pt. 1, s 1(2)(a–e).
77 Id. s 1(1)(b–c).
81 Trac Reports, supra note 78; see also 18 U.S.C. §§ 2332b, 2339(A) (2006).
original Patriot Act and add new provisions.\textsuperscript{84} Although the Patriot Act has been heavily criticized for threatening civil liberties, including freedom of speech,\textsuperscript{85} it does not go so far as to criminalize specific forms of speech, such as the encouragement of terrorism.\textsuperscript{86} The Patriot Act attempts to curtail terrorism by focusing on surveillance,\textsuperscript{87} terrorist financing,\textsuperscript{88} and immigration;\textsuperscript{89} it also strengthens the criminal laws against terrorism.\textsuperscript{90} The Patriot Act allows the detention of suspected terrorists, as well.\textsuperscript{91} One important aspect of the Patriot Act is its “expansion of [the] regional information sharing system” to increase information sharing between federal, state, and local law enforcement agencies that may enhance investigations and prosecutions of terrorists.\textsuperscript{92}

II. REASONS FOR THE DIFFERENCES IN COUNTERTERRORISM LAW IN THE UNITED KINGDOM AND UNITED STATES

As Part I illustrated, both the United States and the United Kingdom have enacted major anti-terror legislation in the beginning of the 21st century.\textsuperscript{93} Much of the motivation for the new laws is attributable to acts of terrorism that have occurred throughout the world since 2000.\textsuperscript{94} The United States attempts


\textsuperscript{85} See, e.g., The American Civil Liberties Union, The USA Patriot Act and Government Actions that Threaten Our Civil Liberties, available at http://www.aclu.org/FilesPDFs/patriot%20act%20flyer.pdf.


\textsuperscript{88} Id. § 302. The Patriot Act also provides countermeasures to money laundering, which is a primary means of financing terrorism. Id.

\textsuperscript{89} Id. §§ 401–405. The Act authorizes appropriations for an increase in border patrol personnel. See generally H.R. REP. No. 109-333, supra note 86.

\textsuperscript{90} Patent Act § 801–817.

\textsuperscript{91} Id. § 412.

\textsuperscript{92} Id. § 701.


\textsuperscript{94} The September 11 attacks in the United States in 2001, the May 2004 Madrid bombings in Spain, the July 7, 2007 London Bombings in the United Kingdom, and the May 2003 Casablanca bombings in Morocco are all attributable to radical Islamists. See, e.g., Hoong, supra note 9; BBC News Europe, Madrid Blasts: the
to curtail terrorism by focusing on surveillance, terrorist financing, and immigration; thus far, it has steered away from criminalizing speech. The United Kingdom, on the other hand, has passed the UK Terrorism Act 2006, which criminalizes speech that encourages terrorism. Therefore, the 2006 Act would be unconstitutional in the United States.

The differences in the counterterrorism laws of each country can be attributed to both systematic differences in the constitutions of each country, as well as to cultural differences in the United States and the United Kingdom. Part II addresses each of these differences.

A. United States and United Kingdom: Muslim Cultures Compared

British public officials, members of Parliament, the media, and opponents and proponents of the 2006 Act have made speeches and comments that clarify terrorist speech by radical Muslims as the target of the 2006 Act.

Because the United Kingdom focuses so intently on British Muslims in its terror legislation, it is important to examine how the U.K. Muslim culture contrasts with the United States Muslim culture to understand the differences between each country’s counterterrorism legislation and strategy.

1. Muslim Culture in the United States

Although there is widespread agreement that Islam is the fastest-growing religion in the United States, there is no clear count of the Muslim population in the United States because the Census Bureau does not gather

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95 See supra Part I.B.
96 See supra Part I.A.
97 See infra Part II.B.3.b.
98 See infra Part II.B.
99 See infra Part II.A.
100 675 PARL. DEB., H.L. (5th ser.) (2005) 1384.
101 See, e.g., First Home Secretary Letter, supra note 37; Second Home Secretary Letter, supra note 35. A month after the July 7 London bombings, Former Prime Minister Tony Blair warned, “[l]et no one be in any doubt . . . . The rules of the game are changing . . . .” He warned that those who do not “share and support the values that sustain the British way of life,” or incite hatred, “have no place here.” Caldwell, supra note 16, at 42. In early 2006, Blair expressed his opinion that Islamist preachers who condone terrorism “should not be in [Britain].” Id.
Estimates of the total (not adult) Muslim population in America range broadly from one to seven million. Although estimates vary, three to six million Muslims, or one to two percent of the total American population, is the most reasonable estimate.

American Muslims are well-integrated into American society. Their “[r]elative prosperity, high levels of education, and political participation” is indicative of their successful integration. Although Muslims are often typecast as holding less-desirable jobs, the reality is actually quite different, as the majority of American Muslims work in “technical, white-collar, and professional fields.” Estimates show that twice as many Muslim American adults have college degrees compared to American adults overall, and the median family income of Muslim Americans is substantially higher than the national median. When asked why they immigrate into the United States, Muslims usually explain that they came to capitalize on the economic and educational opportunities and emphasize the constitutional protections of

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103 See U.S. Census Bureau Question & Answer Center, Question: Does the Census Bureau have Data for Religion?, https://ask.census.gov/cgi-bin/askcensus.cgi/php/enduser/std_alp.php (search for “information on religion”; then follow “Information on Religion” hyperlink) (last visited Jan. 19, 2008). It is illegal for the Census Bureau to ask a mandatory question based on religious affiliation, but it may collect religious information in voluntary household surveys. Id. In the 2001 American Religious Identification Survey, approximately less than one percent of the respondents answered “Muslim” and/or “Islamic.” U.S. Census Bureau, The 2008 Statistical Abstract, the National Data Book, Table 74: Self Described Religious Identification of Adult Population: 1990 and 2001, available at http://www.census.gov/compendia/statab/tables/08s0077.xls, (last visited Jan. 19, 2008). This survey is a random and voluntary telephone survey of over 50,000 American households. Id. The survey estimated that 1,104,000 out of the 207,980,000 adult population were Muslim or Islamic. Id.

104 See, e.g., David Briggs, Needing Each Other: Recent World Events Force Immigrant and Black Muslims to Become Closer, PLAIN DEALER (Cleveland), Oct. 21, 2006, at E1; Andrea Elliot, A Muslim Leader in Brooklyn, Reconciling 2 Worlds, N.Y. TIMES, Mar. 5, 2006, at 1; Sheila M. Poole, Islam in the Class; Religious Base Adds to Lessons, ATLANTA J. CONST., Aug. 24, 2005, at 4F. Muslim groups estimate that there are at least six million Muslims in the United States, whereas surveys conducted by non-Muslims produce much lower estimates of American Muslims. BARRETT, supra note 102, at 8–9. Muslim leaders become angered at such estimates because they claim that they ignore immigrant and poor black Muslims. Id.

105 BARRETT, supra note 102, at 9–10.

106 Id.

107 Id.

108 Id. at 9. For instance, Muslims often hold jobs in the areas of “information technology, corporate management, medicine, and education.” Id.

109 Id. Studies show that only twenty-seven percent of American adults have college educations, whereas fifty-nine percent of Muslim American adults have college degrees. Id.

110 Id. One study showed that the median Muslim family income is sixty thousand a year, compared to the national level of fifty thousand. Id.
freedom of speech and religion that are rare in most predominately Muslim countries.111

Although Muslims are, for the most part, “an American immigration success story,” there are exceptions.112 In 1993, a jury convicted Egyptian cleric Omar Abdul Rahman of conspiring to bomb major landmarks in New York;113 he enjoyed the United States’ free speech guarantees before his arrest.114 In the years and decade prior to his arrest, Rahman spoke to groups of young, anti-American Muslim men in New Jersey.115 Among others, the men who bombed the World Trade Center in 1993 were in attendance and listened to him call the United States “the great Satan.”116

Following the events of September 11, the government has stopped much of the militant networking and fundraising by fundamentalist Islamic groups.117 Public anti-American speeches rarely occur.118 Fundamentalists groups are not as visible today, but they still exist secretly or as privately as possible.119 A large majority of them disagree with United States foreign policy in the Middle East.120 Since September 11, some Muslims feel disrespected by fellow Americans and question whether they are accepted as true Americans.121

One example of successful Muslim integration occurred in November 2006, when Minnesota voters elected the first Muslim United States Congressman, Keith Ellison.122 Ellison made no issue of his religious faith while he campaigned, but others made an issue of both his request and his faith

111 Id. at 4.
112 Id. at 5.
114 Id.
116 See, e.g., KERSCH, supra note 82, at 162.
117 BARRETT, supra note 102, at 275.
118 Id. Some believe that speeches such as those are reserved for private meetings or spoken in other languages. Id.
119 Id.
120 Id. at 5. Many American Muslims strongly disagree with the military action in Iraq and Afghanistan and the United States support of Israel. Id.
121 Id. at 6.
122 Editorial, Fear and Bigotry in Congress, NEW YORK TIMES, Dec. 23, 2006, at A18. Although he is a non-immigrant born into a family that arrived in American in the 1700s, Ellison converted to Islam as a college student. Id.; Bill Maxwell, Religious Intolerance is Un-American, ST. PETERSBURG TIMES, Dec. 31, 2006, at 3P.
when he requested to be sworn into office using the Koran. While most people were unbothered, radio host Dennis Prager and Congressman Virgil Goode voiced strong disapproval. Rumors also spread that terrorists funded Ellison’s campaign; however, chat rooms linked to al-Qaeda expressed strong disapproval of Ellison because “he is one of them” whom they would continue to fight through their jihad.

Although both were vocal in their disapproval of a Muslim congressman, Goode and Prager display the views of a small minority in this country. Ellison’s election suggests that the United States welcomes Muslims.

