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# The Terrorist's Veto: Why the First Amendment Must Protect Provocative Portrayals of the Prophet Muhammad

Daniel Ortner<sup>1</sup>

## I. INTRODUCTION

On Wednesday, January 7, 2015, armed gunmen entered the offices of French satirical magazine *Charlie Hebdo* and killed employees and editors of the magazine in probable retaliation for the publication of satirical cartoons depicting the Prophet Muhammad.<sup>2</sup> The attack on *Charlie Hebdo* has contributed to the debate over whether publication of speech that is likely to provoke violent reactions from religious extremists should be permissible.<sup>3</sup> Some have argued that such speech should be prohibited in order to prevent responsive violence and terrorism.<sup>4</sup> Recently, a school of journalism dean argued in *USA Today* that the publication of cartoons that insult the Prophet Muhammad

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<sup>1</sup> Daniel Ortner, J.D. BYU Law '15, Law Clerk to Judge Kent A. Jordan, Federal Court of Appeals for the Third Circuit. With thanks to Professor Ronnell Andersen Jones, for her invaluable assistance with this article.

<sup>2</sup> See Josh Levs, Ed Payne & Michael Pearson, *A Timeline of the Charlie Hebdo Terror Attack*, CNN (Jan. 9, 2015), <http://www.cnn.com/2015/01/08/europe/charlie-hebdo-attack-timeline/>. See also *What Motivated the Attacks on Charlie Hebdo?*, PBS NEWSHOUR EXTRA (Jan. 9, 2015), [http://www.pbs.org/newshour/extra/daily\\_videos/what-motivated-the-attacks-on-charlie-hebdo/](http://www.pbs.org/newshour/extra/daily_videos/what-motivated-the-attacks-on-charlie-hebdo/).

<sup>3</sup> A foiled attack in May 2015 on a Texas cartoon contest by two armed gunmen launched another wave of debate over the censorship of provocative images. See generally Scott Shane, *Texas Attacker Left Trail of Extremist Ideas on Twitter*, N.Y. TIMES, May 5, 2015,

[http://www.nytimes.com/2015/05/06/world/middleeast/isis-texas-muhammad-cartoons.html?\\_r=0](http://www.nytimes.com/2015/05/06/world/middleeast/isis-texas-muhammad-cartoons.html?_r=0). If attacks related to the publication of images of the Prophet Muhammad on U.S. soil become even more common, it is likely that calls to censor/calls for restriction will also intensify. An indication of such escalation in calls for restriction is the decision of PEN America to give a free speech award to *Charlie Hebdo*, which led to sharp criticism and illustrates the continuing intensity of this debate. See Alan Yuhas, *Two Dozen Writers Join Charlie Hebdo PEN Award Protest*, GUARDIAN, Apr. 29, 2015, <http://www.theguardian.com/books/2015/apr/29/writers-join-protest-charlie-hebdo-pen-award>; see also, e.g., Rich Lowry, *Americans Have a Right to Insult Islam*, NAT'L REV. (May 5, 2015, 12:00 AM), <http://www.nationalreview.com/article/417903/americans-have-right-insult-islam-rich-lowry>.

<sup>4</sup> See, e.g., Tomas Byrne, *Banning Blasphemy: The Repercussions of Religious Offense Under the Right to Free Speech*, TOMAS BYRNE (Jan. 29, 2015), <http://www.tomasbyrne.com/blasphemy-may-offensive-laws-no-place-tolerant-society/>; see also Javier E. David, *After Paris and Copenhagen, Can Free Speech Learn to Live with Religion?*, CNBC (Feb. 21, 2015, 12:00 PM), <http://www.cnbc.com/id/102439946>. Garry Trudeau, the well-known creator of the *Doonsbury* cartoon series also declared that *Charlie Hebdo* “wandered into the realm of hate speech,” which is illegal in France because “it directly incites violence.” Garry Trudeau, *The Abuse of Satire*, ATLANTIC (Apr. 11, 2015), <http://www.theatlantic.com/international/archive/2015/04/the-abuse-of-satire/390312/>.

“constitute fighting words, or a clear and present danger . . . .”<sup>5</sup> Thus, attempts have been made to restrict speech that is seen as offensive to religion or religious sentiments.<sup>6</sup>

This is not the first time that publication of media that is critical of Islam has sparked controversy.<sup>7</sup> Several years ago, the publication of cartoons depicting the Prophet Muhammad in Danish Newspaper *Jyllands-Posten* led to massive worldwide protests, violent attacks, and a large number of casualties.<sup>8</sup> More recently, the release of *Innocence of Muslims*,<sup>9</sup> a trailer critical of the Prophet Muhammad, sparked riots and demonstrations in countless cities in Africa and the Middle East.<sup>10</sup> The trailer may also have played some role in the infamous attacks on the U.S. compound in Benghazi, which resulted in the death of U.S. Ambassador Chris Stevens.<sup>11</sup> As a response to protests and violence over the *Innocence of Muslims* video, senior Obama Administration Officials such as Secretary of State Hillary Clinton urged YouTube to remove the videos in certain countries, which further sparked debate about the extent of freedom of speech and whether such cartoons should be permitted.<sup>12</sup>

<sup>5</sup> DeWayne Wickham, *Wickham: ‘Charlie Hebdo’ Crosses the Line*, USA TODAY, Jan. 20, 2015, <http://www.usatoday.com/story/opinion/2015/01/19/charlie-hebdo-cross-line-free-speech-covers-islam-limits-wickham/21960957/>. *But see* Eugene Volokh, *Adherents of Islam, Second Largest Religion in the World, Are a “Powerless, Disenfranchised Minority”?*, WASH. POST: THE VOLOKH CONSPIRACY (Apr. 11, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/11/adherents-of-islam-second-largest-religion-in-the-world-are-a-powerless-disenfranchised-minority/> (“I would have thought that one of the most prominent and (at least in the distant past) iconoclastic cartoonists in the world, receiving an award for his lifetime achievement as a cartoonist, would have explained in a bit more detail just which sorts of ideologies should now be immunized from ridicule, and which sort of cartoons should indeed be criminalized or at least condemned by the cartooning elites.”); *see also* David Frum, *Why Garry Trudeau Is Wrong About Charlie Hebdo*, ATLANTIC (Apr. 13, 2015), <http://www.theatlantic.com/politics/archive/2015/04/why-garry-trudeau-is-wrong-about-charlie-hebdo/390336/>.

<sup>6</sup> For instance, Missouri enacted a law in 2012 that outlawed profane behavior near a house of worship, which was struck down by the Eighth Circuit. MO. REV. STAT. § 574.035; *see also* Eugene Volokh, *Ban on Profane, Rude, or Indecent Speech That Disrupts Houses of Worship Violates the First Amendment*, WASH. POST: THE VOLOKH CONSPIRACY (Mar. 9, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/09/ban-on-profane-rude-or-indecent-speech-that-disturbs-houses-of-worship-violates-the-first-amendment/>. *See generally* Elizabeth Crisp, *SNAP Sues over Mo. ‘House of Worship Protection Act,’* ST. LOUIS POST DISPATCH, Aug. 22, 2012, [http://www.stltoday.com/news/local/crime-and-courts/snap-sues-over-mo-house-of-worship-protection-act/article\\_1903f94c-eca5-11e1-8dca-0019bb30f31a.html](http://www.stltoday.com/news/local/crime-and-courts/snap-sues-over-mo-house-of-worship-protection-act/article_1903f94c-eca5-11e1-8dca-0019bb30f31a.html).

<sup>7</sup> More generally, the discussion about the potential for Internet speech to contribute to violence dates back to at least the aftermath of the Oklahoma City bombings in 1995. *See* Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 367 (1996).

<sup>8</sup> For extensive discussion of the Danish Muhammad Cartoon controversy, *see infra* Section I.A.

<sup>9</sup> *Innocence of Muslims* (Kaloula Basseley Nakoula 2012).

<sup>10</sup> For more on the *Innocence of Muslims* controversy, *see infra* Section I.B.

<sup>11</sup> *See* Kevin Drum, *Yes, the “Innocence of Muslims” Video Really Did Play a Role in the Benghazi Attacks*, MOTHER JONES (May 2, 2014, 2:37 PM), <http://www.motherjones.com/kevin-drum/2014/05/yes-innocence-muslims-video-really-did-play-role-benghazi-attacks>. *See also* *Ambassador Killed in Benghazi Attack Considered Leaving Libya in April 2011, Emails Reveal*, FOX NEWS (Mar. 1, 2016), <http://www.foxnews.com/politics/2016/03/01/ambassador-killed-in-benghazi-attack-considered-leaving-libya-in-april-2011-emails-reveal.html>.

<sup>12</sup> *See* Dawn C. Chmielewski, *‘Innocence of Muslims’: Administration Asks YouTube to Review Video*, L.A. TIMES, Sept. 13, 2012, <http://articles.latimes.com/2012/sep/13/entertainment/la-et-ct-administration-asks-youtube-to-review-innocence-of-muslims-video-20120913>. *See generally* Robert M. O’Neil, *Hate Speech*,

Reactions across the world to the publication of these cartoons have varied dramatically.<sup>13</sup> These reactions are part of a long-standing global debate regarding the worth of speech that is offensive to religious sentiments.<sup>14</sup> European nations and the U.N. have been heavily involved in efforts to encourage global bans on so-called hate speech,<sup>15</sup> but the United States has soundly rejected such efforts and strongly defended its stance on freedom of speech.<sup>16</sup>

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*Fighting Words, and Beyond—Why American Law Is Unique*, 76 ALB. L. REV. 467, 490–98 (2013) (discussing international implications of U.S. speech law).

<sup>13</sup> For instance, after the attacks in France, Russia reiterated that the publication of the cartoons would violate laws banning materials offensive to religious sentiments: “Disseminating caricatures on religious themes in the media can be considered insulting or humiliating to the representatives of religious confessions and groups, and qualified as inciting ethnic and religious hatred.” *Russia: Publishing Prophet Cartoons Illegal*, LOCAL (Jan. 16, 2015), <http://www.thelocal.fr/20150116/russian-watchdog-publishing-muhammad-cartoons-illegal>. Protestors in Russia who demonstrated in solidarity with victims of the attacks in France were actually arrested or fined. *See id.*

In stark contrast, French authorities arrested 54 people for hate speech including a well-known French comedian. *See France Arrests 54 for ‘Defending Terrorism’ After Charlie Hebdo Attack*, AL JAZEERA AM. (Jan. 14, 2015, 8:17 AM), <http://america.aljazeera.com/articles/2015/1/14/france-charliehebdoarrests.html>.

<sup>14</sup> I have written critically of the willingness of the European Court of Human Rights to allow states to ban speech offensive to religious sentiments. *See Daniel Ortner, Conscientious Offenders: Russia’s Ban on “Extremist” Religious Literature, and the European Court of Human Rights*, 56 VA. J. INT’L L. 147 (2016). *See generally* Bret Stephens, *The Scandal of Free Speech*, WALL ST. J., Jan. 12, 2015, <http://www.wsj.com/articles/bret-stephens-the-scandal-of-free-speech-1421106813> (arguing that the solidarity after the *Charlie Hebdo* attacks belies an increasingly prevalent global attitude against freedom of speech). For a particularly extreme version of this argument, see Tanya Cohen, *Here Is Why It’s Time to Get Tough on Hate Speech in America*, THOUGHT CATALOG (Jan. 5, 2015), <http://thoughtcatalog.com/tanya-cohen/2015/01/here-is-why-its-time-to-get-tough-on-hate-speech-in-america/>.

<sup>15</sup> *See Fighting Deadly Hate Speech Requires ‘Multi-Layered Approach,’ UN Official Says*, UN NEWS CTR. (Feb. 1, 2013), <http://www.un.org/apps/news/story.asp?NewsID=44056#.VP9YOvnF-AU>; David Stringer & Diaa Hadid, *Muslim Leaders Say Call for Global Ban on Anti-Islam ‘Hate Speech’ Is Not Attack on Free Speech*, NAT’L POST (Sept. 29, 2012, 4:26 PM), <http://news.nationalpost.com/2012/09/29/muslim-leaders-say-call-for-global-ban-on-anti-islam-hate-speech-is-not-attack-on-free-speech/>; *see also* Eugene Volokh, *Bosnian Serb Legislature Passes Ban on Offensive Speech Online*, WASH. POST: THE VOLOKH CONSPIRACY (Feb. 6, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/06/bosnian-serb-legislature-passes-ban-on-offensive-speech-online/>.

<sup>16</sup> As President Obama powerfully declared before the U.N. General Assembly:

Americans have fought and died around the globe to protect the right of all people to express their views, even views that we profoundly disagree with. We do not do so because we support hateful speech, but because our founders understood that without such protections, the capacity of each individual to express their own views and practice their own faith may be threatened. We do so because in a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities.

We do so because given the power of faith in our lives, and the passion that religious differences can inflame, the strongest weapon against hateful speech is not repression; it is more speech—the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect.

President Barack Obama, Remarks by the President to the U.N. General Assembly (Sept. 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly>.

On the other hand, the President also declared: “The future must not belong to those who slander the prophet of Islam. But to be credible, those who condemn that slander must also condemn the hate we see in

At first glance, the claim that speech can be proscribed not because it is offensive, but because it will engender a violent reaction and harm national security seems more moderate and restrained than an all-out call for hate-speech laws. Yet, ultimately these approaches are two sides of the same coin. Allowing speech to be restricted would allow those offended to shut down speech with which they disagree through the threat of violence, even though the topics of discussion are some of the most pertinent and urgently needed.<sup>17</sup>

This Article analyzes why the American government should not be able to proscribe the publication or republication of media, even when there is reason to believe that the publication could potentially lead to violence and civic reprisals against soldiers, diplomats, or citizens. The Article considers the various exemptions to the First Amendment that allow for the government to regulate or restrict certain types of unprotected speech. While there are many similarities between justifications for these limited-speech doctrines and for those preventing provocative speech, such as images of Muhammad, the differences between these groups of thought are even more significant.<sup>18</sup> These differences highlight why it would be unwise to allow the restriction of such provocative speech.<sup>19</sup> A significant example of this contrast is that unprotected, or prohibited, speech is treated as outside the realm of protected speech because it has an intrinsic lack of value.<sup>20</sup> Punishing provocative, but otherwise fully protected speech, solely because of the reaction it engenders, however, imposes speech restrictions purely for extrinsic reasons rather than in response to the value of the speech itself.<sup>21</sup> It is a terrorist's veto to allow those opposed to an idea the ability to suppress its expression through threats of violence.<sup>22</sup> Such a veto would violate the core First Amendment principle that "constitutional rights may not be denied simply because of hostility to their

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the images of Jesus Christ that are desecrated, or churches that are destroyed, or the Holocaust that is denied." *Id.*

As Professor Turley noted, "President Obama's U.N. address last month declaring America's support for free speech, while laudable, seemed confused—even at odds with his administration's efforts." Jonathan Turley, *Shut Up and Play Nice: How the Western World Is Limiting Free Speech*, WASH. POST, Oct. 12, 2012, [http://www.washingtonpost.com/opinions/shut-up-and-play-nice-how-the-western-world-is-limiting-free-speech/2012/10/12/e0573bd4-116d-11e2-a16b-2c110031514a\\_story.html](http://www.washingtonpost.com/opinions/shut-up-and-play-nice-how-the-western-world-is-limiting-free-speech/2012/10/12/e0573bd4-116d-11e2-a16b-2c110031514a_story.html).

<sup>17</sup> See Ross Douthat, *The Blasphemy We Need*, N.Y. TIMES (Jan. 7, 2015, 4:00 PM), <http://douthat.blogs.nytimes.com/2015/01/07/the-blasphemy-we-need/>; see also Johnathan Chait, Charlie Hebdo and the Right to Commit Blasphemy, N.Y. MAG. (Jan. 7, 2015, 1:20 PM), <http://nymag.com/daily/intelligencer/2015/01/charlie-hebdo-and-the-right-to-commit-blasphemy.html>.

<sup>18</sup> See *infra* Parts II, III.

<sup>19</sup> See *infra* Parts II, III.

<sup>20</sup> See *infra* Parts II, III.

<sup>21</sup> See *infra* Parts II, III.

<sup>22</sup> See *infra* Part IV. The phrase "terrorist's veto" has been used in the popular press and on blogs in reference to the backlash triggered as a result of the publication of provocative images but has thus far received little attention in legal scholarship. See, e.g., Ronald K.L. Collins, *The Terrorist's Veto*, CONCURRING OPINIONS (Feb. 17, 2015), <http://concurringopinions.com/archives/2015/02/the-terrorist-veto.html>; Michael J. Totten, *The Terrorist's Veto*, CITY J. (Sept. 20, 2012), <http://www.city-journal.org/2012/eon0920mt.html>. Professor Logan briefly mentioned the phrase in a footnote in a very different context. See Wayne A. Logan, *Confronting Evil: Victims' Rights in an Age of Terror*, 96 GEO. L.J. 721, 755 n.233 (2008) (speaking of the potential that terrorists sentenced to death would become martyrs).

assertion or exercise.”<sup>23</sup> Just as appellate courts have repeatedly rejected the heckler’s veto,<sup>24</sup> a terrorist’s veto is impermissible under the First Amendment.<sup>25</sup>

Part I contrasts three recent controversies over the publication of images of the Prophet Muhammad to illustrate the complex and varied relationship between the publication of provocative images and actual acts of violence.<sup>26</sup> Part II considers prior restraints regarding certain types of speech, and argues that they are especially inappropriate for provocative material.<sup>27</sup> Part III examines a variety of unprotected speech, including fighting words, incitement, true threats, and material support for terrorism, in order to illustrate why provocative speech is fully protected speech and any efforts to restrict it would fail strict scrutiny.<sup>28</sup> Part IV elaborates on the concept of a terrorist’s veto, and why creating such a veto would be harmful to the marketplace of ideas.<sup>29</sup>

## I. THREE CARTOON CONTROVERSIES AND RECURRING THEMES

This Part focuses on three recent instances where the publication of provocative images of the Prophet Muhammad led to outbreaks of violence: the Danish Cartoon Controversy, the *Innocence of Muslims* video, and the *Charlie Hebdo* cartoons. These three controversies have considerable similarities, but also diverge in meaningful ways. Some of the most notable differences include: the intentions of those publishing the cartoons, the spontaneity of acts of violence, who was targeted for violence, the amount of time it took for violence to occur, the degree to which non-violent means proceeded violence, and public reactions to the images. Following the description of the three incidents in Sections A-C, Section D highlights some of their similarities and differences, illustrating themes that will remain relevant throughout the Article.

Of the three controversies, the Danish Cartoon controversy was the earliest. The passage of time has allowed for more extensive analysis, which has revealed complexities that were not immediately apparent at first sight. In particular, Professor Jytte Klausen has published what is likely the definitive account<sup>26</sup> of the cartoon controversy in the

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<sup>23</sup> Cox v. Louisiana, 379 U.S. 536, 551 (1965) (quoting Watson v. City of Memphis, 373 U.S. 526, 535 (1963)).

<sup>24</sup> Professor Harry Kalven is commonly recognized as originating the term “heckler’s veto” in HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140–45 (1965), although it now sees common usage. See, e.g., Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 710 & n.141 (1993). See also Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 140–42 (1992) (Rehnquist, C.J., dissenting) (speaking of the heckler’s veto generally).

Recently, the Sixth Circuit upheld the right of anti-Muslim evangelical speakers to speak even in light of a hostile and threatening Muslim crowd. The Court concluded that the removal of protesters by police constituted an impermissible heckler’s veto. And it “reaffirm[ed] the comprehensive boundaries of the First Amendment’s free speech protection, which envelopes all manner of speech, even when that speech is loathsome in its intolerance, designed to cause offense, and, as a result of such offense, arouses violent retaliation.” Bible Believers v. Wayne Cnty., Mich., 805 F.3d 228, 234 (6th Cir. 2015).

