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Recommended Citation

Marshall J. Breger, *Ordre Public and the First Amendment*, 13 REV. FAITH & INT'L AFF. 39 (2015).

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ORDRE PUBLIC AND THE FIRST AMENDMENT

By Marshall J. Breger

O*rdre public* is a civil law concept according to which courts refuse to enforce the judgments of the courts of foreign countries because the judgments violate the enforcing state's core notions of public morals and public order. The concept is most often used in private international law. In some sense, it is a misnomer to talk about *ordre public* in American law as the term is little used by American commentators or in American cases. Rather, the term that captures *ordre public* in the American context is "the public policy exception." While there may be subtle differences, for the most part Americans today, if they use the term *ordre public* at all, use it as interchangeable with the public policy exception. That will be the meaning used in this article.

The early basis for the enforcement of foreign judgments by American courts is the principle of comity—the idea that the United States will enforce judgments of other countries and they will enforce those of the United States.¹ The duty of comity has a number of exceptions. Among them is the public policy exception, which provides an escape valve for situations where the foreign judgment reflects laws at strong variance with American legal values.

What is the public policy exception? There is no better definition than that provided by Justice Joseph Story, who argued that:

No nation can be justly required to yield up its own fundamental policy and institutions in favor of those of another

nation. Much less can any nation be required to sacrifice its own interests in favor of another; or to enforce doctrines which, in a moral, or political view, are incompatible with its own safety or happiness, or conscientious regard to justice and duty. (Story 1846)

It is clear that US courts refuse to enforce both foreign judgments and foreign arbitral awards based on public policy grounds.² Nonetheless, it is difficult to ascertain the "metes and bounds" of the public policy exception—even in a single country; indeed one English judge described the public policy exception as an "unruly horse" (*Richardson v. Mellish*) [1921]). Different American states have different public policies, as evidenced by the differences between public policy in Oregon and Washington regarding immunity for charitable organizations in *Landgraver v. Emanuel Lutheran Charity Bd.* [1955]. Even in a single state, public policy may change over

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time, as in Missouri where modern lotteries contradict the court's holding in *Kitchen v. Greenabaum* [1875] that the "sale or exposure of any lottery" ticket is against Missouri public policy. In an effort to set boundaries, the Second Circuit has held on several occasions that "the application of this [exception] is extremely limited" (*Local 97, Int'l Bhd. of Elec. Workers, A.F.L.-C.I.O. v. Niagara Mohawk Power Corp.* [1999]). Courts have underscored that the "confirmation of a foreign award should be denied 'only where enforcement would violate the forum state's most basic notions of morality and justice'" (*Nat'l Oil Corp. v. Libyan Sun Oil Co.* [1990] and *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA)* [1994]). The Uniform Foreign Money Judgments Act (adopted by most states) requires that the award must be "repugnant" to American values (Adams 2005). Thus, "erroneous legal reasoning or misapplication of the law is generally not a violation of public policy" (*Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [2004]). Nonetheless, there is much uncertainty as to which policies a country will consider vital so as to support the use of the public policy exception.

A sense of the clash of fundamental social values comes from a non-legal narrative in the furor in 19th century British India over the Hindu custom of "suttee"—the burning alive of widows on the funeral pyre of the deceased husband. After "suttee" was abolished by the British, Hindu priests complained to Sir Charles Napier, Commander in Chief of British Forces in India,³ that the British were preventing them from following their religious customs, to which Napier replied:

Be it so. This burning of widows is your custom; prepare the funeral pile. But my nation has also a custom. When men burn women alive we hang them, and confiscate all their property. My carpenters shall therefore erect gibbets on which to hang all concerned when the widow is consumed. Let us all act according to national customs. (Napier 1851)

That is the spirit of *ordre public* albeit in a non-legal context.