2. Muslim Culture in the United Kingdom

In the United Kingdom, there are approximately 1.6 million Muslims, which is 3.1 percent of the population; Islam is the most common religion after Christianity. One million Muslims reside in London alone, making up one eighth of its population. In addition to having a larger percentage of Muslims in its population than the United States, the United Kingdom has been forced to deal with homegrown terrorists: British born Muslims of Middle-Eastern descent. Unlike the foreign perpetrators of the September 11 attacks

123 Waleed Aly, It’s Tough, but Not Impossible, for Muslims to Gain Trust, WEEKEND AUSTRALIAN, Dec. 9, 2006, at 27.
124 Id. Radio host Prager said that America is “interested in only one book, the Bible,” and that if Ellison was “incapable of taking an oath on that book, [he should not] serve in Congress.” Id. The radio host claimed Ellison’s choice would “embolden Islamic extremists.” Fear and Bigotry, supra note 122. Prager also claimed that his choice “would do more damage to the unity of America and to the value system that has formed this country than the terrorists of 9/11.” Aly, supra note 123.
125 Maxwell, supra note 122, at 3P. Congressman Virgil H. Goode mailed a letter to his constituents expressing his disapproval of the Minnesota district’s “evil and un-American” election of a Muslim, and disapproval of Ellison’s decision to hold the Koran as he was sworn into office. Id. Goode used Ellison’s election to reiterate his political beliefs that the United States should reduce legal immigration and stop “allowing persons from the Middle East to come to this country.” Id. Goode said that he believes such a policy is “necessary to preserve the values and beliefs traditional to the United States.” Id.
126 Aly, supra note 123, at 27.
127 Fear and Bigotry, supra note 122. Minnesota voters who elected him, on the other hand, recognized that Ellison “works hard, pays taxes and Social Security, and serves his community.” Maxwell, supra note 122, at 3P.
128 Fear and Bigotry, supra note 122.
130 The Muslim Council of Britain, supra note 129.
131 Caldwell, supra note 16, at 42.
132 See, e.g., id.
in the United States, young British Muslims committed the July 7 London bombings.  

The United Kingdom once had a strong reputation for the effective immigration of foreigners.  This all began to change toward the latter part of the 20th Century, when British Muslims began to feel alienated.  According to a Pew poll, eighty-one percent of British Muslims think of themselves first as a Muslim and second as citizens of Britain.  That percentage exceeded all of the other countries surveyed except for Pakistan.  One potential explanation for the increased alienation of British Muslims is the United Kingdom’s alliance with the United States’ war on terror, which is considered by many Muslims as a “global war on Islam.”

For centuries, Britain prided itself in its tradition of welcoming those who felt oppressed by their native lands.  At one time, there was a common belief that Britain’s long history of broad civil liberties “helped stave off” terrorism by radical Islamists on British soil.  Today, however, Britain’s tolerance has arguably created a “haven” for Islamic extremists; the United Kingdom had

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133 Id.
134 Id. at 47.
135 Id.
136 The Pew Global Attitudes Project is a series of public opinion surveys conducted worldwide that address a number of issues. Pew Global Attitudes Project, About the Project, http://pewglobal.org/about/ (last visited Feb. 21, 2007). The project is led by former U.S. Secretary of State Madeleine Albright and the president of the Pew Research Center, among others. Id. The project has conducted over 100,000 interviews in 50 countries. Id.
139 Ash, supra note 137. One possibility is that about one half of British Muslims are of Pakistani national origin, which was the only country with numbers higher than Britain in that poll. Id. France, on the other hand, has strongly opposed the global war on terror. Id.
140 See, e.g., Caldwell, supra note 16, at 42. Individuals, such as Karl Marx and Friedrich Engels, and groups, such as the Russian Jews during the 19th century and the Huguenots during the 17th century, immigrated into Britain to escape oppression at home. Id.
142 Id. at 9. Potential Islamic extremist recruits are carefully selected and then targeted by recruiters. Rosie Cowan & Richard Norton-Taylor, Britain Now No. 1 Al-Qaeda Target, GUARDIAN, Oct. 10, 2006, at 1.
become a “breeding ground for hate, fed by a militant version of Islam” for a long period prior to the July 7 bombings.\textsuperscript{143} During the 1980’s and 1990’s, “a hands-off government allowed London to become a haven for radicals and a center for calls to jihad.”\textsuperscript{144} As a result, prior to the July 7 London bombings, the city became a “crossroads for would-be terrorists who used it as a home base, where they could raise money, recruit members and draw inspiration from the militant messages.”\textsuperscript{145}

Terrorists that were later involved in terrorist attacks around the world used London as a home base.\textsuperscript{146} In an interview before his arrest in September of 2006,\textsuperscript{147} Abu Abdullah said that “he would ‘love’ to kill British troops in Afghanistan, called the Sept[ember] 11 . . . attacks a ‘deserved punch in the nose’ for the United States[,] and described President Bush as a ‘scalp that needs to be taken.’”\textsuperscript{148} Radical cleric Sheik Omar Bakri Mohammed called for Jihad against the United Kingdom and urged young Muslims to become part of the insurgency in Iraq.\textsuperscript{149} In December 2004, five hundred people attended a sermon by Mohammed where he vowed that “if Western governments did not change their policies, Muslims would give them ‘a 9/11 day after day after day.’”\textsuperscript{150}

The recruits are usually young Muslim men in their teens and twenties, often targeted on college campuses, because recruiters have begun to avoid traditional recruitment locations such as mosques and Islamic bookshops. \textit{Id.}; Sebastian Rotella et al., \textit{Seeds of Islamic Militancy Find Fertile Soil in Britain}, 	extit{L.A. Times}, Aug. 14, 2006, at A1. The recruiters are often imams, or “experienced militants” who fought against British and American forces in Iraq or Afghanistan. Cowan & Norton-Taylor, \textit{supra}. Recruiters begin with weekend and night meetings of religious lectures and prayers that slowly become more radical discussions about the west and Islam. \textit{Id.} They build up recruits, and then push them to become Muslim “patriots” who are willing to turn against the West. \textit{Id.} Next, they often teach the recruits how to make bombs, all the while creating a sense of brotherhood among the recruits. \textit{Id.} Many times there are initiation rituals where the recruiters put the recruits in situations where they must show their loyalty to one another. \textit{Id.} The United Kingdom is a target for recruitment of radical Islamic men because of its large Pakistani immigrant population and the alienation felt by many in the Muslim community. \textit{Id.}; Rotella et al., \textit{supra}, at A1.
Abu Hamza al-Masri, the former leader of the Finsbury Park mosque, openly preached violence for years before his arrest in April 2004. Other prominent jihadists [also] . . . found a safe haven” in London during the 1990s.

In the year after the July 7 bombings in London, the threat of Islamic terror increased. In November 2006, investigators had targeted thirty terrorist plots. One of those terrorist plots led to the arrests of over twenty British Muslim citizens in August 2006 in connection with a terrorist plot to blow up transatlantic airliners. According to a Populus poll of British Muslims completed in mid-2006, seven percent answered that there are “circumstances under which . . . suicide bombings can . . . be justified” against civilians in the United Kingdom. The poll also found that thirteen percent of British Muslims consider the July 7 bombers “martyrs.” Two percent of those Muslims polled “would be proud if a family member joined Al Qaeda,” while sixteen percent would be indifferent. The results of the poll are

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151 Id. Charges against al-Masri included incitement to murder. Caldwell, supra note 16, at 42. Al-Masri claimed that members of the British domestic security service tolerated his callings for jihad and violence from 1997 to 2000 when they told him, “It’s freedom of speech. You don’t have to worry as long as we don’t see blood on the streets.” Id. Britain ignored pleas to arrest al-Masri from foreign governments for years, despite accusations against him as being an organizer of specific terrorist plots. Id.

152 Caldwell, supra note 16, at 42. Prominent jihadists include: Omar Bakri Muhammed, who fled Britain after the July 7 bombings; Abu-Musab al-Suri, who was captured by “Coalition forces in Pakistan” in Fall 2005; and “Abu Qatada, who led several European al-Qaeda cells and is now fighting deportation to his native Jordan.” Id.


155 Don Van Natta, Jr. et al., In Tapes, Receipts, and a Diary, Details of the British Terror Case, N.Y. TIMES, Aug. 28, 2006, at 1. The British home-grown terrorists planned to mix liquid explosives in bottles and detonate them on transatlantic flights with batteries from electrical items such as MP3 players. See id.; Marina Jimenez, Pakistan Arrest Points to Al-Qaeda Role in Plot, TORONTO GLOBE AND MAIL, Aug. 12, 2006, at A1. The suicide bombers were close to performing a test run of their operation, and had bought airplane tickets and had already made a “martyrdom tape.” See id.; Van Natta, Jr. et al., supra note 155, at 1.

156 Populus researches “attitudes to social, business, economic, and political issues.” Populus Limited, Leaders in Reputation Research, http://www.populuslimited.com/ (last visited Feb. 17, 2007). Populus is the pollster for THE TIMES, the British daily newspaper. Id.


158 Phillips, supra note 153; Populus Poll, supra note 157.

159 Phillips, supra note 153; Populus Poll, supra note 157.

similar to the results of other polls of British Muslims. Although these numbers represent a very small minority of British Muslims, they amount to “hundreds of thousands of [the 1.6 million] British Muslims who either justify or support the murder of their fellow citizens.”

While a Pew opinion poll in Europe found that Britain is “more sympathetic to its Muslim minority than any other [European] country,” British Muslims view Westerners more negatively than Muslims in France, Spain, and Germany. This view is perpetuated by a common Muslim belief that “the West is engaged in a conspiracy to attack and destroy the Islamic world.” Some Muslims blame Britain itself for terrorist attacks against it.

The feelings of alienation of British Muslims are similar to those in other European countries, but they are more predominant in the United Kingdom. One possible explanation for those feelings of alienation is that the majority of British Muslims fail to prosper economically. A main cause of British Muslims’ economic struggles is that the vast majority of British Muslim women do not work, especially in comparison to Muslim women in France and British women of other religions.

Muslim feelings of alienation are growing stronger among younger, second-generation Muslims. Although these second-generation British Muslims did not have to face the hardships that their immigrant parents’ faced when they came to a new country, they resent the difficulties that they face in finding economic success and employment opportunities.

