To Confront the Assassin's Veto, or to Ratify It?

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The morning of January 7, 2015, Cherif and Said Kouachi, two brothers deeply offended by satirical drawings of the Muslim prophet Mohammad published in the French weekly newspaper *Charlie Hebdo*, exacted their own punishment for perceived blasphemy. They forced their way into a staff meeting in the newspaper's offices and massacred twelve people.[1] This was yet another grim marker in the cross-cultural conflict illustrated by events such as the Ayatollah Khomeini's 1989 fatwah against Salman Rushdie for writing *The Satanic Verses*, the 2004 murder of filmmaker Theo van Gogh on the streets of Amsterdam for perceived insults to Islam, and the violent reaction to the cartoons of Mohammad published in the Danish newspaper *Jyllands-Posten* in 2005. And this is just a partial list.[2]

The phenomenon of killing or threatening to kill those who insult you or your way of life has come to be known as the assassin's veto.[3] It is a darker and more sinister version of "the heckler's veto," which the law of free expression is designed in substantial part to prevent. As Professor Timothy Garton Ash described it, "[w]here the heckler's veto says merely 'I will shout

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[1] Dan Bilefsky and Maia de la Baume, *Terrorists Strike Paris Newspaper, Leaving 12 Dead*, NEW YORK TIMES, January 7, 2015 at A1.

[2] *See generally* Flemming Rose, THE TYRANNY OF SILENCE (Cato Institute 2014); Rick Gladstone, *A Timeline of Threats and Acts of Violence Over Blasphemy and Insults to Islam*, NEW YORK TIMES, January 8, 2015 at A6.

[3] *See*, *e.g.*, James Taranto, *The Assassin's Veto*, WALL STREET JOURNAL, Jan. 23, 2015 (http://www.wsj.com/articles/the-assassins-veto-1422046668).

you down,' the assassin's version is 'dare to express that and we will kill you.'" [4] But where should the law come down on this? Should it defend free expression at all costs no matter how inflammatory the language or who is offended? Or should it permit the state's coercive power to silence those who trade in insult or invective?

At the heart of this conflict lies this fundamental question: how much expression must a free society tolerate? It is tempting to describe this as a debate between those who believe in freedom of expression and those who do not, but that would be too simplistic. First, it is not a "debate" at all for people who truly believe that they may impose their sensibilities – often religious sensibilities – on others by employing violence or enforcing draconian laws. Debate depends on the free exchange of ideas, not coercion. Second, even for those societies that value freedom of expression and whose laws support it, none permit "absolute" free speech, whatever that may mean. So the question comes down to how much, and what kind of speech, may be limited for a governmental system to be considered one that protects freedom of expression. Put another way, should the legal system protect or punish the kind of inflammatory speech and drawings that prompted the assault on the *Charlie Hebdo* offices?

Are We Charlie?

The answer to that question is as complicated as the global reaction to the *Charlie Hebdo* killings themselves. The initial shock and outrage was met with a showing of seeming solidarity. Some two million people, including more than forty world leaders, rallied in Paris in the name of national unity four days after the attack. Nearly four million people across France joined in,

[4] Timothy Garton Ash, *Defying the Assassin's Veto*, THE NEW YORK REVIEW OF BOOKS, February 19, 2015, p. 4.

united by the slogan Je suis Charlie (French for "I am Charlie"). Similar demonstrations were held around the world. [5]

This reaction included many in the Muslim world. A number of governments, including those of Iran, Saudi Arabia, Jordan, Bahrain, Algeria, Morocco, and Qatar, issued statements denouncing the attack.[6] The U.S.-based Council on American-Islamic Relations likewise condemned the killings and supported the right of free expression, including "speech that mocks faiths and religious figures." [7]

But any notion of a uniform response was soon dashed. As might be expected, some demonstrators and activists around the world cheered the tragedy. Muslims in the Philippines took to the streets to proclaim that the event should serve as a "moral lesson for the world to respect any kind of religion, especially the religion of Islam." Freedom of expression, they said, "does not extend to insulting the noble and the greatest prophet of Allah." [8] Protesters in Pakistan displayed posters that read, "This is not freedom of expression, it is open aggression against Islam," and similar rallies took place in Turkey, Chechnya, and elsewhere. [9]

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[5] Anthony Faiola and Griff Witte, *Tributes, Marches Held in France After Terror Attacks*, WASHINGTON POST, January 11, 2015 at A1.

[6] Ian Black, *Hebdo Killings Condemned by Arab States – but Hailed Online by Extremists* (http://theguardian.com/world/2015/jan/07/charlie-hebdo-killings-arab-states-jihadi-extremist-sympathizers-isis'Charlie).

[7] *U.S. Muslims Condemn Paris Terror Attack, Defend Free Speech* (http://cair.com/press-center/press-releases/12797-american-muslims-condemn-paris-terror-attack-defend-free-speech.html).

[8] *Muslims in Philippines March Against Charlie Hebdo*, THE MALAYSIAN INSIDER, Agence France-Presse, January 14, 2015 (http://themalasianinsider.com/world/article/muslims-in-philippines-march-against-charlie-hebdo).

[9] Jack Linshi, *5,000 Rally Against Charlie Hebdo in Pakistan*, Time.com, Jan. 18, 2015 (http://time.com/3672871/charlie-hebdo-pakistan/); *Chechens Protest Against Charlie Hebdo*

Such reactions were not confined to the streets. In a *USA Today* op-ed, British cleric Anjem Choudary, wrote "Muslims do not believe in the concept of freedom of expression, as their speech and actions are determined by divine revelation and not based on people's desires. . . This is because the Messenger Muhammad said, 'Whoever insults a Prophet kill him.'" [10] Similarly, Junaid Thorne, an Australian Muslin wrote, "If you want to enjoy 'freedom of speech' with no limits, expect others to exercise 'freedom of action.'" [11]

Some prominent non-Muslims expressed similar sentiments. The president of the U.S. Catholic League, Bill Donohue, wrote that *Charlie Hebdo* had "a long and disgusting record" of mocking religion and had its editor "not been so narcissistic, he may still be alive." [12] In a somewhat milder vein – or, at least, not blaming the victims quite as much – Pope Francis told reporters, ""[o]ne cannot provoke, one cannot insult other people's faith." [13] And even some supposedly familiar with traditional journalistic protections in the United States took a similar tack. DeWayne Wickam, Dean of Morgan State University School of Global Journalism, wrote

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Cartoons, THE GUARDIAN, Jan. 19, 2015 (http://www.theguardian.com/world/2015/jan/19/chechens-protest-charlie-hebdo-cartoons-grozny).

[10] Anjem Choudary, *Why did France allow the tabloid to provoke Muslims?* USA TODAY, Jan. 8, 2015 (http://usatoday.com/story/opinion/2015/01/07/islam-allah-muslims-shariah-anjem-choudary-editorials-debates/21417461/).

[11] *Paris Terror at Charlie Hebdo Newspaper: Aussies Justify Attack*, THE HERALD-SUN, Jan. 8, 2015 (http://www.heraldsun.com.au/news/paris-terror-at-charlie-hebdo-newspaper-aussies-justify-attack/story-fni0fiyv-122717800371).

[12] Eric W. Dolan, *Catholic League Chief: Charlie Hebdo Editor Got Himself Murdered by Being a Narcissist*, THE RAW STORY, Jan. 7, 2015 (http://www.rawstory.com/rs/2015/01/catholic-league-chief-charlie-hebdo-editor-got-himself-murdered-by-being-a-narcissist/).

