

2014

In Opposition of Cultural Institutionalization of Speech Following U.S. Intervention into Foreign Governments

Carmen M. Cusack

Follow this and additional works at: <http://lawpublications.barry.edu/barryrev>

 Part of the [First Amendment Commons](#), [Foreign Law Commons](#), [International Law Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Carmen M. Cusack (2014) "In Opposition of Cultural Institutionalization of Speech Following U.S. Intervention into Foreign Governments," *Barry Law Review*: Vol. 19: Iss. 2, Article 3.
Available at: <http://lawpublications.barry.edu/barryrev/vol19/iss2/3>

This Article is brought to you for free and open access by Digital Commons @ Barry Law. It has been accepted for inclusion in Barry Law Review by an authorized administrator of Digital Commons @ Barry Law.

IN OPPOSITION OF CULTURAL INSTITUTIONALIZATION OF SPEECH FOLLOWING U.S. INTERVENTION INTO FOREIGN GOVERNMENTS

Carmen M. Cusack*

I. INTRODUCTION

Culture limits speech.¹ Unfettered self-expression is not supported by any culture.² Such expression could seemingly be anarchistic or harmful to society.³ Social graces, professional language, and appropriate speech between family members are just some of the contexts that can be influenced or dictated by culture.⁴ Some cultures devalue free speech in contexts that are valued by other cultures.⁵ Local culture enforces speech restrictions when people are shunned, shamed, or otherwise disciplined for violating speech norms, such as acceptable dress, appearance, language, word choice, speech content, gestures, emotional expression, tone, eye contact, touch, and volume.⁶ Although uniformity maintained through enforcement may unify groups and facilitate communication to some extent, enforcement can marginalize minorities, sublimate those who wish to differentiate themselves, and oppress political discourse.⁷

The U.S. Constitution protects free speech by severely limiting governmental infringement on speech.⁸ Governmental authority may be used by individuals to trump local enforcement of cultural speech restrictions.⁹ Some governments are highly influenced by cultures and enforce cultural speech restrictions.¹⁰ In places where the United States intervenes in conflicts or within other governments, oftentimes, severe oppression of speech is cited as one of many reasons for

* Carmen M. Cusack holds a BA in English and a JD from Florida International University, a Ph.D. in Criminal Justice specialized in Behavioral Science from Nova Southeastern University. She is an Instructor of Criminal Justice at Keiser University and Adjunct faculty at Nova Southeastern University. She serves as the Editor of *Journal of Law and Social Deviance*.

1. See discussion *infra* Section II.
2. See discussion *infra* Sections II–III.
3. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
4. See discussion *infra* Section II.
5. See discussion *infra* Section II.
6. See discussion *infra* Section II.
7. See discussion *infra* Section II.
8. U.S. CONST. amend. I.
9. See discussion *infra* Section V.
10. See, e.g., *Saudi Arabia*, HUMAN RIGHTS WATCH, <http://www.hrw.org/world-report/2013/country-chapters/saudi-arabia> (last visited Mar. 3, 2014); Lynne Al-Nahhas, *Saudi Braces for 'Open Driving Campaign' by Women*, YAHOO! NEWS, (Oct. 26, 2013), <https://en-maktoob.news.yahoo.com/saudi-braces-open-driving-campaign-women-035141130.html>.

intervening or using violence against governments.¹¹ Relying on law, policy, and social science, this article posits that, in principle, implementation of governments that protect free speech is noble and valuable. However, institutionalization of American cultural speech norms following intervention would be utterly unacceptable because American culture is no better or worse than any other culture.¹² Section II of this article discusses limitations or normativity of speech created or enforced by culture. Section III provides an overview of constitutionally guaranteed free speech and some limitations on it in the United States. Section IV reviews U.S. foreign policy and implementation of free speech as a valuable reason for intervening. Section V discusses institutionalization of culture in intervention. Section VI will discuss the problem with cultural supremacy and why cultural value of unlimited self-expression should not be enforced or expected. Section VII concludes.

II. CULTURE AND SPEECH

Culture can be defined as “the beliefs, customs, arts, etc., of a particular society, group, place, or time,”¹³ or “a particular society that has its own beliefs, ways of life, art, etc.”¹⁴ An individual’s expression and environment are shaped by culture.¹⁵ In a sense, culture creates a comfort zone.¹⁶ Adherence to cultural norms communicates abidance, which may be intended to preserve comfort zones.¹⁷ Communication of a particular message may be more successful when communication means are restricted by culturally acceptable boundaries.¹⁸ Unfortunately, miscommunication, uncomfortable speech, or offensive speech often occurs when comfort zones are violated.¹⁹ Violations can occur through verbal or nonverbal speech acts.²⁰ However, nontraditional speech, e.g., by minorities or innovators, could positively broaden local cultural comfort zones.²¹

11. See, e.g., Kimberly Tabor, *The Press in Iraq*, FRONTLINE WORLD (Nov. 2002), <http://www.pbs.org/frontlineworld/stories/iraq/press.html>. But see *Iraq: Intensifying Crackdown on Free Speech, Protests*, HUMAN RIGHTS WATCH (Jan. 22, 2012), <http://www.hrw.org/news/2012/01/22/iraq-intensifying-crackdown-free-speech-protests>.

12. See discussion *infra* Sections II–V.

13. *Culture*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/culture> (last visited Mar. 3, 2014).