<sup>25</sup> Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 140–42 (1992) (Rehnquist, C.J., dissenting) (speaking of the heckler’s veto generally).

<sup>26</sup> See Oliver Kamm, *Danish Cartoons: The Tyranny of Moderation*, PROSPECT MAG. (Dec. 19, 2019), <http://www.prospectmagazine.co.uk/arts-and-books/the-tyranny-of-moderation> (“Jytte Klausen, a Danish academic in the US, has written what must rank as the definitive account.”); Steven Poole, *Steven Poole’s Non-Fiction Roundup*, GUARDIAN (Nov. 20, 2009, 7:06 PM) (referring to Klausen’s book as “what

English language.<sup>27</sup> Her first-hand research, including interviews on and off the record with key participants, revealed critical and otherwise unavailable information regarding the roots of the controversy and those who attempted to inflame public sentiment regarding the cartoons.

The *Innocence of Muslims* video and the murder of the editors of French satirical magazine *Charlie Hebdo* are still quite recent and a full account of what exactly provoked the reactions against these images still remains to be written, but this Article attempts to paint a thorough picture by relying on newspaper articles and other sources.

### A. Danish Cartoon Controversy

On September 30, 2005, *Jyllands-Posten* published twelve cartoons that were the result of a solicitation for drawings depicting the Prophet Muhammad from the Denmark's newspaper illustrators.<sup>28</sup> In response to a rumor that illustrators had refused to draw such depictions for a Danish children's book on the Prophet Muhammad, the newspaper hoped to test how many artists would be willing to submit a drawing.<sup>29</sup> Of the forty-two illustrators solicited, only twelve submitted drawings.<sup>30</sup> The newspaper had promised that all the drawings submitted would be published "as a demonstration against intimidation and self-censorship."<sup>31</sup> The cartoons were published alongside an essay by the newspaper's culture and book review Editor, Flemming Rose, which emphasized that the cartoons were being published in opposition to both self-censorship and greater political correctness.<sup>32</sup> Carsten Juste, the newspaper's editor in chief, later stressed that if he had been aware of the extent of the backlash to the cartoons, he never would have allowed them to be published.<sup>33</sup>

The cartoons themselves varied in content and in level of offensiveness to Islamic sentiments.<sup>34</sup> Some were actually critical of the newspaper's solicitation rather than of Islam itself.<sup>35</sup> Some did not feature Muhammad at all, or were criticisms of Islamic

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deserves to become the definitive account of the Danish cartoon controversy of 2005-6 . . . "); see also Jytte Klausen, *The Cartoons that Shook the World*, Yale University Press, 2009, <http://yalebooks.com/book/9780300124729/cartoons-shook-world> (demonstrating more reactions to the cartoons).

<sup>27</sup> Ironically, Klausen's book itself was the subject of considerable controversy when Yale University Press refused to publish the cartoons in her book. See David Gura, *Show and Tell*, COLUM. JOURNALISM REV. (Dec. 2, 2009), [http://www.cjr.org/critical\\_eye/show\\_and\\_tell.php?page=all](http://www.cjr.org/critical_eye/show_and_tell.php?page=all) (book review). The failure to include the images has harmed the reputation of the book in the eyes of the general public. Every single review of the book on Amazon is critical of the decision, including seven one-star reviews, all of which are based solely on the failure to publish the cartoons themselves. See *Customer Reviews: The Cartoons that Shook the World*, AMAZON.COM, [http://www.amazon.com/The-Cartoons-That-Shook-World/product-reviews/0300124724/ref=dp\\_db\\_cm\\_cr\\_acr\\_txt?ie=UTF8](http://www.amazon.com/The-Cartoons-That-Shook-World/product-reviews/0300124724/ref=dp_db_cm_cr_acr_txt?ie=UTF8) (last visited Apr. 11, 2016).

<sup>28</sup> See JYTTE KLAUSEN, *THE CARTOONS THAT SHOOK THE WORLD* 13–14 (2009).

<sup>29</sup> *Id.* at 14.

<sup>30</sup> *Id.* at 14–15.

<sup>31</sup> *Id.* at 14.

<sup>32</sup> *Id.* at 13, 15.

<sup>33</sup> See *id.* at 19.

<sup>34</sup> See *id.* at 20.

<sup>35</sup> See *id.* at 20–21.

fundamentalists who use Islam to justify atrocities.<sup>36</sup> The most iconic of the images was drawn by cartoonist Kurt Westergaard, who depicted “the Prophet with a bomb in his turban.”<sup>37</sup> Westergaard stated that he intended his drawing to show how radical Muslims distort the message of Muhammad rather than to attack the Islamic faith.<sup>38</sup> Another one of the cartoonists emphasized that he simply sought to subject Islam to the same kind of criticism to which he had subjected other figures, saying, “I have teased the Pope and Bush, so I thought I could tease Muslims, too.”<sup>39</sup>

The initial reaction to the publication of the cartoons was tepid, with a variety of local Danish newspapers leveling criticism at *Jyllands-Posten* for bashing Muslims.<sup>40</sup> The publication of the cartoons was also seen in Denmark as an extension of a local debate over the influence of a few radical mullahs who had been subject to extensive criticism by the newspaper.<sup>41</sup> This local context was lost once the cartoons spread. Ironically, these same Danish mullahs played an extremely active role in provoking international criticism of the cartoons, while at the same time relying on their right to freedom of speech to defend making controversial sermons.<sup>42</sup>

Within a couple of weeks of the publication of the cartoons, an international backlash began against the cartoons and against Denmark. The cartoons had fit perfectly into an existing narrative building in several Muslim countries that Denmark had allowed for the expression of speech which was hateful to Islam.<sup>43</sup> In early October, eleven ambassadors of Muslim countries sent a letter to the Prime Minister of Denmark regarding the cartoons, as well as other incidents that were viewed as part of an “on-going smearing campaign in Danish public circles and media against Islam and Muslims.”<sup>44</sup> When the Danish Government did not respond, resolutions against the cartoons were passed and a boycott movement started.<sup>45</sup> At first, the efforts were all non-violent: peaceful protests occurred in Copenhagen,<sup>46</sup> letters to the editor were penned, and community groups organized to raise awareness of anti-Islamic sentiment.<sup>47</sup> Indeed, these peaceful protests were successful in ultimately leading to an apology by the Danish

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<sup>36</sup> At least two of the cartoons mocked the contest as a publicity stunt or reactionary. Another used imagery critical of Islam but did not feature an image of the Prophet. And at least one was an illustration of Muhammad but not critical at all. See Martin Asser, *What the Muhammad Cartoons Portray*, BBC NEWS, (January 2, 2010), [http://news.bbc.co.uk/2/hi/middle\\_east/4693292.stm](http://news.bbc.co.uk/2/hi/middle_east/4693292.stm).

<sup>37</sup> See KLAUSEN, *supra* note 28. at 21–22.

<sup>38</sup> See KLAUSEN, *supra* note 28 at 22 (arguing that this understanding would have been clear to Danish readers who would see the cartoon in light of the existing norm of anticlerical sentiment, but that it would have been foreign to an international audience).

<sup>39</sup> See KLAUSEN, *supra* note 28 at 25.

<sup>40</sup> See KLAUSEN, *supra* note 28. at 17.

<sup>41</sup> See KLAUSEN, *supra* note 28 at 27–29.

<sup>42</sup> See KLAUSEN, *supra* note 28 at 27–28. Likewise, given the newspaper’s strong defense of freedom of expression it is ironic that the newspaper later attempted to use lawsuits to silence critics of its decision to publish the cartoons. See *generally id.* at 34 (discussing the newspaper’s two attempts “to use legal means to stop critics”).

<sup>43</sup> See KLAUSEN, *supra* note 28 at 35.

<sup>44</sup> See KLAUSEN, *supra* note 28. at 36.

<sup>45</sup> See KLAUSEN, *supra* note 28. at 35, 37.

<sup>46</sup> See KLAUSEN, *supra* note 28. at 83.

<sup>47</sup> See KLAUSEN, *supra* note 28. at 43. Those protesting also raised legitimate concerns, such as the fact that Denmark has a law against Holocaust denial, but not one protecting against anti-Islamic speech. See *id.* at 88.

Prime Minister,<sup>48</sup> as well as from the editor in chief of *Jyllands-Posten*.<sup>49</sup> Nevertheless, even in the early nonviolent phases of the controversy, there were death threats against the newspaper employees and several of the cartoonists.<sup>50</sup>

Yet, there were individuals who sought to benefit from igniting even larger protests. Klausen concludes that the increasing radicalization of protests was the result of a “deliberate, albeit uncoordinated, escalation.”<sup>51</sup> In particular, certain Danish imams sought to capitalize on the cartoons.<sup>52</sup> They visited Cairo and Beirut with a dossier of anti-Islamic cartoons, some of which were far more inflammatory than the *Jyllands-Posten* cartoons.<sup>53</sup> This collection of cartoons helped to spur outrage on the part of more radical actors, such as the Muslim Brotherhood, and even years later Middle Eastern leaders did not know which cartoons had actually been published in the Danish newspaper.<sup>54</sup> The imams also appeared on Arab-language television stations sharply criticizing the cartoons.<sup>55</sup> As a result, in early 2006 the protests began turning violent.<sup>56</sup> In February, influential Muslim Brotherhood leader al-Qaradawi “delivered a fiery sermon” calling for a “day of rage,” which spurred on violence.<sup>57</sup> The scale and destructive potential of protests increased: in Lebanon, Hezbollah’s leader provoked a crowd of 500,000 individuals gathered for the commemoration of the Shiite holiday Ashura into opposition to the cartoons.<sup>58</sup> At its peak, the protestors destroyed embassies and killed scores of individuals.<sup>59</sup> In one day of protesting in Nigeria alone, forty-five people were killed and 185 were injured as a result of the protests.<sup>60</sup>

The protests evolved far beyond opposition to the particular cartoons. For example, American businesses were targeted even though the U.S. government had publically condemned the cartoons.<sup>61</sup> Al Qaeda also co-opted the cartoons as part of its anti-Western message.<sup>62</sup> Likewise, local Islamic leaders continued to encourage protests, many motivated not by opposition to the cartoons, but by a desire to galvanize popular anger against local governments.<sup>63</sup>

The aims of the protesters varied markedly. It is likely that some had never even seen the cartoons.<sup>64</sup> Some drew distinctions between cartoons that depicted Muhammad positively and those that depicted him negatively, while others sought to prohibit all

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<sup>48</sup> See KLAUSEN, *supra* note 28, at 41. Muslims leaders accepted what they interpreted to be the Prime Minister’s apology, even though he denied that it was in fact an apology.

<sup>49</sup> See KLAUSEN, *supra* note 28, at 32.

<sup>50</sup> See Paul Belien, *Jihad Against Danish Newspaper*, BRUSSELS J. (Oct. 22, 2005), <http://www.brusselsjournal.com/node/382>.

<sup>51</sup> KLAUSEN, *supra* note 28, at 39.

<sup>52</sup> See KLAUSEN, *supra* note 28, at 39.

<sup>53</sup> See KLAUSEN, *supra* note 28, at 88–91.

<sup>54</sup> See KLAUSEN, *supra* note 28, at 101.

<sup>55</sup> See KLAUSEN, *supra* note 28, at 102.

<sup>56</sup> See KLAUSEN, *supra* note 28, at 83.

<sup>57</sup> See KLAUSEN, *supra* note 28, at 103, 106.

<sup>58</sup> See KLAUSEN, *supra* note 28, at 40.

<sup>59</sup> See KLAUSEN, *supra* note 28, at 108.

<sup>60</sup> See KLAUSEN, *supra* note 28, at 108.

<sup>61</sup> See KLAUSEN, *supra* note 28, at 41.

<sup>62</sup> See KLAUSEN, *supra* note 28, at 45.

<sup>63</sup> See KLAUSEN, *supra* note 28, at 113.

<sup>64</sup> See KLAUSEN, *supra* note 28, at 126.

efforts to depict the Prophet and criticized even pro-Islamic depictions.<sup>65</sup> Other protesters focused more on the perceived lack of an apology than on the cartoons themselves.<sup>66</sup> Some Muslims instead spoke out against the protests and the violence, encouraging peaceful and polite protest instead.<sup>67</sup> The publication of the cartoons also sparked extensive discussion in the media and elsewhere as to the propriety in general of published images likely to be highly offensive.<sup>68</sup> While many European newspapers republished the cartoons in solidarity, many others criticized the cartoons and refused to republish them.<sup>69</sup> In the United States, in particular, few newspapers decided to reprint the controversial cartoons.<sup>70</sup> International republication, despite its rarity, played a critical role in escalating the conflict.<sup>71</sup>

Klausen argues that even though almost none of those protesting in Islamic countries had first heard about the cartoons from the internet,<sup>72</sup> the internet and new media was “a causal factor” in the explosion of the controversy.<sup>73</sup> Those opposing the cartoons used the internet and mobile technology to share the images and galvanize protests.<sup>74</sup> The mobs themselves were often summoned by anonymous text messages and mobile phone calls.<sup>75</sup>

Looking at this history of the Danish cartoons, it is clear that events escalated as a result of efforts on the part of extremist groups to provoke backlash. While the initial reaction was a thoughtful debate and non-violent protest, individuals co-opted the protests and turned them into an opportunity for personal or political gain. Years after their publication, “[t]he cartoons became a standard reference for real and perceived conflict over what you ‘can say’ about Muslims.”<sup>76</sup> Remarks about Islam that took place even after the cartoon controversy had died down, such as Pope Benedict’s remarks that Islam is “a faith spread by the sword,” were “linked to the cartoons by both the European media and . . . Muslims.”<sup>77</sup> As such, the cartoons became a weapon wielded by Muslims to attack speech critical of their faith, regardless of how offensive or provocative those criticisms were intended to be. Later, self-censorship regarding the publication of images of the Prophet Muhammad continued to be rampant, an example of which was Comedy Central’s decision to censor an episode of the provocative comedy show *South Park* that depicted Muhammad.<sup>78</sup> Indeed, Comedy Central went so far as to bleep out even usage of

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<sup>65</sup> See KLAUSEN, *supra* note 28, at 132–33.

<sup>66</sup> See KLAUSEN, *supra* note 28, at 106.

<sup>67</sup> KLAUSEN, *supra* note 28, at 95, 106.

<sup>68</sup> See KLAUSEN, *supra* note 28, at 51–52.

<sup>69</sup> See KLAUSEN, *supra* note 28, at 51.

<sup>70</sup> Klausen estimates that only twenty-five U.S. newspapers republished the cartoons, and that most of them were student papers. See KLAUSEN, *supra* note 28, at 9.

<sup>71</sup> KLAUSEN, *supra* note 28, at 47.

<sup>72</sup> See generally KLAUSEN, *supra* note 28, at 115 tbl.3.

<sup>73</sup> See KLAUSEN, *supra* note 28, at 5.

<sup>74</sup> See Jytte Klausen, *Egypt Fans the Flames*, FOREIGN AFF. (Sept. 13, 2012), <https://www.foreignaffairs.com/articles/libya/2012-09-13/egypt-fans-flames> (discussing *Innocence of Muslims* reactions in light of the Danish Cartoon controversy).

<sup>75</sup> See KLAUSEN, *supra* note 28, at 109.

<sup>76</sup> KLAUSEN, *supra* note 28, at 56.

<sup>77</sup> KLAUSEN, *supra* note 28; see also Jeff Israely, *The Pope Tackles Faith and Terrorism*, TIME (Sept. 13, 2006), <http://content.time.com/time/world/article/0,8599,1534640,00.html>.

<sup>78</sup> See generally Dave Izkoff, *‘South Park’ Episode Altered After Muslim Group’s Warning*, N.Y. TIMES, Apr. 22, 2010, <http://www.nytimes.com/2010/04/23/arts/television/23park.html>.

the name “Muhammad” in order to avoid provoking a violent backlash.<sup>79</sup> This censorship was in place even though the show had included a depiction of Muhammad in 2001 without incident.<sup>80</sup> Thus, radical groups stoked the flames of controversy and used violent responses to impose censorship.

### B. *Innocence of Muslims*

The origins of the *Innocence of Muslims* video are still shrouded in some mystery. It was likely written by filmmaker Nakoula Basseley Nakoula, a Coptic Christian strongly opposed to Islam, in consultation with other individuals who are strongly anti-Islam.<sup>81</sup> Those cast for the film were told that the movie was to be an epic about a tribal leader.<sup>82</sup> The filmmaker later dubbed in dialogue that references Muhammad.<sup>83</sup> The fourteen-minute trailer, which was posted on YouTube and spread across the globe, depicts a highly critical and questionable account of the origin of Islam.<sup>84</sup> An example of this is the trailer’s portrayal of Muhammad as a murderer and pedophile.<sup>85</sup>

Unlike the Danish cartoonists who sought to spark a dialogue about freedom of speech, Nakoula seems to have attempted to be especially provocative through the release of the film; for instance, he used the pseudonym Sam Bacile,<sup>86</sup> and claimed to be an

<sup>79</sup> See *id.*

<sup>80</sup> See *South Park Creators Warned Over Muhammad Depiction*, BBC NEWS (Apr. 22, 2010), <http://news.bbc.co.uk/2/hi/entertainment/8636455.stm>; See also Todd Leopold, *Has ‘South Park’ gone too far this time?*, CNN (Apr. 21, 2010), <http://www.cnn.com/2010/SHOWBIZ/TV/04/21/south.park.religion/>.

<sup>81</sup> See Adrian Chen, *Here Is the Original Script for Innocence of Muslims*, GAWKER (Sept. 18, 2012, 5:45 PM), <http://gawker.com/5944290/here-is-the-original-script-for-innocence-of-muslims>.

<sup>82</sup> See Olga Khazan, *‘Innocence of Muslims’ Movie Disavowed by Its Actors*, WASH. POST (Sept. 13, 2012), [https://www.washingtonpost.com/blogs/blogpost/post/innocence-of-muslims-cast-disavows-movie/2012/09/13/5c4d0a52-fdaf-11e1-a31e-804fcb658f9\\_blog.html](https://www.washingtonpost.com/blogs/blogpost/post/innocence-of-muslims-cast-disavows-movie/2012/09/13/5c4d0a52-fdaf-11e1-a31e-804fcb658f9_blog.html); See also Chen, *supra* note 81.

<sup>83</sup> Chen, *supra* note 81.

<sup>84</sup> See Chen, *supra* note 81.

<sup>85</sup> See Michael Joseph Gross, *Disaster Movie*, VANITY FAIR (Dec. 27, 2012), <http://www.vanityfair.com/culture/2012/12/making-of-innocence-of-muslims>.

<sup>86</sup> The filmmaker, Nakoula Basseley Nakoula, was arrested after the release of the film for violating the terms of his parole due to his use of a pseudonym in the publication of the film. Critics of his arrest implied that he was arrested due to public opposition to the content of the film. Brooks Barnes, *Man Behind Anti-Islam Video Gets Prison Term*, N.Y. TIMES, Nov. 7, 2012, <http://www.nytimes.com/2012/11/08/us/maker-of-anti-islam-video-gets-prison-term.html>; Jessica Garrison & Victoria Kim, *‘Innocence of Muslims’ Filmmaker Arrested on Probation Violation*, L.A. TIMES (Sept. 27, 2012, 3:36 PM), <http://latimesblogs.latimes.com/lanow/2012/09/innocence-of-muslims-filmmaker-arrested-on-probation-violation.html>; Charles C. Johnson, *Imprisoned ‘Innocence of Muslims’ Producer Nakoula Nakoula: ‘I Want the World to See the Truth,’* DAILY CALLER (Aug. 5, 2013, 10:14 PM), <http://dailycaller.com/2013/08/05/imprisoned-innocence-of-muslims-producer-nakoula-nakoula-i-want-the-world-to-see-the-truth/>. See also Stan Wilson, *Producer of Anti-Islam Film Arrested, Ordered Held Without Bail*, CNN (Sept. 28, 2012), <http://www.cnn.com/2012/09/27/world/california-anti-islam-filmmaker/> (“Dugdale pointed to a probation report citing eight allegations in which Nakoula had allegedly violated his probation. One of those was a requirement not to use aliases without permission from his probation office.”).