[13] Elizabeth Dias, *Pope Francis Speaks Out on Charlie Hebdo: 'One Cannot Make Fun of Faith,'* TIME, January 15, 2015.

of the *Charlie Hebdo* killings, "The once little-known French satirical news weekly crossed the line that separates free speech from toxic talk."[14]

The French reaction seemed to crystalize the bipolar nature of the response to *Charlie Hebdo*. Its Justice Ministry sent a letter to prosecutors and judges urging more aggressive tactics against racist or anti-Semitic speech. The order did not mention Islam. [15] In the first week after the *Charlie Hebdo* attack, 54 people were arrested for hate speech. [16] One of those charged was comedian Dieudonne M'bala M'bala, who was convicted of condoning terrorism for tweeting "I feel like Charlie Coulibaly," combining a reference to *Charlie Hebdo* and the name of the gunman who attacked a kosher supermarket. [17]

The official response to controversial speech in France following the attacks underscores the stark differences between European law and the First Amendment to the United States Constitution, which provides that "Congress shall make no law . . . abridging freedom of speech,

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[14] DeWayne Wickam, *"Charlie Hebdo" Crosses the Line*, USA TODAY, Jan. 8, 2015 (http://www.usatoday.com/story/opinion/2015/01/19/charlie-hebdo-cross-line-free-speech-covers-islam-limits-wickham/21960957/).

[15] Lori Hinnant, *In Crackdown on Hate Speech, France Arrests 54 for Defending Terror*, ASSOCIATED PRESS, January 14, 2015 (https://www.bostonglobe.com/news/world/2015/01/14/crackdown-hate-speech-france-arrests-for-defending-terror/exzmOcyRHLEPPWKJIVcHYK/story.html).

[16] *Id*. *See also* Alexander Trowbridge, *French Arrests Draw Charges of Free Speech Hypocrisy*, CBS NEWS, January 15, 2015 (http://www.cbsnews.com/news/french-arrests-draw-charges-of-free-speech-hypocrisy/).

[17] *French Comedian Dieudonné Faces Inquiry Over 'Charlie Coulibaly' Remark*, theguardian.com, Jan.12, 2015 (http://www.theguardian.com/world/2015/jan/12/french-comedian-dieudonne-charlie-coulibaly-prosecutor); Aurelien Breeden, *Dieudonné M'bala M'bala, French Comedian, Convicted of Condoning Terrorism*, NEW YORK TIMES, March 19, 2015 (http://www.nytimes.com/2015/03/19/world/europe/dieudonne-mbala-mbala-french-comedian-convicted-of-condoning-terrorism.html).

or of the press . . . ," and which has been interpreted to protect even the most vile attacks based on race or religion.

The American Way: Defending the Indefensible

It is often said that the First Amendment is not an absolute, but, at the same time, a central tenet of the law protecting freedom of expression in the U.S. holds it is a "prized American privilege to speak one's mind, although not always with perfect good taste, on all public (issues)." [18] This basic principle was established in an early First Amendment case, *Terminiello v. City of Chicago*, in which the Supreme Court invalidated a breach of peace conviction of a firebrand Catholic priest whose speech "provoked a hostile mob and incited a friendly one, and threatened violence between the two." [19] The Court's majority acknowledged the inflammatory nature of the remarks, but nevertheless voided Terminiello's conviction, reasoning that "a function of free speech under our system of government is to invite dispute." Such speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." [20]

There was no question but that Terminiello's words invited dispute and stirred people to anger. The confrontation provoked a near riot between what were characterized as pro-Fascist and pro-Communist mobs, but it was also the fact that Father Terminiello's remarks were littered with what now would be called "hate speech." His ugly racial and ethnic slurs included condemnation of "atheistic, communistic Jewish or Zionist Jews," and his speech provoked even

[18] *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964).

[19] *Terminiello v. City of Chicago*, 337 U.S. 1, 13 (1949) (Jackson, J., dissenting).

[20] *Id*. at 4 (opinion for the Court by Douglas, J.).

more hate-filled and racist responses from the assembled crowd.[21] The facts of the case divided the Court, prompting three strong dissenting opinions. In a characteristically well-written and carefully-reasoned opinion, Justice Robert Jackson criticized the majority's "dogma of absolute freedom for irresponsible and provocative utterance which almost completely sterilizes the power of local authorities to keep the peace as against this kind of tactics."[22]

But it was not so much the harshness of the speech as it was the incitement to immediate violence that separated the majority from the dissenters. Justice Jackson wrote that the First Amendment "is more tolerant of discussion than are most individuals or communities," and that "[r]eligious, social and political topics that in other times or countries have not been open to lawful debate may be freely discussed here." He observed that the law protects the "utmost freedom of utterance," including the right to advocate fascism, communism, socialism, or capitalism, but also that individuals "may go far in expressing sentiments whether pro-semitic or anti-semitic, pro-negro or anti-negro, pro-Catholic or anti-Catholic."[23] For Justice Jackson, the key issue was the imminence of a riot, including the fact that police were being pelted with rocks, bottles, and even ice picks. He therefore drew the free speech line at the prospect of mob violence because "[n]o mob has ever protected any liberty, even its own, but if not put down it always winds up in an orgy of lawlessness which respects no liberties."[24]

Different people may set the threshold differently, but the overriding presumption in American law is that the potential for violence – not the presence of hate – is what separates free

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[21] *Id*. at 20-22 (Jackson, J., dissenting).

[22] *Id*. at 28.

[23] *Id*. at 32.

[24] *Id*.

from restricted speech. The Supreme Court addressed this issue in *Chaplinsky v. New Hampshire*, holding that the First Amendment does not protect so called "fighting words" – epithets delivered directly to a person that are likely to provoke an immediate breach of the peace. [25] It described such words as one among several "classes of speech" that it said "the prevention and punishment of which has never been thought to raise any Constitutional problem," including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words." [26]

This categorical approach has established some limits on First Amendment protections, but the Supreme Court has kept the number of unprotected categories limited and it has narrowed their scope over time. Thus, the list of epithets that might qualify as "fighting words" has been pared down almost to the vanishing point since *Chaplinsky*. In 1942, the Supreme Court considered it too obvious for argument that "the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation," but it is difficult to imagine such a statement raising an eyebrow today.[27] And the Court has since made it clear that it is not prepared to add to the categories of unprotected speech, explaining that the government does not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." [28]

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[25] *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942).

[26] *Id*. at 572.

[27] *Id*. at 547. *See* James L. Swanson, *Unholy Fire: Cross Burning, Symbolic Speech, and the First Amendment Virginia v. Black*, 2003 CATO SUP. CT. REV. 81, 90 (2002-2003) ("*Chaplinsky* has certainly been marginalized and might be viewed today as an ill-advised endorsement of the 'heckler's veto'").

[28] *United States v. Stevens*, 559 U.S. 460, 469-471 (2010).

American law has maintained this focus on the probability of violence rather than the potential to cause offense even when the expression at issue includes racial provocation. The Court tightened its test for what constitutes illegal incitement in *Brandenburg v. Ohio* in the face of images of members of the Ku Klux Klan burning a cross as a sign of racial hatred. It held that to constitute incitement, the expression at issue must be intended to cause imminent lawless action *and* be likely to produce such an immediate result. [29] Applying these principles, the Supreme Court struck down a St. Paul, Minnesota ordinance that prohibited placing on public or private property "a symbol, object, appellation, characterization or graffiti including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses, anger, alarm or resentment on others on the basis of race, color, creed, religion or gender." [30]

In the case of the St. Paul ordinance, the Court found that the measure was not directed at forestalling violent confrontation as much as preventing offense to particular groups, and was undermined by its content-based selectivity, which "creates the possibility that the city is seeking to handicap the expression of particular ideas." [31] It has since upheld a state law that prohibited cross burning when done for purposes of racial intimidation, but it also held that criminal intent could not be inferred from the symbolic act itself. Rather, the Constitution requires that the state must prove that any particular act of cross burning was done in order to intimidate. [32]

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[29] *Brandenburg v. Ohio*, 395 U.S. 444, 447-449 (1969).

[30] *RAV v. City of St. Paul*, 505 U.S. 377, 380, 391 (1992).

[31] *Id*. at 393-394.

[32] *Black v. Virginia*, 538 U.S. 343 (2003).

