

Zick on Trans-Border Expression

Timothy Zick, who is a professor of law at William and Mary Law School, has posted *Falsely Shouting Fire in a Global Theater: Emerging Complexities of Trans-Border Expression* on SSRN. The abstract reads:

In Schenck v. United States (1919), Justice Holmes wrote that “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.” Owing to globalization, the digitization of expression, and other modern conditions a metaphorical global theater is emerging. In this theater, speakers’ voices and the physical and psychological effects of domestic expressive activities will frequently traverse or transcend territorial borders. This Article draws upon several recent events — the Quran burning in Florida, the international reaction to an Internet posting calling for a “Draw Mohammed Day” event, the criminalization of the provision of expressive assistance to designated foreign terrorist organizations, the posting of potentially inciting speech on the Internet, and the WikiLeaks disclosures — to examine how First Amendment doctrines relating to offensive expression, incitement, hostile audiences, treason, and the distribution of secret or potentially harmful information might apply in the global theater.

The Article makes four general claims or observations regarding these doctrines. First, although in rare instances the government could punish domestic incitement that causes harmful extraterritorial effects, in general expression that breaches global peace or order by producing distant offense and other harms ought to remain fully protected in the global theater. Second, owing to the instantaneous trans-border flow of offensive and incendiary expression, speakers will frequently have to assess in advance whether they are willing to risk the possibility of harm from distant threats, while officials will need to consider whether to offer some protection to domestic speakers in response to explicit threats from foreign hecklers. Third, the expanding category of proscribed enemy-aiding expression, which now includes the provision of “material support” (including otherwise lawful expression) to terrorists and may include a form of cyber-treason, must be defined as narrowly as possible in the global theater. In general, laws ought to be drafted and enforced such that only intentional enemy-aiding conduct, rather than speech or expressive association, is proscribed. Fourth, with regard to the trans-border

exposure of governmental secrets, the United States ought to focus primarily upon improving its processes for protecting secrecy rather than on prosecuting the publishers, whether foreign or domestic, of such information.

The Article also draws some broader free speech, association, and press lessons from recent events and controversies in the emerging global theater. Public officials, courts, and commentators must begin to think more systematically about trans-border speech, association, and press concerns. The First Amendment's trans-border dimension must be defined and incorporated into political, legal, and constitutional discussions regarding global information flow in the twenty-first century. In the global theater, America's exceptional regard for offensive expression will be vigorously challenged both at home and abroad. We must be prepared to explain and defend our exceptional First Amendment norms, principles, and values to both domestic and global audiences. Recent episodes confirm that core First Amendment principles, including marketplace justifications for protecting offensive speech, will retain considerable force in the global theater. The Article also discusses various lessons for the press, as it continues its transformation from a domestic information hub and local watchdog to a loosely bound international distribution network. As this transformation occurs, the press will need to be more circumspect in its reporting on matters of global concern, such as religion, and with regard to the nature and character of its relationships with some foreign sources. Moreover, the press's own commitment to the free flow of information will be tested, as new sources and publishers, operating on different models and in pursuit of different missions, continue to materialize.

Finally, new threats to free speech and information flow will arise in the global theater. We ought to be paying more attention to the influence of private intermediaries on the trans-border flow of information, and to new forms of governmental information control such as prosecution of information distributors and extra-judicial means of punishing speakers (including targeted executions).

The paper is forthcoming in the *Vanderbilt Law Review*.