More recently, the political motivation behind Nakoula’s arrest returned to the spotlight, when the father of one the victims of the attack on the embassy in Benghazi reported that shortly after the attacks he was told by then-Secretary of State Hillary Clinton that she would have the filmmaker arrested as a result of the attacks. See J. Taylor Rushing, *Benghazi Victim’s Father: Hillary Told Me Maker of Film About Prophet Muhammad Would Be Arrested ‘for Causing my Son’s Death,’* DAILY MAIL ONLINE (Oct. 24,

Israeli Jew, likely in order to further stoke outrage.<sup>87</sup> Nakoula also claimed that “he had raised \$5 million from . . . Jewish donors to make [the film].”<sup>88</sup> He has declared that, “Islam is a cancer, period,” and stated that he acted in order to denounce Islam.<sup>89</sup> The filmmaker made it clear that he “has no regrets,” and promised that he would continue to produce films and books critical of Islam.<sup>90</sup>

The trailer was posted on YouTube in July 2012 but did not attract attention until an Arabic-language version also appeared on YouTube several months later.<sup>91</sup> Coptic Christian activists promoted the video, seeking to draw attention to the film.<sup>92</sup> On September 8, 2012, a Muslim television program in Egypt aired the video, after which the trailer began to spread rapidly in the region.<sup>93</sup> The video “led to protests across the globe,” including in Egypt, Indonesia, Iran, Iraq, Lebanon, Malaysia, Morocco, Pakistan, Sudan, Tunisia, and Yemen.<sup>94</sup> It is likely that the film also played some role, albeit a contested one, in the attack on the U.S. Embassy in Benghazi in 2012.<sup>95</sup> Just as with the Danish cartoons, some of the protests may have been instigated by political groups, like the Muslim Brotherhood.<sup>96</sup> It is estimated that twenty-eight people were killed as a result of the violence involved in the protests against the film.<sup>97</sup> Cast members and others involved in the film also received death threats, and one Egyptian cleric issued a fatwa calling for the death of everyone involved in the film.<sup>98</sup> To date, however, there has been no noted violence against anyone involved in the making of the film.<sup>99</sup>

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2015, 6:30 AM), <http://www.dailymail.co.uk/news/article-3287090/Benghazi-victim-s-father-Hillary-told-maker-film-prophet-Mohamed-arrested-causing-son-s-death.html>.

<sup>87</sup> See Emily Chertoff, *Real-Life ‘Law and Order’ Move: ‘Innocence of Muslims’ Filmmaker Arrested for Violating Probation*, ATLANTIC (Sept. 28, 2012), <http://www.theatlantic.com/national/archive/2012/09/-real-life-law-and-order-move-innocence-of-muslims-filmmaker-arrested-for-violating-probation/263017/>. Seth Barrett Tillman, Lecturer, Maynooth University Department of Law, has suggested that Nakoula knowingly risked Islamists’ violence against Jews and Israelis and strife between Jews and Muslims in order to shield his own identity and to deflect violence against himself, his family, and his co-religionists. E-mail from Seth Barrett Tillman, Lecturer, Maynooth Univ., to author (Apr. 19, 2015, 06:10 EST) (on file with author). Although Nakoula clearly was deliberately provocative, there is no indication that he specifically hoped that Jews would be targeted as a result of his actions. It seems likely that his pseudonym was a way to hide his parole violations; whether it was intended to do more is less clear. Even though there is a lack of evidence of his intending to stoke violence, the implications of this possibility are discussed further in *infra* note 325.

<sup>88</sup> Jens Erik Gould, *How Innocence of Muslims Emerged from the Seamy Side of Hollywood*, TIME (Sept. 15, 2012), <http://nation.time.com/2012/09/15/how-innocence-of-muslims-emerged-from-the-seamy-side-of-hollywood/>.

<sup>89</sup> Gross, *supra* note 85.

<sup>90</sup> Serge F. Kovaleski & Brooks Barnes, *From Man Who Insulted Muhammad, No Regret*, N.Y. TIMES, Nov. 25, 2012, <http://www.nytimes.com/2012/11/26/us/from-the-man-who-insulted-islam-no-retreat.html>.

<sup>91</sup> See Gross, *supra* note 85.

<sup>92</sup> See Gross, *supra* note 85.

<sup>93</sup> See Gross, *supra* note 85.

<sup>94</sup> Kovaleski, *supra* note 90.

<sup>95</sup> See Drum, *supra* note 11; see also David D. Kirkpatrick, *A Deadly Mix in Benghazi*, N.Y. TIMES, Dec. 28, 2013, <http://www.nytimes.com/projects/2013/benghazi/#/?chapt=0>.

<sup>96</sup> See Michael Weiss, *Guilt and the ‘Innocence of Muslims,’* WORLD AFF. J., <http://www.worldaffairsjournal.org/article/guilt-and-innocence-muslims> (last visited Apr. 12, 2016).

<sup>97</sup> See *id.*

<sup>98</sup> See Adi Robertson, *YouTube Must Take Down Explosive ‘Innocence of Muslims’ Video in Copyright Suit*, VERGE (Feb. 26, 2014, 1:03 PM), <http://www.theverge.com/2014/2/26/5449826/google-youtube-must-remove-innocence-of-muslims-video-in-copyright-suit>; Phil Willon & Robert Faturechi, *‘Innocence*

The film was widely and almost universally condemned. President Obama, for one, officially spoke out against and condemned the film.<sup>100</sup> The United States also issued a heavily apologetic television advertisement that aired in Pakistan, featuring President Obama and then-Secretary of State Hillary Clinton.<sup>101</sup> White House administration officials also urged YouTube to check whether the film was in violation of the site's terms of service.<sup>102</sup> Ultimately, the film was removed from YouTube, although not as a result of its provocative content; the Ninth Circuit ordered the video to be taken down as a result of a copyright claim by one of the actresses who claimed she had been deceived into participating in the film.<sup>103</sup>

### C. *Charlie Hebdo*

*Charlie Hebdo* is a highly irreverent French satirical magazine. It has been the target of Islamic fundamentalism for years as a result of repeatedly printing cartoons of Muhammad and other images critical of Islam.<sup>104</sup> Yet, in contrast with *Jylland-Posten*, which was labeled hypocritical by some for not publishing cartoons critical of Christianity, *Charlie Hebdo* has published a wide variety of blasphemous and sacrilegious content.<sup>105</sup> *Charlie Hebdo* initially became enmeshed in the Muhammad cartoon controversy after it published an issue in 2006 with an image of Muhammad weeping over religious fundamentalism and reprinted the *Jyllands-Posten* cartoons.<sup>106</sup> It

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*of Muslims' Associates Get Death Threats, Consultant Says*, L.A. TIMES: L.A. NOW (Sept. 15, 2012, 9:22 AM), <http://latimesblogs.latimes.com/lanow/2012/09/innocence-of-muslim-allies-fearful-after-threats-consultant-says.html>.

<sup>99</sup> One of the actresses had to move and shut down her business in light of threats, but there is no indication that any of the threats of violence came to fruition. See Nancy Dillon, *Cindy Lee Garcia, Actress in 'Innocence of Muslims,' Is Ecstatic Court Has Ordered YouTube to Take Islam Mocking Video Down*, N.Y. DAILY NEWS, Feb. 27, 2014, <http://www.nydailynews.com/news/national/actress-ecstatic-muslim-mocking-video-youtube-article-1.1704410>.

<sup>100</sup> Toby Harnden, *Obama Tells United Nations It Is 'Time to Heed the Words of Gandhi,' Condemns 'Disgusting' Anti-Islam Video and Insists 'Muslims Have Suffered the Most at the Hands of Extremism,'* DAILY MAIL ONLINE (Sept. 25, 2012), <http://www.dailymail.co.uk/news/article-2208396/Obama-condemns-disgusting-anti-Islam-video-insists-Muslims-suffered-hands-extremism.html>.

<sup>101</sup> See Shareen Pathak & Ken Wheaton, *See the Spot: U.S. Runs Ad in Pakistan Denouncing Anti-Islam Video*, ADVERT. AGE (Sept. 20, 2012), <http://adage.com/article/media/u-s-runs-ad-pakistan-denouncing-innocence-muslims/237344/>.

<sup>102</sup> Dawn C. Chmielewski, *YouTube's Role at Issue over Video That Incited Mideast Violence*, L.A. TIMES, Sept. 13, 2012, <http://articles.latimes.com/2012/sep/13/business/la-fi-ct-youtube-accountability-20120914>.

<sup>103</sup> See Robertson, *supra* note 98.

<sup>104</sup> See Abby Phillip & Abby Ohlheiser, *What Is Charlie Hebdo, the Provocative Satirical Newspaper Attacked by Gunmen in Paris?*, WASH. POST, Jan. 7, 2015, <http://www.washingtonpost.com/news/world/wp/2015/01/07/what-is-charlie-hebdo-the-provocative-satirical-magazine-attacked-by-gunmen-in-paris/>.

<sup>105</sup> See Jason Karaian & Gideon Lichfield, *Charlie Hebdo Has Had More Legal Run-Ins with Christians Than with Muslims*, QUARTZ (Jan. 7, 2015), <http://qz.com/322550/charlie-hebdo-has-had-more-legal-run-ins-with-christians-than-with-muslims/>. See also Gwladys Fouché, *Danish Paper Rejected Jesus Cartoons*, GUARDIAN, Feb. 6, 2006, <https://www.theguardian.com/media/2006/feb/06/pressandpublishing.politics>.

<sup>106</sup> Miriam Krule, *Charlie Hebdo's Most Controversial Religious Covers, Explained*, SLATE: BROW BEAT (Jan. 7, 2015, 1:23 PM), [http://www.slate.com/blogs/browbeat/2015/01/07/charlie\\_hebdo\\_covers\\_religious\\_satire\\_cartoons\\_translated\\_and\\_explained.html](http://www.slate.com/blogs/browbeat/2015/01/07/charlie_hebdo_covers_religious_satire_cartoons_translated_and_explained.html).

was also firebombed in 2011.<sup>107</sup> But the most direct trigger for the violent rampage was a 2012 issue that featured a picture of the Prophet Muhammad lying naked in a pornographic pose.<sup>108</sup>

On January 7, 2015, two masked gunmen burst into the office of *Charlie Hebdo* and killed editors and other employees of the magazine during a staff meeting.<sup>109</sup> The gunmen also murdered a caretaker and a police officer, among others.<sup>110</sup> At first, the shooters evaded the police, killing another police officer the following day, but they were ultimately shot after a siege.<sup>111</sup> Additionally, there was a related attack on a kosher grocery store, which was carried out by a friend of the initial attackers.<sup>112</sup>

Al Qaeda in Yemen claimed responsibility for the attack on the *Charlie Hebdo* office.<sup>113</sup> The attack was long-planned and professionally executed.<sup>114</sup> Unlike the Danish Cartoons or *Innocence of Muslims*, there were no spontaneous protests, attacks on embassies, or other targets overseas as initial responses to the cartoons. Likewise, there were no demands that France apologize, or an effort to hold the nation accountable. For three years after the publication of the offending cartoon there seemed to be little reaction until the brutal murders.

In response to the attacks there was a large groundswell of solidarity: 3.7 million people marched in France in criticism of the attacks.<sup>115</sup> However, after the magazine published another issue featuring cartoons of Muhammad in defiance of the massacre, a large wave of violence began, strongly resembling the *Jyllands-Posten* protests, with individuals killed and homes vandalized.<sup>116</sup> Some of the protests had a strong anti-French

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<sup>107</sup> *See id.*

<sup>108</sup> *See id.* This issue was notably condemned by the White House, which questioned “the judgment of publishing something like this,” according to then-Press Secretary Jay Carney. *See* Erik Wemple, *On CNN, Jay Carney Stick to Position that Charlie Hebdo Should Have Pulled Back*, WASH. POST, Jan. 8, 2015, <http://www.washingtonpost.com/blogs/erik-wemple/wp/2015/01/08/on-cnn-jay-carney-sticks-to-position-that-charlie-hebdo-should-have-pulled-back/>. *See also* Catherine Taibi, *These Are The Charlie Hebdo Cartoons That Terrorists Thought Were Worth Killing Over*, THE HUFFINGTON POST (Jan. 7, 2015), [http://www.huffingtonpost.com/2015/01/07/charlie-hebdo-cartoons-paris-french-newspaper-shooting\\_n\\_6429552.html](http://www.huffingtonpost.com/2015/01/07/charlie-hebdo-cartoons-paris-french-newspaper-shooting_n_6429552.html).

<sup>109</sup> *Charlie Hebdo Attack: Three Days of Terror*, BBC NEWS (Jan. 14, 2015), <http://www.bbc.com/news/world-europe-30708237>.

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

<sup>112</sup> *See* Kim Sengupta, *Charlie Hebdo Attacks Background: A Network of Dissidents Stretches from Algeria to Finsbury Park*, INDEPENDENT (Jan. 9, 2015), <http://www.independent.co.uk/news/world/europe/charlie-hebdo-attacks-a-network-of-dissidents-stretches-from-algeria-to-finsbury-park-9969253.html>.

<sup>113</sup> *Id.*

<sup>114</sup> *See* Catherine E. Shoichet & Josh Levs, *Al Qaeda Branch Claims Charlie Hebdo Attack Was Years in the Making*, CNN (Jan. 21, 2015), <http://www.cnn.com/2015/01/14/europe/charlie-hebdo-france-attacks/>.

<sup>115</sup> The phrase “Je Suis Charlie” became ubiquitous after the attacks as a symbol of unity. *See* Ashley Fantz, *Array of World Leaders Joins 3.7 Million in France to Defy Terrorism*, CNN (Jan. 12, 2015), <http://www.cnn.com/2015/01/11/world/charlie-hebdo-paris-march/>.

<sup>116</sup> *See* Joseph Goldstein & Jawad Sukhanyar, *Shots Fired at Kabul Protest Against French Newspaper*, N.Y. TIMES, Jan. 31, 2015, <http://www.nytimes.com/2015/02/01/world/asia/shots-fired-during-protest-against-charlie-hebdo-in-kabul.html>; Josh Levs, *10 Killed, Churches Torches in Protests over Charlie Hebdo*, CNN (Jan. 21, 2015), <http://www.cnn.com/2015/01/20/world/charlie-hebdo-violence/>.

theme.<sup>117</sup> There were also non-violent protests in several countries, including Russia, Mali, Somalia, and Lebanon.<sup>118</sup>

In July 2015, Laurent Sourisseau, the editor of *Charlie Hebdo*, declared that the magazine would no longer feature images of the Prophet Muhammad.<sup>119</sup> He emphasized that the magazine had drawn the cartoons “to defend the principle that one can draw whatever they want,” and that, “[w]e've done our job. We have defended the right to caricature.”<sup>120</sup> The cartoonist who drew the images had also previously declared that he would no longer draw images of the Muhammad.<sup>121</sup> Thus, even though the editor suggested that other cartoonists had taken up the mantle of drawing the similar images,<sup>122</sup> the attacks were successful in silencing at least one of the most visible sources of controversial content.

#### D. Commonalities and Points of Diversion

The similarities and differences between the controversies are illustrated in the following table:

	Danish Cartoons	Innocence of Muslims Film	Charlie Hebdo Cartoons
<b>Anti-Islamic Intent</b>	No <sup>123</sup>	Yes <sup>124</sup>	No <sup>125</sup>
<b>Time Between Initial Publication and First Acts of Violence</b>	3 Months <sup>126</sup>	3 Months <sup>127</sup>	3 Years for the initial attack; less than a month for attacks following the second publication, which was a response to the initial attacks <sup>128</sup>
<b>Spontaneous Protests</b>	Yes <sup>129</sup>	Yes <sup>130</sup>	Yes, after the second publication <sup>131</sup>

<sup>117</sup> See Max Colchester & Drew Hinshaw, *Anti-French Protests in Niger Kill 10 as Rallies Hit Africa, Middle East, Asia*, WALL ST. J., Jan. 18, 2015, <http://www.wsj.com/articles/anti-french-protests-in-niger-kill-5-as-rallies-hit-africa-middle-east-asia-1421531073>.

<sup>118</sup> See Levs, *supra* note 116.

<sup>119</sup> See Raziye Akkoc, *There Will Be No More Prophet Mohammed Cartoons, Says Charlie Hebdo Editor*, TELEGRAPH (July 17, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/france/11747854/There-will-be-no-more-Prophet-Mohammed-cartoons-says-Charlie-Hebdo-editor.html>.

<sup>120</sup> *Id.*

<sup>121</sup> See *Top Charlie Hebdo Cartoonist Luz Says Will No Longer Draw Mohammad*, YAHOO NEWS (Apr. 29, 2015), <http://news.yahoo.com/top-charlie-hebdo-cartoonist-luz-says-no-longer-155059897.html>.

<sup>122</sup> See *Charlie Hebdo Editor: No More Mohammed Cartoons*, BRIETBART LONDON (July 17, 2015), <http://www.breitbart.com/london/2015/07/17/charlie-hebdo-editor-no-more-mohammed-cartoons/>.

<sup>123</sup> See *supra* notes 33–34 and accompanying text.

<sup>124</sup> See *supra* note 99 and accompanying text.

<sup>125</sup> See *supra* notes 77–84 and accompanying text.

<sup>126</sup> See *supra* note 52 and accompanying text.

<sup>127</sup> See *supra* notes 85–88 and accompanying text.

<sup>128</sup> See *supra* notes 101–102 and accompanying text.

<sup>129</sup> See *supra* notes 46–58 and accompanying text.

<sup>130</sup> See *supra* note 94 and accompanying text.

<sup>131</sup> See *supra* notes 106–109 and accompanying text.

	<b>Danish Cartoons</b>	<b>Innocence of Muslims Film</b>	<b>Charlie Hebdo Cartoons</b>
<b>Coordinated Protests</b>	Yes <sup>132</sup>	Yes <sup>133</sup>	Yes, after the second publication <sup>134</sup>
<b>Threats Against Creators</b>	Yes <sup>135</sup>	Yes <sup>136</sup>	Yes <sup>137</sup>
<b>Violence Against Creators</b>	No	No	Yes <sup>138</sup>
<b>Non-Violent Protests</b>	Yes <sup>139</sup>	No	Yes, after the second publication <sup>140</sup>
<b>Boycotts and Other Political Action</b>	Yes <sup>141</sup>	No	No
<b>Attacks Against Country of Origin</b>	No <sup>142</sup>	Yes <sup>143</sup>	Yes <sup>144</sup>
<b>Anti-Americanism</b>	Yes <sup>145</sup>	Yes <sup>146</sup>	No
<b>Reactions to the Cartoons</b>	Mixed praise and criticism <sup>147</sup>	Almost universal criticism <sup>148</sup>	Initial criticism, but large amounts of solidarity after the attacks <sup>149</sup>
<b>Apology by the State of Publication</b>	Reluctantly <sup>150</sup>	Yes <sup>151</sup>	No

The facts from these situations help to illustrate some initial themes that will recur throughout the subsequent parts of the Article. The intent of the speaker, for example, is a factor that will recur frequently in the legal analysis that follows, particularly in Parts III and IV.<sup>152</sup> The intent of those producing the images, however, varied dramatically. With *Jyllands-Posten*, the initial purpose of the cartoons was to stir up a conversation about Islamic images, and the magazine published cartoons both favorable to and critical of

<sup>132</sup> See *supra* notes 51–64 and accompanying text.

<sup>133</sup> See *supra* note 94 and accompanying text.