The First Amendment presumes that "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" [33] The Supreme Court repeatedly has emphasized that "[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens find shabby, offensive, or even ugly," and the government cannot justify regulation on the assumption that "the speech is not very important." [34] This is because "[t]he Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed" without government interference. [35] The Court has described "[t]he point of all speech protection" as being "to shield just those choices of content that in someone's eyes are misguided, or even hurtful." [36]

Such principles are not always easy to uphold, particularly when the speech at issue is hateful. But American jurisprudence is based on the assumption that protections for freedom of expression will not long endure if they can be abandoned when the message is particularly repellant or its target especially sympathetic. Thus, members of a neo-Nazi organization were permitted to march in Skokie, Illinois in the mid-1970s, where over half the population at the time was Jewish and five to seven thousand residents were survivors of concentration camps. [37] The Illinois Supreme Court recognized that the sight of swastikas and German-style uniforms

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[33] *Sullivan*, 376 U.S. at 271 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963).

[34] *United States v. Playboy Entmt. Group, Inc.*, 529 U.S. 803, 826 (2000).

[35] *Id.* at 818.

[36] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995).

[37] *Village of Skokie v. National Socialist Party of Am.*, 69 Ill. 2d 605, 610 (1978). *See National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977).

was abhorrent to Jewish citizens and especially to the survivors of Nazi persecution, yet still held that the First Amendment would not permit restricting the demonstration. The court explained:

> [T]he popularity of views, their shocking quality, their obnoxiousness, and even their alarming impact are not enough. Otherwise, the preacher of any strange doctrine could be stopped; the anti-racist himself could be suppressed, if he undertakes to speak in "restricted" areas; and one who asks that public schools be open indiscriminately to all ethnic groups could be lawfully suppressed, if only he chose to speak where persuasion is needed most. [38]

A distinctive feature of American law is that the government cannot take sides where speech is at issue. Thus, the First Amendment protects radical priests and Vatican critics alike.[39] It also protects militant civil rights activists and white supremacists equally. [40] It likewise shields those who would speak for or against a woman's right to terminate a pregnancy.[41] And it protects those who would burn American flags or crosses as a form of protest, just as it does those who display them with pride. [42] In short, the First Amendment requires "the government must remain neutral in the marketplace of ideas." [43]

It does so not because speech is impotent or lacks the capacity to cause suffering. Rather, the First Amendment is premised on the understanding that speech is powerful. "It can stir

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[38] *Village of Skokie*, 69 Ill. 2d at 618 (citation omitted).

[39] *Compare Terminiello*, 337 U.S. at 4, *with Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[40] *Compare NAACP v. Claiborne Hardware Co*., 458 U.S. 886 (1982), with *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-135 (1992).

[41] *Compare McCullen v. Coakley*, 134 S. Ct. 2518 (2014), with *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[42] *RAV*, 505 U.S. at 382, with *Texas v. Johnson*, 491 U.S. 397, 408-410 (1989).

[43] *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

people to action, move them to tears of both joy and sorrow, and . . . inflict great pain." [44] This understanding was put to the test when the Supreme Court considered whether the Constitution protects even the speech of the Westboro Baptist Church. This peculiar family cult of religious fundamentalists believes that their god hates the United States because of the nation's tolerance of homosexuality, among other things. And it has chosen as one principal venue for its hateful message the funerals of servicemen, with picket signs such as "Thank God for Dead Soldiers," "Fags Doom Nations," "God Hates Fags," and "You're Going to Hell." [45]

The Westboro Church members are careful to obey laws governing public assemblies, to keep their distance (often set by ordinance) from the actual funerals, and to obey police instructions. [46] So when in *Snyder v. Phelps* the Supreme Court reviewed a decision involving a multi-million dollar judgment against the church for intentional infliction of emotional distress, the case focused entirely on whether the First Amendment extends to such scurrilous speech. The trial court had awarded the family of Matthew Snyder, the fallen serviceman in the case, $5 million in compensatory and punitive damages, holding that the hurtfulness and outrageousness of the speech deprived it of First Amendment protection. The United States Court of Appeals for the Fourth Circuit reversed the decision, and the Supreme Court affirmed in an 8-1 decision.

Chief Justice Roberts' opinion for the Court observed that the messages displayed by the Westboro Baptist Church members "may fall short of refined social or political commentary" but that the issues they raise "are matters of public import" and "certainly convey Westboro's position on those issues." As a consequence, their speech received the highest level of First

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[44] *Snyder v. Phelps*, 562 U.S. 443, 460-461 (2011).

[45] *Id*. at 448.

[46] *Id*. at 449.

Amendment protection.[47] And that constitutional immunity was not diminished because the speech was especially outrageous. The Court observed that "outrageousness" was a highly subjective and malleable concept that could easily become a vehicle to suppress vehement, caustic, or unpleasant speech. It concluded we "'must tolerate insulting, and even outrageous, speech in order to provide adequate "breathing space" to the freedoms protected by the First Amendment.'" [48]

The European Approach: A Question of Balance

European law also protects freedom of expression, although in a less robust way than does U.S. law. Article 10 of the European Convention on Human Rights ("ECHR"), based on Article 19 of the U.N.'s Universal Declaration of Human Rights, states that "everyone has the right to freedom of expression," including the "freedom of hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers," but that guarantee is subject to certain important limitations. First, Article 17 of the ECHR provides that no state, group, or individual has the "right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein." And even though Article 10 protects free expression, it also conditions this right on restrictions deemed necessary to preserve other values, including "the protection of the reputation and rights of others." [49] The Council of Europe's Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, likewise recognizes freedom of expression as "one of the essential

[47] *Id*. at 453-455.

[48] *Id*. at 458 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

[49] Article 10, European Convention on Human Rights (http://www.echr.coe.int/Documents/Convention_ENG.pdf), pp. 11, 13-14.

foundations of a democratic society" and a basic condition "for [social] progress and for the development of every human being." But it also requires signatories to criminalize such things as using a computer system to insult persons based on race, color, descent, national origin or religion, or to deny, minimize, approve, or justify acts of genocide. [50]

In short, European law protects free speech, but subject to more of a multi-factor balancing test. But the first step in this balancing regime is to decide whether the speech at issue is "free expression" that is entitled to the ECHR's protection. Under Article 17, certain expression may be excluded from the protections of the Convention – including Article 10 – if the speech is determined to be "hate speech" which negates the fundamental values of the ECHR. The Council of Europe has explained that Article 17 "aims at guaranteeing the preservation of the system of democratic values underpinning the convention notably by preventing totalitarian groups from exercising the rights set by the convention in a way to destroy the rights and liberties established by the convention itself." [51]

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[50] Council of Europe, Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (http://conventions.coe.int/Treaty/en/Treaties/Html/198.htm) (2003). Other instruments of international law also recognize the importance of freedom of expression but simultaneously require signatories to punish expression of racial or religious discrimination or hatred. The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") and the International Covenant on Civil and Political Rights ("ICCPR") praise free expression but require signatories to punish hate speech. Article 4(a) of the CERD requires signatories to prohibit "all dissemination of ideas based on racial superiority or hatred." United Nations, International Convention on the Elimination of All Forms of Racial Discrimination (http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx) (1969). Article 20 of the ICCPR requires that signatories prohibit "any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence." United Nations, International Covenant on Civil and Political Rights (http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx) (1976).

[51] Council of Europe, Fact Sheet on Hate Speech, https://wcd.coe.int/ViewDoc.jsp?id=1477721 (Aug. 2009) ("COE Fact Sheet") at 2.

The European Court of Human Rights has ruled that "there is no doubt that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 by Article 17." [52] Under this process of exclusion, the court has held that anti-Semitic speech, [53] political advocacy based on racial divisiveness, [54] and Holocaust denial,[55] among other things, are outside the protection of Article 10. Religious intolerance is also excluded from Article 10 protection. In one notable case a person was convicted of aggravated hostility toward a religious group for displaying a poster supplied by the British National Party that depicted a World Trade Center in flames with the caption "Islam out of Britain – Protect the British People." The European Court of Human Rights denied Article 10 protection, finding that a general, vehement attack on a religious group, linking it with a grave act of terrorism, constituted an act within the meaning of Article 17 because it was incompatible with the values proclaimed by the Convention. [56]

Assuming speech clears the Article 17 hurdle, it is then subject to the balancing process set forth in Article 10. Under Article 10, freedom of expression may be conditioned or restricted

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[52] *Seurot v. France*, Application No. 57383/00 (European Court of Human Rights, 2004) (http://hudoc.echr.coe.int/eng?i=001-45005). *See* European Court of Human Rights, Fact Sheet on Hate Speech (June 2015) (http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf) ("Hate Speech Fact Sheet") at 2.