14. *Id.*

15. See, e.g., Joan Flynn, *Bowling Alone but Working Together*, 26 BERKELEY J. EMP. & LAB. L. 607, 610–11 (2005).

16. *Id.*

17. *Id.*

18. Ian McMillan, *Communicating Through Dance: Ian McMillan Explains How the Magpie Dance Group Builds Trust and Relationships Using Non-verbal Communication*, COMMUNITY LIVING, Winter 2012, at 14, 14.

19. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

20. See, e.g., Sharon Waxman, *Saudi Women Defy Authority, Seize the Driver’s Seat (Updated)*, YAHOO! CELEBRITY, (Oct. 25, 2013), <http://omg.yahoo.com/news/saudi-women-defy-authority-seize-driver-seat-weekend-175946029.html>; *Saudi Government Warns Driving Ban Activist*, ALJAZEERA, <http://www.aljazeera.com/news/middleeast/2013/10/saudi-warns-women-against-defying-driving-ban-20131024165440384707.html> (last modified Oct. 25, 2013).

21. See Waxman, *supra* note 20.

The vast majority of speech is nonverbal.²² Verbal communication uses words, but wordless communication involves interpretation.²³ Verbal communication almost always occurs with nonverbal communication. Though quasi-nonverbal, written communication on the internet may sometimes be removed from nonverbal communication.²⁴ Nonverbal communication is comprised of three elements.²⁵

First, there is the communication environment which consists of the physical environment and spatial environment. Second, there are the communicators' physical characteristics: physique or body shape, general attractiveness, height, weight, hair, skin color, tone or odors (body or breath), physical appearance (clothes, lipstick, eyeglasses, wigs and other hairpieces, false eyelashes, jewelry), and accessories such as attaché cases. Third, there are the body movements and positions. These can include gestures, posture, touching behavior, facial expressions, eye behavior and vocal behavior.²⁶

When an unintended nonverbal communication is received, it creates a sense of intuition in the receiver.²⁷ However, what is received may not have been communicated by the communicator.²⁸ The information may have been created by the context in which it was intuited by the receiver.²⁹ This phenomenon frequently occurs when other countries view U.S. television.³⁰ International viewers' perception of nonverbal communication may vary significantly from local viewers.³¹ For example, a viewer watching U.S. news in Singapore may view a scenario involving graffiti as much more serious and negative than a viewer in the United States because of how differently these cultures deal with graffiti.³² Communication is embedded into cultural and intuitive perceptions by law, society, and context.³³ Verbal communication of local law also permeates foreign cultures.³⁴ For example, one report discusses how French arrestees ask to be read their rights, though Miranda rights do not exist in France.³⁵ Prisoners developed the

22. Jeanne Binstock van Rij, *Trends, Symbols, and Brand Power in Global Market: The Business Anthropology Approach*, STRATEGY & LEADERSHIP 18, 18 (1996).

23. Jean A. Mausehund, Susan A. Timm, & Albert S. King, *Diversity Training: Effects of an Intervention Treatment on Nonverbal Awareness*, 27 BUS. COMM. Q. 27, 28 (1995).

24. *Id.*

25. Yun Chu, et al., *Silent Messages in Negotiations: The Role of Nonverbal Communication in Cross-Cultural Business Negotiations*, 9 J. ORG. CULTURE, COMMS. & CONFLICT 113, 114 (2005).

26. *Id.* at 114, 115.

27. Binstock van Rij, *supra* note 22.

28. Virginia B. Wickline, Wendy Bailey, & Stephen Nowicki, *Cultural In-Group Advantage: Emotion Recognition in African American and European American Faces and Voices*, 17 J. GEN. PSYCHOL. 5, 19 (2009).

29. Chu, *supra* note 25, at 126; Binstock van Rij, *supra* note 22, at 21.

30. *See* Binstock van Rij, *supra* note 22, at 20.

31. *Id.* at 19.

32. *Id.* at 20.

33. *Id.* at 19.

34. *Id.* at 20.

35. *Id.* *See* *Miranda v. Arizona*, 384 U.S. 436 (1966).

idea from watching U.S. media.³⁶ Globally, younger generations belong to several cultures simultaneously because of media and internet.³⁷

Culture significantly impacts understanding and expression.³⁸ One study demonstrated in-group advantages of recognizing nonverbal communication, i.e. vocalized emotional tones and facial expressions.³⁹ The study found that African American, European American, and international European students were much better at interpreting nonverbal communication of American students.⁴⁰ Accurate interpretation created advantages.⁴¹ Not only was successful communication important, but sharing culture created “insiders.”⁴² The study also demonstrated that those who are similar can interpret nonverbal communication better.⁴³ This success reinforces the value of cultural normativity and comfort zones.⁴⁴

Nonverbal communication can be symbolic.⁴⁵ “Symbols exist within and gain meaning from culture, often providing contextual keys that help create and communicate the meaning of a situation or relationship.”⁴⁶ Nonverbal communication, including movement, facial expression, clothing, and other physical objects can be used to communicate.⁴⁷ A single gesture, like a handshake between Palestinian and Israeli leaders, can be perceived or intended to symbolize “peace/hope/optimism, authority/legitimacy, agreement/promise, violence, betrayal, anguish, . . . dislike,” legitimacy, betrayal, and curse.⁴⁸ Culturally acceptable messages or forms of communication expressed symbolically may receive approval or fail to draw scorn.⁴⁹ For example, in Japan, to demonstrate respect a superior should not be met with excessive eye contact.⁵⁰ Similarly, Colonel Muammar el-Qaddafi was once interviewed by Barbara Walters in Libya.⁵¹ Afterward, she complained that during their interview he looked everywhere in the room but at her.⁵² She became aware of cultural differences after learning that he did not look her in the eye to avoid lustful or disrespectful gazes, which are discouraged or prohibited in Islam.⁵³ However, Qaddafi’s followers and

36. See Binstock van Rij, *supra* note 22, at 20.

37. *Id.*

38. *Id.* at 19.