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161 E.g., Riddell, supra note 157, at 6; Bernard Dineen, Turmoil, Intolerance, and a Lesson for Migrants, YORKSHIRE POST, Feb. 13, 2006; Phillips, supra note 153.
162 See generally Populus Poll, supra note 157.
163 Phillips, supra note 153.
164 See generally id.; PEW POLL No. 2, supra note 138, at 22, 59–60.
165 See generally Phillips, supra note 153; PEW POLL, supra note 137, at 15.
166 See generally Phillips, supra note 153.
168 See Look Out, Europe, They Say, ECONOMIST, June 24, 2006, at 30 [hereinafter Look Out].
169 See id.
170 See id. Muslims in Europe come from different countries, and those in Britain are predominately from Pakistan or Bangladesh. Id.
171 See, e.g., Caldwell, supra note 16, at 42.
172 Rotella et al., supra note 142, at A1. Many British Muslims claim that there is “no equality in jobs,” and feel that they are unable to get good jobs because of their skin color even though they are educated and qualified. Id. at A6. Once they find a job, they often feel that they are unable to move up the ladder, despite their hard work and good performance, for the very same reasons. Id.
In addition to the Muslims’ economic hardships and the war in Iraq, another culture war is raging in Britain and across Europe. The debate about banning veils worn by Muslim women in Britain began in fall 2006 when former Foreign Secretary Jack Straw said that Muslim women should remove their veils before entering his office.\(^\text{173}\) Although many British Muslims are outraged by particular statements\(^\text{174}\) and actions\(^\text{175}\) that have occurred since the veil debate began, some in the United Kingdom believe that the veil ban is necessary to ensure that Muslims are fully integrated into society\(^\text{176}\) and to maintain safety in the United Kingdom.\(^\text{177}\) Former Prime Minister Tony Blair stated that immigrants have “a ‘duty to integrate’” and should stay away unless they can accept the United Kingdom’s partial tolerance of Islam.\(^\text{178}\) After a college in the United Kingdom attempted to ban both the head-covering hijab and the face-covering niqab, Britain’s Higher Education Minister responded by supporting the ban on the niqab, but not the ban on the hijab.\(^\text{179}\) Minister Bill Rammell explained that Muslim students in the United Kingdom deserve


\(^{175}\) One school suspended a Muslim teaching assistant for teaching in a veil that only showed her eyes. Mark of Separation, supra note 174.

\(^{176}\) Blair believes that showing the face at a job that requires direct communication with people is “plain common sense,” and blamed the veil as a reason for Muslims’ lack of integration into British society. Teaching Assistant, supra note 174; British Watchdog Warns on Muslim Veil Debate, Oct. 22, 2006, MSNBC.com, available at http://www.msnbc.msn.com/id/15375910/ [hereinafter British Watchdog]; Stay Away, supra note 174; Mark of Separation, supra note 174. Blair supported his belief by stating that evidence shows that integration by Muslims leads to better achievements. Mark of Separation, supra note 174.

\(^{177}\) In December 2006, the government revealed that a man wanted in connection with a police officer’s murder may have escaped Britain by dressing as a Muslim woman in a face-covering niqab. Martin Hodgson, Muslim Veils Should Be Illegal in Public, Says Bishop, INDEPENDENT (London), Dec. 24, 2006, available at http://news.independent.co.uk/uk/this_britain/article2100007.ece. After that incident, a bishop of the Church of England expressed his belief that Muslim women should be banned from wearing the veil in public by outlawing the veil in places such as airports, train and subway stations. Id.

\(^{178}\) Stay Away, supra note 174. Still, Blair claimed that “[equal] respect and treatment [of] all citizens” is a key national value, and that the Department for Education and Skills would ensure that faith schools teach “tolerance and respect” for other religions. Id.

\(^{179}\) Staff and Agencies, Rammell Backs University’s Muslim Veil Ban, INDEPENDENT (London), Oct. 11, 2006, available at http://education.guardian.co.uk/higher/news/story/0,1896776,00.html [hereinafter Rammell Backs]. He believes that “teachers would feel very uncomfortable” teaching students with covered faces. Id.
tolerance, but stressed that there are limits to their requests. The Minister warned that his country’s limited tolerance for Muslim’s religious needs may further create “‘fertile recruitment grounds’” for young Muslim extremists within Britain.

3. Different Muslim Cultures in the United States and the United Kingdom Result in Different Counterterrorism Perspectives

The noticeable disparities in British and American Muslim cultures create different threats toward each country that, in turn, result in distinct perspectives of the fight against domestic terrorism.

a. The United Kingdom’s Counterterrorism Perspective

The United Kingdom has a Catch-22 situation. It has a home-grown terrorism problem; young Muslim men are willing to turn their backs on the country in which they were born and commit heinous acts of terrorism. At the same time, the government has already alienated the Muslim population whose aid it needs to help combat radical Islamic terrorism. To further compound these issues, a number of radical Muslims within the United Kingdom glorify terrorism. The United Kingdom included the new encouragement of terrorism offense in the 2006 Act to stop those individuals

180 Id. He further commented on the issue, saying that religious needs “cannot automatically trump all others,” and that some demands were “[‘unrealistic’ in a secular, historically Christian country] because Muslims should not expect their religious needs to be granted as much as would be the case in a Muslim country. Id.

181 Id.

182 See infra Part II.A.3.a–b.

183 See supra note 9. The four men involved in the attempted car bombings in London and Glasgow, Scotland, in June 2007 were not considered home-grown terrorists because three of the four were born outside of the United Kingdom and did not move there until they received jobs as doctors. William Tinning, Terror Charge Doctor Is Held, HERALD (Glasgow), Aug. 14, 2007, at 5; Charlotte Gill, Doctor Held on M6 Charged over Terror Bomb Plot, DAILY MAIL (London), July 20, 2007, at 45; Rashid Razaq, Glasgow Airport Bomber ‘Talked of Martyrdom,’ EVENING STANDARD (London), Aug. 20, 2007, at 6. The other man was born in Britain but moved to Iraq when he was five and did not return until he received his job as a doctor in the United Kingdom. Deborah Haynes et al., Bombing Plots ‘Were Carried Out with bin Laden’s Blessing,’ TIMES (London), July 6, 2007, at 24. Although the four men involved in the United Kingdom’s most recent terrorist acts varied from the home-grown July 7 suicide bombers and the masterminds of the transatlantic airliner bomb plot, home-grown terrorists in the United Kingdom have far outnumbered terrorists who immigrated there. See generally Some Recent Terror Attacks and Plots, SEATTLE TIMES, Sept. 6, 2007, at A12.

184 See supra Part II.A.2; infra Part III.B.

185 See supra Parts IA, II.A.2.
from glorifying terrorism despite opponents’ urgings that doing so may further alienate the Muslim community.186

In fashioning its counterterrorism approach, the United Kingdom has attempted to bolster its law enforcement for all citizens,187 while simultaneously ensuring that mainstream Muslims, who are the overwhelming majority of Muslims within Britain,188 feel included.189 Although the United Kingdom does focus on immigration and surveillance, it focuses more on strengthening the partnership between the government and the Muslim community and on expanding the abilities of police and security services to catch terrorists.190 The new Prime Minister, Gordon Brown, has stated his goal of winning over the “hearts and minds”191 of Britain’s Muslim community in order to “tackle extremism on the ground.”192 Brown has taken a different approach than his predecessor Tony Blair; for example, he has discontinued the use of the phrase “war on terror” and did not use the word “Muslim” in the days after the attempted car bombings.193 He has modified his language in order to “encourage a ‘strong consensual approach’” to all of Britain’s communities.194 His approach appears to have pleased Muslim groups who feel that they are “being treated fairly and being embraced as citizens” more than when Tony Blair was the Prime Minister.195 By fostering such relations

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186 See supra Part I.A, infra Part III.B.
187 The United Kingdom bolsters its law enforcement by expanding counterterrorism laws in order to “enable the police and Security Services to track down terrorists and prevent acts of terrorism.” Home Office, How We’re Protecting the UK, http://www.homeoffice.gov.uk/security/protecting-the-uk/ (last visited Oct. 11, 2007) [hereinafter How We’re Protecting].
188 E.g., Muslims: Over-reaction 'Could Lead New Generation into Arms of Extremists,' Warn Leaders, SCOTLAND ON SUNDAY, Aug. 13, 2006, at 13; see also supra Part II.A.2.
189 Caldwell, supra note 16, at 42.
190 How We’re Protecting, supra note 187. The government’s focus on the Muslim community strengthens their relationship by working closely with mosque officials, encouraging Muslims to become involved in their communities, and teaches parents and mosques how to “deal with extremist tendencies.” Home Office, Communities to Lead Response to Extremism, Nov. 10, 2005, http://www.homeoffice.gov.uk/about-us/news/communities-to-lead-response [hereinafter Community Approach].
193 Kevin Sullivan, Brown Calmly Prevails in First Days as Premier, WASH. POST, July 4, 2007, at A10. Tony Blair was criticized after the July 7 bombings for “demoniz[ing] Muslims” when he proposed the Encouragement of Terrorism offense. Id.
194 Id.
195 Dipesh Gadher, The Battle for Hearts and Minds, SUNDAY TIMES (U.K.), July 8, 2007, at 14. The new “hearts and minds” plan proposes an extension of “citizenship education nationally into madrasahs and
with the Muslim community, the United Kingdom increases the likelihood that members of the mainstream Muslim community will denounce radicalization\textsuperscript{196} and report activity among Muslim extremists to the authorities.\textsuperscript{197}

One commentator believes that the United Kingdom’s antiterrorism law attempts to balance the increased demand for protection since the July 7 bombings with its unwillingness to single out Muslims.\textsuperscript{198} As a result, he explains, legislation that \textit{explicitly} singled out Muslims has been rejected, such as suggestions that radical mosques be closed.\textsuperscript{199} Although the text of the encouragement of terrorism offense in the UK Terrorism Act 2006 does not expressly mention Muslims, its proponents were clear before its passage that it is aimed at speech by radical Muslims.\textsuperscript{200} Considering the government’s self-declared dedication to strengthening its ties with the Muslim community,\textsuperscript{201} the risk of further Muslim alienation threatened by the 2006 Act suggests that the Act is counterproductive.\textsuperscript{202}

\textit{b. The United States’ Counterterrorism Perspective}

The United States’ counterterrorism perspective differs from the United Kingdom’s.\textsuperscript{203} Long before September 11, the United States feared Islamic terrorists rooting themselves in Europe and the United Kingdom, but targeting the United States.\textsuperscript{204} September 11, the 2004 Madrid bombings, and the July 7

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supplementary schools.” \textit{Id.} A mosque council is providing material to be used in “every main mosque in [London] and the government wants to see it rolled out nationally.” \textit{Id.}\textsuperscript{196} Muslim leaders, often criticized for not taking enough action to stop radicalization, spoke out quickly to condemn the car bomb attacks in London and Glasgow. \textit{Id.} Comments such as these signaled a new movement: mainstream Muslim groups’ willingness to publicly discourage extremism. \textit{Id.}\textsuperscript{197} See Caldwell, supra note 16, at 43–44; How We’re Protecting, supra note 187; Community Approach, supra note 190.\textsuperscript{198} Caldwell, supra note 16, at 45.\textsuperscript{199} \textit{Id.}\textsuperscript{200} See supra Part II.A.\textsuperscript{201} Community Approach, supra note 190.\textsuperscript{202} Even if the 2006 Act is used effectively to prevent a “climate” which causes some individuals to believe that terrorists acts are acceptable and justifiable, it will likely alienate a large majority of the Muslim population whose aid the government needs to help stop future terrorism in the United Kingdom. See Second Home Secretary Letter, supra note 35; see also infra Part III.B.\textsuperscript{203} Caldwell, supra note 16, at 43.\textsuperscript{204} Demetri Sevastopulo, UK Seen as a Weak Link by the US, FINANCIAL TIMES (London), Asia Edition, Aug. 11, 2006, at 2. Those fears were based on the belief that the large Muslim populations in Europe and the United Kingdom would provide a great terrorist “base” to churn out a terrorist attack against the United States. \textit{Id.}
bombings in London\textsuperscript{205} increased those concerns, but the foiled plot by alleged terrorists to bomb transatlantic United States aircraft confirmed those anxieties.\textsuperscript{206}

The United States realizes that it does not have a homegrown terrorist problem like that of the United Kingdom and Europe,\textsuperscript{207} but many jihadists are citizens of France or Britain, and can enter the United States without visas.\textsuperscript{208} The United States realizes that Islamic terrorists targeting the United States “[count] less on domestic sleeper cells than on foreign infiltration;”\textsuperscript{209} therefore, it focuses heavily on immigration and surveillance.\textsuperscript{210}

Additionally, the United States does not have to address the problem of radical Muslims praising terrorists or glorifying terrorism.\textsuperscript{211} Thus, even though the United States could not pass an encouragement of terrorism offense similar to the United Kingdom’s without violating the Constitution,\textsuperscript{212} it has no practical reason to do so.