[53] *See, e.g.*, *Pavel Ivanov v. Russia*, Application No. 35222/04 (ECHR, 2007) (http://hudoc.echr.coe.int/eng?i=001-79619).

[54] *Glimmerveen and Hagenbeek v. the Netherlands*, Application Nos. 8348/78 & 8406/78 (ECHR, 1979) (http://hudoc.echr.coe.int/eng?i=001-74187).

[55] *See, e.g.*, *Garaudy v. France*, Application No. 65831/01 (ECHR, 2003) (http://hudoc.echr.coe.int/eng-press?i=003-788339-805233).

[56] *Norwood v. the United Kingdom* (ECHR, 2004). *See* Hate Speech Fact Sheet, http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf, at 3.

as prescribed by particular national laws when such limits "are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." [57] In applying Article 10, the European Court of Human Rights examines whether a member state's limitation on freedom of expression satisfies various requirements, beginning with determining whether the restriction was authorized by the applicable national law.

In this regard, European countries historically have restricted hate speech through both criminal and civil law, and, pursuant to European Directive, all EU member states must criminalize "serious manifestations of racism and xenophobia" and to make such expression punishable by "effective, proportionate and dissuasive penalties." [58] In France, for example, the Press Law of 1881 prohibits incitement to racial discrimination, hatred, or violence on the basis of national origin or membership in an ethnic, national, racial, or religious group.[59] Article 266(b) of the Danish Criminal Code outlaws "expressing and spreading national hatred" which may include the use of threatening, vilifying, or insulting language intended for the general public. [60] In the Netherlands, Articles 137(c) and (d) of the Criminal Code prohibit engaging in

[57] Article 10, European Convention on Human Rights (http://www.echr.coe.int/Documents/Convention_ENG.pdf), p. 11.

[58] Council of Europe, Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, No. 2008/913/JHA (Nov. 28, 2008) (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33178).

[59] *See* http://www.coe.int/t/dghl/monitoring/ecri/legal_research/national_legal_measures/France/France_SR.pdf.

[60] *See* http://www.coe.int/t/dghl/monitoring/ecri/legal_research/national_legal_measures/Denmark/Denmark_SR.pdf.

verbal, written, or illustrated incitement to hatred on account of race, religion, sexual orientation, or personal convictions. [61] And in the United Kingdom, the Public Order Act of 1986 provides that "a person who uses threatening, abusive, or insulting words or behaviour, or displays any written material which is threatening, abusive, or insulting," may be penalized if he "intends to stir up racial hatred," or "having regard to all the circumstances racial hatred is likely to be stirred up thereby." [62]

Assuming a given restriction on speech was authorized by national law, review under Article 10 asks whether the restriction falls within the legitimate aims of the Convention and whether limiting speech is necessary in a democratic society to achieve one or more of the objectives set forth in the Article. The European Court of Human Rights has ruled that restrictions on speech are necessary only if they respond to a "pressing social need," but that national authorities are provided a "margin of appreciation," or, rather, a high degree of latitude, in such determinations. In a given case, the court will take into account various factors, including the objective of the speaker, the content of the speech, its context (*e.g.*, whether the speaker is a politician or a journalist), the profile of the person or group who were the targets of the speech, the potential impact of the speech, including whether it was widely disseminated. Against these factors, the court will weigh the gravity of the speech restriction to determine whether the means employed are proportionate to the social values to be served. [63]

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[61] *See* http://www.coe.int/t/dghl/monitoring/ecri/legal_research/national_legal_measures / Netherlands/Netherlands_SR.pdf.

[62] *See* http://www.coe.int/t/dghl/monitoring/ecri/legal_research/national_legal_measures/ United_Kingdom/United_Kingdom_SR.pdf, at p. 22.

[63] COE Fact Sheet, https://wcd.coe.int/ViewDoc.jsp?id=1477721, at 3.

With this many variables it can be quite difficult to discern when speech crosses the line from acceptable discourse to illegal hate speech. The Council of Europe has acknowledged that there is no universally agreed definition, but points to a 1997 recommendation by its Committee of Ministers that defines hate speech as including "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin." [64] Defining this rather broad class of expression is further complicated by the Council's acknowledgment that "[t]he identification of expressions that could be qualified as 'hate speech' is sometimes difficult because this kind of speech does not necessarily manifest itself through the expression of hatred or of emotions. It can also be concealed in statements which at a first glance may seem to be rational or normal." [65]

Under this framework it is not uncommon for political advocacy to be subjected to criminal or civil sanctions. In 2009, Daniel Féret, a member of Belgium's parliament and chairman of the political party Front National/Nationaal Front, was convicted of incitement to racial discrimination and sentenced to community service and disqualified from holding parliamentary office for ten years. The conviction was for distributing leaflets with such slogans as "Stand up against the Islamification of Belgium," "Stop the Sham Integration Policy," and "Send non-European job-seekers home." The European Court of Human Rights held that the conviction did not violate Article 10 because the campaign literature "sought to make fun of the immigrants concerned," with the inevitable risk of arousing feelings of distrust, rejection, or even

[64] *Id*. at 1.

[65] *Id*. at 2.

hatred towards foreigners, "particularly among less knowledgeable members of the public." [66] The court reached a similar decision in 2010 in the case of Jean-Marie Le Pen, then chairman of the French National Front party, for saying in a newspaper interview that "the day there are no longer 5 million but 25 million Muslims in France, they will be in charge." It found that the interference with the applicant's enjoyment of his right to freedom of expression had been "necessary in a democratic society." [67]

How Do the Systems Compare?

Both the United States and the EU nations consider freedom of expression to be a fundamental right, and in neither system is free speech treated as an "absolute." Yet free speech cases in the respective legal systems yield very different results. The United States protects speech that would never be tolerated under European law, and European nations impose both criminal and civil penalties for expression to a degree that is unthinkable in the U.S. What are the principal reasons for these differences?

1. Limited vs. Open-Ended Exceptions. Under the First Amendment to the U.S. Constitution, protection for free speech is the default position and exceptions are few and narrowly defined. In fact, after the Supreme Court in *Chaplinsky* enumerated "classes of speech" that "the prevention and punishment of which has never been thought to raise any Constitutional problem," the list of unprotected categories has been reduced and the scope of the remaining classes more focused. While the First Amendment exceptions still include incitement to violence and "true threats," they do not cover insults based on race or religion. The Supreme Court has

[66] *Féret v. Belgium*, Application No. 15615/07 (European Court of Human Rights, 2009) (http://hudoc.echr.coe.int/eng-press?i=003-2800730-3069797).

[67] *Le Pen v. France*, Application No. 18788/09 (European Court of Human Rights, 2010) (http://hudoc.echr.coe.int/eng-press?i=003-3117124-3455760).

more recently rejected the concept of "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." [68]

European countries have taken the opposite approach. Various countries have long prohibited "hate speech" (among many other classes of speech that would be protected in the U.S.), and the European Convention on Human Rights reinforces that tradition. Notwithstanding the Article 10 guarantee that "everyone has the right to freedom of expression," speech may be excluded from the protections of the ECHR under Article 17 if it is considered to be an "abuse" of free expression because it is incompatible with the values proclaimed by the Convention. What may be considered "incompatible" is not bound by any fixed categories and is subject to expansion.