<sup>134</sup> See *supra* notes 106–108 and accompanying text.

<sup>135</sup> See *supra* note 50 and accompanying text.

<sup>136</sup> See *supra* note 98 and accompanying text.

<sup>137</sup> See *supra* note 106 and accompanying text.

<sup>138</sup> See *supra* note 109 and accompanying text.

<sup>139</sup> See *supra* notes 46 and accompanying text.

<sup>140</sup> See *supra* note 118 and accompanying text.

<sup>141</sup> See *supra* notes 40–47 and accompanying text.

<sup>142</sup> Arguably, the murder of two in Copenhagen in February 2015 was at least somewhat related to the *Jyllands-Posten* cartoons. See Andrew Higgins & Melissa Eddy, *Terror Attacks by a Native Son Rock Denmark*, N.Y. TIMES, Feb. 15, 2015, <http://www.nytimes.com/2015/02/16/world/europe/copenhagen-attacks-suspect-is-killed-police-say.html>.

<sup>143</sup> See *supra* note 95 and accompanying text.

<sup>144</sup> See *supra* note 109 and accompanying text.

<sup>145</sup> See *supra* note 61 and accompanying text.

<sup>146</sup> See *supra* note 95 and accompanying text.

<sup>147</sup> See *supra* notes 63–70 and accompanying text.

<sup>148</sup> See *supra* notes 98–101 and accompanying text.

<sup>149</sup> See *supra* note 115 and accompanying text.

<sup>150</sup> See *supra* note 48 and accompanying text.

<sup>151</sup> See *supra* notes 100–101 and accompanying text.

<sup>152</sup> See *infra* Section III.A.iii. and Part IV.

Islam.<sup>153</sup> The *Innocence of Muslims* video maker had an overtly anti-Islamic agenda and saw his film as an attack against Islam.<sup>154</sup> *Charlie Hebdo* sought to assert its willingness to defy a history of violent acts against the magazine.<sup>155</sup> Regardless of the intent of the initial speaker, or the degree to which the images were intended to offend, the reactions were all substantially similar.

The attacks raise questions about the closeness of the connection between publication of offensive material and violent responses, which is a critical legal factor discussed extensively in Parts II and III. Timing is one element that varied dramatically between the incidents. It took about three months for acts of violence to occur after both *Jyllands-Posten*<sup>156</sup> and *Innocence of Muslims*,<sup>157</sup> but with the *Charlie Hebdo* attack, it took almost three years.<sup>158</sup>

Similarly, though, in each of the three controversies, planned and organized terror attacks mixed with spontaneous demonstrations in a deadly way. In response to the Danish cartoons, a non-violent movement was slowly escalated by violent extremists.<sup>159</sup> In the backlash to both the Danish cartoons<sup>160</sup> and the *Innocence of Muslims*, there were seemingly spontaneous acts that were actually organized by professional organizations, such as the Muslim Brotherhood.<sup>161</sup> In contrast, after the *Charlie Hebdo* publication, an organized terror attack preceded any spontaneous protests or violence.<sup>162</sup> The role of professional provocateurs, and whether the attacks were truly directly caused by the cartoons, will be relevant factors throughout Parts II, III, and IV of this Article.

Finally, the Danish cartoon controversy also suggests that non-violent protests can be as effective as violent ones. It was the non-violent threat of a boycott, for example, which initially caused Denmark to apologize for the cartoons.<sup>163</sup> Unfortunately, it seems that this is one lesson from the Danish cartoons controversy that has been forgotten, as non-violent protests played only minor roles in the two subsequent controversies. Part IV discusses how the non-violent protests show the potential for a marketplace-based response, instead of acts of violence.

## II. PRE-PUBLICATION RESTRICTIONS ON PROVOCATIVE CONTENT FORBIDDEN

The next two Sections of this Article consider a variety of categories of speech that have been deemed less worthy of Constitutional protection and therefore are more easily proscribed. Section A considers speech that has been deemed sufficiently dangerous to national security that it justifies restraints. The Supreme Court has effectively narrowed this category to only include speech that “inevitably, directly, and immediately cause[s]”

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<sup>153</sup> See *supra* notes 31–39 and accompanying text.

<sup>154</sup> See *supra* notes 81–90 and accompanying text.

<sup>155</sup> See *supra* note 104 and accompanying text.

<sup>156</sup> See *supra* note 51 and accompanying text.

<sup>157</sup> See *supra* notes 84–86 and accompanying text.

<sup>158</sup> See *supra* notes 100–103 and accompanying text.

<sup>159</sup> See *supra* notes 46–58 and accompanying text.

<sup>160</sup> See *supra* note 51 and accompanying text.

<sup>161</sup> See *supra* note 89 and accompanying text.

<sup>162</sup> See *supra* notes 100–101 and accompanying text.

<sup>163</sup> See *supra* notes 40–44 and accompanying text.

harm to national security, e.g. the disclosure of national security secrets.<sup>164</sup> With respect to the publication of national security secrets, the confidential information itself justifies government intervention, in contrast to the publication of provocative materials where it is the reaction or conduct of those receiving the knowledge that might encourage restraint.<sup>165</sup>

Section B then turns to post-publication remedies, and examines fighting words, incitement, and true threats as paradigmatic categories of unprotected speech. Each of these is contrasted to provocative speech to show why a restriction on such speech would be inappropriate. It also discusses two statutory prohibitions on speech that the Supreme Court recently reviewed, to illustrate that any bans on provocative content would fail strict scrutiny.

#### A. *The National Security Exception is Exceptionally Narrow*

In a situation where the government is aware that a newspaper is about to publish or republish a set of Muhammad images, it might wish to seek an injunction against the publication using the argument that waiting to act until after the publication of such images is futile because the harm will already have been done and violence will likely follow.<sup>166</sup> Such an effort from the government would be based on the national security exception that was established by the Supreme Court in *Near v. Minnesota ex rel. Olson*<sup>167</sup> and in the *Pentagon Papers*<sup>168</sup> case. These cases, however, make it clear that this exception is very narrow, and only arises in such circumstances where speech will “inevitably, directly, and immediately cause” harm to national security.<sup>169</sup>

As a rule, prior restraints have traditionally been treated with great skepticism by U.S. Courts.<sup>170</sup> In *Near*, the Supreme Court firmly rejected prior restraints on publication outside of a few narrow exceptions.<sup>171</sup> In that case, a Minnesota law, which restrained the publication of “malicious” or “scandalous” newspapers, was struck down as a violation of the First Amendment.<sup>172</sup> The Court explored the history of the First Amendment and

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<sup>164</sup> See discussion *infra* Section II.A.

<sup>165</sup> See discussion *infra* Section II.B.

<sup>166</sup> Although such arguments have not been made specifically with regard to inflammatory images, there has been much scholarly discussion in recent years of prior restraints on speech because of the Edward Snowden and WikiLeaks scandals. See, e.g., Amitai Etzioni, *A Liberal Communitarian Approach to Security Limitations on the Freedom of the Press*, 22 WM. & MARY BILL RTS. J. 1141 (2014); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013). See generally Robert A. Sedler, *The Media and National Security*, 53 WAYNE L. REV. 1025 (2007); Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185 (2007).

<sup>167</sup> 283 U.S. 697 (1931).

<sup>168</sup> *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam).

<sup>169</sup> *Id.* at 726–27 (Brennan, J., concurring).

<sup>170</sup> A comprehensive definition of prior restraints is outside of the scope of this article because prior restraints can take many forms. See generally WAYNE OVERBECK & GENELLE BELMAS, MAJOR PRINCIPALS OF MEDIA LAW 63–113 (1st ed., 2015), available at [http://www.cengage.com/resource\\_uploads/downloads/0534620051\\_50487.pdf](http://www.cengage.com/resource_uploads/downloads/0534620051_50487.pdf). Generally, however, mentions of “prior restraints” in this article refer to any effort to prevent the publication of images of the Prophet Muhammad.

<sup>171</sup> *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 723 (1931).

<sup>172</sup> *Id.*

found that opposition to British abuses of prior restraint was one of the reasons the First Amendment was ratified.<sup>173</sup> As such, prior restraints generally received far stricter scrutiny than restraints on speech that occurred after publication.<sup>174</sup> Nevertheless, the Court emphasized that “the protection even as to previous restraint is not absolutely unlimited.”<sup>175</sup> In so doing, the Court laid out a few potential exceptions.<sup>176</sup> Most significantly, the Court recognized that “[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured . . . .”<sup>177</sup> In such a situation, the government “might prevent” speech that causes “actual obstruction” of recruiting services, or “the publication of the sailing dates of transports or the number and location of troops.”<sup>178</sup>

While this exception has at times been called the “national security” exception, it is narrower than a grant of authority to restrict any speech that endangers national security; it focuses on either speech that causes “actual obstruction,” or the publication of information that will lead to harm to troops and troop movements.<sup>179</sup>

The *Pentagon Papers* case revealed the narrow scope of this specific exception. The United States government sought to block publication in the *New York Times* of the Pentagon Papers study, which had been leaked by former military analyst Daniel Ellsberg.<sup>180</sup> The Court’s opinion was extraordinarily brief. The Court, in a 6-3 opinion, emphasized that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,”<sup>181</sup> and that the government had not met the “heavy burden of showing justification for the imposition of such a restraint.”<sup>182</sup> The Supreme Court as a whole offered no further analysis.

However, each of the Justices on the Court at the time wrote a separate concurrence or dissent outlining his views on the case. Because of the myriad of concurrences, it is difficult to discern the core holding from the *Pentagon Papers* case.<sup>183</sup> Yet, when

<sup>173</sup> See *id.* at 723.

<sup>174</sup> *Id.*; See Overbeck, *supra* note 170, at 63.

<sup>175</sup> *Near*, 283 U.S. at 716.

<sup>176</sup> The Court also wrote that “[t]he security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.” *Id.* This exception closely follows the traditionally unprotected category of incitement, which will be considered in greater depth in a subsequent Section of this Article. See *infra* Section III.B. The other exceptions mentioned in *Near*, such as the prevention of the publication of obscenity, and the preservation of private rights of action, are not relevant to the publication of offensive films or cartoons and are outside the scope of this Article. See *infra* Section III.B.

<sup>177</sup> *Near*, 283 U.S. at 716 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)). See *infra* Section III.B.

<sup>178</sup> *Near*, 283 U.S. at 716. For examples of when the press has leaked information that was arguably harmful to national security, see Etzioni, *supra* note 166, at 1153–56.

<sup>179</sup> See Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1132–33 (2001) (suggesting that national security harms must stem from the “certainties of war”). But see Stanley Godofsky & Howard M. Rogatnick, *Prior Restraints: The Pentagon Papers Case Revisited*, 18 CUMB. L. REV. 527, 554 (1988) (suggesting that, in order to avoid a strict scrutiny analysis and potential invalidation, courts will declare that national security classifications are not necessarily prior restraints).

<sup>180</sup> See *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 714 (1971).

<sup>181</sup> *Id.* (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

<sup>182</sup> *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

<sup>183</sup> As Professor Sims has noted, the “boundaries of the case remain largely uncharted.” John Cary Sims, *Triangulating the Boundaries of the Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341, 342 (1993).

examining the separate opinions as a whole, it is clear that prior restraints are presumptively unconstitutional, and that even the national security exception only applies in narrow circumstances. While Justices Black and Douglas would have completely eliminated the *Near* exceptions, the rest of the Court at least suggested that exceptions could exist, and thus rejected such an absolutist position.<sup>184</sup> Although the other concurrences were each highly critical of unilateral executive action,<sup>185</sup> and fearful that an overly broad national security exception would lead to the suppression of speech, they did recognize that the government would have the authority to prevent publication of material which would “inevitably, directly, and immediately cause” harm to national security.<sup>186</sup> As a result of the multitude of concurrences, it is not clear how broad the national security exception ultimately is,<sup>187</sup> but the opinion does reveal that a very

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<sup>184</sup> See *Pentagon Papers*, 403 U.S. at 714–19. More recent scholarship has given deeper historical underpinning to the Black and Douglas absolutist approach. See, e.g., Jeffrey A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 448–58 (1987).

<sup>185</sup> Justice Marshall in particular took umbrage at the fact that the executive was acting when Congress had expressly refused to create a cause of action, but he acknowledged that at least “in some situations” the executive could get an injunction unilaterally. See *Pentagon Papers*, 403 U.S. at 742 (Marshall, J., concurring). Justice Marshall seemed to rely on the tripartite distinction that the Court had made in the *Youngstown Sheet & Tube Co.* case between actions the executive takes with either Congressional approval, Congressional indifference, or Congressional opposition. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952). Because there was evidence that Congress had considered and rejected allowing the executive to get a prior restraint for national security leaks, it fit in the final category and was presumptively improper. See *id.* at 745–46. For the purposes of this paper, this distinction will not be examined closely, but it is certainly far more likely that a legislatively enacted prior restraint for provocative material could withstand scrutiny than could one sought solely by the executive. A legislative enactment would also make it likely that the standard for a prior restraint would be judicially manageable, which is an issue that will be further discussed below. See *infra* Section II.B.

<sup>186</sup> This seems to be the prevailing consensus of courts and scholars. See, e.g., David Corneil, Comment, *Harboring WikiLeaks: Comparing Swedish and American Press Freedom in the Internet Age*, 41 CAL. W. INT'L L.J. 477, 512 (2011) (“Case law has determined that the holding in *New York Times Co.* is represented by Justice Stewart's concurring opinion, which asserts that prior restraints on classified government information are only justified when publication ‘will surely result in direct, immediate, and irreparable damage.’” (footnote omitted) (quoting *Pentagon Papers*, 403 U.S. at 730)); see also Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 364 (1986) (“Presumably, it follows that irreparable injury would somehow overcome the absence of congressional action.”).

<sup>187</sup> A possible majority of the Court seems to have supported a broad definition of “national defense.” Justice White, joined by Justice Stewart, emphasized that restraint of information was justified not only for information that would cause “grave and irreparable injury to the United States,” but also when the information would have “broad connotations” such as “national preparedness.” See *Pentagon Papers*, 403 U.S. at 739–40 (White, J., concurring). Together with the three dissenters, they appear to have formed a majority in favor of a broad reading of the national security exception. See *Pentagon Papers*, 403 U.S. at 731–39 (White, J., concurring), 752–63 (Harlan, J., dissenting).

On the other hand, Justices Black and Douglas wrote in favor of completely abolishing the national security exception. *Id.* at 714–24. Justice Brennan would have narrowed it to “a single, extremely narrow class of cases” involving either a state of war, a situation “tantamount to a time of war,” or a situation in peacetime where the consequences of inaction would be tantamount to a nuclear holocaust. See *id.* at 726 (Brennan, J., concurring).

*Holder v. Humanitarian Law Project*, a recent case regarding a material support for terrorism statute again suggests that the Court is willing to accept a broad definition of national security when articulated by Congress. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) This case will be discussed in depth in

specific and concrete harm is necessary before a prior restraint is permissible.<sup>188</sup> In addition, because The *Pentagon Papers* case focused solely on the leaks portion of the *Near* exception and said nothing about speech that causes “actual disruption,” it is not clear whether an exception applies to material which does not convey national secrets, but is still harmful to national security.<sup>189</sup>

Other Supreme Court cases suggest that exceptions to the ban on prior restraint are to be interpreted narrowly. For instance, in *Organization for a Better Austin v. Keefe*, the Court rejected an attempt to impose a prior restraint in order to prevent an “invasion of privacy” through the disclosure of critical literature.<sup>190</sup> In another case involving an injunction against a political rally, the Court recognized that there are “special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment,” but found that necessary procedural safeguards, such as notice and the ability for parties to present counter arguments, were not met.<sup>191</sup> The Court has also emphasized that prior restraints can only be allowed if they are “assured an almost immediate judicial determination of the validity of the restraint.”<sup>192</sup> These cases all suggest that the exceptions to prior restraint are limited, and are meant to be narrowly construed and guarded with robust procedural safeguards.<sup>193</sup> It thus seems unlikely that the existing exception would be broadened to encompass the publication of provocative material.<sup>194</sup>

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Section III.B. See Frances Howell Rudko, *Searching for Remedial Paradigms: Human Rights in the Age of Terrorism*, 5 U. MASS. ROUNDTABLE SYMP. L.J. 116, 139 (2010).

<sup>188</sup> Reviewing the specific claims advanced by the Solicitor General in his secret brief shows that most of the claims focused on generalities and abstract harms which were uncertain to occur, which fails to fulfill the requirement that publication “inevitably, directly, and immediately cause” harm. See generally Sims, *supra* note 183, at 413–14 (describing the various claims made by the government in the secret brief).

<sup>189</sup> In the Court’s recent *United States v. Alvarez* decision, the plurality seemed to broadly categorize *Near* as creating a speech exemption for “speech presenting some grave and imminent threat the government has the power to prevent.” 132 S. Ct. 2537, 2544 (2012). However, the Court also emphasized that “a restriction under” this category of speech “is most difficult to sustain.” *Id.* (citing *Pentagon Papers*, 403 U.S. 713). For further discussion of *Alvarez*, see *infra* Section III.B.

<sup>190</sup> See *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419–20 (1971).

<sup>191</sup> See *Carroll v. President of Princess Anne*, 393 U.S. 175, 180 (1968).

<sup>192</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

<sup>193</sup> It has been argued that since *Pentagon Papers* there has been a “changing judicial attitude toward the kind of national security claims that were put forward and almost summarily rejected in the *Pentagon Papers* case.” Thomas S. Martin, *National Security and the First Amendment: A Change in Perspective*, 68 A.B.A. J. 680, 684 (1982). In the reaction to the September 11, 2001 attacks the country seemed to show a greater willingness to restrain speech in the name of national security. The *Humanitarian Law Project* case (discussed in Section III.B) shows that perhaps the Supreme Court is more willing to uphold restrictions on speech when the goal of the restriction is to combat terrorism. However, the Supreme Court itself has not shown any indication of a relaxing of the standard for prior restraints to be issued and continues to aggressively strike down what it sees as prior restraints.

<sup>194</sup> One unanswered question that remains after *Near* and *Pentagon Papers* is whether additional exceptions can be recognized. In *Pentagon Papers*, Justice Brennan said that there was only “a single, extremely narrow class of cases” that justified prior restraints, suggesting that he did not recognize the other exceptions that the Court mentioned in *Near*, such as incitement or obscenity, let alone the possibility of additional exceptions. *Pentagon Papers*, 403 U.S. at 726 (Brennan, J., concurring). David Fialkow has written that contrary to Justice Brennan’s argument, the national security exception remains the easiest exception to trigger, but it is not the only one that exists. See David E. Fialkow, Note, *The Media’s First Amendment Rights and the Rape Victim’s Right to Privacy: Where Does One Right End and the Other Begin?*, 39 SUFFOLK U. L. REV. 745, 750–54 (2006) (arguing that the national security exception is easier to

Subsequent cases have again affirmed that prior restraints are presumptively invalid<sup>195</sup> and subject to the strictest scrutiny.<sup>196</sup> The Court also clarified that such restraint is only proper when “the evil that would result . . . is both great and certain and cannot be mitigated by less intrusive measures.”<sup>197</sup> Thus, the harm that would result from a publication must be “great and certain,” and the measure of restraint must be truly necessary before prior restraints will be permitted.<sup>198</sup> As the following section shall illustrate, provocative images of Muhammad fall far short of this lofty standard.

### B. *The National Security Exception Should Not Apply to Provocative Speech*

As outlined in the previous Section, prior restraints for national security purposes are only permitted in very narrow circumstances, specifically when publication “inevitably, directly, and immediately” causes harm to national security. Allowing the government to block the publication of provocative or offensive speech is inappropriate and falls short of this high standard. This Section discusses several concerns that such prior restraints would raise if applied to offensive speech, such as images of Muhammad. First, such restrictions would run afoul of precedent declaring that prior restraints are inappropriate for preventing religious offense. Second, such restrictions cannot be said to “inevitably, directly, and immediately” cause harm to national security. Third, the harm caused by such speech differs fundamentally from the harm caused by the release of national security secrets. Fourth, because of these differences, restrictions on provocative speech would not be judicially manageable. Finally, these restrictions would be ineffective for both technological and pragmatic reasons.

