



The First Amendment Provides Full Protection to *Innocence of Muslims*

Questions have arisen over whether the Internet film *Innocence of Muslims* (or its fourteen-minute trailer) should be considered protected by the First Amendment.¹ The very core of free speech would be nullified if the film were denied constitutional protection.

Some may assert that this film meets the standard of “a clear and present danger” in inciting violence, thus rendering it undeserving of legal protection. This standard was expressed in the United States Supreme Court² case of *Schenk v. United States*, 249 U.S. 47, 52 (1919), which upheld a socialist’s conviction for mailing leaflets to potential military draftees, urging resistance to conscription into the armed forces. This case would not be viable precedent today. Its rationale has been substantially narrowed in almost a century of subsequent decisions.

In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the Court imposed a new test for determining if a given expression enjoys constitutional protection. It reversed the conviction of a Ku Klux Klan member who, at a Klan rally, advocated returning African Americans to Africa and returning Jews to Israel. The speaker also said that some type of revenge may be necessary if the government continues to oppress white people. He also used the horrid N-word in saying that they will bury black people. The Court held that the comments were constitutionally protected because they were not directed toward “inciting or producing imminent lawless action” and were not “likely to incite or produce such action.” Even “mere advocacy” of such lawless action

was deemed constitutionally permissible, as long as it was not coupled with inciting or producing such imminent activity.

There is nothing in *Innocence of Muslims* that exhorts anyone to undertake any immediate violent action against Muslims. Ridiculing a religion’s beliefs and its founder is not an incitement to imminent lawless action. If free expression works properly, no adherent of any type of belief system, be it religious or otherwise, has any special right to silence a critic, even if the critic resorts to ridicule. Blasphemy is a human right. An integral part of freedom requires that anyone be permitted to express views that are deeply offensive to someone else’s beliefs. Those whose feelings are hurt are entitled to strike back verbally. The believer has a legal right to say that nonbelievers will burn in hell forever. The nonbeliever has a legal right to say there is no God in the first place, and thus no hell in which anyone will ever burn. Neither has a right to invoke the police power of the state to silence the other. Neither has a right to engage in violent acts against others or against other people’s property as a consequence of feeling offended.

First Amendment law also does not permit a “heckler’s veto,” *Reno v. ACLU*, 521 U.S. 844, 880 (1997). This means that the legal right to say something offensive cannot be abridged because an offended listener will respond violently or have some other negative reaction. Were it otherwise, our rights of free speech

would be at the mercy of those who oppose our views. They could determine the legality of our right to speak merely by how they reacted to what we say. This would be the ultimate form of allowing the fox to guard the henhouse. Thus, no amount of violent rioting anywhere in the world can be permitted to put even the slightest dent in the legal right of this film to be accessible to the public. In *Texas v. Johnson*, 491 U.S. 397, 414 (1989), even

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a form of expression as offensive as setting fire to an American flag was correctly deemed constitutionally protected. The Court held that the mere offensiveness of a form of expression, regardless of how severe, cannot be a basis for allowing it to be legally suppressed.

The doctrine that “fighting words” fall outside of First Amendment protection has also been limited since that concept was first introduced. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942), the Court said that words would not enjoy First Amendment protection if, by their very utterance, they inflict injury

or incite an immediate breach of the peace. The Court allowed branches of government to punish “face to face words plainly likely to cause a breach of the peace by the addressee” (p. 573).

In *Chaplinsky*, the Court upheld the conviction of the defendant for calling a city marshal a “God damned racketeer and a damned fascist” (p. 569). In *Gooding v. Wilson*, 405 U.S. 518, 523 (1972), the Court overturned the conviction of someone who said to a police officer, “you son of a bitch, I’ll choke you to death.” The state statute that the Court held unconstitutional in *Gooding* read: “Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.” While the Court in *Gooding* paid lip service to *Chaplinsky*, it’s clear that by overturning the conviction in *Gooding* and declaring the Georgia statute unconstitutional, the justices were backing away from the restrictions on free expression enunciated in *Chaplinsky*. The Court has clearly moved away from allowing

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the criminalization of speech because of the adverse, or potentially adverse, reaction of listeners.

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. Even if the content of the film were the substance of a face-to-face confrontation with Muslims, it would still be protected expression under today’s more evolved interpretation of the First Amendment.

In *Terminiello v. Chicago*, 337 U.S. 1, 2 (1949), the Court declared unconstitutional a city ordinance that made it a crime to use speech to “stir the public to anger . . . invite dispute . . . bring about a condition of unrest . . . create a disturbance . . . or molest the inhabitants [of the city] in enjoyment of peace and quiet by arousing alarm.” The defendant had made a speech in a filled-to-capacity auditorium, in which he vehemently denounced African Americans and Jews. The audience was growing hostile and there was an antagonistic howling crowd outside the auditorium, (pp. 2–3). The Court said:

A function of free speech is to invite dispute. It may best serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of ideas . . . There is no room under our Constitution for a more restrictive view (p. 4)

Not only does the free speech clause of the First Amendment protect *Innocence of Muslims*, but the establishment clause also provides protection. Ever since *Everson v. Board of Education*, 330 U.S. 1, 15–16 (1947), the Court has held that no branch of government can favor members of any religion over members of any other religion or favor believers over nonbelievers.