2. Strict Scrutiny Versus Proportionality. When the government seeks to restrict the content of speech in the United States it is subject to strict scrutiny. Under this level of review, the government has the burden to prove a restriction on speech is necessary to serve a compelling interest and that it has employed the least restrictive means of achieving its purpose.[69] For that reason, it is the rare case where a content-based restriction can survive such scrutiny. [70] Moreover, the government lacks the ability to regulate speech based on its asserted "value." Outside the limited (and anomalous) area of obscenity, where courts ask whether patently offensive, graphic sexual material lacks serious literary, artistic, political or scientific

[68] *Stevens*, 559 U.S. at 472. *See also U.S. v. Alvarez*, 132 S. Ct. 2537, 2543-47 (2012); *Brown v. EMA*, 131 S. Ct. 2729, 2734-35 (2011).

[69] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226-27 (2015); *Playboy Entmt. Group, Inc*., 529 U.S. at 813.

[70] *Burson v. Freeman*, 504 U.S. 191, 211 (1993); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25-39 (2010). *See Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1636, 1668-70 (2015) (plurality op.).

value,[71] the Supreme Court has made clear that "serious value" cannot be used "as a general precondition to protecting *other* types of speech in the first place." After all, the Court reasoned, "'[*m*]*ost* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is sheltered from government regulation." [72]

No such concept as strict scrutiny exists under the ECHR. Instead, the European Court of Human Rights weighs the various factors – including the objective of the speaker, the content of the speech and its context, the profile of the targets of the speech, and the impact – against the gravity of the speech restrictions. If the perceived social value of the expression is sufficient, or if the restrictions are considered severe, then Article 10 may provide protection – or it may not. The factors to be considered require the court to consider the relative social importance of the speech and the prominence of the speaker. [73]

3. Benefit of the Doubt for Speech. In the United States, the presumption favors freedom of expression and the speaker gets the benefit of the doubt. This concept has been expressed in various ways in the cases, most often that First Amendment freedoms need "breathing space" to survive. [74] Or, as Chief Justice Roberts has written, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." [75] But the balancing calculus used by the European Court of Human Rights gives breathing space to the national laws

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[71] *Miller v. California*, 413 U.S. 15, 24 (1973).

[72] *Stevens*, 559 U.S. at 479-480 (emphasis in original).

[73] COE Fact Sheet, https://wcd.coe.int/ViewDoc.jsp?id=1477721, at 3.

[74] *Sullivan*, 376 U.S. at 271-272.

[75] *Federal Election Comm'n v. Wisconsin Citizens for Life, Inc.*, 551 U.S. 449, 474 (2007).

that regulate speech. Applying Article 10, the court seeks to determine whether there is a "pressing social need" to restrict freedom of expression and whether the means used are "proportionate" to the government's legitimate aim. In this analysis, national authorities are accorded a certain "margin of appreciation" in how they enforce their laws. [76] In short, it is the state – not the speaker – that enjoys the benefit of the doubt.

The European court has said that freedom of expression extends not just to ideas that are "favourably received or regarded as inoffensive" but also to those that "offend, shock or disturb the state or any sector of the population." It has also said that religious groups "must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith." [77] But it is difficult to expect such protections to be firm or predictable where member states are accorded a "margin of appreciation" in applying their hate speech laws, and where the court decisions suggest that "[t]he identification of 'hate speech' is sometimes difficult because this kind of speech does not necessarily manifest itself through the expression of hatred or emotions." Such speech "can be concealed in statements which at first glance may seem to be rational or normal." [78] Given the number of factors the court is called upon to balance, it is hard to predict whether the tie goes to the speaker or to the censor. The only honest answer can be, "it depends."

4. Treatment of Intermediaries. Under U.S. law, those who provide online platforms for third-party speech receive broad immunity from liability. Section 230 of the Communications Decency Act provides, among other things that online services cannot be

[76] COE Fact Sheet, https://wcd.coe.int/ViewDoc.jsp?id=1477721, at 3.

[77] COE Fact Sheet at 3-4.

[78] *Id*. at 2.

treated "as the publisher or speaker of any information provided by another information content provider." [79] Congress adopted this provision in support of First Amendment values "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." [80] And it has had its intended effect. Freedom of expression has flourished online, but with it – inevitably – comes hateful speech. As a consequence, a recent decision of the European Court of Human Rights held that the publisher of a commercially-run news portal could be held responsible for comments posted by third parties. In *Delfi AS v. Estonia*, the court found no violation of Article 10 after the news site was fined for failing to take down anti-Semitic readers' comments. It decided the finding of liability had been justified and was a proportionate restriction on the portal's freedom of expression.[81] Thus far, the holding applies to commercially-run news sites that allow readers to post comments, but not to general social media platforms.

A Grave Test

Tragedies like the *Charlie Hebdo* massacre raise important questions about these different approaches to freedom of expression. Some have asked whether the law should even allow the kind of inflammatory speech that is the hallmark of *Charlie Hebdo*. But if such restrictions are to be imposed, would it not ratify and give official sanction to the assassin's veto? And if the potential to offend is sufficient to justify censorship, whose sensibilities should define the limits of free expression? Is the agenda to be set by those willing to commit violence in response to images that upset them or transgress their religion? If that is the case, is the *Book*

[79] 47 U.S.C. § 230 (c)(1).

[80] *Zeran v. AOL, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

[81] *Delfi AS v. Estonia*, Application No. 64569/09 (European Court of Human Rights 2015).

of Mormon musical, with its profanity and sacrilegious content, permissible only because the Church of Jesus Christ of the Latter Day Saints is unlikely to declare a jihad? Or, should the law restrict expression to buffer *everyone's* perceived sensibilities? Under that approach, the question is no longer what speech crosses the line to be an "abuse" of free speech; it is what speech does not?

These questions are far from academic. A little more than a month after the *Charlie Hebdo* attack, a lone wolf gunman in Copenhagen attacked a café that hosted a debate on freedom of speech entitled "Art, Blasphemy and the Freedom of Expression." The event was organized by artist Lars Vilks, who had drawn one of the Mohammad cartoons published in *Jyllands-Posten* in 2005. Vilks survived the attack, but Danish documentary filmmaker Finn Noergaard was killed. [82] None of the panelists at the free speech event had anything to do with the Mohammad cartoons, thus expanding the assassin's veto beyond those who insult the Prophet to speakers who merely talk about whether insulting the Prophet should be permitted. For radical religious fundamentalists, there is no room for debate.

In May, two gunmen were killed by police in Garland, Texas after they opened fire on a "Draw Mohammad Contest" sponsored by the American Freedom Defense Initiative. [83] The event was conceived by controversial blogger Pamela Geller as a response to the *Charlie Hebdo*

[82] Melissa Locker, *Gunman Dead After Attack on a Free Speech Event and Synagogue in Copenhagen*, VANITY FAIR, Feb. 15 2015 (http://www.vanityfair.com/news/2015/02/gunman-dead-copenhagen-attacks); Susanne Gargiulo, *Copenhagen Attacks: Police Kill Man During Shootout*, CNN, February 14, 2015 (http://www.cnn.com/2015/02/14/europe/denmark-shooting/index.html).

[83] Liam Stack, *Texas Police Kill Gunmen at Exhibit Featuring Cartoons of Prophet Mohammed*, NEW YORK TIMES, May 3, 2015 (http://www.nytimes.com/2015/05/04/us/gunmen-killed-after-firing-on-anti-islam-groups-event.html?_r=1).

attack. [84] But it was roundly criticized as being needlessly and intentionally provocative. Bill O'Reilly of Fox News argued it was wrong "to insult every Muslim on the planet" and that "Jesus would not have sponsored that event." [85] Representative Peter King said that the event "went too far," was insulting to Muslims, and "put people's lives at risk needlessly." [86] And CNN news commentator Chris Cuomo took the position that the event was "hate speech" and therefore not protected under the First Amendment, citing *Chaplinsky* for that proposition. [87]

Cuomo is dead wrong about the law, but his reaction, and those of others, illustrates that many people believe the U.S. should adopt a more European approach to freedom of expression. One of the more prominent voices was that of cartoonist Garry Trudeau, who called what *Charlie Hebdo* did with its Mohammad cartoons "an abuse of satire." In remarks made as he accepted the George Polk Career Award for journalism in April 2015, the *Doonesbury* creator criticized *Charlie Hebdo* and *Jyllands-Posten* for publishing cartoons of Mohammad, and slammed "free speech absolutists" for defending them. He compared the cartoons to crude and vulgar graffiti that "punches down" and attacks "the little guy," thereby wandering "into the

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[84] For background on Geller, *see* Anne Barnard and Alan Feuer, *Outraged, and Outrageous*, NEW YORK TIMES, Oct. 8, 2010 (http://www.nytimes.com/2010/10/10/nyregion/10geller.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article).