39. See Wickline et al., *supra* note 28, at 19.

40. *Id.*

41. *Id.* at 21.

42. *Id.* at 19.

43. *Id.* at 20.

44. *Id.* at 22.

45. Carmen M. Cusack, *To-Get-Her ForEVER: A Man Hater’s Right to Same-Sex Marriage*, 10 RUTGERS J.L. & PUB. POL’Y 63, 83 (2013).

46. Elizabeth A. Suter & Karen L. Daas, *Negotiating Heteronormativity Dialectically: Lesbian Couples’ Display of Symbols in Culture*, 71 WESTERN J. COM. 177, 177 (2007).

47. See Wickline et al., *supra* note 28; Chu, *supra* note 25.

48. Valerie Manusov & Tema Milstein, *Interpreting Nonverbal Behavior: Representation and Transformation Frames in Israeli and Palestinian Media Coverage of the 1993 Rabin-Arafat Handshake*, 69 WESTERN J. COM. 183, 191 (2005).

49. See, e.g., *id.* at 198.

50. See *id.* at 184.

51. C. Barnum & N. Wolniansky, *Taking Cues from Body Language*, MANAG’T REV., June 1989, at 59, 59 (1989).

52. *Id.*

53. See, e.g., *id.* at 59.

Muslim viewers were likely aware of the meaning of his gaze during the interview, which occurred in Libya.⁵⁴

Nonverbal communication can be used to create symbolism both intentionally and unintentionally.⁵⁵ However, culturally unpopular or unacceptable symbols or the use of symbols in unacceptable contexts can attract disapproval, rejection, or violence.⁵⁶ For example, holding hands may be a symbol of friendship or romance.⁵⁷ If two men strolled down a promenade in Kingston, Jamaica while holding hands, their gesture would be interpreted to indicate that they were homosexuals and they could or ought to be killed or abused.⁵⁸ The men may have been attempting to communicate love to one another or the public, or make a political statement, but were not likely asking to be killed or abused.⁵⁹ Even if they knew the possible consequences for their actions ahead of time, the cultural limitation on that symbol in that context is what would prompt punishment.⁶⁰

Culture need not directly enforce speech restrictions.⁶¹ Culture may socialize children by embedding educational materials with cultural ideology.⁶² For example, gender roles that limit speech and performative speech acts can be institutionalized through education.⁶³ A study of pedagogy in Iran found that thirty-five Farsi, Arabic, and English teaching and grammar textbooks instilled male dominance by the kinds of behaviors presented in the material.⁶⁴ The study also found that associations between gender and language are strongly influenced by social structure.⁶⁵ Students learning from these books are exposed to cultural limitations of expression.⁶⁶ The authors' expressions about these activities and age-appropriate knowledge are limited by their cultural perceptions of gender roles.⁶⁷ Words used to describe activities will be contextually limited by appropriateness and gender.⁶⁸

Verbal and nonverbal speech reflecting cultural norms exist within and shape families.⁶⁹ Child Protective Services (CPS), for example, will offer parenting

54. *Id.* at 59.

55. *Id.*

56. *See id.* at 60.

57. Barnum & Wolniansky, *supra* note 51, at 60.

58. *See generally* Charlene L. Smith & Ryan Kosobucki, *Homophobia in the Caribbean: Jamaica*, 1 J.L. & SOC. DEVIANCE 1, 4, 5, 46 (2011) (discussing acts interpreted as "gross indecency" in Jamaica and retribution for such acts).

59. *See, e.g., id.* at 42–49.

60. *See id.*

61. *See* Yaghoob Foroutan, *Gender Representation in School Textbooks in Iran: The Place of Languages*, 60 CURRENT SOC. 771, 772 (2012).

62. *Id.*

63. *Id.*

64. *Id.* at 771.

65. *Id.*

66. *See id.* at 782.

67. Foroutan, *supra* note 61, at 782.

68. *Id.*

69. *See* Mark T. Morman & Kory Floyd, *A "Changing Culture of Fatherhood": Effects on Affectionate Communication, Closeness, and Satisfaction in Men's Relationships with Their Fathers and Their Sons*, 66 W. J. COMM. 395, 397–98 (2002).