The First Amendment in American Public Law

The United States is generally understood to be the world's leading defender of free speech and religious freedom. Case after case following World War II underscored the importance of the First Amendment in our constitutional fabric ranging from the Pentagon Papers case prohibiting "prior restraint" (*New York Times Co. v. United States* [1971]) to the defense of flag burning as a protected speech-act (*Texas v. Johnson* [1989]), to the carefully cabined definition of pornography (which lacks free speech protection) (*Miller v. California* [1973]), and to the rejection of so-called blasphemy laws (*Joseph Burstyn, Inc. v. Wilson* [1952]), the rejection of hate speech laws,⁴ and the rejection of any semblance of "viewpoint discrimination" as regards First Amendment values (*Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly* [2002]).

Further, from the get-go, the United States has opposed efforts in international fora to vitiate First Amendment values. The Senate acceded to the International Covenant on Civil and Political Rights (ICCPR) (Office of the High Commissioner for Human Rights 1966) with the reservation that it did so only to the extent that there was no disagreement with the First Amendment. It supported the Human Rights Committee Comment 34 to the ICCPR (General Comment No. 34, ICCPR 2011), which requires a detailed explanation as to why and how one would use the Convention's public order clause. And for years it opposed efforts by the Organization of Islamic Cooperation (OIC) to pass United Nations resolutions that criminalized blasphemy and defamation of religion. Only when the OIC shifted in 2011 to promote education rather than criminalization did the United States join in these efforts.⁵

US courts have been prepared to employ the public policy exception to defend the First Amendment. Indeed, notwithstanding their instinctive view that any suggestion that the British legal system lacks "system fairness"⁶ is "risible" (*Soc'y of Lloyd's v. Ashenden*, 476 [2002])

(Posner, J.),⁷ American courts have rejected the enforcement of British defamation judgments as violating First Amendment principles. Thus, in *Telnikoff v. Matusevitch* [1997], the Maryland Supreme Court held that an English libel judgment was contrary to Maryland public policy related to freedom of expression.⁸ And a federal district court in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme* [2001] refused enforcement of a French court judgment ordering Yahoo! to remove Nazi memorabilia from its auction site, holding that US enforcement of that order would violate the First Amendment. On appeal, the 9th Circuit in *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitism* [2006] dismissed the action on technical procedural grounds.

Not every enforcement action that raises First Amendment issues gives rise to the necessary “repugnance.” The 9th Circuit in *Naoko Ohno v. Yuko Yasuma* [2013] chose to enforce a Japanese money judgment against the Saints of Glory Church for using undue influence to secure large donations from the widow plaintiff. While the public policy exception is used when considering enforcement of foreign judgments, courts can also refuse to interpret domestic contracts or enforce arbitral agreements based on laws that violate fundamental American values.

The Special Case of Islamic Law in the United States

When it comes to Islamic or shari’a law, since 9/11 there has been a tsunami of fear about the Islamization of the U.S. legal system. As one state representative has stated, shari’a law “threatens America’s Judeo-Christian heritage” (Duncan 2011). This fear has led to a concern that US courts will not apply the public policy exception to foreign judgments based on shari’a law. Some of this fear goes further to an obsession that American courts will enforce domestic contracts that choose to utilize shari’a or decisions of local religious courts, or even—conspiracy theorists take note—that state legislatures will actually incorporate shari’a into state statutes.

The poster child for these fears was a New Jersey lower court case in which an estranged wife sought a restraining order against her husband, a

Moroccan Muslim, for raping her. She alleged that her husband told her that “[t]his is according to our religion. You are my wife, I c[an] do anything to you” (*S.D. v. M.J.R.*, 416 [2010]). The trial judge accepted this cultural defense finding that the husband believed that “his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited” (*S.D. v. M.J.R.*, 418 [2010]). Thus, “he lacked the requisite intent to sexually assault” (*S.D. v. M.J.R.*, 413 [2010]).