[85] Greg Richter, *Bill O'Reilly: Jesus Wouldn't Have Sponsored "Draw Muhammad" Event*, NEWSMAX, May 7, 2015 (http://www.newsmax.com/Newsfront/Bill-OReilly-Jesus-draw-muhammad-ISIS/2015/05/07/id/643339/).

[86] Greg Richter, *Peter King: Pamela Geller Put Lives at Risk "for No Good Reason,"* NEWSMAX, May 7, 2015 (http://www.newsmax.com/US/Peter-King-pamela-geller-Muhammad-texas/2015/05/07/id/643303/).

[87] Hans Bader, *The "Draw Muhammad" Contest and the Futility of Trying to Correct Journalistic Mistakes about the Law*, CEI BLOG, May 6, 2015 (https://cei.org/blog/draw-muhammad-contest-and-futility-trying-correct-journalistic-mistakes-about-law).

realm of hate speech." [88] Later that same month 145 writers signed a letter protesting the PEN American Center's decision to present its annual Freedom of Expression Courage award to *Charlie Hebdo*, and six writers backed out as literary hosts for the award dinner. [89] Academic writers have also suggested that the American system goes too far in protecting free speech. [90]

It is unlikely such criticism will lead to changes in American law, although recent cases and legislation have had the effect of limiting the display of symbols characterized as hate speech. In 2015 the Supreme Court decided that it did not violate the First Amendment for Texas to reject a depiction of the Confederate battle flag as part of its specialty license plate program on grounds it was considered offensive. The issue in that case was not whether the state could ban images of the flag, but whether the specialty plate program constituted "government speech," which is not covered by First Amendment constraints. A divided Court held that license plates are government property and that they convey government speech notwithstanding the messages permitted as part of the specialty plate program.[91] Similarly, South Carolina decided to remove the Confederate flag from its State Capitol grounds in the wake of the

[88] Garry Trudeau, *The Abuse of Satire*, THE ATLANTIC, April 2015 (http://www.theatlantic.com/international/archive/2015/04/the-abuse-of-satire/390312/).

[89] *Rejecting the Assassin's Veto*, PEN American Center, April 26, 2015 (http://www.pen.org/blog/rejecting-assassins-veto); Jennifer Schuessler, *Six PEN Members Decline Gala After Award for Charlie Hebdo*, NEW YORK TIMES, April 26, 2015 (http://www.nytimes.com/2015/04/27/nyregion/six-pen-members-decline-gala-after-award-for-charlie-hebdo.html?_r=0).

[90] *See, e.g.*, Jeremy Waldron, THE HARM IN HATE SPEECH (Harvard Univ. Press 2012); Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480 (2014); Stanley Fish, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO (1990).

[91] *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

racially-motivated murder of nine churchgoers in Charleston. [92] Both examples involved government "sponsorship" of offensive speech, not whether an individual could be punished for displaying the flag.

But while a change in American constitutional law is unlikely in this regard, there has been movement by some on the Supreme Court. In a series of recent opinions, Justice Stephen Breyer has articulated a theory of "proportionality" in First Amendment cases that sounds distinctly European. In *United States v. Alvarez*, in which the Court invalidated the "Stolen Valor Act," Justice Breyer concurred, but said he would not apply strict scrutiny to reach that result. Rather, he wrote that the Court should employ a form of intermediate scrutiny that asks "whether the statute works speech-related harm that is out of proportion to its justifications." [93]

He has floated the same theory in other cases as well. Dissenting from a 2011 decision that invalidated a California law regulating violence-themed video games, Justice Breyer opined that the Court should not have applied strict scrutiny but should have asked whether, overall, "the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide." [94] And in another dissent, this time from a decision striking down a commercial speech regulation, Justice Breyer again wrote, "I would ask whether Vermont's regulatory provisions work harm to First Amendment interests that is disproportionate to their furtherance

[92] Richard Fausset and Alan Blinder, *Era Ends as South Carolina Lowers Confederate Flag*, NEW YORK TIMES, July 10, 2015 (http://www.nytimes.com/2015/07/11/us/south-carolina-confederate-flag.html).

[93] *Alvarez*, 132 S. Ct. at 2551-52 (Breyer, J., concurring).

[94] *Brown*, 131 S. Ct. at 2766 (Breyer, J., dissenting).

of legitimate regulatory objectives." [95] In this dissent he was joined by Justices Ruth Bader Ginsburg and Elena Kagan.

Justice Breyer suggested how this theory of proportionality would apply in a case involving "hate speech" in his concurring opinion in *Snyder v. Phelps*, the case involving funeral protests by the Westboro Baptist Church. While Justice Breyer agreed with the majority, that the church could not be penalized for its offensive speech on the facts of the case, he wrote that "[t]o uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm." [96] The implication of his opinion is that he would have voted to uphold the jury verdict against the church if he had found it to be "proportionate."

If this sounds like the way the European Court of Human Rights operates, it is because it is. In exercising its powers of review over member states' restrictions on speech (including hate speech), the ECHR "assesses the proportionality of a restriction on freedom of expression to the aim pursued." Any interference "disproportionate to the legitimate aim pursued will not be deemed 'necessary in a democratic society' and will thus contravene Article 10 of the Convention." [97] Assessment of the "proportionality" of the response varies from case to case, depending on the court's estimation of the magnitude of the government's interest and the importance of the rights in question.

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[95] *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2012) (Breyer, J., dissenting).

[96] *Phelps*, 562 U.S. at 462-463 (Breyer, J., concurring).

[97] Human Rights Files, No. 18, FREEDOM OF EXPRESSION IN EUROPE (Council of Europe Publishing, March 2007) at 9.

Justice Breyer acknowledged his intellectual debt to these sources in his 2015 book THE COURT AND THE WORLD. He wrote that he has found the legal concept of proportionality "often used by European and other foreign judges" to be "useful in describing and applying classical American rules of constitutional law."[98] He does not suggest elimination traditional modes of First Amendment analysis – such as strict scrutiny – but argues "they are not, and cannot be, the whole story where the First Amendment is concerned." Justice Breyer advocates supplementing traditional levels of First Amendment scrutiny with a form of balancing – "[a]nd that is where proportionality comes in."[99] Specifically, he favors "adding the judge-made concept of proportionality as a guide in deciding First Amendment cases." [100]

Reviewing his dissenting opinion in *Sorrell* as well as some of his concurrences (which read remarkably like his dissents), Justice Breyer noted that "my view of the case would likely have prevailed" if the Court adopted a more European balancing approach. He argues that proportionality better enables judges to analyze how statutes actually operate and would "produce results more consistent with the First Amendment's purposes." [101] Of course, that necessarily would mean revising current law to be more in line with Justice Breyer's view of the First Amendment's purpose, which would require reversing a number of recent decisions upholding free expression claims, such as *Brown v. EMA*, in which the Court's majority invalidated California's regulation of violence-themed video games. It also would mean adopting a more European approach toward so-called "hate speech."

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[98] Stephen Breyer, THE COURT AND THE WORLD 254 (Alfred A. Knopf 2015).

[99] *Id*. at 256.

[100] *Id*. at 257.

[101] *Id*. at 259-260.

Where does this leave *Charlie Hebdo*?