classes to parents who fail to frequently bathe children.⁷⁰ Failure to bathe children frequently may not qualify as abuse or neglect that permits CPS or state intervention, but it breaches cultural parenting norms.⁷¹ A parent is supposed to belong to his or her own parenting culture, and participation in that culture is communicated verbally and nonverbally.⁷² Fatherhood, for example, may be gauged by the culture of fatherhood.⁷³ Shared expectations for paternal comportment are sustained between and within families based on general cultural ideas about masculinity and fatherhood.⁷⁴ Fathers' behaviors communicate familial roles to children, but also communicate participation in or acquiescence to culture.⁷⁵ For example, a father who keeps a picture of his child on his desk could intend to communicate paternal love and pride.⁷⁶ However, a father wearing a shirt bearing "fuck this proceeding"⁷⁷ to a custody hearing is likely intending to communicate a message other than reverent focus on the legal process and the unparalleled importance of his role as a father. However, the father may believe that he is communicating valuable familial and cultural expectations for and to his child.⁷⁸ A study of 139 father-son relationships found that relationships between sons and fathers reflect a cyclical in American culture.⁷⁹ In this study, researchers found that fathers were becoming more verbally and nonverbally supportive of their sons.⁸⁰ Respondent fathers reported experiencing greater closeness and affection than what their sons reported feeling for their fathers.⁸¹ Cultural shifts allowed for increased supportive expression by fathers and sustained their belief that their expression was rewarding.⁸² However, sons did not report experiencing this same shift.⁸³ Increased emotional expression among fathers towards sons was particular to that dynamic.⁸⁴ This demonstrates nuances in cultural communication.⁸⁵

Professional translation of nonverbal communication can be difficult because expression, communication, reception, and understanding could diverge from the speaker's intention.⁸⁶ Interlingual functional equivalents of nonverbal

70. JILL GOLDMAN ET AL., U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE ON CHILD ABUSE AND NEGLECT, A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE 45 (2003), available at <http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf>.

71. Morman & Floyd, *supra* note 69, at 407.

72. *Id.* at 397-98.

73. *See id.* at 398-400.

74. *See id.* at 397-400.

75. *Id.* at 397-400, 407.

76. *See, e.g., id.* at 406.

77. *But see* Cohen v. California, 403 U.S. 15, 20 (1971).

78. Morman & Floyd, *supra* note 69, at 396.

79. *Id.* at 399-400, 405-06.

80. *Id.* at 403-04.

81. *Id.* at 404-05.

82. *Id.* at 405-07.

83. *See id.* at 406.

84. Morman & Floyd, *supra* note 69, at 406.

85. *See id.* at 406-07.

86. *See* Hu Yuan, *Nonverbal Communication and Its Translation/ La Communication Non Langagiere et Sa Traduction*, 3 CANADIAN SOC. SCI. 77, 77 (2007).

communications must be established even if they are not synonymous.⁸⁷ Five techniques are used to establish equivalency: (1) foreignization; (2) amplification; (3) annotation; (4) substitution; and (5) paraphrasing.⁸⁸ Each of these techniques is useful but can be faulty.⁸⁹ By using foreignization, the interpreter attempts to maintain the original culture's sentiment.⁹⁰ Nonverbal communication is not always effective between people from the same culture due to ambiguity.⁹¹ When translating ambiguous nonverbal communication, translators may supply additional context by using language that specifies proper meaning.⁹² Nonverbal communication of cultural traditions requires annotation to inform readers about traditions or explain with equivalent substitutions of nonverbal communication.⁹³ Paraphrasing can be used to approximate the expression of nonverbal communication.⁹⁴ These professional techniques demonstrate the complexity in understanding and potential for misunderstanding of nonverbal communication, especially between cultures.⁹⁵

III. U.S. FIRST AMENDMENT, FREE SPEECH AND LIMITATIONS

Free speech is constitutionally guaranteed by the First Amendment.⁹⁶ The government cannot pass laws that limit speech content without: (1) providing a compelling reason for why a narrowly tailored law was needed to proscribe certain speech; and (2) proving how that law only limits targeted speech but no other lawful speech.⁹⁷ Some limitations on speech have passed strict scrutiny.⁹⁸ Examples include, but are not limited to, circumscriptions on defamation, obscenity, fraud, solicitation, fighting words, and conspiracy.⁹⁹ In addition to some narrowly tailored restrictions on content, the government may use content neutral time, place, and manner restrictions to limit lawful speech to uphold state powers, like order and safety, under an intermediate scrutiny standard.¹⁰⁰ Speech rights are not equally guaranteed to all people.¹⁰¹ For example, children in public schools and prisoners have fewer rights than others.¹⁰² Except under rare circumstances, e.g.,

87. *Id.* at 78.

88. *Id.*

89. *Id.* at 80.

90. *Id.* at 78.

91. *See, e.g., id.* at 78, 79.

92. *See* Yuan, *supra* note 86, at 79.

93. *Id.*

94. *Id.*

95. *Id.* at 80.

96. U.S. CONST. amend. I.

97. *See* Sable Comms. of Cal., Inc. v. FCC, 492 U.S. 115, 126–27 (1989).

98. *See* discussion *infra* note 113.

99. *See, e.g., Miller v. California*, 413 U.S. 15, 23 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 573 (1942). *See also* Carmen M. Cusack, *Busting Patriarchal Booby Traps: Why Feminists Fear Minor Distinctions in Child Porn Cases, An Analysis of Social Deviance Within Gender, Family, or the Home (Etudes 4)*, 39.1 S.U. L. REV. 43, 53 (2011).