The decision was promptly reversed by *S.D. v. M.J.R.* [2010] as it should have been—religious or cultural beliefs are not a defense against a charge of sexual assault—but the damage was done and rather than pointing out that the system worked, anti-shari’a advocates trumpeted the lower court decision as proof of “creeping shari’a” and its effect on American law. Their fear, of course, was that a multi-cultural society would accept the “cultural défense” in all matters Muslim. A more rational response might have been to recognize that any cultural defense that one’s religion allows a husband to forcibly have sex with his wife cannot be a defense to the New Jersey statute, or more generally, to recognize such a cultural defense has only limited utility in American criminal law, and that the Establishment Clause would vitiate any effort (however fanciful) to codify shari’a in American law.

Courts have come down on both sides in viewing Islamic shari’a law. In *Tarikonda v. Pinjari* [2009], a Michigan court refused to recognize a religious divorce in India based on a *talaq*, whereby a husband divorces his wife by repeating the ritual locution “I divorce thee” three times. It considered that the triple *talaq* violated public policy as the wife did not have prior notice and she did not have the right to be present at the religious divorce ceremony. On the other hand, American courts have upheld the validity of avunculate marriage (marriage between an uncle and a niece) sanctified in a Muslim country; after all, Rhode Island—drawing upon the Bible (Leviticus 8:6–18)—accepts this type of marriage (R.I. Gen. Laws Ann. § 15–1–2 (West)). A Louisiana court in *Ghassemi v. Ghassemi* [2008]

recently recognized an Iranian marriage between first cousins, although such marriages are unlawful under Louisiana law. On the other hand, in *Soleimani v. Soleimani* [2012], a Kansas district court refused to enforce an Iranian marriage contract that included a *mahr*, which provided the wife a sum of money in the case of a divorce. The court's reasoning was complex but included the view that the marriage contract "emanated" from a legal system antithetical to Kansas law.

It should be no surprise that US Courts make use of religious law with an eye to the Free Exercise Clause and the Establishment Clause, as well as to due process values. In the New York case *Hirsch v. Hirsch*, [2004] for example, a Jewish Beth Din issued an award granting joint custody of children to the parties, directing the husband to pay child support, and also directing that marital property held in the name of the wife's father be sold and half the proceeds allotted to the husband. The court vacated the award on public policy grounds, holding that the custody issue was not subject to arbitration; that the child support was not in the best interest of the children, as it was not compliant with relevant child protection laws; and that the requirement that the wife's father sell his property deprived him of due process, as he was not a party to the dispute. In *Kahan v. Rosner* [2009], a Jewish Beth Din judgment was denied enforcement in New York as the parties' choice of counsel was subject to Beth Din approval. The court held that the right to counsel could not be waived in that way.

Using Statutes to Codify the Public Policy Exception

It is important to note that the public policy exception is a judicial tool. It consists of "retail" decisions as to whether a foreign law is "repugnant" to American values and whether a foreign legal system fails the fundamental fairness test. But what if judges are not to be trusted to act robustly enough? In that event, the practice would be to pass a statute to codify the public policy exception. While statutes still have to be interpreted by judges, the "bright line" character of a statute means that the judiciary will have far less wriggle room (that is to say interpretation). And if

the concern with a legal system such as shari'a requires broad strokes focusing on systematic unfairness, rather than specific rules contrary to public policy, then a statute might be appropriate.

This can be seen in two statutory substitutes for judicial decision-making. The Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act (28 U.S.C. §§ 1401–05 2010) denies recognition to foreign libel and defamation judgments that would impinge on First Amendment values. The statute codifies the rule of non-recognition on public policy grounds set out in cases like *Telnikoff v. Matusevitch* (1997).