United States constitutional law forcefully repudiates the assassin's veto, and publications like *Charlie Hebdo* unquestionably receive the law's full protection. So do the anti-Semitic routines of Dieudonne. This is because formative First Amendment decisions were predicated on vanquishing the assassin's veto's weaker cousin, the heckler's veto. The Supreme Court repeatedly reaffirmed its holding from *Terminiello* that threats of violence from "angry and turbulent" hostile audiences cannot justify censorship, most notably in cases arising from the civil rights movement where the danger of a violent crowd reaction was commonplace.

Limiting civil rights speakers because of the fear that angry mobs might shatter domestic tranquility would have severely undermined both the First Amendment and the cause of equality.[102] As a consequence, the Supreme Court held that controversial speakers cannot be punished or silenced simply because "their critics might react with disorder or violence." [103] And, based on the principle of content neutrality, the same principles extend to speakers who are hostile to the cause of civil rights,[104] and to those who raise controversial issues as well. [105] Accordingly, the Court held that the act of burning an American flag as a form of protest is protected by the First Amendment despite the possibility that offended onlookers might react with violence. [106]

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[102] *See generally* Harry Kalven, Jr., *The Negro and the First Amendment* 140-60 (1965) (discussing the heckler's veto as a barrier to civil rights).

[103] *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966); *see also Cox v. Louisiana*, 379 U.S. 536, 550-551 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

[104] *See, e.g., Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

[105] *See, e.g., Street v. New York*, 394 U.S. 576, 592 (1969) ("the possible tendency of . . . words to provoke violent retaliation" cannot justify restricting such words).

[106] *Johnson*, 491 U.S. at 408-409.

American hostility to the heckler's veto was most forcefully reaffirmed recently by *the en banc* Sixth Circuit in a case with particular relevance to the *Charlie Hebdo* controversy. In *Bible Believers v. Wayne County, Michigan*, the court held that police violated the First Amendment rights of members an evangelical Christian group for ejecting them from an Arab culture festival because of their intentionally provocative speech. The evangelicals attended the festival to proselytize, and their essential message was one of intolerance – "proclaiming that Mohammed was a false prophet who lied to them and that Muslims would be damned to hell if they failed to repent by rejecting Islam." [107] Their message was calculated to be inflammatory, including signs reading "Islam is a Religion of Blood and Murder," "Turn or Burn," and "Your prophet is a pedophile." And if that were not enough, the Bible Believers carried a severed pig's head on a spike to, as they explained it, "ke[ep] [the Muslims] at bay." [108] Not surprisingly, they provoked a number of angry reactions, including profane taunts and being pelted with plastic bottles and other debris.

The Sixth Circuit held in a divided opinion that threatening the Bible Believers with arrest if they failed to leave the festival in light of the hostile crowd reaction was a classic heckler's veto. The majority concluded that the offensive religious message delivered in a public forum did not fit into a recognized First Amendment exception such as incitement or "fighting words," and that the police had an obligation to protect the speakers rather than "join a roiling mob intent on suppressing ideas." [109] Although the Bible Believers' message was "vile and offensive to most every person who believes in the right of their fellow citizens to practice the

[107] *Bible Believers v. Wayne County, Michigan*, 805 F.3d 228, 236 (6th Cir. 2015) (*en banc*).

[108] *Id*. at 238, 244.

[109] *Id*. at 251 (quoting *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975)).

faith of his or her choosing," the court found that "freedom to espouse sincerely held religious, political, or philosophical beliefs, especially in the face of hostile opposition, is too important to our democratic institution for it to be abridged simply due to the hostility of reactionary listeners who may be offended by a speaker's message." [110] It reaffirmed the principle that "the answer to disagreeable speech is not violent retaliation by offended listeners or ratification of the heckler's veto through threat of arrest by the police." [111]

Critics say that U.S. law goes too far in an "absolutist" direction in that it protects speech that is hateful, hurtful, or that may foment social unrest. And while they don't condone the murderous reactions to the likes of *Charlie Hebdo's* slashing satire, they "get" the motivations underlying the violent backlash. Critics from across the political spectrum argue that this takes free speech "too far," and that such expression should be silenced. Hate speech laws operate on the same principle, imposing limits on freedom of expression in the name of civility and social order. They substitute state power in the form of criminal penalties or civil sanctions for extremist vigilante actions, but they begin with the same premise – freedom of speech does not include the right to say [insert your preferred epithet or satirical cartoon here].

European law assumes that these vital interests can be balanced under a rule of law. Freedom of expression can be protected to a significant degree, but these protections give way when necessary to preserve countervailing values of democracy and equality. This not an easy balancing act to perform. In a 2015 address at Catholic University School of Law, Dr. Wolfgang Brandstetter, the Austrian Federal Minister of Justice, explained that Austrian law prohibits hate speech or a hate crime, imposing jail terms of up to two years for a violation. "For us, hate

[110] *Id*. at 252, 254-255.

[111] *Id*. at 261.

speech is misusing freedom of speech, and therefore shouldn't be permitted," he said, but he acknowledged the difficulty of maintaining consistency. He noted that denying or trivializing the genocidal crimes of Adolf Hitler could be prosecuted under hate speech laws, but denying those of Joseph Stalin would not. He added that "speech involving religion causes the worst problems of all." [112]

Religion necessarily raises the thorniest problems, as it is difficult to explain how to prohibit "insults" to religion as a form of hate speech without effectively criminalizing blasphemy. And it is not just blasphemy against an official religion, but against *all* religions. This is especially true when humor is involved, as illustrated by the reaction to *Charlie Hebdo*. Some, like the Pope, Garry Trudeau, or Bill O'Reilly will condemn you for it; others, like Cherif and Said Kouachi, will kill you because of it; while some governments will merely ban your work or jail you for it.

For example, Polish authorities imposed a fine of 1,200 EUR on Doda, a popular rock performer, for her statements that the Bible was written by people "drunk with wine and smoking some stuff" and that she "believes more in dinosaurs than the Bible." She was charged under Article 196 of the Polish Criminal Code, which prohibits offending "religious feelings of other people by publicly insulting an object of religious cult or a place for holding of religious ceremonies." The fine and the blasphemy law were upheld by the Polish Constitutional Court in October 2015. The court held that the right to free expression did not include a right to make insulting statements that offend the feelings of others, and it found the fine to be

[112] *See* Catholic University of America, *Austria's Top Justice Official Explains Europe's Approach to Hate Crimes and Hate Speech* (http://www.law.edu/2015-Spring/Austrias-Top-Justice-Official-Explains-Europes-Approach-to-Hate-Crimes-and-Hate-Speech.cfm). *See also* Hate Speech Legislation in Austria and the European Union (https://www.youtube.com/watch?v=gpl0-bJY0gA).

"proportionate."[113] Separately, a performer in a death metal band was charged for calling the Catholic Church "the most murderous cult on the planet." [114] In Turkey, the owner of a publishing company was convicted of insulting "God, the Religion, the Prophet and the Holy Book" for publishing a novel that addressed theological and philosophical issues. He was fined and sentenced to two years in prison, but the prison sentence was commuted.

In the Turkish case, the European Court of Human Rights found in 2005 that Muslims could legitimately feel that certain passages of the book constituted an unwarranted and offensive attack on them, and the conviction did not violate Article 10. It noted that the authorities had not seized the book, and that the fine was proportionate to the aims of the law. [115] Under this legal framework, could a film like Monty Python's *Life of Brian* be made today? Considered a comedy classic, the film caused outrage at the time, and was banned as sacrilegious in Ireland and Norway. (*Life of Brian* was marketed in Sweden with posters exclaiming "So funny, it was banned in Norway!"). In the UK, thirty-nine local authorities effectively prohibited its exhibition. [116]

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[113] *See* Dominika Bychawska-Siniarska, *Polish Blasphemy Law Declared Constitutional*, MLRC MEDIA LAW LETTER, Nov. 25, 2015 at 30-31.

[114] Mike Harris, *Europe's Rules on Freedom of Information and Hate Speech*, X INDEX, Jan. 6, 2014 (https://www.indexoncensorship.org/2014/01/eus-commitment-freedom-expression-freedom-information-hate-speech/#footnote1).