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

101. *Shaw v. Murphy*, 532 U.S. 223, 223 (2001); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

102. *See* *Shaw v. Murphy*, 532 U.S. 223 (2001); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

subpoenaed testimony or some commercial speech, the government cannot compel speech.¹⁰³

Under *Spence v. Washington*, symbolic speech requires a communicator to have intended to communicate a particularized message, which would likely be understood by the public.¹⁰⁴ Intent to communicate is not sufficient; reception of the intended communication is vital for symbolism to qualify as protected speech.¹⁰⁵ An example of symbolic speech that is imbued with essential elements occurs when a peace sign is affixed to a flag.¹⁰⁶ The symbolism expressed seems to be easily understood.¹⁰⁷ A peace sign is widely understood to mean peace, and affixation to a flag indicates a political desire for peace or political disapproval of war.¹⁰⁸ However, civil disobedience is not protected.¹⁰⁹ For example, a person who intends to communicate opposition to the draft by burning a draft card may seem to satisfy the two prong test, but because that speech destroys government property, it cannot be protected.¹¹⁰ The speech did not incidentally destroy government property.¹¹¹ The burner intended to destroy the card to symbolize and physically create opposition to the draft.¹¹²

The influence of local culture on free speech rights is essential to First Amendment jurisprudence. In *Miller v. California*, the Court set forth the test for obscenity after Miller was charged for sending unsolicited depictions of orgies and other images on an advertisement promoting his business to members of the local community using the U.S. mail.¹¹³ The Court held obscenity to be unprotected speech.¹¹⁴ The three-prong test asks whether: (1) an average person who applies contemporary community standards would find that the speech in question appeals to prurient interests overall; (2) the speech is patently offensive and proscribed by law, e.g. sexual, bestial, or excretory depictions; and (3) taken as a whole, the speech lacks serious literary, artistic, political, or scientific value.¹¹⁵ In the first prong, the Court specifically relies on local cultural values to measure the degree of sexual content and offensiveness of the speech in question.¹¹⁶ In the second prong, local laws could proscribe speech.¹¹⁷ Determination of what is patently offensive clearly relies on American cultural standards.¹¹⁸ This is evidenced by the fact that

103. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 627 (1985).

104. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

105. Elizabeth Hildebrand Matherne, *The Lactating Angel or Activist? Public Breastfeeding as Symbolic Speech*, 15 MICH. J. GENDER & L. 121, 137 (2008).

106. *Spence*, 418 U.S. at 405.

107. See Carmen M. Cusack, *Boob Laws: An Analysis of Social Deviance Within Gender, Family, or the Home* (*Etudes* 2), 33 WOMEN'S RTS. L. REPTR. 197, 214 (2012); Cusack, *supra* note 45, at 83.

108. *Spence*, 418 U.S. at 405.

109. *U.S. v. O'Brien*, 391 U.S. 367, 367 (1968).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Miller v. California*, 413 U.S. 15, 15 (1973).

114. *Id.* at 23.

115. *Id.* at 24–25.

116. *Id.*

117. *Id.*

118. *Id.*

importation of pornography lawfully produced or traded in other countries, could qualify as obscenity in the United States.¹¹⁹ In the third prong, value is definable by local or national standards, but is shaped by cultural and societal judgment, sensibility, utility, norms, etc.¹²⁰

IV. INTERVENTION AND IMPLEMENTATION OF DEMOCRATIC FREE SPEECH

The U.S. government and the Supreme Court of the United States have repeatedly stated the essentiality of free speech to U.S. democracy.¹²¹ U.S. foreign policy intends to establish an American brand of democracy in other nations.¹²² These nations often lack democracy and free speech.¹²³ Implementation of free speech is one valuable reason for intervening into other governments.¹²⁴ There are several desirable outcomes for intervening into other governments to establish free speech.¹²⁵ First, free speech allows citizens to make informed choices in a democratic society.¹²⁶ Second, it facilitates the pursuit of discovery of truth.¹²⁷ Third, it allows personal development of individual capacities, and can nurture self-valuing.¹²⁸ Fourth, it fosters self-government and collective decision making that permits political change.¹²⁹ U.S. volition does not solely propel intervention.¹³⁰ In the Arab world, for example, extremists and moderates value U.S. democracy, free speech, gender equality, and other related political concepts and law.¹³¹ In one survey, fifty percent of extremists and thirty-five percent of moderates reported that increased democracy would contribute to Arab and Muslim progress.¹³² In nations like India, Brazil, and Mexico, establishment of democracy focused on free speech has allowed economic growth and increased governmental and social stability.¹³³ The United States' and other nations' belief in, and institutionalization of,

119. *Miller*, 413 U.S. at 34–35.

120. *Id.* at 24–25.

121. Judge Helen Ginger Berrigan, “*Speaking Out*” About Hate Speech, 48 LOY. L. REV. 1, 6 (2002).

122. Gabe Rottman, *A “Foreign Policy Exception” to the First Amendment?*, AMERICAN CIVIL LIBERTIES UNION (ACLU), Sept. 28, 2012, <https://www.aclu.org/blog/free-speech/foreign-policy-exception-first-amendment> (last visited on Oct. 24, 2013).

123. *Id.*

124. *Id.*

125. James L. Oakes, *1987 Survey of Books Relating to the Law: IV. The Federal Courts and the Constitution: Tolerance Theory and the First Amendment*, 85 MICH. L. REV. 1135, 1147 (1987).

126. *Id.*

127. *Id.*

128. *Id.*

129. Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 304 (2008).

130. Mark P. Lagon, *Promoting Democracy: The Whys and Hows for the United States and the International Community*, CENTER FOR HUMAN RIGHTS (Feb. 2011), <http://www.cfr.org/democratization/promoting-democracy-whys-hows-united-states-international-community/p24090>.