A second instance was the effort to promote legislation that would protect America from perceived "creeping shari'a" by *inter alia* denying courts the ability to recognize foreign judgments or arbitral awards based on shari'a law. This fear of "creeping shari'a" has led to a plethora of statutory proposals and indeed to an exclusion of arbitral judgments where the use of Jewish or Muslim law is consented to by the parties. Not to be outdone, some states forbade judicial recourse to foreign or international law, then created carve-outs for corporations because of worries over the inadvertent effect on business. Part of the reason for this legislative nativism was an effort to hide the true intent of these efforts—a fear of shari'a.

As of now, more than 32 states have proposed legislation to forbid in some way state recognition of shari'a, and in at least eight states such legislation was approved (albeit blocked so far in Oklahoma by the federal courts). Wyoming's House Joint Resolution 0008 (H.R. 0008, 61st Gen. Sess. 2011) states that courts may not consider shari'a law or decisions of another American state that "include shari'a law." An Arizona statute (H.B. 2582, 50th Leg., 1st Reg. Sess. 2011) prohibits the consideration of any "religious sectarian" law and defines this to include shari'a law, Canon law, Halacha (Jewish law), and Karma. Tennessee Senate Bill 3740 (S. B. 3740, 107th Gen Assemb. 2012) makes unenforceable any contract, court decision, administrative decision, or arbitration decision that incorporates any foreign or religious laws that would violate the rights and privileges guaranteed under the US or Tennessee Constitutions.

It is likely that these anti-shari'a laws violate the Establishment Clause in that they discriminate against Islam, thereby violating the very First Amendment that ostensibly gave rise to their concern. Moreover, they are either inadvisable or reflect little more than rhetorical bluster. They are inadvisable as written because of inadvertent collateral consequences. A statute forbidding courts from recourse to foreign or international law would likely cripple local corporations seeking to do business abroad. Such business deals would likely include contract provisions that require disputes to be settled by the law of the place where the transaction takes place. Alternatively, they are mere rhetorical bluster for at least two reasons. Fearful of the effect on business development, some states provided carve-outs for corporate activity. Or more broadly, they may only exclude foreign, international, or religious law that is already illegal. As an example, the recently passed Alabama constitutional amendment on this point forbids recourse to foreign law that would violate federal and state Constitutional guarantees (Constitution of Alabama of 1901 2014).

One more point regarding the 2010 SPEECH Act, the law that codifies First Amendment principles regarding libel and defamation. This effort, goes far beyond the public policy exception. It reflects a desire to exclude the use of shari'a in domestic legal contexts, as well precluding, as example, enforcement of private contracts and domestic arbitral awards even where such voluntary arrangements have been deemed consistent with the free exercise of religion (*Trout Point Lodge, Ltd. v. Handshoe* [2013]).

The Future of *Ordre Public* and First Amendment Values in the United States

The notion of *ordre public* is limited in space and time (or in Karl Von Savigny's iconic phrase: "the limits, in space, of rules on legal relations"), which underscores that public policy values differ within different societies and different stages of that society's development. Certainly, different societies and national jurisdictions can have different views of *ordre public*. Consider the tension between individual

freedom and social stability. Some countries put a premium on social stability and thus would proscribe speech that offends religious people. In contrast, countries like the United States, with a focus on individual freedom, will defend the right to offend.

Few countries understand this tension better than Canada. Its judges know American constitutional law, but Canada is constitutionally a multi-cultural nation, one that places both cultural and legal emphases on civility and social stability: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (Canadian Charter of Rights and Freedoms, §1, Constitution Act, 1982, pt. I 1982). In affirming the conviction of a teacher for hate speech in *R. v. Keegstra* [1990], Chief Justice Brian Dickson noted that while "there is much to be learned from First Amendment jurisprudence," it is vital to fashion a "uniquely Canadian vision of a free and democratic society." He concluded that "the special role given equality and multiculturalism in the Canadian Constitution necessitate[s] a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression."