[115] *I.A. v. Turkey*, Application No. 42571/98 (European Court of Human Rights, 2005). Hate Speech Fact Sheet, http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf, at 10.

[116] Sanjeev Bhaskar. *What Did 'Life of Brian' Ever Do For Us?*, THE TELEGRAPH, Nov. 29, 2009 (http://www.telegraph.co.uk/culture/film/6679546/What-did-Life-of-Brian-ever-do-for-us.html); *see Monty Python's Life of Brian*, WIKIPEDIA (https://en.wikipedia.org/wiki/Monty_Python's_Life_of_Brian#Religious_satire_and_blasphemy_accusations) (reviewed Sept. 13, 2015).

When it comes to freedom of expression, how can one tell the difference between countries whose citizens are protected by the ECHR and those whose citizens are not? [117] It's not always easy to say. Three members of *Pussy Riot*, the punk rock protest group that performed its "Punk Prayer" in Moscow's Christ the Savior cathedral in 2012, were convicted and each sentenced to two years for "hooliganism motivated by religious hatred." [118] Witnesses at the trial testified about how their religious sensibilities had been seared by the performance ("they basically spat in my face, in my soul, in my Lord's soul," according to one), and a poll found that forty-two percent of Russians considered the performance "an attack on the Russian Orthodox Church." Yet the lyrics of their song ("Virgin birth-giver of God, drive away Putin!") are unmistakably an attack on the political order, not religion. [119] This is not an uncommon outcome for so-called "hate speech" laws. They may be interpreted too broadly or purposely used by authorities to silence dissent. After Russia adopted a law prohibiting "Nazi propaganda," one of the first books removed from bookstores was *Maus*, Art Spiegelman's Pulitzer-Prize-winning graphic novel about life in Nazi Germany – hardly a promotion of Nazism. [120]

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[117] *See Russia Overrules European Court of Human Rights*, EURACTIV.COM, July 14, 2015 (http://www.euractiv.com/sections/europes-east/russia-overrules-european-court-human-rights-316305).

[118] *See* Masha Lipman, *The Absurd and Outrageous Trial of Pussy Riot*, THE NEW YORKER, Aug. 7, 2012 (www.newyorker.com/news/news-desk/the-absurd-and-outrageous-trial-of-pussy-riot).

[119] Jeffrey Tayler, *What Pussy Riot's 'Punk Prayer' Really Said*, THE ATLANTIC, Nov. 8, 2012 (www.theatlantic.com/international/archive/2012/11/what-pussy-riots-punk-prayer-really-said).

[120] *See* Sonny Bunch, *Subjecting Free Speech to the Assassin's Veto*, WASHINGTON POST, May 5, 2015 (www.washingtonpost.com/news/act-four/wp/2015/05/05/subjecting-free-speech-to-the-assassins-veto).

Is this a fair comparison? After all, it might be argued that neither *Charlie Hebdo* nor other publications were prosecuted in Europe for printing cartoons depicting Mohammad. This is largely true, but only to a point. In the face of demands that *Jyllands-Posten* be prosecuted for its 2005 publication of Mohammad cartoons, Danish authorities declined to initiate a criminal case because the cartoons were published in the context of an important political debate. The decision prompted the Organization of the Islamic Conference ("OIC") to demand that the European Parliament pass a law prohibiting "Islamophobia" and that the EU should impose new limits on freedom of expression regarding the use of religious symbols. [121] The OIC also has spearheaded efforts to get the United Nation to adopt resolutions prohibiting "defamation of religion," a measure that has been likened to an international blasphemy law.

The European response to such demands was less than firm in supporting freedom of expression. The EU's foreign policy coordinator, Javier Solana, responded that Europeans viewed the *Jyllands-Posten* publication with "resentment and disgust" and pledged that the EU would "do its utmost to make sure that that kind of cartoon wouldn't be published in the future."[122] Former Danish foreign minister Uffe Elleman-Jensen also condemned *Jyllands-Posten*, and said that publication of the cartoons was at odds with founding principles of democracy.[123] More recently, British Labor Leader Ed Miliband has proposed outlawing language deemed offensive to Muslims, pledging to make Islamophobia "an aggravated crime."[124] Milliband, as British Foreign Secretary in 2009, had defended the decision to exclude

[121] *See* Rose, *supra* note 2, at 96-97.

[122] *Id.* at 98.

[123] *Id.* at 122-123.

[124] *See* Bunch, *supra* note 120.

Dutch parliamentarian Geert Wilders from entering the UK to exhibit a film critical of Islam. Milliband said that Britons have a "profound commitment to freedom of speech," but "there is no freedom to stir up hate, religious and racial hatred, according to the laws of the land." [125]

Charlie Hebdo republished three of the *Jyllands-Posten* Mohammad cartoons in 2006 in an article discussing the growing controversy over freedom of expression, and was sued by the Paris Grand Mosque and the Union of French Islamic Organizations under French law. The Paris court held that *Charlie Hebdo* had not violated the law because two of the cartoons targeted radical Islamists but not Muslims in general. The third, while insulting to Muslims generally, was not published with an intent to insult, but was part of the ongoing debate about *Jyllands-Posten* and censorship. [126] The decision was upheld on appeal.

That case, like the decision by Danish officials not to prosecute *Jyllands-Posten* are good examples of how the balancing approach in the EU came down on the side of free expression. But the closeness of the reasoning suggests that neither *Charlie Hebdo* nor other publications may take a favorable outcome for granted. In the United States, such a case would not have made it to court (or would not last long if a complaint had been filed). But in the EU, the best one can say is that the publication *probably* would win.

But not always. In October 2008 the European Court of Human Rights dismissed a complaint by French cartoonist Denis Leroy who had been convicted and fined for publishing a political cartoon condoning the World Trade Center attack in the days after 9/11. The cartoon,

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[125] *See* Rose, *supra* note 2, at 124.

[126] *See* Gregory Viscusi, *French Magazine is Cleared Over Mohammad Cartoons (Update 2)*, BLOOMBERG.COM, March 22, 2007 (http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aJaZYqtP9ZFY&refer=europe); Jacob Sullum, *How France Legitimizes Violent Responses to Offensive Speech*, REASON.COM, Jan. 8, 2015 (http://reason.com/blog/2015/01/08/how-france-lends-legitimacy-to-violence).

published in a Basque weekly newspaper depicted the attack on the twin towers with a caption that was a play on a famous advertising slogan: "We all dreamt of it . . . Hamas did it." The court held that the conviction did not violate Article 10 because the cartoonist's expression of moral support for the terrorists "diminished the dignity of the victims." [127] Of course, the same calculus could be used to condemn *Charlie Hebdo* or *Jyllands-Posten* depending on how sentiment is running at any particular time. In the win some/lose some world of Article 10 protections for free expression, anything is possible.

This should serve as a cautionary note for those eager to impose punishment on whatever speech they detest. Anjem Choudary, whose USA TODAY op-ed in the aftermath of the *Charlie Hebdo* murders proclaimed that "Muslims do not believe in the concept of freedom of expression," may have reason to reconsider his position. In August 2015 Choudary was arrested and charged with fomenting terrorism. To add to the irony, he was arrested along with Mohammad Mizanur Rahman, an associate who had served two years in prison for his part in a 2006 protest over the *Jyllands-Posten* cartoons. [128] It will be fascinating to see if their defense includes appeals to freedom of speech, and, if so, how that is assessed in the EU's balancing regime.

In the end, the key point is not whether legal protections for freedom of expression should be absolute. *Jyllands-Posten* editor Flemming Rose wrote that the issue boils down to whether a free society chooses to defend the right to offend, or opts instead to champion a right not to be offended. *That* is the question.

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[127] *Leroy v. France*, Application No. 36109/03 (ECHR 2008) (http://hudoc.echr.coe.int/eng-press?i=003-2501837-2699727); Hate Speech Fact Sheet, *supra*, at 6.

[128] Karla Adam, *Briton Arrested Over Online Lectures*, WASHINGTON POST, Aug. 6, 2015 at A6.