131. John L. Esposito, *The War on Terrorism: Implications for U.S. Foreign Policy*, PRINCE ALWALEED BIN TALAL CENTER FOR MUSLIM-CHRISTIAN UNDERSTANDING (ACMCU), <http://acmcu.georgetown.edu/the-war-on-terrorism> (last visited Oct. 24, 2013).

132. *Id.*

133. Lagon, *supra* note 130.

democracy and free speech rights have demonstrated the significance of establishing democratic governments that protect free speech rights.¹³⁴

V. INTENTIONAL OR INADVERTENT INSTITUTIONALIZATION OF CULTURE FOLLOWING INTERVENTION

Institutionalization of culture may be intentional or inadvertent.¹³⁵ There is no shortage of historical examples in the Old World, New World, Far East, and Middle East of one culture invading another, institutionalizing a new cultural regime, and eradicating cultural cohesion or any furtherance of the former culture.¹³⁶ Intentional institutionalization of culture can involve forcible religious conversion, breeding, change of language, and codifying customs.¹³⁷ Inadvertent institutionalization of culture could result from commerce, education, art, adaptation, and other positive or desirable exchanges.¹³⁸

The U.S. government institutionalizes culture through promotion of expressive mediums.¹³⁹ Government regulation and protection of speech is supposed to be content neutral.¹⁴⁰ However, the U.S. government has engaged in the promotion of certain content.¹⁴¹ For example, 26 U.S.C. § 501(c)(3)–(4) status aides corporations seeking to promote specific ends, means, and messages that are deemed to benefit citizens and society.¹⁴² Though U.S. law has been linked with forcible institutionalization of American culture domestically, e.g., miscegenation laws or the Defense of Marriage Act (DOMA), U.S. foreign policy does not set out to institutionalize American culture through intervention into foreign governments.¹⁴³ It attempts to establish democratic policies and regimes trained to defend democracy.¹⁴⁴ Yet, U.S. policies, objectives, and actions are embedded with American culture.¹⁴⁵ Donated educational books, policy manuals, police training, and other forms of speech present and establish U.S. culture through intervention.¹⁴⁶

Institutionalization of culture could occur inadvertently with promotion of western preferences for time, place, and manner restrictions.¹⁴⁷ Culture connects

134. Esposito, *supra* note 131.

135. Dana Zartner, *The Culture of Law: Understanding the Influence of Legal Tradition on Transitional Justice in Post-Conflict Societies*, 22 IND. INT'L & COMP. L. REV. 297, 300–01 (2012).

136. See, e.g., Laurence Juma, *The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho*, 23 PACE INT'L L. REV. 92 (2011).

137. *Id.*

138. Esposito, *supra* note 131.

139. Ammori, *supra* note 129, at 308.

140. See discussion *supra* Section III.

141. See Ammori, *supra* note 129.

142. 26 U.S.C. § 501(c)(3)–(4).

143. 1 U.S.C. § 7; 28 U.S.C. § 1738C; *Loving v. Virginia*, 388 U.S. 1 (1967); Cusack, *supra* note 45, at 83.

144. Norvell B. De Atkine, *Western Influence on Arab Militaries: Pounding Square Pegs into Round Holes*, GLOBAL RESEARCH IN INTERNATIONAL AFFAIRS (GLORIA) Center (Mar. 18, 2013), <http://www.gloria-center.org/2013/03/western-influence-on-arab-militaries-pounding-square-pegs-into-round-holes/>.

145. *Id.*

146. *Id.*

147. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

time, place, and manner.¹⁴⁸ When time, place, and manner of speech are regulated, it could shape which speech is promoted verbally and nonverbally even if restrictions are intended to be content neutral based on American concepts of neutrality.¹⁴⁹ Restrictions on time, place, and manner and requirements for adherence to restrictions that contravene local cultural norms compel speech to an extent.¹⁵⁰ Though compulsion may be incidental and not governmentally sponsored, it could reflect or institutionalize American culture.¹⁵¹

Westernization could occur voluntarily, but when it coincides with intervention, its connection to institutionalization ought to be questioned.¹⁵² Minor adaptations may not give rise to questions, but significant changes could. Holning Lau states that labeling cultural changes as westernization denies cultural agency and self-identification to the changers.¹⁵³ However, when westernization coincides with intervention, the question ought to be whether the impetus, process, or results of institutionalizing Western culture deny agency and self-identification.

VI. DEMOCRATIC FREE SPEECH RIGHTS, NOT INSTITUTIONALIZATION OF CULTURAL SUPREMACY

Free speech creates a democratic personality in society.¹⁵⁴ Following interventions, outside forces may impose exogenous transitional justice requiring institutionalization of free speech rights, norms, allowances, and expectations.¹⁵⁵ Endogenous transitional justice is an organic mechanization of free speech exercise by the transitional society.¹⁵⁶ Citizens may not engage in speech.¹⁵⁷ When citizens are granted free speech rights following intervention, their culture may continue to abide by content restrictions or individuals may continue to believe that they are better served by silence in some situations.¹⁵⁸ For these reasons, forcing or favoring speech acts or certain content; e.g., supporting certain forms of discourse or content as being more “civilized,” should consciously be avoided and should cautiously be circumnavigated as much as possible.¹⁵⁹

148. See discussion *supra* Section II.

149. *Id.*

150. *Id.*

151. See discussion *supra* Section II.

152. See discussion *infra* Section V.

153. Holning Lau, *The Language of Westernization in Legal Commentary*, 61 AM. J. COMP. L. 507, 530 (2013).

154. Oakes, *supra* note 125, at 1141.

155. Zartner, *supra* note 135, at 300, 315.

156. *Id.* at 300.