\textbf{B. Constitutional Differences: Free Speech Constraints in the United States as Compared to the United Kingdom}

The apparent distinctions between the United States and United Kingdom constitutions make laws that hinder freedom of speech possible in the United

\textsuperscript{205} See supra note 9 and accompanying text.

\textsuperscript{206} See Sevastopulo, supra note 204.

\textsuperscript{207} In the first detailed analysis of the United State’s increased risk of homegrown terror, the intelligence division of the New York Police Department determined that the United States faces a “serious terror threat” from “clusters” of “unremarkable” young Muslim men located in the northeast United States. Brian Ross et al., \textit{Exclusive: U.S. Studying Two Dozen Possible Homegrown Terrorists}, ABC NEWS: THE BLOTTER (Aug. 15, 2007, 7:00 a.m.), http://blogs.abcnews.com/theblotter/2007/08/exclusive-us-st.html (last visited Sept. 16, 2007). The report cites mosques, bookstores, and prisons as “radicalization incubators” where these men are being led down the path to radicalization. \textit{Id.} Still, the United States has not yet been attacked by any such home-grown terrorists and the report concedes that the threat from home-grown terrorism is much less severe in the United States than in Europe. \textit{Id.}

\textsuperscript{208} See Sevastopulo, supra note 204.


\textsuperscript{211} \textit{See supra} Part II.A.1.

\textsuperscript{212} \textit{See infra} Part II.B.3.
Kingdom but impossible in the United States. This section discusses the differences in the countries’ constitutional frameworks as well as the evolution of free speech in the respective countries. It also addresses the constitutionality of the UK Terror Act 2006 in the United Kingdom and the Act’s incompatibility with the United States Constitution.

1. Free Speech in the United States

The United States guarantees free speech through an explicit grant in the First Amendment of the Constitution, which states that “Congress shall make no law . . . abridging the freedom of speech.” Because the United States Constitution expressly grants a right to free speech and the Supreme Court has a “sworn duty to uphold the Constitution,” the Supreme Court must overturn all legislation that violates the free speech guarantee. The First Amendment applies to laws passed by state legislatures in addition to laws passed by the United States Congress.

The courts of the United States have not interpreted the First Amendment literally, and “[t]he First Amendment does not guarantee an absolute right to anyone to express their views any place, at any time, and in the way they want.” The United States Supreme Court balances free speech with other important interests such as public order, national security, and the right to a free trial.
a. The Evolution of Free Speech in the United States

Although the United States has had strong free speech protection since its inception,222 that protection has been somewhat shaky.223 Because the First Amendment is not an absolute freedom, the Supreme Court allows the government to regulate speech in some areas;224 however, the Supreme Court has not always been consistent regarding the degree to which speech may be regulated.225 When the government has attempted to regulate speech, especially during times of war, the Supreme Court has inconsistently approved and disapproved of governmental regulation.226

Before the Twentieth Century, the Supreme Court decided free speech cases using the Bad Tendency test,227 which allowed the government to outlaw speech with a tendency to “incite illegal conduct” or “obstruct government action.”228 During World War I, both the national and state governments proscribed “dangerous and counterproductive speech”229 through the implementation and vigorous enforcement230 of the Espionage Act,231 the Trading with the Enemy Act,232 and the Sedition Act.233

222 See U.S. CONST. AMEND. I.
223 See infra Part II.B.1.a.
226 See generally KERSCH, supra note 82.
227 Id. at 114. This test dated back to “Blackstone and English common law.” Id.
228 Id. For instance, in 1907, the Supreme Court upheld Colorado’s prosecution of a newspaper editor for criticizing a judge because the court reasoned that such criticism, regardless of its accuracy, “tends to obstruct the administration of justice.” Id. at 114–15 (citing Patterson v. Colorado, 205 U.S. 454 (1907)).
229 KERSCH, supra note 82, at 111.
230 Id. at 113. Shortly after passage of the Espionage Act, Learned Hand dismissed the Bad Tendency test in a federal district court decision, but the Second Circuit Court of Appeals overturned his decision and federal courts continued upholding convictions under the Espionage Act. Id. at 115–16 (citing Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917); Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919)). But see Masses Publishing Co. v. Patten, 246 F. 24 (2d Cir. 1917). For example, the Supreme Court upheld convictions under the Espionage Act for anti-draft materials, an antiwar speech that suggested draft opposition, and newspaper owners’ criticism of the war. KERSCH, supra note 82, at 115–17 (citing Schenck, 249 U.S. at 47; Debs, 249 U.S. at 211).
231 The Espionage Act criminalized false statements that intended to interfere with the success of the war efforts, including the “[willful] [obstruction]” of the United States enlistment service. KERSCH, supra note 82, at 112–13 (citing 40 Stat. 219 (1917)).
232 The Trading with the Enemy Act also gave the Postmaster General the “authority to censor American foreign-language newspapers.” Id. at 113 (citing Priv. L. No. 65-91 (1917)).
The Supreme Court eventually replaced the Bad Tendency test with the Clear and Present Danger Test, which established a more stringent requirement for the government to justify laws restricting speech—only speech that created a “clear and present danger” could be proscribed. The Clear and Present Danger test focused on the intent and context of the speech; therefore, speech that would not normally be outlawed could be proscribed during wartime. In 1940, Congress passed the Smith Act, which made it illegal to advocate, through speech or other means, forceful overthrow of the government.

The Supreme Court grew truly doubtful of laws that restricted speech only after World War Two and the death of the former Soviet Union’s Joseph Stalin. On a date now regarded as Red Monday, it simultaneously overturned a number of speech-based convictions. Although the Supreme Court retreated slightly from its expansive interpretation of the freedom of

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233 The Sedition Act supplemented these acts, and “made it a crime to say, print, or publish anything intended” to “scorn” the United States government or military, or to impede the war efforts. Id. (citing 40 Stat. 1012 (1918)).

234 Id. at 116 (citing Schenck, 249 U.S. at 52).

235 Id.

236 Id.

237 Id. at 137 (citing 54 Stat. 670 (1940)). The United States passed the Smith Act soon after Hitler invaded Austria. Id. In Dennis, the Court upheld Learned Hand’s federal appeals court decision allowing the indictment of prominent Communist leaders for “advocating the overthrow of the U.S. government” under the Smith Act. Id. at 140 (citing Dennis v. United States, 341 U.S. 484 (1951)). Hand’s reasoning was contextual, and he explained that “understood in the context of a hot and a Cold War, one could not imagine a more probable danger.” Id. (citing United States v. Dennis, 183 F.2d 201, 213 (1950)).

238 Id. at 142. The Supreme Court offered less protection of free speech prior to the end of World War Two, as did all federal courts. Id. However, in Abrams v. United States, Justice Oliver Wendell Holmes’s dissent sharply criticized the Clear and Present Danger test and pronounced his “marketplace of ideas” doctrine, which stands for the notion that the best test for speech is to release it into the “competition of the market,” where it will be either accepted or rejected by society. Robert S. Tanenbaum, Preaching Terror: Free Speech or Wartime Incitement, 55 AM. U. L. REV. 785, 797 (2006) (citing Abrams v. United States, 250 U.S. 616, 630 (S.D.N.Y. 1919) (Holmes, J., dissenting)). Holmes declared “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.” Abrams, 250 U.S. at 630 (Holmes, J., dissenting). Only speech that is “so imminently linked to harm that it [does] not face competition in the marketplace” may be punished. Tanenbaum, supra at 816.

239 KERSCH, supra note 82, at 142; Norman T. Deutsch, Professor Nimmer Meets Professor Schauer (and Others): An Analysis of ’Definitional Balancing‘ as a Methodology for Determining the ’Visible Boundaries of the First Amendment‘, 39 Akron L. Rev. 483, 500 (2006) (citing Brandenburg v. Ohio, 315 U.S. 568, 569 (1942)); Bruce Ackerman, This Is Not a War, 113 YALE L.J. 1871, 1896–97 n.69 (2004). The court overturned a conviction “of a man who had refused to answer [the House Un-American Activities Committee’s] questions, reversed the Smith Act convictions of prominent [Communist] leaders, limited the ability of states to investigate the political allegiances of state university processors.” KERSCH, supra note 82, at 142. The Court also reversed a State Department “loyalty dismissal.” Ackerman, supra note 239, at n.69.
speech on Red Monday, the Court was well on its way to developing “a consistently protective attitude’ of all forms of speech.”

Today, free speech is staunchly protected by American courts. In *Chaplinsky v. New Hampshire*, the Supreme Court ruled that fighting words were proscribable and upheld a state law that made it a crime to speak offensively to any person in public. However, after *Chaplinsky*, the Court in *Brandenburg v. Ohio* gave fighting words more free speech protection.

Today, a law may not constitutionally proscribe speech except where particular speech is “directed [at] inciting or producing imminent lawless action and is likely to incite or produce such action.” Additionally, a law restricting expression will be considered unconstitutional if the law distinguishes between permissible and impermissible speech based on its content. Although the Court in *R.A.V.* held that certain types of speech are still proscribable, including fighting words, it is unconstitutional to regulate speech based on its content. Unless the regulation is necessary to stop violence that flows from the fighting words, such a regulation is “presumptively invalid.”