Similarly, many European countries, including Denmark, France, The Netherlands, and the UK, have hate-speech laws. Many Muslim countries such as Afghanistan, Algeria, Egypt, Iran, Jordan, Kuwait, Pakistan, Saudi Arabia, and Sudan have blasphemy laws. Other countries, including Austria, Belgium, Bosnia, and Herzegovina, the Czech Republic, France, Germany, and Israel, have laws against Holocaust denial or the sale of Nazi propaganda. These countries rarely reject the value of free speech or religious freedom. Like Canada, they merely balance it against other social values and reach different conclusions.

In many respects, US civil society appears to increasingly trend toward the Canadian model; adding to the Canadian concern for social stability are newly created "rights" to feel welcome, not to feel offended, and not to

encounter views felt to be offensive. Thus, it is legitimate to ask whether American society is becoming less sensitive to free speech values and may yet adopt some of these alternate global approaches. The shift in cultural values may in the future affect the American legal landscape and impact views of *ordre public*.

This is exemplified in the continuing effort to legitimize campus speech codes, notwithstanding that courts have consistently rejected such codes in public institutions. The proponents of such codes argue that the sensibility of the listener must be taken into account in a campus environment. They justify this "censorship" in one of two ways. Some argue that speech "that deeply offends other students" falls within the definition of incitement (Education 2014). This, of course, reverses the traditional understanding from *Brandenburg v. Ohio* (1969) of incitement as speech that incites those who agree with it to violence. Instead, this new version gives the hearer a "heckler's veto" because the hearer is intensely angered by hearing the speech so that he or she is moved to a violent response (Education 2014).

A variant on this approach is the view that the stressful effect on the listener is sufficient in itself to limit speech. This approach has been accepted in Europe for hate speech.⁹ It has been advanced by some American feminists, such as Catherine MacKinnon (1993), who regard pornographic speech as a violent act against women. This approach was rejected in the well-known case of *Nat'l Socialist Party of Am. v. Vill. of Skokie* (1977), where Jewish Holocaust survivors sought to ban a march of American Nazis claiming that watching such a march would give them mental anguish.

When the issues are presented less starkly, however, we see many government agencies at least flirting with restrictions on speech that offends. This is illustrated most clearly in Title IX of the Education Amendments of 1972, 2006, implementing federally mandated victim protection by the Office for Civil Rights (OCR) of the US Department of Education.

The education context underscores this new sensitivity to the sensibilities of the listener over the free-speech rights of the speaker. Consider the now clear change in emphasis in the efforts of the Department of Justice and the Department of Education to enforce federal regulations against sexual harassment at colleges and universities. In a 2003 "Dear Colleague" letter discussing Department of Education enforcement procedure, the OCR of the Department of Education noted that:

Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere

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expression of views, words, symbols, or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's

ability to participate in or benefit from the educational program. Thus, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the alleged victim's age. (www2.ed.gov 2014)

Fast forward only 10 years to a May 9, 2013 letter (Justice.gov 2014) detailing findings and a resolution agreement from the Department of Justice, Civil Rights Division, Educational Opportunities Section, and the Department of Education, OCR, to the University of Montana. Here the government agencies state that, "sexual harassment should be more broadly defined as 'any unwelcome conduct of a sexual nature'" including "verbal" conduct (Justice.gov 2014). Moreover, the alleged verbal harassment need not be offensive to an "objectively reasonable person of the same gender in the same situation" (Justice.gov 2014). Through recourse to subjective tests, the focus is on the needs of the hearer, whether reasonable or not.

Other harassment codes that sweep in concern for the sensibilities of the hearer while broadening speech to include unwelcome verbal statements include that of the University of Connecticut (Ode.uconn.edu 2014), which along with forbidding “actions that intimidate, humiliate, or demean persons or groups” includes actions “that undermine their security or self-esteem”; Athens State University (Athens.edu 2014), where harassment consists of “words or actions that are unwelcome”; and the University of Hawaii (University of Hawaii at Hilo Registered Independent Student Organizations Handbook 2014), which forbids solicitation, not only of funds but of literature because “people can feel intimidated” and “they [the students] can’t say no” (*Burch v. University of Hawaii System* [2014]).