157. See discussion *supra* Section IV.

158. See discussion *supra* Section II.

159. See *The Burqa and Niqab—Uncovering the Facts*, ISLAMIC INFO. & SERVICES NETWORK OF AUSTRALIA (IISNA), <http://www.iisna.com/articles/pamphlets/the-burqa-and-niqab-uncovering-the-facts/> (last visited Feb. 24, 2014).

Outside perspectives should take note of rich cultural symbolism expressed through nonverbal speech prior to judging the extent of speech exercise.¹⁶⁰ A burqa, for example, may seem to enforce silence through gender roles and religion, but wearing a burqa can also express a message that the wearer intends to express and is not necessarily forced to express.¹⁶¹ Though Americans may not value the message, free speech rights cannot restrict content.¹⁶² For example, Americans may not want to believe that an Islamist woman voluntarily intends to express subservience, Islamic pride, modesty, or any other number of messages; but if she does, then supremacist cultural intervention ought not to supplant her right to express that message.¹⁶³ Its offensiveness to many people could demonstrate that it is widely understood and therefore symbolic and protected free speech.¹⁶⁴ U.S. intervention should ensure that she has the right to express alternate messages, but not frown upon the content of any message, especially by enforcing regulations that compel contrary speech; e.g., require removal for government photos or airline security.¹⁶⁵ Speech must be protected regardless of whether speech is in favor of or opposed to the outgoing, transitional, or incoming regime.¹⁶⁶

President Obama said,

We [protect speech critical of religion not] because we support hateful speech, but because our founders understood that without such protections, the capacity of each individual to express their own views and practice their own faith may be threatened. We do so because in a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities.¹⁶⁷

160. See, e.g., *Saudi Government Warns Driving Ban Activist*, AL JAZEERA (Oct. 25, 2013), <http://www.aljazeera.com/news/middleeast/2013/10/saudi-warns-women-against-defying-driving-ban-20131024165440384707.html>. Saudi women planned to protest a culturally enforced ban on female drivers. Abdullah Al-Shihri & Aya Batrawy, *Saudi women's driving kicks off without arrests*, YAHOO (Oct. 26, 2013), <http://news.yahoo.com/saudi-womens-driving-kicks-off-without-arrests-130714540.html>. Though Saudi law does not prohibit it, Islamist regimes operating the government threatened to use force and legal enforcement against unlicensed driving, protests, and civil disobedience to stop female drivers. *Id.* Officially, the women chose to terminate their scheduled protest opting to continue open-ended protests. Al-Nahhas, *supra* note 10. Several dozen women defied the ban by driving on the scheduled protest date. *Id.* Some Saudi women have stated that they want to drive or have driven because it seems fun, however some have failed to cite gender equality as a reason for driving. Al-Shihri & Batrawy, *supra* note 160. Local culture defies female driving, not the law. *Id.* Yet, women may drive for fun, not to protest gender roles. *Id.* Thus, outsiders should not overlook the importance of cultural dynamics in favor of concluding that Saudi women break the law to make a statement about or achieve gender equality. *Id.*

161. See *The Burqa and Niqab—Uncovering the Facts*, *supra* note 159. But see Yasmin Alibhai-Brown, *The burka empowering women? You must be mad, minister*, DAILY MAIL (July 21, 2010), <http://www.dailymail.co.uk/debate/article-1296132/The-burka-empowering-women-you-mad-minister.html#ixzz1JleRseDs>.

162. See *supra* Section V.

163. *The Burqa and Niqab—Uncovering the Facts*, *supra* note 159. But see Alibhai-Brown *supra* note 161.

164. See *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968).

165. See Jane Taber, *'No Exceptions' for Veil at Airports*, *Baird Says*, THE GLOBE AND MAIL, <http://www.theglobeandmail.com/news/politics/ottawa-notebook/no-exceptions-for-veil-at-airports-baird-says/article1368737/> (last updated Sept. 10, 2012).

166. See Rottman, *supra* note 122.

167. *Id.*

President Obama's statement reinforces some of the main purposes for instilling democracy.¹⁶⁸ However, President Obama continued, "We do so because given the power of faith in our lives, and the passion that religious differences can inflame, the strongest weapon against hateful speech is not repression; it is more speech."¹⁶⁹ President Obama implicitly seems to support institutionalization of American cultural values of speech.¹⁷⁰ This should be avoided. The antidote to repression is allowance, not compulsion.¹⁷¹

One reason to avoid demands for speech is that some cultures perform better when thoughts, processes, or actions are not verbalized.¹⁷² One study found that Asian Americans, unlike European Americans, solved problems better when their problem solving strategies were not verbalized.¹⁷³ Verbalization of strategy impaired their cognitive processes.¹⁷⁴ This phenomenon was linked to traditional Asian values for respectful silence and contemplation.¹⁷⁵ Establishment of free speech rights does not annihilate private or cultural proscriptions on speech—only governmental ones.¹⁷⁶ Local culture can still encourage or enforce silence.¹⁷⁷ Violent enforcement may not be deterred despite the law.¹⁷⁸ Furthermore, minorities could still be pressured or face losses that would not be justified merely by the principle of free speech or some abstract governmental validation of rights.¹⁷⁹ Institutionalization of U.S. culture would not necessarily liberate minorities in this case, and could potentially aid further suppression.¹⁸⁰ Minorities can exist in any number of social realms including "ethnicity, race, locality, or geography . . . gender, age, religion, immigration status, disability, sexual orientation, socioeconomic status (i.e., "income, education, or both"), occupation, and . . . [employment] organization."¹⁸¹ For example, a Christian living in a transitional Muslim society may not immediately choose to exercise free speech rights following transition.¹⁸²