First, the Supreme Court has already rejected an expansion of the prior restraint doctrine for offensive religious material. In a case highly relevant to the publication of offensive religious images, the Supreme Court concluded that avoiding offending

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get, but it is not the only prior restraint exception to survive *Pentagon Papers*). As Professor Meyerson noted, much of the problem with defining prior restraints stems from the fact that “the Court neither defined prior restraint, nor explained precisely why injunctions fit within a definition of prior restraint.” Meyerson, *supra* note 179, at 1087.

<sup>195</sup> See *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 558 (1976) (right to a fair trial could not justify restraint on press access and publication about a trial).

<sup>196</sup> *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 766 (1994) (noting that there is a “heavy presumption” against the constitutionality of prior restraints).

<sup>197</sup> *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994).

<sup>198</sup> Some scholars have labeled laws like those requiring a permit for a parade as prior restraints, because they require some sort of preliminary assessment of speech. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-36, at 1046–47 (2d ed. 1988) (noting examples of restrained activities). See also Ryan Lambrecht, *Trade Secrets and the Internet: What Remedies Exist for Disclosure in the Information Age?*, 18 REV. LITIG. 317, 327 (1999) (discussing prior restraints that the Court has allowed). These restraints seem to be distinct from the type of prior restraint sought in *Pentagon Papers* for at least two reasons. First, restrictions on permits are focused on time, place, or manner, which generally has been subject to more limited scrutiny. Second, the Supreme Court has required that permit policies be based on clearly articulable standards and may not leave too much discretion to those implementing the policy. In contrast, it is much more difficult to articulate clear standards for a national security exception. For these reasons, for purposes of this article, permits and other time, place, and manner restrictions are not treated as a form of prior restraint.

religious sentiments could not justify a prior restraint on the publication of a sacrilegious film.<sup>199</sup> The Supreme Court declared that,

from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.<sup>200</sup>

Thus, if the purpose of an injunction is to prevent offense to religious sentiment, such a purpose is illegitimate. This decision suggests that any effort to prevent speech that is potentially offensive to religious sentiment will be viewed with particular skepticism, even if there is a purported national security connection. It is likely that courts will view any attempted justification of a restriction as not intended to prevent offense, but merely intended to protect against violence, as pretextual.<sup>201</sup>

Second, it is difficult or impossible to say that the publication of provocative images, such as those of Muhammad, “inevitably, directly, and immediately cause[s]” attacks. While it is quite clear that publication of depictions of Muhammad have already led to terror attacks both against civilians and U.S. diplomatic and military targets, there remain significant problems of timing and causation regarding predicting responses to any future publication of provocative speech.<sup>202</sup> As already discussed in Part I, it took several months after the publication of the Danish cartoons for violent backlash to occur, with months of diplomacy, and discussion preceding any violence.<sup>203</sup> When American Pastor Terry Jones threatened to burn the Koran, the international backlash occurred in a mere two weeks.<sup>204</sup> In stark contrast, Al Qaeda planned its attack on *Charlie Hebdo* for years before finally executing it.<sup>205</sup> It is difficult to determine which of these incidents qualify as being caused “immediately,” as a result of publication, and even more difficult to evaluate this before the speech is published.

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<sup>199</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

<sup>200</sup> *Id.* at 505.

<sup>201</sup> Many scholars have noted that the government uses acceptable justifications as pretext to restrict unpopular or offensive speech. For more on this “pretext effect” see, for example, Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996); Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPPERDINE L. REV. 273 (2008). The potential use of national security as a pretext for prior restraints on provocative speech should further tip the scales against upholding a policy of prior restraints on provocative speech.

<sup>202</sup> Similar concerns have been raised with regard to the *Progressive Magazine* case where a district court found that the government could prevent the publication of a magazine article that included instructions about how to construct an atomic bomb. Professor Meyerson has argued that the judge in the *Progressive* case neglected to demand the proper standard of proof regarding the inevitability of the harm. See Meyerson, *supra* note 179, at 1132–33.

<sup>203</sup> See *supra* Section I.A.

<sup>204</sup> G. Aaron Leibowitz, *Terry Jones and Global Free Speech in the Internet Age*, 31 CARDOZO ARTS & ENT. L.J. 509, 516 (2013)

<sup>205</sup> See *supra* Section I.B.

Likewise, the publication or republication of a variety of depictions of the Prophet Muhammad has met with tepid or nonexistent reactions, making it difficult to predict which cartoons or images will provoke a serious backlash, thus, it is invalid to call the reactions “certain” or “inevitable.” Indeed, as seen in the case of the Danish cartoons, the publication of the images led to diplomacy and discussions, which only gradually escalated into violence as a result of mistakes on the part of the Danes and exploitation by Islamic leaders.<sup>206</sup> This suggests that unlike the release of classified intelligence, such as the location of troops, the publication of the cartoons cannot be said to generate the type of “great and certain” harm needed to justify prior restraints.<sup>207</sup>

Directness is also difficult to establish. As the attack on the U.S. Embassy in Benghazi illustrates, planned terrorist attacks and spontaneous demonstrations can become conflated.<sup>208</sup> Likewise, with the Danish cartoons, clerics co-opted the protests for general anti-Western or anti-government causes.<sup>209</sup> With so many other mixed motivating factors, it will be difficult for a court to say that the cartoons will “directly” cause any attacks. Professor Tribe has suggested that only “the unusual clarity of the prepublication showing of harm” can justify prior restraints.<sup>210</sup> Yet, because there are so many unpredictable variables with the publication of provocative images, such an “unusual clarity” will almost invariably be absent.

Third, the release of information damaging to national security is fundamentally different than the publication of provocative speech. Releasing state secrets directly provides an enemy with insider information to which they otherwise would not have had access. The danger with publication of classified information is that the information itself provides an enemy an opportunity to cause harm.<sup>211</sup> While the Government can of course move troops from disclosed locations, the harm is already done immediately upon publication because the harm is the release of the information itself.<sup>212</sup> Release of information in this way is often considered irreparable because it cannot be retracted or removed from the marketplace after publication.<sup>213</sup> In contrast, when publishing of depictions of Muhammad, the harm is not in the content or the information itself, but rather in the public’s reaction to the content. Neither the *Innocence of Muslims* film nor the various Muhammad cartoons disclosed any state secrets or illegally acquired intelligence. Instead, the harm caused by these depictions was that they engendered violent attacks against either the publishers or the country of origin. The resulting harm was not because of an inherent trait of the author’s intent or of the provocative content, but because of the listener’s reaction.<sup>214</sup> The same image that might have been innocuous

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<sup>206</sup> See *supra* Section I.A.

<sup>207</sup> Cf. Stone, *supra* note 166, at 202.

<sup>208</sup> See *infra* note 87 and accompanying text.

<sup>209</sup> See *supra* Section I.A.

<sup>210</sup> TRIBE, *supra* note 198 § 12-36, at 1047.

<sup>211</sup> It is the fact that “the government must, to a certain extent, keep some information confidential because it is simply too sensitive or dangerous to expose to the public” which justifies state secrets being subject to prior restraints. See Alexander Blanchard, *A False Choice: Prior Restraint and Subsequent Punishment in a Wikileaks World*, 24 U. FLA. J.L. & PUB. POL’Y 5, 8 (2013).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> The Court’s antipathy towards injunctions in the fair trial context also illustrates this distinction. Professor Wells has argued that in the *Nebraska Free Press* case the Court rejected an injunction “against obviously high-value speech” despite “the potential danger caused by that speech.” Such cases involving

only several years ago transforms into a dangerous publication because of the potential reaction from terrorists and radicals. As will be discussed further in Part IV, this terrorist's veto is deeply contrary to first amendment principles.

Fourth, this distinction between national security concerns and the potential for extremist responses means that an exception for provocative content would be much less judicially manageable than the exception for national security information. With national security issues, it is relatively easy to establish that, at the very least, the information is classified,<sup>215</sup> and related to military positions and strategies.<sup>216</sup> The *Pentagon Papers* case suggests that harm to the nation's reputation or standing is an insufficient harm to trigger the national security exception. A court's inquiry is thus much narrower and more judicially manageable in the case of national security intelligence. Judicial decision-making regarding provocative speech, in contrast to national security concerns, requires a far more searching inquiry into whether the speech will provoke a violent reaction.<sup>217</sup> The court is not simply evaluating the information itself, but the impact that information will have. Yet, as seen with each of the above controversies, a wide variety of human factors must converge to produce such violent reactions, and it is difficult to predict whether publication of a certain set of images or words will cause harm.<sup>218</sup> Giving courts such vast discretion with regard to determining how harmful the impact of certain speech will be is a concern that has led courts to view prior restraints unfavorably: "the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."<sup>219</sup>

Fifth, the efficacy of prior restraints is also highly questionable in light of the incredible developments in technology, and the ability of individuals to disseminate information in an instant.<sup>220</sup> Even in the 1970s when the *Pentagon Papers* case was decided, Justices White and Stewart noted that usually "publication will occur and the

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high value speech require "a far more complex weighing of factors." See Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 21 (2000).

<sup>215</sup> The legislative branch is also involved in questions of classifications, which reduce the concerns raised in *Pentagon Papers* regarding solely executive conduct. See *supra* note 173.

<sup>216</sup> Indeed, it is clear that this is precisely what happened in the *Pentagon Papers* case where the Court was able to see through the abstract and inconclusive asserted harms of the government, to conclude that publication would not cause the kind of imminent harm needed to justify prior restraint. See *Pentagon Papers*, 403 U.S. at 730 (Stewart, J., concurring).

<sup>217</sup> Professor Tribe argues that evidentiary certainty is what has allowed for prior restraints in certain contexts, such as obscenity. A judge can just as easily determine whether something is obscene before publication as after because the test is not dependent on the reaction of a third party, but on pre-existing community norms. In contrast, with the publication of provocative speech, the harm is solely in the reaction of those viewing the speech, which requires evidence that is only available after publication. See TRIBE, *supra* note 198 § 12-36, at 1048. But see David Rudenstine, *The Courts and National Security: The Ordeal of the State Secrets Privilege*, 44 U. BALT. L. REV. 37, 90-91 (2014) (arguing that the judiciary can be trusted with a greater role in national security matters because "in some landmark national security cases, federal judges have exercised meaningful review, and by so doing have contributed to the prestige and legitimacy of the courts").

<sup>218</sup> See *supra* Section I.D.

<sup>219</sup> *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980).

<sup>220</sup> President Obama suggested as much in his speech before the U.N. regarding the *Innocence of Muslims* video: "But in 2012, at a time when anyone with a cell phone can spread offensive views around the world with the click of a button, the notion that we can control the flow of information is obsolete. The question, then, is how do we respond?" Obama, *supra* note 16.

damage be done before the Government has either opportunity or grounds for suppression,” and that “efficacy” of prior restraints is “doubtful at best.”<sup>221</sup> Technological advances certainly make the possibility of a successful prior restraint far less likely. As has been argued, concern over prior restraint “appears in hindsight almost medieval given the ease with which any individual can anonymously upload classified information to the Internet and the ease, in turn, with which that information can suddenly ‘go viral.’”<sup>222</sup> Indeed, David Corneil argues that the requirement that publication will “surely result in direct, immediate, and irreparable damage,” means that a prior restraint can almost never be acquired in time to prevent the release of information.<sup>223</sup> Because “[i]nformation moves so fast over the Internet by the time a judge [could] consider [this factor], . . . [the harm] would already [be] done.”<sup>224</sup>

Prior restraints imposed for provocative images are unlikely to be effective.<sup>225</sup> For one, it is not at all clear that restricting the publication or republication of such images will actually do anything to limit violent outrage.<sup>226</sup> This is especially true given that those seeking to spark outrage are responsible for much of the spread of the images.<sup>227</sup> These individuals may be outside the jurisdiction of U.S. Courts, and, thus, efforts to restrain publication will be unavailing.<sup>228</sup> Moreover, given the nature of the internet it is far too easy for image to be reposted anonymously. Additionally, the mere fact that someone is attempting to publish such an image may be sufficient to trigger a reaction, especially if radical elements seek an excuse for provocation.<sup>229</sup> Just as

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<sup>221</sup> *Pentagon Papers*, 403 U.S. at 733 (Stewart, J., concurring).

<sup>222</sup> Geoffrey Schotter, *Shouting Fire in a Burning Theater: Distinguishing Fourth Estate from Fifth Column in the Age of Wikileaks*, 2 CASE W. RES. J. L. TECH. & INTERNET 117, 127–28 (2011). See also, David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 HARV. C.R.-C.L. L. REV. 473, 504 (2013) (“[t]o open the door to greater use of prior restraints in response to nontraditional publishers would be to erode basic protections of free speech without obtaining a benefit worthy of such cost.”).

<sup>223</sup> See Corneil, *supra* note 186, at 512–13 (quoting *Pentagon Papers*, 403 U.S. at 730).

<sup>224</sup> Corneil, *supra* note 186 at 512.

<sup>225</sup> However, there are certain factors that could make a prior restraint occasionally more effective in the context of provocative materials (e.g. the Muhammad cartoons), than in the context of the release of state secrets. With the latter, once information is out preventing its subsequent dissemination does little to prevent the harm. In contrast, with the publication or republication of provocative speech, each new instance of publication creates new risks of threats against the author or publisher. Because it is not the information contained in the cartoons, but the act of publication and republication that creates the risk, preventing the spread of the image may work to limit responsive acts of violence. See Malise Ruthven, *Why Are the Muhammad Cartoons Still Inciting Violence?*, N.Y. REV. BOOKS (Feb. 9, 2011, 2:00 PM), <http://www.nybooks.com/blogs/nyrblog/2011/feb/09/why-are-muhammad-cartoons-still-inciting-violence/>. See also KLAUSEN, *supra* note 28, at 5 (“Had *Jyllands-Posten* not published the cartoons in the paper’s online edition—and kept them there—only regular subscribers would have seen them. And when the crisis reached its zenith six months later, the offending pages would have been composted and available only in a few libraries in Denmark.”).

<sup>226</sup> See Leibowitz, *supra* note 204, at 524 (“Taking the Danish cartoon events as an example, one could argue that even if publication of the images could have been avoided, fundamental differences in freedom of expression would have still led to violence between [Islamic and Western cultures].”).

<sup>227</sup> See Klausen, *supra* note 74.

<sup>228</sup> See *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (discussing the extraterritorial application of a French order that Yahoo remove holocaust related content from its auction sites).

<sup>229</sup> The Terry Jones case is a good example of this. The mere fact that a pastor had stated his intention to burn a Koran was sufficient to provoke massive worldwide outrage and protest. *How The Florida Quran*

the Danish imams printed provocative images that had not actually been published,<sup>230</sup> it would be relatively easy to manufacture a controversy based on the mere allegation that such an image was to be published.

These practical concerns give greater emphasis to the aforementioned doctrinal concerns. With so much dependent on how others choose to respond to the publication of the images, it is impossible to say that harm “inevitably, directly, and immediately” follows publication. Unlike the release of state secrets, where release of the information itself causes harm, organized efforts were needed to provoke violence in response to each of the controversial publications.<sup>231</sup> Because of the potential for individuals to use the threat of harm as a way to stifle speech they find offensive, prior restraints are an inappropriate response to provocative images.<sup>232</sup> The same distinction exists with respect to other categories of unprotected speech discussed below.

### III. EFFORTS TO PUNISH PROVOCATIVE SPEECH WOULD BE UNCONSTITUTIONAL

As outlined above, allowing prior restraints against the publication of provocative images would be deeply inappropriate because the restraint would be justified not by the speech itself or the speaker’s intent, but by the reaction of listeners and the ability of terrorists to exploit such speech. Due to the same concerns about allowing a terrorist’s veto, post-publication punishment of provocative speech is likewise inappropriate. Such restrictions would be an unprecedented and inappropriate erosion of First Amendment rights.

To illustrate this point, the first section below considers some of the categories of unprotected speech that are most analogous to provocative speech. This analysis illustrates that none of the restraints placed on speech in these categories are justified solely by the reaction of listeners. Having established that provocative speech is protected speech, the second section considers two recent Supreme Court decisions demonstrating that statutes proscribing the publication of provocative content are very likely to fail strict scrutiny.

#### A. *Provocative Images Are Fully Protected Speech*

The Supreme Court has emphasized that there might exist “some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law.”<sup>233</sup> However, before the Court is willing to

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*Burning Let To Violence In The Middle East (VIDEO)*, THE HUFFINGTON POST, June 16, 2011, [http://www.huffingtonpost.com/2011/04/16/how-did-the-quran-burning\\_n\\_849120.html](http://www.huffingtonpost.com/2011/04/16/how-did-the-quran-burning_n_849120.html). Analogously, the mere threat of the publication of a cartoon featuring Muhammad may be sufficient to incite violence. See Leibowitz, *supra* note 204, at 524. This is especially true given that it is not clear how many of those protesting had actually even seen the cartoons. See Thomas Hylland Eriksen, *The Cartoon Controversy and the Possibility of Cosmopolitanism*, HYLLANDERIKSEN.NET 6 (2007) (unpublished manuscript), <http://hyllanderiksen.net/Cosmopolitanism.pdf>.

<sup>230</sup> See Gura *supra* note 27.

<sup>231</sup> See *supra* Section I.D.

<sup>232</sup> See *infra* Part IV (discussing the terrorist’s veto).

<sup>233</sup> *Alvarez*, 132 S.Ct. at 2547 (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)).

recognize a new category of unprotected speech, it requires “persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.”<sup>234</sup> This is a burden that those advocating for an exemption for publication of offensive content, such as Muhammad cartoons, cannot meet. Not only is there no tradition of proscription, but the justifications advanced for the proscription of such speech drastically depart from the justifications underlying other unprotected speech.

### 1. Unlike Fighting Words, Provocative Images Are Speech with High Intrinsic Worth

The fighting words exception focuses on whether certain words provoke a violent reaction, and for that reason it appears very similar to an exception for provocative content.<sup>235</sup> At first glance, the fighting words exception seems to provide support for restrictions of speech solely based on the reaction of the listener. Indeed, scholars have noted that this exception “seems not only archaic but also wholly illogical,” and have expressed surprise that this exception has not been “mercifully overruled long since.”<sup>236</sup> Yet, due to fear of a heckler’s veto, the fighting words exception was dramatically narrowed by the Supreme Court to only encompass speech of extremely limited social value and highly provocative content.<sup>237</sup> The Supreme Court has taken a “libertarian approach to fighting words cases” and dramatically limited the application of fighting words doctrine.<sup>238</sup> Indeed, Supreme Court cases have shown that the category of impermissible fighting words is incredibly small or even non-existent.<sup>239</sup>

The Supreme Court has declared that “[r]esort[ing] to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”<sup>240</sup> In *Chaplinsky v. State of New Hampshire*, the Supreme Court affirmed an

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<sup>234</sup> *Id.* (quoting *Brown v. Ent. Merchants Ass’n*, 131 S.Ct. 2729, 2734 (2011)).

<sup>235</sup> Despite the narrow application of the fighting words doctrine by the Supreme Court, scholars continue to argue for its renewed application in a variety of contexts involving provocative speech. For instance, scholars have argued for an approach to fighting words that would allow the Court to include various forms of hate speech, but such an approach has been soundly rejected by the Supreme Court. *See* Scott J. Catlin, Note, *A Proposal for Regulating Hate Speech in the United States: Balancing Rights Under the International Covenant on Civil and Political Rights*, 69 NOTRE DAME L. REV. 771, 808–09 (1994). *But see* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992). Additionally, some have argued that fighting words should apply to cyber bullying or anonymous online speech. *See* Raul R. Calvoz et al., *Cyber Bullying and Free Speech: Striking an Age-Appropriate Balance*, 61 CLEV. ST. L. REV. 357, 386–87 (2013); *see also* Sophia Qasir, Note, *Anonymity in Cyberspace: Judicial and Legislative Regulations*, 81 FORDHAM L. REV. 3651, 3671 (2013).