Scholars consider *R.A.V.* as the most recent case to drastically shape the stance of United States free speech law. However since *R.A.V.*, in a case

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240 KERSCH, supra note 82, at 142. Congress responded to Red Monday by threatening the Court, and the Court responded to those threats by issuing somewhat more restrictive free speech rulings for a short period. *Id.* (citing Watkins v. United States, 354 U.S. 178 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Service v. Dulles, 354 U.S. 363 (1957); Yates v. United States, 354 U.S. 298 (1957)).


242 “Fighting” words are defined as words that either “are likely to cause a fight” or words that “by their utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942).

243 *Id.* at 574.

244 *Brandenburg*, 395 U.S. at 448–49.

245 *Id.* at 447. The “marketplace of ideas” stood as the rationale for the new rule in *Brandenburg*. Tanenbaum, supra note 238, at 815–16 (citing Arielle D. Kane, Note, *Sticks and Stones: How Words Can Hurt*, 43 B.C. L. REV. 159, 160 (2001); David M. Raban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1352 (1983)). Although the Court in *Brandenburg* did not abandon a contextual analysis, it did not consider the degree of harm imposed by the speech. Tanenbaum, supra note 238, at 806.


247 *Id.* at 377.

248 *See id.*

249 *Id.* at 422. Because the law in question criminalized fighting words only if the distress caused was “on the basis of race, color, creed, religion or gender,” it regulated offensive speech of *that kind only*, and was therefore unconstitutional. *See id.* at 422–23.

250 See generally, e.g., Deutsch, supra note 239; Tanenbaum, supra note 238; KERSCH, supra note 82.
scarce, scarcely covered by the American media, a court convicted a Muslim man named Ali al-Timim on charges that he incited Muslims to fight the United States forces in Afghanistan. His April 2005 conviction, and subsequent life sentence, was the first significant conviction involving terrorist speech since the September 11 attacks. Prior to the case, the only prosecutions were against actual “perpetrators of terrorist acts” and individuals that “provided tangible assistance to terrorist organizations.”

2. Free Speech in the United Kingdom

The United Kingdom has no written constitution or express right to freedom of speech. The United Kingdom’s Constitution is a combination of common law, legislation, and other fundamental laws such as the Magna Carta. Under traditional English political and legal theory, freedom of speech is not a fundamental right and does not receive special constitutional protection. A constitutional measure is no more important than any other statute passed by Parliament and Parliament cannot secure the legal protection of constitutional rights because “[i]t cannot bind its successors.” If Parliament attempted to secure a constitutional right, a future Parliament could repeal the law expressly by statute or implicitly by a conflicting statute through the doctrine of “implied repeal.”

Some consider the doctrine of parliamentary sovereignty, another important constitutional concept in the United Kingdom, as the most fundamental
concept of Britain’s constitutional system. Because of parliamentary sovereignty, “which vests the supreme power over legislation in parliament,” the British judiciary lacks the ability to limit Parliament through judicial review. Parliament may enact or repeal any legislation that it chooses, and the judiciary has absolutely no power to invalidate Parliament’s actions. British courts generally defer to Parliament, and the United Kingdom relies on “cultural norms to check the abuse of government power to restrict [the freedom of speech].”

In 1951, the United Kingdom ratified the European Convention on Human Rights, which expressly guarantees a number of rights, including the freedom of expression. The United Kingdom eventually incorporated the Convention through the Human Rights Act 1998, which went into effect in October 2000. Article 10 of the Convention protects the freedom of expression, but this freedom is not absolute and may be derogated if “necessary in a democratic society, [or] in the interests of national security.”

Section three of the Human Rights Act 1998 imposes a duty on the courts to read and give effect to existing and future legislation in a way that is compatible with the Convention, if at all possible. If a court is unable to make a “saving construction,” the court must issue a “declaration of incompatibility,” which notifies Parliament that the judiciary interprets its legislation as incompatible with the European Convention. After a court issues a “declaration of incompatibility,” Parliament may consider enacting


\[262\] Id.; see also KROTOZYNSKI, supra note 220, at 184 (stating that the Human Rights Act requires judges to render a saving construction of ambiguous laws or regulations).

\[263\] Hyre, supra note 261, at 431.

\[264\] KROTOZYNSKI, supra note 220, at 184–87.

\[265\] LESTER & CLAPINSKA, supra note 257, at 67. However, because Britain did not incorporate the Convention into its own law, there were gaps in the legal protection of human rights. Id. at 69–70. Because Britain is a party to the Convention, the European Court of Human Rights has jurisdiction over Britain when another state or individual alleges violations of the Convention rights. See id. at 67–68.

\[266\] Human Rights Act, 1998, c. 42.

\[267\] LESTER & CLAPINSKA, supra note 257, at 73.


\[269\] Laws, supra note 259, at 131.

\[270\] ECHR, supra note 268, art. 10(2).

\[271\] LESTER & CLAPINSKA, supra note 257, at 75.

\[272\] KROTOZYNSKI, supra note 220, at 184 (citing ECHR, supra note 268, art. 4).
legislation to correct the incompatibility or a “Crown minister may unilaterally order amendments to the offending legislation.”

The Human Rights Act omits the doctrine of implied repeal; therefore, courts require a later statute to expressly abridge a convention right. Because the Act requires an express repeal or amendment, the rights in the Act are more protected than other British laws, which may be implicitly or expressly repealed by Parliament. Still, the Act does not alter the supreme power of Parliament to change law, and “[offers] legal, but not constitutional, guarantees of basic rights.”

a. The Evolution of Free Speech in the United Kingdom

Because the 1998 Human Rights Act incorporated a written guarantee of freedom of expression that was previously absent in the United Kingdom, an analysis of speech before and after the incorporation of the 1998 Act is important.

i. Pre-Human Rights Act 1998

Before the 1998 Act, the absence of any express guarantee of freedom of speech meant that the right existed only where legislation or common law did not constrain it; however, in reality, British judges have been protecting free speech for years. Still, because the British principle of parliamentary sovereignty weakens courts in the United Kingdom, case law in the United Kingdom is less important to chronicle than statutory law that limits free speech.

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273 Id. (citing ECHR, supra note 268, art. 10(2)). The 1998 Act also requires all sponsors of legislation to state whether the legislation is compatible with the European Convention. KROTOSZYNSKI, supra note 220, at 184 (citing ECHR, supra note 268, art. 19).
274 Lester & Clapinska, supra note 257, at 76–77.
276 Laws, supra note 259, at 131 (emphasis in original).
277 Supra part II.B.2.
278 Barendt, supra note 219, at 40.
279 Krotoszynski, supra note 220, at 185. Judges protected the freedom by using common law principles of freedom of speech to limit other common law rules that inhibited the freedom of speech. Barendt, supra note 219, at 40.
280 Hyre, supra note 261, at 431. Parliamentary sovereignty is the “power to enact and repeal legislation” such that the powers of the Crown are a “mere formality.” Id. at 428.
281 See Krotoszynski, supra note 220, at 187.
282 See id.
Free speech limits in the United Kingdom have varied over the past few centuries. In the Seventeenth Century, the extremely broad seditious libel offense criminalized speech that criticized, or even cast in a negative light, the British Crown, the British government, or the British people. The government used the offense mainly to punish those seen as a “threat to the monarchy,” but occasionally used it to proscribe hate speech. In 1936, Parliament adopted the Public Order Act, which made convictions for seditious libel easier to obtain by dispensing the requirement that the speech actually lead to violence. Another Act, the Offences Against the Person Act 1861, restricted free speech by criminalizing the act of encouraging or soliciting the murder of another person.

After World War II, the United Kingdom enacted laws to combat hate propaganda. In 1965, The United Kingdom’s first Race Relations Act criminalized certain types of hate speech. In 1986, an amendment to the Public Order Act “made hate speech punishable if it amounted to harassment of a target group or individual;” it also made harassment illegal. In 1997,  

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284 Id. Seditious libel threatens debate because it can be used to stop government criticism. Id. The offense criminalized speech with “an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty . . . or to promote feelings of ill-will and hostility between different classes of . . . [her] subjects.” Id. (quoting ANTHONY LESTER & GEOFFREY BINDMAN, RACE AND LAW IN GREAT BRITAIN 345 (1972)).
285 Id. By the early 1900s, however, the offense became ineffective because no conviction could be made without evidence that the libel directly led to violence or “breach of public order.” Id.
286 Public Order Act, 1936, 1 Edw. 8 & 1 Geo 6, c. 6; Rosenfeld, supra note 283, at 1545.
287 Rosenfeld, supra note 283, at 1545–46. The Act made speech that was merely “likely” to lead to violence” punishable, as well as speech made with the “intend to provoke violence.” Id. at 1545. Section 5 of the Public Order Act made it easier for the government to stop fascists before and during World War II. See id.
288 Id.
289 Rosenfeld, supra note 283, at 1546.
290 Race Relations Act, 1965, c. 73.
291 Laura K. Donohue, Terrorist Speech and the Future of Free Expression, 27 CARDOZO L. REV. 233, 261 (2005). The Act made public utterances or publishing of “threatening, abusive, or insulting” words “intended to incite hatred on the basis of race, color, or national origin” an offense. Rosenfeld, supra note 283, at 1545 (citing The Race Relations Act, 1965, c. 73, § 6).
292 Donohue, supra note 291, at 261. Section 17 of the Public Order Act 1986 defines “racial hatred” as “hatred against a group of persons in Great Britain defined by reference to color, race, nationality (including citizenship), or ethnic or national origin.” Public Order Act, 1986, c. 64, § 17. Section 18 outlaws
Parliament made a separate law banning harassment when it passed the Protection from Harassment Act. Both the Public Order and Protection from Harassment Acts increased the government’s ability to curb hate speech. These hate speech proscriptions are constitutional in the United Kingdom because the European Court held that the proscriptions are consistent with the freedom of expression guarantees of the European Convention on Human Rights.

ii. Post Human Rights Act 1998

Because the 1998 Human Rights Act did not go into effect until October 2000, its effects are not yet clear. Even after passage of the 1998 Act, as explained earlier, the British judiciary cannot overturn legislation that violates the Act. Rather, it must issue a statement of incompatibility, and Parliament may then consider correcting the incompatibility. The declaration of incompatibility is a characteristic of the United Kingdom’s constitutional system of parliamentary sovereignty.