For a person of the Christian faith, imagine what it would be like if the dominant religion in America were Islam. . . . It would certainly be understandable if you, as a Christian, would be wary of the dominant Muslims you encounter each day, wondering who

168. *See id.*

169. *Id.*

170. *See id.*

171. *See id.*

172. Heejung S. Kim, *Culture and Self-Expression*, PSYCH. SCI. AGENDA, June 2010, available at <http://www.apa.org/science/about/psa/2010/06/sci-brief.aspx>.

173. *Id.*

174. *Id.*

175. *Id.*

176. *See Berrigan, supra* note 121, at 3–4.

177. *Id.* at 7–10, 15.

178. *Id.* at 7–8.

179. *Id.* at 9–10.

180. *See id.*

181. Ascanio Piomelli, *Cross-Cultural Lawyering By The Book: The Latest Clinical Tests and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L. J. 131, 151 (2006).

182. Berrigan, *supra* note 121, at 10–11.

is an anti-Christian sympathizer, who is not. And given a choice, you might not readily expose yourself to the possibility of finding out. It is not worth the hassle. You opt to lie low. The alternative is to speak out and risk ostracism or worse, as the Christian martyrs did centuries ago, and as southern blacks experienced in the very recent past.¹⁸³

Verbalization may be destructive to some cultures or individuals and should not be enforced or promoted, though it should not be prohibited.¹⁸⁴ U.S. pundits ought not to view transitional societies as failing to engage in free speech as much as engaging in silence.¹⁸⁵

U.S. intervention should not choose to support one local culture over another.¹⁸⁶ Supporting one local culture to any extent reflects preferences for elevation of one group.¹⁸⁷ Even if groups are more successful or democratic, democracy permits locals to elect preferred representatives.¹⁸⁸ The United States should not supersede cultural preferences for one group above the democratic process it seeks to implement.¹⁸⁹ The United States should not supply American culture even if it is in demand or accepted.¹⁹⁰ Projected eagerness by Arab and Muslim nations to improve relations with the United States was reported by fifty-eight percent of extremists and forty-five percent of moderates.¹⁹¹ Moderates and extremists also reportedly admired the United States' technology, cultural work ethic, cooperation, and self-responsibility.¹⁹² They may want to absorb U.S. culture, but force or intervention should not include promotion of cultural values.¹⁹³ Institutionalizing culture is a brand of supremacy, not democracy.¹⁹⁴ Intervention should only establish democracy, which includes free speech.¹⁹⁵ Free speech rights should be exercised by citizens independently of influence by U.S. culture.¹⁹⁶ Handing over values minimizes the importance of allowing individuals and groups to pursue happiness, a goal of democratic societies.¹⁹⁷

183. *Id.*

184. *See id.* at 8–9.

185. *See Kim, supra* note 173.

186. *See, e.g., John A. Tures, Does Mitt Romney Believe in Cultural Supremacy?*, YAHOO! (Aug. 2, 2012) <http://voices.yahoo.com/does-mitt-romney-believe-cultural-supremacy-11633788.html>.

187. *Id.*

188. *See id.*

189. *Id.*

190. Esposito, *supra* note 131.

191. *Id.*

192. *Id.*

193. Zartner, *supra* note 135, at 315.

194. *See id.* at 308–09, 312.

195. Berrigan, *supra* note 121, at 7.

196. *See Rottman, supra* note 122.

197. *See Zartner, supra* note 135, at 298, 303.

VII. CONCLUSION

Family, economy, gender, and other clusters of society are deeply connected to cultural influences.¹⁹⁸ Speech is typically shaped by local cultural norms.¹⁹⁹ Normal expression aids communication and understanding, but it also limits individuality and constricts expression of non-normative ideas, feelings, symbols, and activities.²⁰⁰ To some extent, free speech rights protect speech that is valued by society.²⁰¹ However, in general, free speech rights are endemic to democracy.²⁰² When the United States intervenes into other governments to establish democracy, care should be taken to avoid institutionalization of U.S. cultural norms that would promote or reduce expression, or demand performance of certain speech acts.²⁰³ Speech rights should be established and free speech should be protected, but cultures should be permitted to authentically regulate themselves through their cultural norms throughout transitional periods.²⁰⁴ Development of minorities' exercise of speech rights ought to evolve through the democratic process and cultural climate independently of intentional, or unintentional, institutionalization of U.S. culture.²⁰⁵

198. See discussion *supra* Section II. See also Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, 42 AM. SOCIO. REV. 726, 727 (1977).

199. See Zartner, *supra* note 135.

200. See Zucker, *supra* note 198.

201. See discussion *supra* Sections III–IV.

202. See discussion *supra* Section IV.

203. See discussion *supra* Section V.

204. See Zartner, *supra* note 135, at 301–02.

205. See *supra* Section V.