<sup>236</sup> O’Neil, *supra* note 12, at 471–72.

<sup>237</sup> Indeed, “the Supreme Court, while never overruling or even qualifying *Chaplinsky*, has persistently failed to find even in-your-face epithets provocative enough to warrant criminal sanctions.” *Id.* at 476–77; *see, e.g.,* *Street v. New York*, 394 U.S. 576, 578–79 (1969).

<sup>238</sup> Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 636 (1985).

<sup>239</sup> *See, e.g.,* *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 756 (1978) (George Carlin’s profane monologue did not constitute fighting words); *see also* *Gooding v. Wilson*, 405 U.S. 518, 525 (1972) (striking down a Georgia statute which extended fighting words to “opprobrious” and “abusive” words).

<sup>240</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940). As Professor Gerard has noted, historically laws banning lewd and profane words were common at the time of ratification of both the First and Fourteenth

individual's conviction for addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place."<sup>241</sup> The individual had called a City Marshall "a damned fascist," and the Supreme Court concluded that the use of such "epithets or personal abuse" is "of such slight social value as a step to truth" that it does not constitute protected speech.<sup>242</sup> Even in affirming the conviction, the Supreme Court emphasized that the category of fighting words was narrow. Specifically, the Court focused on words which "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."<sup>243</sup> The Supreme Court also seemed to imply that such words must be uttered in a "face-to-face" setting.<sup>244</sup>

Thus, fighting words are punishable precisely because they are considered intrinsically valueless, and are delivered in the setting least conducive to discourse and most conducive to acts of violence.<sup>245</sup> From *Chaplinsky* and other fighting words cases, five limitations on what can be considered fighting words can be drawn. While the publication of provocative images like the Muhammad cartoons or the *Innocence of Muslims* film unquestionably includes some of the elements of fighting words, it varies from each of these limitations in significant ways.

First, the words must be of "slight social value."<sup>246</sup> The Supreme Court has made it clear that even speech that is highly offensive is protected if it makes a contribution to the marketplace of ideas. This is especially true for offensive religious speech. In *Cantwell v. Connecticut*, the Supreme Court overturned the conviction of a Jehovah's Witness who had been convicted for playing in public a record that attacked other churches as instruments of the devil.<sup>247</sup> The Supreme Court emphasized that in the religious sphere, "sharp differences arise," and because of the urgency of religious messages speakers may resort "to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement."<sup>248</sup> Yet, despite "the probability of excesses and abuses" permitting such speech is "essential to enlightened opinion and right conduct on the part of the citizens of a democracy."<sup>249</sup> *Cantwell* thus suggests that provocative speech regarding religion has, if anything, heightened constitutional protection as a result of the vital nature of religious speech.

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Amendment. See Jules B. Gerard, *The First Amendment in A Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003, 1017 (1993).

<sup>241</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942).

<sup>242</sup> *Id.* at 572.

<sup>243</sup> *Id.* at 573.

<sup>244</sup> *Id.* at 572.

<sup>245</sup> See Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1367 (1998) ("Under a rights-based model, speech may properly be restricted when it is likely to provoke violence because of its wrongful character."); see also ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 72 (1975) ("There is such a thing as verbal violence, a kind of cursing, assaultive speech that amounts to almost physical aggression, bullying that is no less punishing because it is simulated.").

<sup>246</sup> *Chaplinsky*, 315 U.S. at 572.

<sup>247</sup> *Cantwell*, 310 U.S. 296.

<sup>248</sup> *Id.* at 310.

<sup>249</sup> *Id.*

It is unfair to say that provocative images are “of such slight social value as a step to truth” that they do not deserve Constitutional protection.<sup>250</sup> Publication of images of Muhammad is meant to provoke the audience into thinking critically about political and social events of great importance. The editors of *Jyllands-Posten* intended to spark a discussion on political correctness and the role of religion in a Western Liberal democracy, and were in fact able to engender exactly that sort of debate.<sup>251</sup> The editors of *Charlie Hebdo* likewise hoped to push the boundaries of acceptable speech, and show that Islam is not above caricature or satire.<sup>252</sup> Even the *Innocence of Muslims* film, which was deliberately and unquestionably provocative, still was meant to communicate its creator’s viewpoint regarding the founding narrative of Islam.<sup>253</sup> Just as with the religious speech in *Cantwell*, these images at times indulge in “exaggeration” and in “excesses and abuses” but are on a topic of great public and private concern. Unlike epithets merely leveled for the sake of insult, which can rightly be described as “weapons hurled in anger to inflict injury or invite retaliation,”<sup>254</sup> the publication of such images can constitute commentary on the state of the world and on dangers of racial Islamic fundamentalism. In this sense, the Muhammad images differ greatly from the epithets from *Chaplinsky*.<sup>255</sup> They are “chosen as much for their emotive as their cognitive force,” and mere “hostility to their assertion or exercise” does not strip such ideas of Constitutional protection.<sup>256</sup>

Second, fighting words must be “directed” at the listener and akin to “a direct personal insult,” rather than a more generalized insult or offense.<sup>257</sup> Neither wearing a profane jacket in a courthouse,<sup>258</sup> nor burning an American flag can qualify as fighting words.<sup>259</sup>

The provocative images involved in the above controversies were not delivered “face-to-face” or “directed” at a specific listener. Instead, they were published in magazines or on the internet, and contained a general criticism of the Islamic faith or of radical Islamic fundamentalism.<sup>260</sup> It is therefore inappropriate to call these provocative

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<sup>250</sup> See Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT L.J. 275, 280 (1998) (arguing that the quality of speech often plays a subtle but distinct role in First Amendment analysis by courts).

<sup>251</sup> See *supra* Section I.A.

<sup>252</sup> See *supra* Section I.C.

<sup>253</sup> See *supra* Section I.B.

<sup>254</sup> Tribe, *supra* note 198, at 838.

<sup>255</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>256</sup> *Id.* at 26. Professor Tribe also argues that *Cohen* stands for the proposition that it is improper to “sterilize discourse by reducing it to logic.” Tribe, *supra* note 198, at 840.

<sup>257</sup> Fighting words cases have properly been criticized for assuming that “under some circumstances, the appropriate and ‘reasonable’ response to speech” is violence. See Sean M. Selegue, *Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment*, 79 CAL. L. REV. 919, 932 (1991). These restrictions on when speech can be considered fighting words cabin the deleterious impact of that assumption.

<sup>258</sup> *Cohen*, 403 U.S. at 19–20 (holding that the jacket was not considered fighting words because it was not “directed to the person of the hearer,” nor was anyone who saw the jacket “violently aroused.”).

<sup>259</sup> In *Texas v. Johnson* the majority rejected the argument that flag burning was akin to fighting words declaring that “[n]o reasonable onlooker would have regarded Johnson’s generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.” 491 U.S. 397 (1989).

<sup>260</sup> See Edward Tabash, *The First Amendment Provides Full Protection to Innocence of Muslims*, FREE INQUIRY, Dec. 2012–Jan. 2013, at 12,

images “a direct personal insult,” especially considering the huge number of Muslims in the world, and the unpredictable nature of each individual’s response to these images.<sup>261</sup> While there is limited Supreme Court precedent for the idea that speech directed at groups may be punished,<sup>262</sup> this precedent has been seriously called into question<sup>263</sup> and is highly unlikely to apply in a fighting words setting.<sup>264</sup>

Although the flag burning of *Texas v. Johnson* is closely analogous to the speech in the above controversies (both are highly insulting to large groups of individuals who may take offense), *Johnson* has been read to stand for the principle that the government “cannot forbid all offensive speech because violence may occasionally result.”<sup>265</sup> Professor Greenawalt has argued that what sets apart a case like *Johnson* where restrictions are impermissible, and other cases where restrictions are allowed, is the presence or absence of “specific victims” as opposed to generalized group offense.<sup>266</sup> Additionally, in recent years the Supreme Court has shown even less inclination to allow restrictions on speech based on a generalized group offense.<sup>267</sup>

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<http://www.tabash.com/articleAdmin/articles/Innocence%20of%20Muslims%2011-1-12.pdf> (“Of course *Innocence of Muslims* isn’t a face-to-face confrontation. It’s not even addressed to individual followers of Islam. It ridicules a claimed historical religious figure.”).

<sup>261</sup> Reactions to images of the Prophet Muhammad vary dramatically among Muslims. See Lucas Powers, *Prophet Muhammad Images Draw Varied Reactions Within Muslim Community*, CBC NEWS (Jan. 14, 2015), <http://www.cbc.ca/news/world/prophet-muhammad-images-draw-varied-reactions-within-muslim-community-1.2899987>.

<sup>262</sup> In the defamation context, the Court upheld an Illinois statute that punished group libel, and held that “if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group.” *Beauharnais v. Illinois*, 343 U.S. 250, 257 (1952). Some dicta from the *Beauharnais* case could be analogized to the context of speech offensive to religions. For instance, the court discussed how “willful purveyors of falsehood concerning . . . religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.” *Id.* at 259. Moreover, the Court criticized “false or malicious defamation of . . . religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.” *Id.* at 261.

<sup>263</sup> See O’Neil, *supra* note 12, at 483 (“[T]he *Beauharnais* ruling has not fared well over time and would be cited at an advocate’s peril.”).

<sup>264</sup> Most scholars suggest that laws that proscribe things such as group defamation or insults targeting a broad class would be unconstitutional. See Ronald K. L. Collins, *Free Speech, Food Libel, & the First Amendment... in Ohio*, 26 OHIO N.U. L. REV. 1, 28 (2000); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 952–53, 978–79 (2d ed. 2002); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 142 n.164 (1992). But see Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145 (2013) (suggesting that group defamation and the cross burning from *Virginia v. Black* are examples of when speech against groups can be proscribed). It is worth noting that there are very few things that might be considered sufficiently provocative for a whole group, although certain epithets, such as the N-word, come to mind.

<sup>265</sup> KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 34 (1996).

<sup>266</sup> *Id.* at 35.

<sup>267</sup> Many have suggested that the Roberts Court takes a more categorical and absolutist approach to free speech than previous courts. As such, it is far less likely to recognize a new category of unprotected speech. See David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 508 (2001).

This is especially true given that the Muhammad cartoons touch upon matters of public concern just as did the anti-gay speech in *Snyder v. Phelps*, which the Supreme Court held was protected in an 8-1 decision. 562 U.S. 443 (2011). See Douglas Behrens, *Balancing Intentional Infliction of Emotional Distress*

Third, the Supreme Court has suggested that any breach of the peace that occurs must truly be imminent. For instance, the Supreme Court struck down a Georgia statute because it covered conduct that did not lead to an “immediate violent response.”<sup>268</sup> As discussed in Part II, it is difficult to say that publication of the provocative speech caused an “immediate violent response.” Indeed, sometimes the publication of provocative speech led to threats of attacks that were carried out months or years later. Moreover, in each of the controversies, the violent reactions were spurred by provocateurs who sought to capitalize on the controversy.<sup>269</sup> Thus, mere publication without more cannot be said to cause an “immediate violent response” akin to a direct personal attack. Given the disparity, in both timing and scope, between the reactions of violence in each of the above controversies, it is inaccurate to say that publication of provocative speech will always lead to an imminent disturbance of the peace.

Fourth, fighting words cannot be regulated in a way that takes into account the speaker’s viewpoint.<sup>270</sup> Even actions that unquestionably constitute fighting words or true threats cannot “be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”<sup>271</sup> Yet, that is precisely what would happen if provocative speech lost its constitutional protection.<sup>272</sup> Many of the newspapers that published the Muhammad cartoons also published cartoons lambasting Christianity.<sup>273</sup> Likewise, rituals and practices considered sacred by members of the Church of Jesus-Christ of Latter-day Saints have been parodied and displayed in musicals and TV Shows.<sup>274</sup> Yet, even though such speech offends members of these faiths, there is a lack of the same sort of vociferous and hateful reaction as to the publication of images of Muhammad.<sup>275</sup> The resultant application of any exception for provocative speech is that

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*Claims and First Amendment Protections in Snyder v. Phelps*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 213, 221 (2013) (discussing the emphasis that the *Snyder* Court put on the fact that the speech was of public concern). Indeed, it seems highly improbable that the same Court which recently found the Westboro Baptist Church’s “God Hates Fags” funeral demonstration to be protected speech would find it acceptable to punish speech that is highly offensive even to a majority of the general public.

<sup>268</sup> *Gooding v. Wilson*, 405 U.S. 518, 528 (1972).

<sup>269</sup> See Jane Kramer, *Comment - Images*, NEW YORKER, Feb. 27, 2006, at 25–26.

<sup>270</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (holding that even though the burning of a cross could arguably be considered a true threat, a statute which banned cross burning in certain circumstances was unconstitutional because it engaged in viewpoint bias).

<sup>271</sup> *Id.*

<sup>272</sup> See *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation.”).

<sup>273</sup> See Section I.C (regarding *Charlie Hebdo*).

<sup>274</sup> See *The Publicity Dilemma*, The Church of Jesus Christ of Latter-Day Saints (Mar. 9, 2009), <http://www.mormonnewsroom.org/article/the-publicity-dilemma>; Misha Berson, *Mormons View ‘Book of Mormon’ More as Opportunity Than Offense*, SEATTLE TIMES, Jan. 5, 2013, <http://www.seattletimes.com/entertainment/mormons-view-book-of-mormon-more-as-opportunity-than-offense/>.

<sup>275</sup> See Daniel Ortner, *Maestro of Dissent: A Radical Proposal: Advocating Cartoon Freedom*, BRANDEIS HOOT (Oct. 30, 2009), 18, [https://issuu.com/thebrandeisshoot/docs/the\\_hoot\\_10-30-09](https://issuu.com/thebrandeisshoot/docs/the_hoot_10-30-09) (drawing parallels between the reaction to the display of Mormon temple rituals in the HBO series “Big Love” and the reaction to the publication of cartoons depicting Muhammad); see also Ross Douthat, *Blasphemy Revisited*, N.Y. TIMES (Jan. 14, 2015), <http://douthat.blogs.nytimes.com/2015/01/14/blasphemy-revisited-i/> (“And I am very confident that if, say, a group of Christians burned down a movie theater during a screening of ‘The Last Temptation of Christ’ . . . , or if a Mormon assassinated an actor in ‘The Book of Mormon,’ . . . the response across the board and certainly across the left would be that the show must, for the sake of

anti-Christian or anti-Mormon speech would be acceptable, while anti-Islamic speech restricted.<sup>276</sup> This selective prohibition on speech is precisely the evil that the First Amendment is intended to prevent.<sup>277</sup>

Fifth, the fighting words exception must not be employed to provide an opportunity for a heckler's veto.<sup>278</sup> Looking at the Court's precedent regarding fighting words, it is clear that one of the reasons the Court limits fighting words to face-to-face confrontations where epithets are personally directed to cause an immediate reaction is that it does not want to allow organized and systemic outrage to stifle unpopular or controversial ideas.<sup>279</sup> The application of this concept to provocative images will be discussed further below, but for now it suffices to note that any restriction on provocative speech would provide precisely the opportunity for groups to stifle unpopular or offensive speech that has been so odious in the fighting words context.

Each of these restrictions on the scope of the fighting words doctrine has been established by the Supreme Court to ensure that the exception does not swallow the general rule of freedom to speak out on controversial topics. They illustrate the extent to

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vindicating liberty and rebuking fanaticism, go on."); Jim Picht, *Mormons and Muslims, South Park and Charlie Hebdo: Why the Difference?*, COMMUNITIES DIGITAL NEWS (Jan. 9, 2015), <http://www.commdiginews.com/politics-2/mormons-and-muslims-south-park-and-charlie-hebdo-why-the-difference-33042/#KuShuXR2jy8x33jC.01> ("People who watch The Book of Mormon musical don't fear violent reprisals from angry Mormons; the South Park creators would have more to fear from Muslims."); Joseph Walker, *LDS Church Buys Ad Space in 'Book of Mormon' Musical Playbill*, DESERET NEWS (Sept. 6, 2012), <http://www.deseretnews.com/article/865561906/LDS-Church-buys-ad-space-in-Book-of-Mormon-musical-playbill.html?pg=all> ("The playbill ad is another example of the LDS Church's savvy response to 'The Book of Mormon' musical," said award-winning public relations guru Chris Thomas, co-owner of Intrepid Communications in Salt Lake City."). *But see* Michael Brendan Dougherty, *The Charlie Hebdo Attacks Show That Not All Blasphemies Are Equal*, WEEK (Jan. 12, 2015), <http://theweek.com/articles/531501/charlie-hebdo-attacks-show-that-all-blasphemies-are-equal> ("But those Muslims who are faithful to a religious tradition concerned primarily with restoring fidelity to sources from the first three centuries of Islam were not a party to the secularist bargain. And we ought to be aware that we are asking them to live as Christians, and to be insulted like them, too.").

<sup>276</sup> It has been suggested that this effect might even raise Establishment Clause concerns. *See* Tabash, *supra* note 260, at 12 ("Accordingly, no members of a religion have any greater rights than any others to call upon government to censor offensive spoken words, written articles, or films."). While I find this argument highly implausible because the government restriction would have neither the purpose nor effect of establishing or favoring religion, this argument draws further attention to lack of viewpoint neutrality. *See id.* ("Any legal system will suffer enormously diminished legitimacy as a protector of free speech if advocates of a certain point of view are the only ones given the right to silence opponents. This legitimacy would be even more gravely compromised if that legal system harbors even the slightest assumption that violence perpetrated by adherents of one set of beliefs—upon hearing or seeing offensive comments—deserves more lenient treatment than the same kind of violence perpetrated by adherents of any other beliefs.").

<sup>277</sup> *See* Zvi Triger, *Discriminating Speech: The Heterophilia of the Freedom of Speech Doctrine*, 19 CARDOZO J.L. & GENDER 349, 371 (2013) (explaining that "'feelings' and 'hurt' are not neutral terms," and that attempting to proscribe such speech is a highly subjective and fraught endeavor).

<sup>278</sup> The Sixth Circuit recently issued a powerful decision affirming the importance of defending freedom of expression against a heckler's veto. In that decision, the court affirmed the right of Christian protestors to distribute anti-Islamic leaflets at an Arab International Festival. The court found that the police had erred when they asked the protesters to disband in the face of an unruly counter-protest where attendees threw rocks and other objects at the Christian protesters. *See Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228 (6th Cir. 2015).

<sup>279</sup> *Cox*, 379 U.S. at 551–52.

which a provocative speech exception would deviate from First Amendment norms, and would allow for manufactured outrage to drown out voices asserting controversial or unpopular points of view.

## 2. Unlike Incitement or True Threats, Provocative Speech Lacks an Intent to Cause Harm

Incitement and true threats illustrate another element common in unprotected speech that is absent from the publication of provocative speech. Specifically, both incitement and true threats require the speaker to have a certain level of specific intent to harm, which is absent in all of the controversies discussed.