As of August 1, 2006, British courts had issued sixteen declarations of incompatibility that were not or have yet to be overturned and six declarations of incompatibility that were overturned by either an appellate court or the House of Lords. Since none of the declarations involved a free speech claim, one can surmise that the 1998 Act will not radically affect the freedom of speech within the United Kingdom.

“threatening, abusive, or insulting” speech, actions, or displays “with intent to stir up racial hatred or in circumstances where racial hatred is likely to be stirred up.” Id. § 18.

294 Donohue, supra note 291, at 261.
295 Id. (citing Public Order Act, c. 64, §§ 5, 6; Protection from Harassment Act, 1997, c. 40, § 7).
296 See Rosenfeld, supra note 283, at 1545.
298 See Lester & Clapinska, supra note 257, at 73.
299 See generally id. at 73–74 (comparing the Act to previous written law in its ability to be interpreted by the judiciary).
300 See Hyre, supra note 261, at 431; Krotoszynski, supra note 220, at 184.
301 See supra text accompanying notes 271–73.
302 See supra text accompanying notes 261–64.
304 See id.
305 Krotoszynski, supra note 220, at 190. R v. Shayler, in the House of Lords, questioned the compatibility of the Official Secrets Act 1989 with the freedom of speech because the law “[does] not allow a
3. Conclusions about Free Speech in the United Kingdom and the United States

Although the British legal system is the foundation of the American legal system, there are significant differences between the two. See supra note 256, at 800. While free speech is not absolute in the United States, "[b]oth theoretically and in practice, free speech enjoys . . . greater protection in the United States than in [Great Britain]." Some legal scholars believe that the United States’ written Constitution places the freedom of speech in a “preferred place” with greater protection, as opposed to the United Kingdom, which until recently, had no written guarantee of the freedom of speech. Because the United Kingdom had no written constitution guaranteeing the right, it was almost always “treated as a defeasible or as an exception or qualification to other well-established legal rights;” the presumption was that the other rights should be protected unless there was “a more powerful free speech argument . . . .” On the other hand, where there is a constitutional guarantee of free speech as in the United States, there is a presumption of free speech and the argument is “whether there is a sufficiently strong justification for restricting [it] . . . .”

Before the 1998 Human Rights Act, parliamentary sovereignty required courts to implement law passed by Parliament that clearly restricted the freedom of speech. Today in the United Kingdom, despite the 1998 Act’s incorporation of an express protection of the freedom of expression, the right
defendant to argue that his [official secret] disclosure was in the public interest.” Barendt, supra note 219, at 45 (citing R v. Shayler [2002] UKHL 11, [2003] 1 A.C. 247). The Official Secrets Act prohibits members of the intelligence service from disclosing certain intelligence information. Official Secrets Act 1989, ch. 6, § 1(1). The House of Lords held that the freedom of speech protected such a disclosure, but that restrictions could be imposed on a disclosure if “necessary . . . in the interests of national security, territorial integrity, or public safety . . . .” Barendt, supra note 219, at 45 (citing Shayler, [2003] 1 A.C. 247). After several European Court rulings on the issue, the House of Lords then considered whether such restrictions to the disclosures were proportionate. Id. The House of Lords held that the restrictions are proportionate because they are not absolute and there are still limited opportunities for those charged under the Act to raise their concerns internally. Id. Critics believe that the government should show why such a broad ban, without any public interest justification, is a proportionate restriction of the freedom of speech. Id.

306 Peysakhovich, supra note 256, at 800.
307 See supra Part II.B.1.a.
308 Krotoszynski, supra note 220, at 199.
310 Barendt, supra note 219, at 41.
311 Id. at 41–42.
312 See supra text accompanying notes 271–73.
313 Barendt, supra note 219, at 42.
may be derogated for national security purposes.\textsuperscript{314} Although courts may issue a declaration of incompatibility, Parliament is not required to pass legislation to correct the incompatibility.\textsuperscript{315}

In the United States, circumventing the First Amendment’s express protection of free speech is more complex.\textsuperscript{316} Speech may not be restricted unless made to produce “\textit{imminent} lawless action and is likely to incite or produce such action;”\textsuperscript{317} laws restricting content are also unconstitutional.\textsuperscript{318} Although certain types of speech, such as fighting words, are proscribable, they may not be regulated based on content.\textsuperscript{319}

Because of the constitutional differences in the United Kingdom and the United States as articulated in Section B of Part II of this Comment, the UK Terrorism Act 2006 would have free speech conflicts in the United States that it does not have in the United Kingdom.

\textit{a. Is the UK Terrorism Act 2006 Constitutional in the United Kingdom?}

The UK Terrorism Act 2006, thus far, appears to be constitutional in the United Kingdom. Parliament passed the Act,\textsuperscript{320} and because of parliamentary supremacy, even if the British courts subsequently issue a statement of incompatibility regarding the 2006 Act and Article 10 of the European Convention on Human Rights,\textsuperscript{321} Parliament is not required to correct the incompatibility.\textsuperscript{322}

Additionally, the United Kingdom’s written protection of the freedom of expression in Article 10 of the European Convention on Human Rights may be derogated.\textsuperscript{323} If the 2006 Act is challenged for violating the Convention at the European Court of Human Rights, the United Kingdom must articulate a “legitimate purpose . . . correspond[ing] to a very pressing social need and

\begin{itemize}
\item \textsuperscript{314} ECHR, supra note 268, art. 10(2).
\item \textsuperscript{315} See supra text accompanying notes 271–73.
\item \textsuperscript{316} See supra Part II.B.1.a.
\item \textsuperscript{317} Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added).
\item \textsuperscript{318} Feldman, supra note 225, at 148 (citing R. A. V. v. City of St. Paul, 505 U.S. 377, 377 (1992)).
\item \textsuperscript{319} Id. at 150 (citing R. A. V., 505 U.S. at 377).
\item \textsuperscript{320} See supra Part I.A.
\item \textsuperscript{321} ECHR, supra note 268, art. 10. Article 10 guarantees the freedom of expression. Id.
\item \textsuperscript{322} See KROTOZINSKI, supra note 220, at 184 (citing ECHR, supra note 268, art. 10(2)).
\item \textsuperscript{323} See supra text accompanying note 270.
\end{itemize}
meet a strict test of proportionality” to justify its derogation of the freedom; however, the Court tends to give substantial deference to the states.

The United Kingdom’s independent reviewer of terrorism legislation believes that the 2006 Act is compatible with the Convention. In October 2005, after having received a draft of the 2006 Act and prior to its parliamentary debate, independent reviewer Lord Carlile of Berriew submitted a report on the proposed legislation. In his report, he stated that the creation of the Encouragement of Terrorism offense is a proportional response to the threat addressed. He also concluded that the Dissemination of the Terrorist Publications offense and the expansion of the ability to proscribe terrorist organizations that encourage terrorism are constitutional.

324 Steve Foster, Q&A: HUMAN RIGHTS & CIVIL LIBERTIES (2006), at 34, available at http://www.oup.com/uk/orc/bin/qanda/books/07hr/hr_ch02.pdf. When interpreting states’ derogations of European Convention on Human Rights obligations pursuant to Article 15 of the Convention, the European Court of Human Rights requires measures to correspond to a “pressing social need” and meet a proportionality test. Id. The proportionality test ensures that there is a balance between the social goal behind the derogation (i.e., public safety) and the protection of fundamental rights. Id. at 43.

325 Id. at 34. The Court defers by granting to states a “margin of appreciation” or discretion when defending their laws against alleged violations of the Convention. Id. at 35.


327 Lord Carlile, Britain’s independent reviewer of counterterrorism laws, is a member of the Liberal Democrat Party who “made a name for himself as a civil libertarian.” Caldwell, supra note 16, at 42. The civil libertarian group is the group in the United Kingdom that has “led the opposition [of] antiterror measures.” Id.

328 PROPOSALS BY HER MAJESTY’S GOVERNMENT FOR CHANGES TO THE LAWS AGAINST TERRORISM, REPORT BY THE INDEPENDENT REVIEWER LORD CARLILE OF BERRIEW Q.C., O.C. 6, 2005, paras. 1, 9 [hereinafter LORD CARLILE REPORT].

329 Id. paras. 20–21. He stated that the offense:

is a proportionate response to the real and present danger of young radically minded people being persuaded toward terrorism by apparently authoritative tracts wrapped in a religious or quasi-religious context. The balance between the greater public good and the limitation on the freedom to publish is no more offended by this proposal than it would be by, say, an instruction manual for credit card fraud were such to be published. I believe that it is Human Rights Act compatible.

Id. para. 23.

330 Lord Carlile supported the creation of the offense and stated that “[T]here is no acceptable ground for objection [of] it being an offense to disseminate such publications.” Id. paras. 24–25 (emphasis added).

331 Id. para. 52. Lord Carlile also stated his opinion that expanding the ability to proscribe terrorist organizations for encouraging terrorism “is a proportional limitation on the freedom of association in relation to the greater public good” and that he believes it “can play a role in reducing the opportunity for disaffected young people to become radicalized towards terrorism.” Id. para. 52.
Because of his background of staunch support of civil liberties, Lord Carlile seems to be an unlikely supporter of the much-criticized 2006 Act. However, he has access to “closed [intelligence] material” and considers the terrorism threat in the United Kingdom extremely severe. During a subsequent debate on the 2006 Act, when a fellow member of Parliament suggested that Lord Carlile would have a different view of the 2006 Act after he realized how much opposition it would bring, Lord Carlile reiterated his approval of the 2006 Act.

When considered together, Lord Carlile’s review, the United Kingdom’s tradition of parliamentary supremacy, and the European Court of Human Rights lenient review of the European Convention on Human Rights derogations, one may conclude that the UK Terrorism Act 2006 is constitutional in the United Kingdom.

b. Would the UK Terrorism Act 2006 Violate the United States Constitution?

Although history shows that the United States tends to restrict the freedom of speech during times of war, when analyzed in light of the current status of
free speech in the United States, the UK Terrorism Act 2006 would violate the First Amendment of the Constitution.

First, the Encouragement of Terrorism offense would violate the First Amendment because it criminalizes speech that does not produce, nor is likely to produce, “imminent lawless action.” Additionally, the Encouragement of Terrorism offense is a content restriction because it criminalizes speech based on its content: glorification or encouragement of terrorist acts.

Second, the 2006 Act broadens the government’s ability to proscribe terrorist organizations that encourage terrorism, which would violate the First Amendment for the same reasons as the Encouragement of Terrorism offense. The expanded authority for proscription is based solely on the groups’ speech; it meets neither the Brandenburg test nor the content neutrality test established by the Supreme Court in R.A.V.

