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New Faces of the First Amendment: The Philosopher, the Pastor, and the Publisher

Posted By [Timothy Zick](#) On September 6, 2011 @ 9:23 am In [First Amendment](#) | [6 Comments](#)

My new book project focuses on the First Amendment's trans-border dimension. I'll explain in more precise terms what this dimension includes in a subsequent post. Briefly, I will be examining and hope to clarify the relationship or intersection between First Amendment liberties and territorial borders.

To be sure, in years to come domestic or intra-territorial First Amendment issues will continue to be prominently debated and litigated. But owing to globalization, digitization, and other twenty-first century phenomena, we will be forced to pay greater attention to trans-border First Amendment concerns. One way to demonstrate the change in focus is to think about some of the contemporary figures or personalities whose expressive activities implicate the First Amendment's trans-border dimension. Three contemporary First Amendment figures – a Swiss philosopher, a Florida pastor, and an Australian Internet publisher – symbolize and demonstrate some of the [emerging complexities of trans-border expression](#) ^[1].

Many readers will recall that Tariq Ramadan, a prominent Swiss philosopher, poet, and writer, sought to enter the U.S. in 2004 to accept an academic post at Notre Dame University. Ramadan is an expert in the interpretation of Islamic texts and advocates, according to his supporters, the virtues for Muslims of inclusivity and integration. The State Department twice denied Ramadan entry. At first the agency revoked Ramadan's visa without providing any explanation. Later it explained that the revocation was based upon Ramadan's alleged support for terrorism. Ramadan eventually resigned his appointment with Notre Dame. When he next applied for and was denied a visa to enter the U.S. for the purpose of participating in various conferences and academic events, the ACLU filed a lawsuit challenging Ramadan's exclusion. The State Department alleged that Ramadan's visa application had been denied on the ground that he had provided material support, in the form of charitable contributions, to designated terrorist groups. In part, the government defended the visa denial on the ground that it was authorized to deny entry to aliens based solely on ideological or associational grounds. After several years of litigation that claim or defense was never actually resolved. Although it was urged to do so, the Obama Administration did not repudiate or abandon the George W. Bush Administration's claim that the executive may engage in ideological exclusion. Secretary of State Hillary Clinton eventually lifted the ban on Ramadan's entry, thereby allowing him to visit the U.S. and to participate in academic conferences and lectures.

Pastor Terry Jones of Gainesville, Florida, recently generated international controversy by first threatening to burn, and later setting fire to, a copy of the Quran. Jones was warned by high-level government officials, including President Obama, not to go through with his plans. The President worried that the burning of the Quran would be an international "recruitment bonanza" for Al Qaeda. Jones nevertheless held his Quran "trial" and burning. His actions were broadcast around the world. Both as a result of Jones's threat to burn the Quran, and after the burning had taken place, deadly riots broke out in Afghanistan. Several people were killed during those clashes. The trial and burning of the Quran produced both international outcry and sustained debate regarding the limits of free speech. Jones was pilloried both within the U.S. and abroad for inciting violence and supporting terrorism.

Julian Assange is an Australian-born journalist, publisher, and Internet activist. Assange became a controversial worldwide figure when his website, WikiLeaks, recently published a trove of documents relating to America's execution of the wars in Iraq and Afghanistan. Assange allegedly received the documents from a private in the U.S. Army. Assange and WikiLeaks, along with major international media outlets including the New York Times, Le Monde, and Der Spiegel, later published a cache of U.S. diplomatic cables, some of which had

been designated “confidential” or “secret” by the U.S. WikiLeaks recently posted additional diplomatic cables (apparently by mistake). The U.S. Department of Justice has opened a criminal investigation and has signaled that Assange might be prosecuted under the Espionage Act of 1917. That law has never been used to prosecute a newspaper, website, blog, or other publisher of truthful information.

These are three of the new faces of the First Amendment. Each represents an important aspect of the First Amendment’s trans-border dimension.

Although Ramadan’s face may be relatively new, at least one of the issues raised by his visa denials is actually quite old yet still unsettled — namely, whether the government can deny entry to aliens based on ideological grounds. The Supreme Court [avoided the question in 1972](#) ^[2], and has not addressed it since. (There is some debate whether current federal laws bar all forms of ideological exclusion.) The combination of ease of international travel, rising demand for trans-border association and exchange between citizens and aliens, and governmental concerns regarding importation of terrorist ideologies will ensure that limits on ingress continue to implicate free speech and association questions. Courts will be asked to determine the scope of the government’s authority to exclude aliens, and the extent to which the First Amendment limits that authority. Over the years, the U.S. has excluded many artists, educators, politicians, and other aliens. Future exclusions, which will likely focus on support for terrorism and terrorist ideologies, will require that courts balance national security and sovereign self-preservation concerns against trans-border First Amendment interests.

Jones’s actions demonstrate a number of aspects of the First Amendment’s trans-border dimension. For one thing, Jones’s Quran-burning showed that the longstanding distinction between “domestic” and “foreign” speech has substantially declined in significance. Jones was not speaking solely to a domestic audience consisting of residents of Gainesville, citizens of Florida, or even citizens of the U.S. Rather, his symbolic act almost immediately reached a worldwide audience. Many in that audience did not understand or share First Amendment norms regarding incendiary and offensive expression. In emerging global theaters or marketplaces, First Amendment exceptionalism will increasingly clash with international norms. The fact that Jones’s expression apparently led in short order to deadly international riots raises the intriguing, [but thus far unresolved](#) ^[3], question whether the First Amendment incitement standard can or should apply to a citizen’s domestic speech that causes international harm. Finally, as President Obama’s response to Jones indicates, owing to digitization and contemporary channels of communication even seemingly localized domestic expression can have immediate foreign affairs or national security implications.

Among other things, Julian Assange’s disclosures precipitated a robust debate concerning the definition of “the press,” the scope of global press freedoms, the extraterritorial application of U.S. laws, the domain of First Amendment liberties, and the power of the U.S. and other governments to control global information flow. To many, Assange is the new face of global transparency via distribution of secret, confidential, and potentially harmful information.

In a narrow sense, the acts of these three figures raise First Amendment doctrinal issues regarding ideological exclusion of aliens, offensive and inciting expression, and freedom of the press. However, as I will explain in the book, their stories highlight some of the emerging complexities associated with the First Amendment’s trans-border dimension.

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URLs in this post:

[1] emerging complexities of trans-border expression:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1905046

[2] avoided the question in 1972: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=408&invol=753>

[3] but thus far unresolved: <http://balkin.blogspot.com/2010/09/on-burning-koran-notes-on-american.html>

[4] : [http://www.thomasmore.org/qry/page.taf?](http://www.thomasmore.org/qry/page.taf?id=119&_function=detail&sbtblct_uid1=903&_nc=75fd197f9128c8f914a3ed62951dd5e0)

[id=119&_function=detail&sbtblct_uid1=903&_nc=75fd197f9128c8f914a3ed62951dd5e0](http://www.thomasmore.org/qry/page.taf?id=119&_function=detail&sbtblct_uid1=903&_nc=75fd197f9128c8f914a3ed62951dd5e0)

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