Black's Law Dictionary defines incitement as "[t]he act or an instance of provoking, urging on, or stirring up."<sup>280</sup> While this definition of incitement encompasses speech that provokes lawless action, as well speech that urges or encourages lawless action, the legal standard for incitement limits punishment to only the latter.<sup>281</sup> The modern test for incitement comes from *Brandenburg v. Ohio*.<sup>282</sup> The state is forbidden from proscribing "advocacy of the use of force or of law violation" unless "such advocacy is *directed to inciting* or producing imminent lawless action and is likely to incite or produce such action."<sup>283</sup> Thus, the intent of the speaker, and whether the speech is "*directed to inciting*," is critical to determining whether incitement occurred.<sup>284</sup> It is this key element that distinguishes provocative speech from incitement. As the Supreme Court has noted, "mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence" is insufficient to qualify as incitement,<sup>285</sup> and even "offensive and coercive speech" is protected.<sup>286</sup> Thus, incitement is punishable precisely because the individual speaks with the desire or purpose of facilitating a crime. In this way, a speaker is culpable for the conduct of those whom he addresses and incites.<sup>287</sup>

True threats are punished for substantially similar reasons. True threats are defined as "those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."<sup>288</sup> Thus, intent to intimidate or convey a serious threat is an essential

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<sup>280</sup> *Incitement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>281</sup> See Tthesis, *supra* note 264, at 1146 (considering the distinction between inflammatory speech and incitement).

<sup>282</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>283</sup> *Id.* (emphasis added). There is also an imminence element to incitement, which the Supreme Court has strictly construed. Hence, a statement like "we will take the fucking streets later" is not imminent enough to constitute incitement. See *Hess v. Indiana*, 414 U.S. 105 (1973); see also Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 44 (2012) ("*Brandenburg's* imminence requirement may in fact be extremely temporally strict.").

<sup>284</sup> With inchoate crimes, such as incitement, a heightened *mens rea* is traditionally required: in the model penal code for instance, criminal conspiracy requires a person to have specific intent or "the purpose of promoting or facilitating" the commission of a crime. MODEL PENAL CODE § 5.03 (Am. Law Inst. 2015).

<sup>285</sup> *Noto v. United States*, 367 U.S. 290, 297–98 (1961).

<sup>286</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (citing *Organization for a Better Austin v. Keefe*, 458 U.S. 886 (1982)).

<sup>287</sup> See Tthesis, *supra* note 264, at 1151 (arguing that the key distinction between protected and unprotected speech is whether "the speaker means to intimidate, defame, or advance criminal conduct.").

<sup>288</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

element. Even if serious fear or apprehension occurs, absent the requisite intent, a threat cannot be penalized. True threats are also distinct because they make the recipients of the threat feel apprehensive for their safety,<sup>289</sup> in contrast to provocative images that do not engender in the listener a personal safety concern.<sup>290</sup>

Another important contrast between the publication of provocative images and incitement or true threats, similar to the distinction from fighting words, involves the value of the ideas promoted. The message of the images involved in all three of the controversies outlined above included a commentary on the politics of religion, rather than mere prompting of illegal activity or threats of such activity, which are often the subject of incitement or true threats. As Cass Sunstein has argued, “There is little democratic value in protecting simple counsels of murder.”<sup>291</sup> Thus, the high bar for prosecuting incitement or true threats containing little social value suggests that even greater caution is appropriate when prosecuting the publication of cartoons conveying a myriad of political messages.<sup>292</sup> Given these guidelines, true threats and incitement are not protected because they are delivered with intent to either incite or threaten, and they fail to contribute to the marketplace of ideas. Provocative speech differs on both fronts. For these reasons, provocative speech should be considered fully protected speech.

### B. *Efforts to Punish the Publication of Provocative Speech Would Fail Strict Scrutiny*

Having established that provocative speech is fully protected, any law restricting or barring the publication of such speech would be subject to strict scrutiny.<sup>293</sup> Two recent Supreme Court decisions illustrate why any attempt to proscribe provocative speech would likely fail strict scrutiny. In the first, the Supreme Court upheld, but narrowly construed, a restriction on speech carried out in conjunction with a terrorist organization.<sup>294</sup> In the second, the Supreme Court rejected efforts to punish false speech regarding veteran’s status.<sup>295</sup>

<sup>289</sup> See Lawrence, *supra* note 24, at 700–01 (discussing the difference between bias crimes and hate speech based on similar terms).

<sup>290</sup> In June 2015, the Supreme Court decided the case of *Elonis v. United States*, which involved the question of which mens rea requirement is sufficient to convict a speaker for making a threatening statement. 135 S.Ct. 2001 (2015). Unfortunately, the Supreme Court refused to draw a clear line and merely concluded that negligence is insufficient. See Lyle Denniston, *Opinion Analysis: Internet Threats Still in Legal Limbo?*, SCOTUSBLOG (June 1, 2015, 1:49 PM), <http://www.scotusblog.com/2015/06/opinion-analysis-internet-threats-still-in-legal-limbo/>; see also Clay Calvert et al., *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 COLUM. J.L. & ARTS 1, 26 (2014) (urging the Court to adopt a standard that, at the very least, takes into account the listener’s actual knowledge and understanding); P. Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM. & ENT L.J. 37, 76 (2015).

<sup>291</sup> Sunstein, *supra* note 7, at 371; see also Noah C.N. Hampson, *Hactivism: A New Breed of Protest in a Networked World*, 35 B.C. INT’L & COMP. L. REV. 511, 538 (2012) (“There is little to commend speech that leaves in its wake material destruction and physical injury.”).

<sup>292</sup> See Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1150 (2005) (suggesting that crime-facilitating speech which touched on issues relevant to public policy should get extra protection).

<sup>293</sup> See *supra* Section III.A.

<sup>294</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>295</sup> *Alvarez*, 132 S. Ct. at 2537.

In *Holder v. Humanitarian Law Project*, the Supreme Court upheld a statute that restricted material support to terrorist organizations, including training and other speech related activities.<sup>296</sup> Material support was widely defined to include “any property, tangible or intangible, or service.”<sup>297</sup> Such material support must be knowingly granted, but there need not be intent to further the organization’s terrorist activities.<sup>298</sup> In a closely divided decision, the Supreme Court found that the statute was not overly vague and did not violate the First Amendment.<sup>299</sup>

The *Humanitarian Law Project* decision has been widely derided by scholars as contorting existing First Amendment doctrine to chill speech.<sup>300</sup> Certainly, in theory, allowing speech to be proscribed because it helps terrorist groups seems like a dramatic expansion.<sup>301</sup> However, the Court’s ruling was ultimately much narrower than that. The Supreme Court expressly construed the statute to not apply to any form of “independent activity.”<sup>302</sup> Thus, any activity such as the publication of a cartoon that is not done “under the direction of, or in coordination with [foreign] terrorist organizations” is not punishable under this statute.<sup>303</sup>

This important distinction led the Court to conclude that the statute was “carefully drawn to cover only a narrow category of speech,” which involved direct coordination with a terrorist organization.<sup>304</sup> As such, even though the law directly burdened speech, the Court found that it successfully met strict scrutiny. In terms of the arguments for proscribing provocative speech, this distinction is completely absent. None of those who

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<sup>296</sup> *Humanitarian Law Project*, 561 U.S. at 8.

<sup>297</sup> *Id.* at 8–9.

<sup>298</sup> “Indeed, it seems possible to convict someone of material support even if they possessed the diametrically opposed intent to prevent further terrorist attacks.” Alexandra Link, *Trying Terrorism: Joint Criminal Enterprise, Material Support, and the Paradox of International Criminal Law*, 34 MICH. J. INT’L L. 439, 468 (2013).

<sup>299</sup> The Court purported to be applying strict scrutiny, but scholars have rightly suggested that the Court’s reasoning “exhibited unprecedented deference to the government, despite purporting to apply strict scrutiny to a content-based speech restriction.” Eileen Kaufman, *Deference or Abdication: A Comparison of the Supreme Courts of Israel and the United States in Cases Involving Real or Perceived Threats to National Security*, 12 WASH. U. GLOBAL STUD. L. REV. 95, 111 (2013).

<sup>300</sup> See Andrew V. Moshirnia, *Valuing Speech and Open Source Intelligence in the Face of Judicial Deference*, 4 HARV. NAT’L SEC. J. 385, 414–19 (2013).

<sup>301</sup> Indeed, an overly broad reading might even encompass the publication of provocative cartoons of Muhammad. Given the acts of violence perpetuated as a result of these images, an individual publishing a provocative image of Muhammad knows that such an image would provide a terrorist organization with “property” or a “service,” which could then be used to increase recruitment or rally anti-Americanism. Yet, such a broad application of the statute correctly seems to be a gross expansion of what Congress intended the statute to proscribe.

<sup>302</sup> *Humanitarian Law Project*, 561 U.S. at 24.

<sup>303</sup> *Id.* at 26.

<sup>304</sup> Of course, scholars have argued that even with this limitation, the statute invites excessive prosecution and produced a chilling effect. See Sam Adelsberg, Freya Pitts & Sirine Shebaya, *The Chilling Effect of the “Material Support” Law on Humanitarian Aid: Causes, Consequences, and Proposed Reforms*, 4 HARV. NAT’L SEC. J. 282, 293 (2013); Brandon James Smith, *Protecting Citizens and Their Speech: Balancing National Security and Free Speech When Prosecuting the Material Support of Terrorism*, 59 LOY. L. REV. 89, 102 (2013) (discussing the messy application of *Holder* to conflicts in territories controlled by Islamic fundamentalist groups). But see Brandon James Smith, *Protecting Citizens and Their Speech: Balancing National Security and Free Speech When Prosecuting the Material Support of Terrorism*, 59 LOY. L. REV. 89, 106 (2013) (favorably comparing the distinction between coordinated and independent activity to the framework for campaign finance from *Buckley v. Valeo*).

published provocative images were working “in coordination with” those who committed acts of violence. Indeed, they deplored and spoke out critically against the violence that occurred.<sup>305</sup> Even though the publishers may have known that their speech could be used by terrorists to encourage violent conduct, there was no coordination between the publishers and any terrorist groups, a factor the Court found necessary in order to avoid serious constitutional problems. Indeed, the majority made it clear that, “we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations.”<sup>306</sup> Here again, the Court chooses to leave only intrinsically dangerous speech open to restrictions: speech that is fostered from close coordination with a terrorist organization.

The Supreme Court’s recent decision in *United States v. Alvarez*—striking down the Stolen Valor Act that made it illegal to falsely claim to have received a military decoration or medals—further illustrates that a prohibition on provocative speech would fail strict scrutiny.<sup>307</sup> Even though these kinds of lies “may offend the true holders of the Medal” and “insult[] their bravery and high principles,” the Supreme Court emphasized that the remedy for such false speech “is speech that is true.”<sup>308</sup>

The plurality opinion discusses at length a wide range of false statements that have been constitutionally proscribed, including false statements made to government officials, perjury, and false representations on behalf of the government.<sup>309</sup> In each instance, the Court emphasized that the context and nature of the speech distinguished it from simple lies or puffery.<sup>310</sup> Perjured statements are particularly problematic because they “undermine[] the function and province of the law.”<sup>311</sup> Perjury statutes characterize the harm of perjury as inherent in the fact that an individual lied despite the “formality and gravity” of the oath proceeding, rather than dependent on any subsequent consequences. The same is true of other false speech regulations, such as those for false representation that one is a government official.<sup>312</sup> The Court emphasized that these types of speech “implicate fraud or speech integral to criminal conduct,” and therefore can be proscribed.<sup>313</sup>

Again, while the Court is willing to affirm restrictions on speech that causes direct harm by its nature, it is unwilling to allow restrictions on speech that only tangentially causes harm. Like false statements about military honor, the publication of the Muhammad cartoons only caused indirect harm. Unlike perjury or pretending to be a police officer, neither the content of the publication itself, nor the context of publication, causes the kind of direct harm that the Court has identified as punishable. In light of

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<sup>305</sup> See *supra* Part I.

<sup>306</sup> *Humanitarian Law Project*, 561 U.S. at 39.

<sup>307</sup> *Alvarez*, 132 S. Ct. at 2537 (striking down a statute that made it illegal to falsely claim receipt of military decoration or medals).

<sup>308</sup> *Id.* at 2550. The Court also noted that “[o]nly a weak society needs government protection or intervention before it pursues its resolve to preserve the truth.” *Id.*

<sup>309</sup> *Id.* at 2546.

<sup>310</sup> *Id.* (an example is the Court’s characterization of perjury as “at war with justice,” because it “threatens the integrity of judgments that are the basis of the legal system”).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

*Humanitarian Law Project* and *Alvarez*, it is highly unlikely that a statute prohibiting the publication of provocative images could survive strict scrutiny.

#### IV. THE TERRORIST'S VETO AND THE MARKETPLACE OF IDEAS

As the preceding sections have shown, efforts to prohibit provocative speech would be especially pernicious because such speech suffers from none of the inherent defects of the categories of unprotected speech, but instead would be proscribed solely on the basis of listeners' reactions. This would constitute a terrorist's veto. The terrorist's veto is similar in many ways to the heckler's veto that the Court has spoken out against in the fighting words context, but has some distinctive features that make it significantly more troubling from a First Amendment standpoint. Although these ideas have been discussed in Parts II and III of this Article, this Part brings together strands of analysis from the various types of speech discussed in order to more fully describe how a terrorist's veto is inconsistent with the First Amendment.

First, the value of the speech threatened by the terrorist's veto is far more likely to be high-value political and/or religious speech that deserves heightened protection.<sup>314</sup> For instance, the heckler's veto frequently arises in the fighting words context where speech is of "slight social value,"<sup>315</sup> or in response to threats or incitement that have "little democratic value."<sup>316</sup> Thus, any heckler's veto in those contexts is less likely to disrupt valuable speech. In contrast, the Muhammad images that led to violence raise important questions about religious pluralism, fundamentalism, and the boundaries of speech.<sup>317</sup> The *Jyllands-Posten* cartoons in particular touched upon matters of ongoing debate and discussion in Denmark and elsewhere.<sup>318</sup> The *Charlie Hebdo* cartoons likewise sparked debate about the appropriateness of religious satire.<sup>319</sup> Even the *Innocence of Muslims* film, which by all accounts lacked artistic value or subtlety, still challenged the traditional accounts of the founding of Islam.<sup>320</sup> Just as the deeply offensive "God Hates

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<sup>314</sup> The traditional heckler's veto also arises in many cases where the speech is highly valuable and fully protected. The Court has not allowed a heckler's veto for fear of stifling such protected speech. *See* Ruth McGaffey, *The Heckler's Veto*, 57 MARQ. L. REV. 39, 47 (1973) (much of the free speech cases involving the heckler's veto involved "either the Jehovah's Witnesses or labor unions . . . [because b]oth groups had enough enemies to make a hostile audience a real possibility in almost any situation.").

<sup>315</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *see, e.g., Terminiello v. Chicago*, 337 U.S. 1 (1949) (involving a highly charged anti-Semitic rant).

<sup>316</sup> Sunstein, *supra* note 7, at 371. In *Feiner v. New York*, 340 U.S. 315, 321 (1951), the Supreme Court held that a police officer acted constitutionally when he disrupted an inflammatory political speech on race issues. However, this decision was sharply criticized by Justice Douglas in dissent, and has since been widely discredited and viewed as an "extreme manifestation" of the Supreme Court erroneously focusing on audience reaction. *See* *Feiner* 340 U.S. at 331 (Douglas, J., dissenting) (arguing that the record showed "an unsympathetic audience" threatening "to haul the speaker from the stage," which is precisely the kind of threat against which "speakers need police protection."). David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 59 (1994). It has been "limited to the grounds found by the majority, that the speaker was indeed inciting the crowd to riot and inadequate means were available to keep the peace." Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1309 (2007).

<sup>317</sup> *See supra* Part I.

<sup>318</sup> *See supra* Section I.A.

<sup>319</sup> *See supra* Section I.C.

<sup>320</sup> *See supra* Section I.B.

Fags” signs held by the Westboro Baptist church deserved heightened First Amendment protection, even though such speech was highly provocative, so too does the publication of provocative images of the Prophet Muhammad.<sup>321</sup> Additionally, as suggested earlier, speech that touches on religion deserves added protection because of the vital nature of religious discourse.<sup>322</sup> The terrorist’s veto will almost always target highly valuable speech touching on vital matters of politics and religion, which will require protection under the First Amendment.

Second, the terrorist’s veto seems completely unconcerned with the speaker’s intent. As discussed in Part III of the article, in many cases where the heckler’s veto arises, a speaker will have diminished protection because of an intent to harm. Although malicious intent is not expressly required with fighting words, it is implied by the fact that the speech must be a “direct personal insult” akin to “an invitation to exchange fisticuffs.”<sup>323</sup> Malicious intent is expressly required with incitement and true threats where the speaker either expressly desires that an unlawful act occurs, or intends to frighten or intimidate the listener.<sup>324</sup> In contrast, those publishing images of the Prophet Muhammad had a wide variety of intents: of those discussed, the *Innocence of Muslims* filmmaker stands on one extreme, as he unapologetically hoped to offend though he did not desire a violent reaction;<sup>325</sup> the *Jyllands-Posten* editors hoped to spark a conversation about censorship, but were certainly aware of the possibility of offending; and on the other end of the spectrum Jytte Klausen wrote an academic book on the Danish cartoon saga and had no desire to offend or provoke, but still had her speech stifled by the terrorist’s veto.<sup>326</sup> The *Charlie Hebdo* editors are somewhat in the middle between these two extremes, as they sought to lampoon and satirize, but also acted with the goal of

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<sup>321</sup> See *supra* note 270 and accompanying text; see also Ronald J. Krotoszynski, Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881, 900–01 (2013) (“Chief Justice Roberts found that the speech enjoyed the full protection of the First Amendment, and held that a standard for civil liability based on the ‘outrageousness’ of speech comes too close to empowering a ‘heckler[’s] veto.’”).

<sup>322</sup> *Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940); see also Tabash, *supra* note 260, at 11 (“An integral part of freedom requires that anyone be permitted to express views that are deeply offensive to someone else’s beliefs.”); Tyll van Geel, *Citizenship Education and the Free Exercise of Religion*, 34 AKRON L. REV. 293, 365 (2000) (arguing that fears of “religious divisiveness” can create ‘heckler’s veto’). Part of the right to speak about matters of religious concern surely involves the right to criticize the faith of others. See Eugene Volokh, *Freedom of Speech, Religious Harassment Law, and Religious Accommodation Law*, 33 Loy. U. Chi. L.J. 57, 69 (2001), <http://www2.law.ucla.edu/volokh/harass/religion.pdf> (“Much religious discourse, and much ideological discourse more generally, involves condemnation of others’ views as well as expression of one’s own. One way of proving the merits of your ideas is by showing the error of rival ideas. If the government may use the force of law to suppress such condemnatory speech, then we have lost a great deal of our First Amendment protection.”).

<sup>323</sup> *Texas v. Johnson*, 491 U.S. 397, 398 (1989).

<sup>324</sup> See *supra* Section III.A.ii.

<sup>325</sup> But see Email from Seth Barrett Tillman to author, *supra* note 87. If it were true that Nakoula actually intended to direct his speech in order to specifically trigger an act of violence against Jews or Israelis, his act would share a common intent component with incitement or true threats. See *supra* Section III.B. Under such narrow circumstances it might be permissible to proscribe such behavior. However, it might be difficult to draft a statute that would narrowly target only this class of behavior without including otherwise protected speech. As evidenced by the continuing ambiguity regarding Nakoula’s motives, intent would also be quite difficult to prove in such cases.

<sup>326</sup> See *supra* Section I.D.

pushing the boundaries of free speech.<sup>327</sup> The terrorist's veto is dangerous because it is a blunt force, indifferent to whether the author actually intended to offend.