Likewise, the new Dissemination of Terrorist Publications offense would violate the First Amendment. The 2006 Act defines “terrorist publication” as a publication likely perceived as encouraging terrorism and does not require the publication to actually encourage anyone to commit terrorist acts. Because this offense also regulates speech based on its content and the speech itself is not required to lead to “imminent lawless action,” the Act would be unconstitutional in the United States.

See supra Part II.B.1.a. See infra text accompanying notes 341–47. This Comment only addresses problems posed by the 2006 Act to free speech, and does not analyze its possible conflict with other constitutional guarantees, such as the freedom of religion or freedom of assembly. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). The Act deems it irrelevant whether the speech actually leads a person to commit terrorism; government speeches prior to passage of the 2006 Act, as well as debate history, make it clear that the offense targets those who offend the British by celebrating “despicable” terrorist acts. Terrorism Act, 2006, c. 11, pt. 1, § 1(5)(a–b); Second Home Secretary Letter, supra note 35; see also 679 PARL. DEB., H.L. (5th ser.) (2006) 137. See supra Part I.A; see also Feldman, supra note 225, at 148 (citing R. A. V. v. City of St. Paul, 505 U.S. 377, 377 (1992)). See supra text accompanying notes 341–42. Brandenburg only allows proscription of speech that produces or is likely to produce “imminent lawless action.” Brandenburg, 395 U.S. at 447. Feldman, supra note 225, at 148 (citing R. A. V., 505 U.S. at 377). See supra Part I.A.2. See R. A. V., 505 U.S. at 377; Brandenburg, 395 U.S. at 447; supra Part II.B.1.a.
III. SPECIFIC CRITICISMS OF THE UK TERRORISM ACT 2006

Opponents of the 2006 Act, who had many criticisms of the Act prior to its passage, still harbor the same concerns and beliefs almost one year after passage of the Act. The following concerns are those that were, and continue to be, the most common among the critics of the Act.

A. The 2006 Act Violates Freedom of Speech

Human rights and civil liberties groups, such as Amnesty International and Liberty, were the main and most vocalized opponents to the 2006 Act. British artists, specifically writers and actors, opposed the new offense due to concern that such a limit on the freedom of expression would suppress artists and discourage debate. Critics believe that the Act will lead to “self-censorship of . . . support for legitimate causes that deserve full and democratic debate.” The opponents of the 2006 Act who feel that it violates freedom of speech are most concerned that the Act is presently chilling speech overall.

Opponents believe that the 2006 Act infringes upon freedom of speech because its vague and broad provisions violate the European Convention on

348 See infra Part III.
351 Riding, supra note 21, at 3.
352 Louise Christian, Comment & Debate: Making Bad Law Worse: Creating a New Offence of Glorifying Terrorism is Hypocritical and a Threat to Legitimate Debate, GUARDIAN (London), Feb. 16, 2006, at 33. Some opponents of the 2006 Act believe that violence results from the government’s suppression of divergent views; therefore, terrorism can only be defeated by debate because “the best way to stop people encouraging violence is to defeat them in argument, not to prevent them from explaining why they are angry.” Id. “The citizens of a democracy must be free to hear even the most intemperate and inflammatory criticism of their nation’s policies and practices, unless it expressly calls for immediate violent action and creates a clear danger that such actions will occur imminently.” Stone, supra note 21, at 17.
353 See, e.g., LIBERTY RESPONSE TO CARLILE, supra note 349; JCHR FIRST REPORT, supra note 18, at app. 2, 4.
They maintain that both the definition of “terrorism” and the Encouragement of Terrorism offense are overly broad and vague and that the Act will become a tool to arrest individuals for acts less severe than ones that the 2006 Act was originally developed to curtail.

Critics believe that the new Encouragement of Terrorism offense and its terms, such as “encouragement”, “glorification”, and “inducement,” do not adequately describe the offense or conduct that may be covered by the offense. They worry that the unclear meaning of “indirect” encouragement of terrorism may apply to many forms of behavior, including foreign resistance movements that involve both peaceful and violent components. Critics worry that those who support only the peaceful components of such movements may be prosecuted. They also feel that the Encouragement offense will result in prosecution for lawful statements. Critics believe that the Act’s criminalization of “reckless” speech is over-encompassing. They argue that intent should always be a required element for offenses that criminalize speech.

Although the definition of “terrorism” is derived directly from the 2000 Act, critics feel that it is overly broad because the 2006 Act applies in the freedom of expression context. The 2000 Act applies to the terrorist acts themselves; however, the 2006 Act applies the definition to statements regarding such terrorist acts. Critics believe that the definition of terrorism

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354 See infra text accompanying notes 363–68.
355 See id.
356 E.g., Article 19 Concerns, supra note 334, at 10; LIBERTY RESPONSE TO CARLILE, supra note 349. The Encouragement of Terrorism offense was passed specifically to curb radical Islamic clerics’ calls for jihad against the United Kingdom. See generally supra Part III.C.
357 Article 19 Concerns, supra note 334, at 10.
358 Christian, supra note 352, at 53.
359 Id.
360 Article 19 Concerns, supra note 334, at 10. The organization Article 19 asserts that statements initiating debate about suicide bombers and statements by Muslim leaders criticizing the West, for example, will in turn chill the freedom of speech in mosques and other places. Id.
361 Liberty recognizes that “[r]ecklessness can be a legitimate element in offenses involving action” where a person’s physical injuries are caused directly by recklessness; however, it feels that the same is untrue in the speech context where the link between the reckless words and someone’s interpretation of them is not as dangerous. Id.
362 JCHR FIRST REPORT, supra note 18, at ch. 2, § 33.
363 See supra Part I.A.
364 See supra Part I.A.
365 See Terrorism Act, 2000, c. 11, pt. 1 § 1.
366 See Terrorism Act, 2006, c. 11, pt. 1, §§ 1, 2(9)(a–b).
used in the speech context criminalizes statements that would otherwise be lawful.\textsuperscript{367} Opponents are also concerned that legitimate gatherings and demonstrations may be considered terrorism under the Act’s definition and would therefore be considered criminal.\textsuperscript{368}

Activist groups argue that the terrorism definition is over-encompassing because it "extend[s] to behavior that would warrant a public order response, [but] not an anti-terrorism response."\textsuperscript{369} The Mayor of London argues that the Act is discriminating and subjective because its definition of terrorism is broad enough to encompass almost any form of legitimate protest; therefore, the government may use it as a political tool on whomever it chooses.\textsuperscript{370}

Opponents of the 2006 Act believe that the 2006 Act’s breadth and ambiguity make it a disproportional\textsuperscript{371} response to the severe threat of terrorism and, therefore, a violation of the European Convention on Human Rights’ guarantee of freedom of expression.\textsuperscript{372} In January 2007, that argument gained credibility following a report by Parliament’s Joint Committee on Human Rights\textsuperscript{373} regarding the United Kingdom’s potential adoption of a treaty on the prevention of terrorism.\textsuperscript{374} The Parliamentary Committee

\begin{footnotes}
\item[367] \textit{Liberty Response to Carlile, supra} note 349, at 11. Calls to overthrow oppressive governments are one example of such statements. Id.
\item[368] \textit{Article 19, supra} note 334, at 8. For instance, the organization Article 19 used “critical mass” bike rides by groups of cyclists to “reclaim the streets” as an example of a demonstration that may be considered “terrorism” under the Act’s definition. Id. Article 19 notes that a critical mass of cyclists causes traffic problems and endangers the health and safety of participants and others on the road; moreover, since the aim may be considered “ideological” and an effort to intimidate, it falls within the definition of “terrorism.” Id.
\item[369] Id. at 9.
\item[370] \textit{JCHR First Report, supra} note 18, at app. 4.
\item[371] As explained before, when a law is challenged for violating a provision of the European Convention on Human Rights, such as the freedom of expression, the state must articulate a “legitimate purpose . . . corresponding to a very pressing social need and meet a strict test of proportionality” to justify its derogation of the freedom. \textit{See Foster, supra} note 324, at 34.
\item[374] \textit{The Convention in question, the Council of Europe Convention on the Prevention of Terrorism, has a provision similar to the encouragement of terrorism offense in which it “requires states to criminalise ‘public provocation to commit a terrorist offence.’” Id. The Convention, however, requires that there be a “specific
concluded that the Encouragement of Terrorism offense is incompatible with the Convention because 1) the offense lacks intent and danger requirements, 2) the concept of “glorification” and the definition of “terrorism” are overly broad and vague, and 3) the offense is “likely to have a disproportionate impact on freedom of expression” as required by the Convention. Because this Convention’s requirement for proportionality is so similar to the proportionality requirement for states that derogate the European Convention on Human Right’s freedom of expression, opponents of the 2006 Act appear to have a strong argument that the 2006 Act violates the freedom of expression.

In January 2007, the Joint Committee also tried to assess the impact of the 2006 Act on freedom of speech. The Committee did not receive any specific evidence of the Act inhibiting freedom of speech, because the offense was new and there was an “inherent difficulty” in assessing a “chilling effect;” still, it concluded that the Act will inhibit legitimate speech and lead to a chilling effect in the United Kingdom. This conclusion by the parliamentary Committee further bolsters the critics’ belief that the 2006 Act violates freedom of speech.

B. The Act will Further Alienate the Muslim Community

The notion that the United Kingdom needs Muslims to “[act] as the eyes and ears of the authorities to police their co-religionists” is a belief that is widely-held throughout the United Kingdom by the government, both

intention to incite the commission of a terrorist offen[ce]” as well as a “danger that such offen[ces] may be committed” as a result of the message.

375 Id. State parties’ actions pursuant to the Convention provision requiring criminalization of a provocation to commit terrorism are “subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society.” Council of Europe Convention on the Prevention of Terrorism, art. 12(2), opened for signature May 16, 2005, C.E.T.S. No. 196. Although this Convention’s requirement of proportionality is separate from the European Court of Human Rights’ requirement of proportionality for derogation of European Convention on Human Rights guarantees, the two are very similar. See generally supra text accompanying notes 323–25.

376 Id.

377 JCHR FIRST REPORT, supra note 18, at ch. 2, §§ 40–49.

378 Id. § 46. The Mayor of London submitted a statement to the Committee that “[s]ections of the Black, Asian, and Minority Ethnic communities testify to the chilling effect of the new laws and to their increased concern about the possible consequences of expressing legitimate views relating to foreign policies.” Id. § 42, § 43, app. 4. Similar concerns were relayed to the Committee from the Muslim Council of Britain. See id.