Private universities have followed suit. Princeton University defines harassment to include “unwelcome verbal ... conduct of a sexual nature” that creates “an intimidating, hostile, or offensive environment” while acknowledging that violations are determined by the “totality of facts and circumstances” (University 2014). The definition of sexual harassment in Harvard University’s new sexual harassment policy notes that sexual harassment can “take many forms,” including “verbal [and] nonverbal,” and describes sexual assault as “any unwelcome conduct”—that is to say—conduct a person does not “request or invite,” that is “regarded ... as undesirable or offensive,” and that “interferes with or limits a person’s ability to participate in or benefit from the University’s education or work programs or activities” (Diversity.harvard.edu 2014).¹⁰

This trope for the right to feel welcome cuts across campus regulation of speech. Campus administrators have dallied with “free speech zones” on campus to protect speakers and their audiences from being forced to engage with unwelcome speech.¹¹ Jewish organizations have been urging restrictions on the activities of Palestinian activists on college campuses because their aggressive advocacy makes the Jewish students feel “unwelcome.” Campus speakers with politically incorrect views have been disinvited as they make certain interest groups

feel unwelcome.¹² As with the sexual harassment policies discussed above, one wonders the extent to which “unwelcome” is another name for an invasion into one’s “comfort zone.”¹³

Concomitant with the need for “comfort zones” is the increasing use of the call for civility as an argument for regulating or censoring speech.¹⁴ Civility is, of course, an important virtue and one vital to both maintaining social relations at universities and a successful civic society. It should be encouraged in universities and in Congress. But as Katherine M. Franke, a Columbia Law professor, has noted, civility has become “a catch word for a kind of censorship of speech that makes us feel uncomfortable” (Schmidt 2014). For many, charges of incivility have become today’s version of charges of communist sympathy in the 1950s.

Religious values are also balanced off against the rights of others not to be offended. Eastern Michigan University threw out a graduate student in a counseling program as she requested that she not be required to affirm a homosexual lifestyle. Until the 6th Circuit intervened, her religious beliefs fell hostage to the fear of offending gays (*Ward v. Polite* [2014]). In a Marquette University philosophy class, a student raised arguments against gay marriage. For fear of offending homosexuals who might have been in the class, he was ordered to retract his religiously based views or drop out of the class (McAdams 2014). Interestingly, the ACLU supported the university in this matter.

The effort to limit campus speech has even developed a scientific (some would say pseudo-scientific) basis. Consider these comments by Commissioner Richard Yak, of the US Commission on Civil Rights, at a recent commission briefing; speaking of college students and speech codes, he questioned:

So when we sit back and talk about what is right or wrong in terms of First Amendment jurisprudence from a reasonable person’s standpoint, we are really not looking into the same referential viewpoint of these people of an adolescent or young adult, including those in universities ...

He or she had so much to look forward to when their brain processes information in a much different way than we do ...

And because of that, and because of the unique nature of a university campus setting, I think that there are very good and compelling reasons why broader policies and prohibitions on conduct in activities and in some instances speech are acceptable on a college campus level that might not be acceptable say in an adult work environment or in an adult situation. (*Washington Post* 2014)

While some argue that university officials should not be given the same deference as secondary school officials when regulating student speech (Roberts Martin 2003), courts have not always accepted this distinction. Thus, in *Hosty v. Carter* (2014), the Court decided that there is no sharp difference in rationale for a school's editorial control of papers for high schools and colleges. We see this most clearly in the seeming expansion of the *Hazelwood* doctrine (*Hazelwood Sch. Dist. v. Kuhlmeier* [1988]). The court there allowed a school district to censor a high school newspaper "sponsored" by a journalism class. Among the justifications was the school's need to "take into account the emotional maturity of the intended audience."¹⁵ In a puzzling footnote, Justice White suggested that the Court "need not decide whether the same degree of deference is appropriate" with respect to school-sponsored expressive activities at the college and university level (*Hazelwood Sch. Dist. v. Kuhlmeier*, 273 [1988]). Later courts have eschewed this "bright line" and have begun to blur the distinction between secondary school and university contexts for free speech (*Hosty v. Carter*, 734–35 [2014]).