Third, because the terrorist's veto, when granted, validates the feeling of offense or outrage, it can further encourage encroachment on once acceptable speech. This is powerfully illustrated by outrage over images featuring Muhammad. Images of the Prophet Muhammad were an accepted part of both Christian and Islamic society until very recently, and yet fear of potentially violent reactions has led to publishers to decide not to publish or republish such historically acceptable images;<sup>328</sup> Similarly, Comedy Central censored an episode of the show *South Park* that included images of Muhammad, despite the fact that the episode had previously aired without incident.<sup>329</sup> What has changed is not the nature of the speech itself nor its publication, but simply the reaction from the audience. It is the radicalization of certain sects of Islam that has led to divergent reactions rather than a change in the content or form of the speech.<sup>330</sup> As attitudes continue to harden towards the publication of images of Muhammad, it is likely that the terrorist's veto will continue to chill more and more content that was once acceptable.<sup>331</sup>

Fourth, the heckler traditionally seeks to disrupt the speech of the individual speaking; in contrast, the terrorist's veto often instead targets nations, or individuals wholly unconnected to the speech.<sup>332</sup> As such, the terrorist's veto creates an environment where the speaker not only fears for his own safety, but is chilled out of a fear of endangering others. Newspapers chose not to republish the cartoons because they feared that their staffers, writers, or editors would be targeted, even if many of them were unconnected to the cartoons and were merely reporting on them.<sup>333</sup> The terrorist's veto turns the choice to publish into one that endangers others in addition to oneself, which increases the chilling effect.

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<sup>327</sup> See *supra* Section I.C.

<sup>328</sup> See John McManus, *Have Pictures of Muhammad Always Been Forbidden?*, BBC NEWS (Jan. 15, 2015), <http://www.bbc.com/news/magazine-30814555>. See also Christiane Gruber, *How the "Ban" on Images of Muhammad Came to Be*, NEWSWEEK (Jan. 19, 2015), <http://www.newsweek.com/how-ban-images-muhammad-came-be-300491>. Scholars debate the degree to which such depictions were "accepted," however some argue that there was never a per se "ban" on depictions of the Prophet Muhammad as there is today. Instead, the legality of such images in the past was determined on their content and context.

<sup>329</sup> See *supra* note 80 and accompanying text.

<sup>330</sup> As Professor Volokh has explained, it becomes difficult to draw the line as to which speech is seen as overly provocative or hate speech. See Volokh, *supra* note 5 ("Might it have been helpful to explain, if only briefly, just what criticisms of Islam (or of other religions) should be seen as criminal—or even immoral—'hate speech'? Any criticisms that someone can label 'punching down'? Any that are seen as blasphemous by people who are willing to respond with murder? Any that are 'crude' or 'vulgar' in their words, or perhaps in their artistic style, which is too much like 'graffiti' rather than 'cartoons'?").

<sup>331</sup> For instance, ISIS has urged that Professor Yasir Qadhi be killed for his criticism of ISIS and the *Charlie Hebdo* attacks. See Ursula Madden, *Mid-South Professor Targeted by ISIS*, WMC ACTION NEWS 5 (Feb. 27, 2015), <http://www.wmcactionnews5.com/story/28225768/mid-south-professor-targeted-by-isis>.

<sup>332</sup> But see Tom Hentoff, *Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1460 (1991) ("Hostile reaction can be by the audience against the speaker, the so-called 'heckler's veto' class of cases; by different members of the audience against one another; or by the audience against a different group or vice versa.").

<sup>333</sup> See *supra* notes 347–53 and accompanying text.

Fifth, with the terrorist's veto, grassroots outrage is co-opted by organized extremism. As such, the organized nature of the terrorist's veto differs from a heckler's veto scenario where outrage is typically spontaneous and disorganized.<sup>334</sup> In each of the controversies discussed, organized groups, such as the Muslim Brotherhood, instigated violence both because of opposition to the speech and in order to achieve political objectives.<sup>335</sup> The terrorist's veto is dangerous because the forces seeking to stifle speech are particularly well organized and capable of following through on threats, and are therefore likely to make further demands once their initial demands are met.

Sixth, just as with the traditional heckler's veto, allowing for the suppression of offensive speech if it triggers a violent reaction would have the perverse incentive of discouraging civilized and reasoned responses to offensive material.<sup>336</sup> Even though the peaceful response to the Danish cartoons succeeded in producing an official apology and encouraged a thoughtful debate, ultimately the violent attacks are what remained in the public conscience. Unfortunately, it seems that the message learned from the Danish cartoon controversy is that provoking violence is both acceptable and profitable.<sup>337</sup> If those threatening violence see that such an approach produces results, such threats are more likely to be employed in the future. For this reason, a terrorist's veto must not be allowed to become a legitimate response to provocative speech.

Finally, in contrast to the heckler's veto, the violence threatened by the terrorist's veto is often delayed.<sup>338</sup> As mentioned in the context of prior restraints, imminent harm has traditionally been a vital check against government overreach and the censorship of unpopular ideas.<sup>339</sup> Because the harm from a terrorist's veto is not necessarily imminent or directly caused by the speech itself (like with the release of secrets, the fear caused by a true threat, or the traditional heckler's veto scenario), there is abundant time for counter speech.<sup>340</sup> As President Obama made clear, "the strongest weapon against hateful speech is not repression; it is more speech . . . ."<sup>341</sup>

<sup>334</sup> See, e.g., *Feiner*, 340 U.S. at 315 (individual telling the police that he would shut up a soapbox preacher who had been preaching for approximately 30 minutes).

<sup>335</sup> See *supra* Section I.D.

<sup>336</sup> See Eugene Volokh, *Sixth Circuit Agrees to Rehear "Heckler's Veto" Decision*, WASH. POST (Oct. 23, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/23/sixth-circuit-agrees-to-rehear-hecklers-veto-decision/> ("Behavior that gets rewarded gets repeated. People who are willing to use violence to suppress speech will learn that such behavior is effective, at least when the police don't come down particularly hard on the thuggery. Indeed, they may find at times that even merely threatening violence might suffice to suppress speech they dislike. And of course this message will be easily learned by the potentially violent of all religious and political stripes . . .").

<sup>337</sup> See Eriksen, *supra* note 229, at 8 ("As a result of the polarisation resulting from the cartoon affair, Islamophobic Danes and militant Islamists were given ample media space, at the expense of almost everybody else. Abu Laban [an Islamic preacher] himself said to a German journalist in February: "I have to thank the government for its stubbornness." His formerly marginal congregation grew rapidly in 2006.").

<sup>338</sup> *Feiner* is a prototypical heckler's veto case, which involved the immediate and potentially violent response to a soap box speaker in a public square. See *Feiner*, 340 U.S. at 315.

<sup>339</sup> See *supra* Part II and Section III.A.

<sup>340</sup> Some have suggested that the requirement of imminence "is too narrow in scope to regulate the dissemination of public threats streaming on the Internet." See Tsesis, *supra* note 264, at 1166. This view is flawed. While it is true that offensive, inciting, or provocative material can remain latent on the internet and eventually trigger violence, the argument attributing this trait solely to the internet misses the mark. See Virginia Rose Priddy, *War of the Words: Why False Statements Should Be Guaranteed First Amendment Protection*, 47 GA. L. REV. 623, 644 (2013) (arguing that internet speech should not be proscribed "because

That counter-speech is an avilment to provocative speech is abundantly clear. Despite the violence, the cartoon controversy also lead to many earnest discussions of the nature of freedom of expression and the need to respect religious viewpoints. With the release of controversial images, there are likely to be people on both sides who will exploit the controversy, but also a spirited debate is likely to begin.<sup>342</sup> With the Danish cartoons in particular, peaceful protests and appeals to common decency and brotherhood were arguably far more successful than violence at truly impacting hearts and minds. This is the natural process of the marketplace where ideas can be criticized, debated and discussed.<sup>343</sup> Any governmental involvement threatens to distort this process and cut off debate.

The market has also shown itself to be quite adept at responding to the publication of such cartoons.<sup>344</sup> Most U.S. newspapers, like the *New York Times*, made reasoned decisions not to republish the provocative cartoons.<sup>345</sup> Networks, such as Comedy

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[of] the miniscule possibility of a physical outcry”). Although the internet has certainly made a variety of material more accessible, books, newspapers, and magazines have always allowed information to remain latent and available. For instance, an individual could pick up the *Hit Man* Manual years after publication and use it to commit an act of violence. *See Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997) (holding the publisher of the book *Hit Man* enjoyed no First Amendment protection in a wrongful death suit where the book was used to assist and instruct murderers in soliciting, preparing for, and committing murders). Furthermore, the internet has the additional benefit of also making counter-speech more accessible than ever. Individuals can respond directly to provocative or inciting material and, because of the nature of internet searching these responses, have a good chance of being seen in conjunction with the initial speech. If it is true that speech doctrines like fighting words and incitement “are of very limited relevance to the Internet,” perhaps that is an argument for the abolition of these exceptions rather than an argument for their expansion.

<sup>341</sup> Obama, *supra* note 16.

<sup>342</sup> Indeed, some have suggested that speech arousing extreme emotion is highly conducive to free discourse. As Justice Douglas argued in his dissent in *Beauharnais v. Illinois*, “Emotions sway speakers and audiences alike. Intemperate speech is a distinctive characteristic of man. Hot-heads blow off and release destructive energy in the process. They shout and rave, exaggerating weaknesses, magnifying error, viewing with alarm.” 343 U.S. 250, 286–87 (1952) (Douglas, J., dissenting).

<sup>343</sup> For a discussion on the origin of the phrase “marketplace of ideas,” see Ronald K.L. Collins, *Holmes’ Idea Marketplace – Its Origins & Legacy*, FIRST AMEND. CTR. (May 13, 2010), <http://www.firstamendmentcenter.org/holmes%E2%80%99-idea-marketplace-%E2%80%93-its-origins-legacy>. Of course, the marketplace of ideas has perhaps as many detractors as it has supporters. For instance, Professor Ingber wrote that the marketplace of ideas simply serves to favor entrenched power and ideology. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984). Joseph Blocher persuasively advances a “New Institutional First Amendment” model of the marketplace that focuses on the role of marketplace-of-ideas-enhancing institutions. The threat of violence can be seen as adding an additional opportunity cost to the exchange of unpopular ideas, which makes such institutions such as the media less likely to convey such ideas. *See* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 822 (2008).

<sup>344</sup> *See* Rick Gladstone & Ravi Somaiya, *New Charlie Hebdo Cover Creates New Questions for U.S. News Media*, N.Y. TIMES, Jan. 13, 2015, <http://www.nytimes.com/2015/01/14/world/europe/new-charlie-hebdo-cover-creates-new-questions-for-us-news-media.html>.

<sup>345</sup> As Ronald Dworkin argued, the decision not to republish the cartoons was often a wise one when considering the harm that republication could cause and the minimal additional benefit that would come from republishing images that were widely available online. *See* Ronald Dworkin, *The Right to Ridicule*, N.Y. REV. BOOKS (Mar. 23, 2006), <http://www.nybooks.com/articles/archives/2006/mar/23/the-right-to-ridicule/>. *See also* Margaret Sullivan, *A Close Call on Publication of Charlie Hebdo Cartoons*, THE NEW YORK TIMES (Jan. 8, 2015, 2:18 PM), [http://publiceditor.blogs.nytimes.com/2015/01/08/charlie-hebdo-cartoon-publication-debate/?\\_r=0](http://publiceditor.blogs.nytimes.com/2015/01/08/charlie-hebdo-cartoon-publication-debate/?_r=0) (describing the *Times* decision not to publish the cartoons).

Central, also engaged in self-censorship when the creators of *South Park* wished to show an image of the Muhammad.<sup>346</sup> Indeed, these acts of self-censorship have been heavily criticized as cowering in the face of terrorism.<sup>347</sup> Nevertheless, these acts of self-censorship suggest that the media is capable of self-regulation.<sup>348</sup> Thus, the publication of such cartoons differs from categories of speech where counter-speech is unavailable, and government intervention is necessary. The additional fear of government censorship would create an even stronger chilling effect, which would disincentivize the publication of politically controversial cartoons.<sup>349</sup> Instead, media organizations need to have confidence that the government will do everything to protect them as they publish controversial material.<sup>350</sup>

Some have argued that because Islamic cultures where the violent backlash often occurs do not fully embrace the norms of freedom of expression, that the marketplace

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<sup>346</sup> See *supra* note 77 and accompanying text.

<sup>347</sup> See Scott Collins & Matea Gold, *Threat Against 'South Park' Creators Highlights Dilemma for Media Companies*, L.A. TIMES, Apr. 23, 2010, <http://articles.latimes.com/2010/apr/23/entertainment/la-et-south-park-20100423> (quoting Professor Eugene Volokh who argues that “[t]he consequence of this position is that the thugs win and people have more incentive to be thugs.”); see also Jerry Birenz, *We Are All Danes*, COMM. LAW., Winter 2006, at 2; Gene Policinski, *Riots over Muhammad Cartoons Challenge Freedoms*, FIRST AMEND. CTR. (Feb. 7, 2006), <http://www.firstamendmentcenter.org/riots-over-muhammad-cartoons-challenge-freedoms>. But see Leibowitz, *supra* note 204, at 524 (“[S]elf-censorship does not necessarily need to be founded in fear, but can be the result of thoughtful planning and open dialogue between representatives of different cultural groups.”).

<sup>348</sup> See John Scalzi, *Disorganized Thoughts on Free Speech*, Charlie Hebdo, *Religion and Death*, WHATEVER (Jan. 11, 2015), <http://whatever.scalzi.com/2015/01/11/disorganized-thoughts-on-free-speech-charlie-hebdo-religion-and-death/> (“[T]here really are millions of Muslims who are just trying to get through their day like anyone else, who also strongly prefer that Muhammad is not visually represented. It’s not a defeat for either the concept or right of free speech for people or organizations to say they’re factoring these millions or [sic] people who neither did nor would do anything wrong into their consideration of the issue.”).

<sup>349</sup> Professor Kendrick has questioned the chilling effect both as an empirical and theoretical matter. However, one flaw with Kendrick’s argument is that he does not adequately distinguish between media defendants and other individuals. Indeed, the various instances of media self-censorship regarding re-publication of the Muhammad cartoons suggest that the media is already very responsive to incentives and disincentives. There is no reason to think that the media would be any less sensitive to the threat of litigation or criminal punishment than it is to other disincentives. See Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1637 (2013) (questioning whether the chilling effect can justify speech protections); see also David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 508 (2001) (discussing how *New York Times Co. v. Sullivan* led to a culture where the media is unafraid to publish controversial content). See also Blocher *supra* note 343 (discussing “marketplace-of-ideas-enhancing institutions”).

<sup>350</sup> The recent controversy over the release of the film *The Interview* seems to suggest a renewed willingness on the part of the Obama Administration to stand up to the terrorist’s veto. Sony Pictures cancelled the theatrical release of a film that offended North Korea after the country threatened terrorist attacks. The Obama Administration criticized Sony’s decision to pull the film and may have been instrumental in getting it released. See Carrie Dann, *Obama: Sony ‘Made a Mistake’ by Pulling ‘The Interview’ Movie*, NBC NEWS (Dec. 19, 2014, 3:22 PM), <http://www.nbcnews.com/storyline/sony-hack/obama-sony-made-mistake-pulling-interview-movie-n271786>; *North Korea Berates Obama over The Interview Release*, BBC NEWS (Dec. 27, 2014), <http://www.bbc.com/news/world-asia-30608179>. The Obama Administration also imposed new sanctions on North Korea as a result of their threats. See Dan Roberts, *Obama Imposes New Sanctions Against North Korea in Response to Sony Hack*, THE GUARDIAN Jan. 2, 2015, <http://www.theguardian.com/us-news/2015/jan/02/obama-imposes-sanctions-north-korea-sony-hack-the-interview>.

cannot be furthered by allowing such provocative speech.<sup>351</sup> But such criticisms miss the mark for a few reasons.<sup>352</sup> First, allowing such speech even in the face of potential violence sends a message about the robust nature and durability of the marketplace.<sup>353</sup> Second, the attacks spurned discussion both within Islam and elsewhere as to the proper response to offensive speech.<sup>354</sup> Third, violent reactions serve as confirmation of the message of the cartoons that Islam has become far too intolerant of criticism and therefore serve to move society towards truth.<sup>355</sup> Fourth, protecting provocative religious speech is vital for encouraging debate within Islam about the faith.<sup>356</sup> The marketplace of ideas is not a “dated, pre-Internet covenant[]”<sup>357</sup> as some have argued, but a vibrant and increasingly needed force. As the Supreme Court recently affirmed, “[t]he response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”<sup>358</sup>

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<sup>351</sup> See Leibowitz, *supra* note 204, at 517 (“[H]ow is American society any closer to discovering ‘truth’ by permitting citizens like Terry Jones to engage in acts that they know are likely to spur almost immediate bloodshed of allied forces or peacekeepers abroad?”).

<sup>352</sup> Professor Kaminski has also argued that a lot of social and legal assumptions regarding crowd behavior are faulty. Accordingly, it may be wrong to see groups as an unthinking mass incapable of persuasion. His research suggests that crowds are more capable of responding to the marketplace of ideas than previously assumed. See Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CINN. L. REV. 1, 72 (2012).

<sup>353</sup> Some scholars have argued that one of the main purposes of allowing robust free speech is to teach that ideas with which we disagree must nevertheless be tolerated. By tolerating some offensive, provocative and even intolerant speech, a society sends a message of the importance of tolerance. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 958 (4th ed. 2011); see also LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 9–10 (1986). As Professor Bollinger explains, “containing that response, and learning something about its nature, is in fact a central lesson of the free speech principle.” *Id.*

One other purpose of publishing or republishing provocative content may be to “spread the risk” and ensure that others feel free to speak out on controversial matters. See Stephen Law, *What’s the Point of Lampooning Religion? To Upset the Religious?*, CTR. FOR INQUIRY: THE OUTER LIMITS (Jan. 8, 2015), [http://www.centerforinquiry.net/blogs/entry/whats\\_the\\_point\\_of\\_lampooning\\_religion\\_to\\_upset\\_the\\_religious/](http://www.centerforinquiry.net/blogs/entry/whats_the_point_of_lampooning_religion_to_upset_the_religious/).

<sup>354</sup> In this way the marketplace plays a function advocated by Professor Jack Balkin as “protecting and promoting a democratic culture.” Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); see also Alvarez, 132 S. Ct. at 2550 (“[S]uppression of speech by the government can make exposure of falsity more difficult, not less so.”).

<sup>355</sup> It is precisely because “[t]he speech that will be found most threatening by any society . . . is speech that questions the society’s assumptions and orthodoxies,” that robust protection is needed for such speech which is critical of orthodox or deeply held practices and policies. PHILLIPA STRUM, *WHEN THE NAZIS CAME TO SKOKIE* 134 (1999).

<sup>356</sup> See Kenan Malik, *Why Hate Speech Should Not Be Banned*, PANDAEMONIUM (Apr. 19, 2012), <https://kenanmalik.wordpress.com/2012/04/19/why-hate-speech-should-not-be-banned/> (“Demanding that certain things cannot be said, whether in the name of respecting faith or of not offending cultures, is a means of defending the power of those who claim legitimacy in the name of that faith or that culture. It is a means of suppressing dissent, not from outside, but from within. What is often called offense to a community or a faith is actually a debate *within* that community or faith.”); see also Volokh, *supra* note 5 (“Much within Islam—like much within many religions—merits some ‘afflicting’ through criticism and even ridicule.”).

<sup>357</sup> See Leibowitz, *supra* note 204, at 535.

<sup>358</sup> Alvarez, 132 S. Ct. at 2550.

## V. CONCLUSION

Provocative speech, such as the publication of images of the Prophet Muhammad, deserves full constitutional protection. Unlike other types of unprotected speech, any attempts to proscribe such speech would focus not on the intrinsic quality of the speech, but on the reactions of third-parties to the speech. Such an approach would invariably create a terrorist's veto, which distorts, rather than furthers, the marketplace of ideas. The Danish cartoons, and other provocative images of the Prophet Muhammad discussed in this article, were not intended to cause violence, but to evoke a global conversation on religious tolerance and freedom of expression. Those who respond with threats and acts of violence do a disservice to the free flow of ideas in a globalized world. It would be inappropriate to allow those who take offense to certain, perhaps unpopular, forms of expression to exercise a terrorist's veto that effectively circumvents and diminishes this vital debate.