379 Id. ch. 2. § 46. The “chilling [effect’s]” very nature stops individuals from expressing their views, so it is unlikely that those who feel inhibited by the Act will actually come forward and identify themselves due to fear of prosecution under the Act. See id. §§ 41, 46.

380 Id. §§ 46–47.
proponents and opponents of the 2006 Act, and members of the Muslim community.\(^{381}\) Many opponents of the 2006 Act, before its passage, felt that it would further alienate the United Kingdom’s Muslim community.\(^{382}\) There is a widespread concern that the 2006 Act will lead to a “loss of trust” between Muslims and the government.\(^{383}\) Critics believe that the 2006 Act is counterproductive because the alienation of the United Kingdom’s Muslim population is already a major problem.\(^{384}\) The government needs assistance from the Muslim community to help combat terrorism by British Muslims,\(^{385}\) in all likelihood, the 2006 Act will cause more Muslim alienation.\(^{386}\)

C. The United Kingdom’s Laws were already Sufficient to Combat Terrorism

Prior to the passage of the 2006 Act, British authorities claimed to need the Anti-glorification offense because the government was unable to persuade the Crown Prosecution Service to charge radical clerics on almost twenty previous occasions.\(^{387}\) Critics argued that the law was superfluous because Britain already had the ability to arrest and convict individuals for terrorist speech that encouraged terrorism.\(^{388}\)

For instance, Britain convicted an Islamic minister, Sheik Faisal, for soliciting murder under Section 4 of the Offences Against the Person Act 1861 and racial hatred under the Public Order Act 1986.\(^{389}\) Beginning in February

\(^{381}\) See, e.g., Cowell, supra note 28, at A10; Duncan Gardham, Radical Websites Defy Deportation Threat by Urging Islamic War on West, DAILY TELEGRAPH (London), Aug. 29, 2005, at 8; Kevin Sullivan, Denmark Tries to Act Against Terrorism as Mood in Europe Shifts; Law Raises Concerns of Civil Libertarians, WASH. POST, Aug. 29, 2005, at A09. The Home Office makes it clear that it needs aid from the Muslim community to combat terrorism. See Community Approach, supra note 190.

\(^{382}\) This opinion is shared by critics such as civil liberties and human rights groups, Muslim groups, and members of Parliament. See, e.g., Russell & Morris, supra note 350, at 1–2; Fahad Ansari, British Anti-Terrorism: a Modern Day Witch-hunt, (2005), http://www.ihrc.org.uk/file/2006Terrorreport.pdf (last visited Jan. 20, 2008); 677 PARL. DEB., H.L. (5th ser.) (2006) 557.

\(^{383}\) Press Release: Muslim Safety Forum, Apr. 13, 2006, http://www.muslimdirectory.co.uk/viewarticle.php?id=100&PHPSESSID=d120e85994e7c7c0a10574b982a7261dc. The Muslim Safety Forum is an “umbrella organization” comprised of over thirty British and international Islamic groups. Id.

\(^{384}\) See supra Part II.A.2.

\(^{385}\) Community Approach, supra note 190.

\(^{386}\) See, e.g., Russell & Morris, supra note 350, at 1–2; Ansari, supra note 382.

\(^{387}\) Caldwell, supra note 16, at 42.


\(^{389}\) R v. El-Faisal, [2004] EWCA (Crim) 456, [1]–[9]. As previously explained, both the Offences Against the Person Act 1861 and the Public Order Act 1986 are commonly-used tools used tools by the United Kingdom to prosecute individuals for speech that incites hatred or murder. See supra Part II.B.2.a.
1998, Faisal spoke to audiences of young Muslim men and encouraged them to wage war against those who did not believe the Islamic faith, specifically “Jews, Christians, Americans, [and] Hindus.” Faisal spoke frequently to large groups of up to five hundred Muslims, and some of his sermons were recorded and sold at Islamic bookstores. Although Faisal never committed acts of violence, the United Kingdom’s preexisting law allowed the government to convict him for speech encouraging terrorism and hatred.

A month before passage of the UK Terrorism Act 2006, Britain also convicted its “most prominent radical Muslim cleric,” Abu Hamza al-Masri, for encouraging terrorism under the Public Order Act 1986 and the Offences Against the Person Act 1861. Like Faisal, al-Masri did not commit acts of violence; he only made speeches that glorified and encouraged terrorism. None of al-Masri’s statements were traced to specific terrorists’ acts, but Britain succeeded in convicting al-Masri for glorifying terrorism before the Anti-glorification offense of the UK Terrorism Act 2006 came into law.

IV. CONCLUSION: THE UNITED KINGDOM’S IMPLEMENTATION OF THE UK TERRORISM ACT 2006

Although Parliament passed the UK Terrorism Act 2006 in March 2006, there has been little government action taken pursuant to the sections of the Act discussed in Part I. There has been only one arrest made under the

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391 Id. at [1].
392 Id. at [13], [20].
393 Id. Quotes by Faisal include “[w]e spread Islam by the Sword” and “[t]he way forward can never be the ballot. The way forward is the bullet.” Id.
394 Woodward, supra note 32, at 5; Jones, supra note 32.
395 Don van Natta, Cleric Convicted of Stirring Hate, N.Y. TIMES, Feb. 8, 2006, at A1.
397 See van Natta, supra note 395, at A1. Al-Masri’s statements included statements that praised the Al-Qaeda attackers of the U.S.S. Cole in Yemen as well as preachers of “murder, hatred, and intolerance” of non-Muslims. Id. He also called for the killing of any non-Muslim. Id.
398 Id.
399 Id. The government charged al-Masri with soliciting murder and racial hatred and also for incitement to racial hatred. Id.
400 Woodward, supra note 32, at 5; Jones, supra note 32.
“glorifying terrorism” provision, and only two terrorist organizations have been banned pursuant to the “glorification” powers created by the 2006 Act.

The terrorist organizations banned in the United Kingdom for glorifying terrorism under the 2006 Act planned and organized protests against the Danish government in February 2006 after countries other than Britain published Prophet Muhammad cartoons. One of the banned organization’s spokespersons described the July 7 bombers as “completely praiseworthy.”

Almost a year after the 2006 Act went into effect, there has only been one arrest for the Encouragement of Terrorism under Section One of the Act. Detained under Section One of the 2006 Act on February 8, 2007 for allegedly encouraging terrorism, Abu Izzadeen is a British citizen born into a Christian family who converted to Islam at the age of 17. Izzadeen’s arrest stems from a speech he made in England in July 2006.

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404 See, e.g., Cobain & Fielding, supra note 402, at 14; Doward, supra note 403, at 21.
406 Steele, supra note 405, at 11.
408 Steele, supra note 405, at 11. In that speech, he allegedly expressed his opinion that statements made by the lead July 7 bomber in a video played after the bombings were “the answer” to the problems. Id. He also allegedly “mocked a South Korean man beheaded in Iraq and a [traumatized] woman who escaped the Twin Towers” on September 11. Id. Izzadeen dropped jokes in throughout his speech which incited laughter, and joked that the September 11 attacks “changed many people’s lives . . . [e]specially those inside [the towers].” Id.
Izadeen’s arrest remains the only arrest for Encouragement of Terrorism made thus far in the United Kingdom.409 Although the original opponents of the 2006 Act are likely satisfied with the government’s inaction, others criticize the British authorities for their failure to utilize the new counterterrorism tools granted by Parliament.410 For instance, Islamist leader Muhammad al-Massari runs a website from his home in the United Kingdom that appears to glorify terrorism under the 2006 Act.411 Despite passage of a Terrorism Act that gives the United Kingdom the ability to stop people such as Massari,412 he enjoys freedom of speech in the United Kingdom as he simultaneously promotes the nation’s demise.413 After the struggle to pass the anti-glorification provision of the 2006 Act, why has Britain chosen not to take advantage of it?

A. The United Kingdom’s Failure to Implement the UK Terrorism Act 2006

The United Kingdom passed a very broad terrorism act in 2006 that authorizes the prosecution of individuals and proscription of organizations solely due to their speech.414 The United Kingdom’s Constitution, unlike the United States Constitution, allowed Parliament to pass the 2006 Act even though it criminalizes, and therefore proscribes, certain types of speech.415 Although British law enforcement authorities are enabled to prosecute individuals and proscribe organizations for their glorification of terrorism, those provisions of the 2006 Act have remained virtually unutilized.416

Empirical studies are likely warranted to determine specifically why the tool has not been utilized more to stop the glorification and encouragement of terrorism, especially given the fact that the Act did not curb all speech glorifying terrorism. One commentator suggested that the Act’s widespread criticism has undermined its chances of being an effective tool.417 There are

409 Id. at 11; 5 Charged, supra note 405, at 15.
410 Mekhennet & Filkins, supra note 15, at 8.
411 Id. The website rejoices about the deaths of British and American soldiers, and allows groups affiliated with al-Qaeda to post words praising suicide bombers in Iraq. Id. Massari says that his website receives tens of thousands of hits daily. Id. Despite passage of the 2006 Act, Massari continues to run his popular extremist website from within Britain and speak in interviews about killing British civilians. Id.
412 See supra Part I.A.
413 See Mekhennet & Filkins, supra note 15, at 8.
414 See supra Part I.A.
415 See supra Parts II.B.3.a.
416 See generally supra Part IV.
417 Caldwell, supra note 16, at 42.
many possible explanations, including criticisms expressed by opponents of the 2006 Act before and after its passage.

One conclusion may be drawn from British authorities’ inability to employ the Act’s provisions criminalizing the glorification of terrorism. Certain speech may be extremely offensive and repugnant to a majority of the community, for instance speech praising the suicide bombers who killed many British citizens traveling to work on London’s public transit system on July 7, 2005. However, despite the repulsiveness of a certain category of speech, a broad and tenuous statute is not an attractive tool to combat that type of speech. It causes strong division in the country between opponents and proponents and further alienates the cultural group that the government needs in order to stop those who actually commit acts of terrorism.\textsuperscript{418} As Justice Oliver Wendell Holmes wrote about certain categories of speech, perhaps “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”\textsuperscript{419}

\textbf{ELLEN PARKER}\textsuperscript{*}

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\textsuperscript{418} See supra Parts III.B.
\textsuperscript{419} Abrams v. United States, 250 U.S. 616, 630 (1919).
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\textsuperscript{*} Executive Administrative Editor, \textit{Emory International Law Review}. J.D. Candidate, Emory University School of Law (2008); B.B.A., cum laude, The University of Georgia (2005). I would like to thank Professor Charles Shanor for his guidance throughout the writing process. Special thanks to my family for their continued love and support.