There is no doubt that sociological issues are involved here. Theories of delayed adolescence may play a role; clearly an excess of multi-cultural entitlement does. Perhaps the high cost of college creates entitlement expectations among those spending (or rather borrowing) so much money. Perhaps educational administrators fear the donor reaction to unwelcome activity on campus. There

is little doubt that the societal currents that have led to "comfort zones" run deep and remain to be fully explored.

Conclusion

The American legal system draws deeply from English common law. Today however, we live in an age of statutes and it is not surprising that interest groups concerned (rightly or wrongly) with issues like free speech, religious freedom, or the dangers of Islamization of American law have not been satisfied with judicial resolution of the public policy exception, but have rather focused on its intrinsic uncertainty of application if not variability of result. As a result, they have sought to paint with a broader brush, passing "bright line" statutes that substitute for the uncertainty of judicial resolution. As suggested earlier, we live in a populist age where interest groups do not trust judges to enforce their values. It is likely that we will see more efforts to codify in statute the public policy exception as regards free speech and religious freedom. This is so whether or not there is a need for such statutory "bright line" determinations. We see this clearly in the efforts (some would say over-inclusive efforts) to use statutes to forbid enforcement of foreign and religious law, particularly shari'a.

At the same time, we may well be seeing a transformative change in the American cultural approach to free speech, as Greg Lukianoff has suggested:

I believe that we are not passing through some temporary phase in which an out-of-touch and hypersensitive elite attempts—and often fails—to impose its speech-restrictive norms on society. It's worse than that: people all over the globe are coming to expect emotional and intellectual comfort as though it were a right. This is precisely what you would expect when you train a generation to believe that they have a right not to be offended. It means that people will eventually stop wanting freedom of speech and instead start wanting freedom from speech (they disagree with). (Lukianoff 2014, 12–13).

Many social institutions today “privilege” welcomeness, comfort zones, and civility. All these are positive concepts for a good society. In recent years, however, there has been a clash of values; free speech is too often balanced against these goods and found wanting. This is especially true on college campuses, which as we are so often told are the birthplace of future social values. The question

we must ask is the extent to which such cultural change will ineluctably lead to a First Amendment jurisprudence that follows Canada and those European countries that are prepared to censor speech to ensure social stability. To the extent that this future comes to pass, there is little doubt that judicial understandings of *ordre public* will similarly evolve—in my view, for the worse. ♦