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. If a Muslim were to post an Internet film that was scathing in its ridicule and condemnation of atheists, no atheist could legally block that film’s showing or have it taken down. The same principle applies with equal force if anyone posts a film that ridicules Islam and its founder. The United States Constitution is, as it should be, an equal opportunity pro-

textor of those who would give offense to the deeply cherished beliefs of others.


In September 2010, the pope made a scathing attack on “atheist extremism” and “aggressive secularism” while visiting Great Britain.³ Yet we didn’t see violent demonstrations by nonbelievers anywhere in the world. No secular humanist killed or physically attacked any member of the Catholic clergy, and there was no atheist vandalism against any Catholic church or other Catholic-owned property. 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.

Ever since the late 1980s, certain segments of what could be called the “politically correct Left” have promoted the idea that certain ethnic and racial groups deserve special insulation from offense.⁴ They would radically revise and curtail what the overwhelming majority of constitutional scholars have agreed upon as the universal application of the First Amendment. Many of these same advocates of restricting otherwise free expression would also withdraw standard First Amendment protection from pornography.⁵ Some on the politically correct Left have also noticeably voiced support for shielding Islamic fundamentalism from full-blown criticism.⁶ This seems particularly absurd as the types of laws that Muslim fundamentalists would impose on any nation in which they could gain control are antithetical to every concern of any liberal to leftist. Such attempts to restrict free speech are actually instances of a left-wing position that conflicts with the core value of liberal civil libertarianism: freedom of expression.

Violations of the First Amendment are not salvaged by the ideological motivation of the would-be censors.

We secular humanists should always oppose censorship if its purpose is to shield members of any group from being offended. Our very right to disseminate the atheistic aspect of our message would be destroyed if laws could prohibit expressing ideas that deeply offend others.

Secular government would be seriously endangered if there were some special benefits or rights conferred upon adherents of any religious belief system, which were not equally available to everyone else, including nonbelievers. The moment there is any discussion about providing only followers of one or some viewpoints on matters of religion—and no one else—with special legal rights to silence offending critics, we must all, in the words of James Madison, “take alarm at the first experiment on our liberties.”

The First Amendment prohibits giving greater government concessions to Muslims who are enraged by this film than what is provided to anyone else outraged by something they have heard or seen. Our Constitution permits no greater solicitude for the feelings of Muslims aggrieved by the ridiculing of Muhammad than it does for atheists upset over religious proclamations of eternal damnation for nonbelievers. We don't need to protect expression that is not controversial or hurtful. We need constitutional protection for those expressions that cause the greatest offense to all of our most cherished beliefs. Otherwise, we reduce the First Amendment to nothing more than an umbrella that is taken away as soon as it begins to rain. 

Notes

1. “Does ‘Innocence of Muslims’ meet the free speech test?” Available at <http://articles.latimes.com/2012/sep/18/opinion/la-oe-chayes-innocence-of-muslims-first-amendment-20120918>.

2. All cases cited in this article are decisions of the United States Supreme Court.

3. “Pope Benedict XVI Goes to War with ‘Atheist Extremism.’” Available at <http://www.guardian.co.uk/world/2010/sep/16/pope-benedict-xvi-atheist-extremism>.

4. Mari Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” 87 *Michigan Law Review* 2320, 2380 (1989).

5. Amy Adler, “What’s Left: Hate Speech, Pornography, and the Problem for Artistic Expression,” 84 *California Law Review* 1499, 1500, 1503 (1996).

6. Christopher Hitchens, “Of Sin, the Left & Islamic Fascism,” *Nation*, October 8, 2001, available at <http://www.thenation.com/article/sin-left-islamic-fascism>.

7. James Madison, “Memorial and Remonstrance Against Religious Assessments,” 1785, available at http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html.

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The Trouble with ‘Religious Hatred’

In the discourse of human rights, impiety is no longer understood as an affront to a sacred entity but to a human entity. Blasphemy is personal. Under existing human rights treaties, the prevailing legal model of personal blasphemy is “religious hatred.” Roughly speaking, laws against religious hatred or religious hate speech tend to draw from one of two traditions: the public order tradition, which emphasizes the harassing and provoking nature of religious insult, or the group defamation tradition, which emphasizes the den-

igration of believers’ reputation or standing in society.

Both traditions have their moral foundation in a principle of equal respect for individuals. So, they can appear to be the more enlightened, quasi-secular descendants of premodern, theological blasphemy. They can pass muster with the liberal-minded. However, the religious hatred standard of personal blasphemy is in some ways more problematic than its more-religious predecessors.

The act of theological blasphemy can

be defined fairly precisely in terms of the religious doctrines or practices it is designed to protect. Personal blasphemy in its public-order version instead makes the act hinge on the subjective experiences of shock, disgust, indignation, or outrage in the hearer or viewer. Absent any reliable, objective, interpersonal measure of these feelings, judges are left with broad discretion to interpret the intentions and propriety of expression.

At the height of the outcry over the controversial Indian literary anthology