1. United States courts have not afforded comity to foreign judgments when the country did not reciprocate comity, as held in *Hilton v. Guyot* [1895]. The notion of comity is even stronger when American states enforce judgments of sister states as they have a constitutional duty to give “full faith and credit” to the court judgment of sister states. (“The Constitution of the United States,” Article 4, Section 1).
2. For foreign arbitral awards the Convention of the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (requiring signing states to recognize and enforce arbitration awards made in other contracting states) [hereinafter New York Convention]. See also Uniform Enforcement of Foreign Judgments Act, 1986, adopted by all but three states. There is a bill in the Massachusetts legislature to adopt the Uniform Act.
3. Napier was also acknowledged as the conqueror of the Sindh. It is worth mentioning the apocryphal story claiming that after conquering the Sindh (now in Pakistan), Napier sent a one word cable in Latin to London: “Peccavi,” that is, “I have sinned.”
4. Until now the Supreme Court has generally rejected hate speech statutes as violating the First Amendment in cases such as *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisconsin Sys.* [1991], *Doe v. Univ. of Michigan* [1989], *Saxe v. State Coll. Area Sch. Dist.* [2001]. However, the Supreme Court in *Wisconsin v. Mitchell* [1993] has approved enhanced punishment for racially motivated acts and in *Virginia v. Black* [2003] restricted cross burnings as a form of freedom of speech. One may wonder why punishment for assault should be greater if the assault was motivated by race than if it was motivated by jealousy or class envy. Nonetheless, the constitutionality of such race-based enhancements is now settled.
5. Many conservatives remain skeptical of the OIC’s (and the Obama administration’s) bona fides and are critical of US support for the revised OIC efforts commonly called the Istanbul Process.
6. Viewing the British system as “the very fount from which our system developed,” American courts, part of the Anglo-American legal tradition, find it difficult that the British courts could effectuate to credit what in America we would instinctively see as a gross due process violation (*Soc’y of Lloyd’s v. Ashenden* [2002]). However, when unable to find “system fairness,” American courts do refuse to enforce judgments from the flawed jurisdiction, as in *Deloria v. Maghreb Petroleum Exploration S.A.* [2014] (noting the Moroccan royal family’s influence over the Moroccan judiciary).
7. “Any suggestion that this system of courts ‘does not provide impartial tribunals or procedures compatible with the requirements of due process of law’ borders on the risible. [T]he courts of England are fair and neutral forums” (*Soc’y of Lloyd’s v. Ashenden*, 476 [2002] (Posner, J.)).
8. In addition to Telnikoff, a number of other courts have considered whether the First Amendment precludes recognition of foreign judgments in the USA. See *Bachchan v. India Abroad Publications, Inc.* [1992] (refusing to enforce English libel judgment on grounds similar to Telnikoff); *Abdullah v. Sheridan Square Press, Inc.* [1994] (denying enforcement of a British defamation judgment as antithetical to First Amendment protections afforded the defendants); *Dow Jones & Co. v. Harrods Ltd.* [2002] (holding that declaratory relief sought by the plaintiff did not arise from “actual controversy” and that US granting of relief would not be dispositive of litigation in the UK where the suit originated).
9. For example, hate speech laws in the UK make it a crime to use or display threatening, abusive, or insulting words “within the hearing or sight of a person likely to be caused harassment, alarm, or distress thereby” (Public Order Act of 1986, §5, 1986).
10. The definition of “sexual harassment” in Harvard’s policy goes beyond the definitions of Title IX and Title VII including harassment based on sexual orientation and gender identity. The policy’s scope and definitions are so broad that a group of current and former Harvard law professors protest the policy as “inconsistent with many of the basic principles [they] teach” including fairness and due process. See also *BostonGlobe.com* (2014).
11. The Supreme Court has approved zones limited in time for unusual public safety reasons, but it is hard to imagine that a college campus is equivalent to a presidential nominating convention as in *Marcavage v. City of New York* [2012].
12. Among the commencement speakers whose invitations were rescinded in the most recent (2014) “disinvitation season” are Christine Lagarde (Smith College), Condoleezza Rice (Rutgers University), Robert Zoellick (Swathmore College), and Ben Carson (Johns Hopkins University).
13. Thus, when Jewish students at Barnard woke to see a pro-Palestinian banner hung in front of a campus building, they remonstrated claiming “emotional distress.” Barnard removed the banner.

14. Whatever the rights or wrongs of rescinding the offer of an appointment by the University of Illinois to Steven Saleita, it is interesting that the university president justified the actions on the grounds that they are a "university community that values civility as much as scholarship" (Illinois 2014).
15. In addition to this so-called "immaturity rationale," the Court also advanced a need "to set high standards for student speech that is disseminated under its auspices" as well as a rationale of dissociation: that the school does not associate itself "with any position other than neutrality on matters of political controversy" (*Hazelwood Sch. Dist. v. Kuhlmeier*, 271–72 [1988]).

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<http://dx.doi.org/10.1080/15570274.2015.1005910>