



EUGENE VOLOKH
GARY T. SCHWARTZ PROFESSOR OF LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CA 90095-1476
(310) 206-3926
volokh@law.ucla.edu

October 29, 2012

U.S. Commission on Civil Rights
624 9th St., NW
Washington, DC 20425

Dear Members of the Commission:

I entirely agree that the religious freedom rights and free speech rights of Muslim Americans, as well as all other Americans, should be protected. I have publicly spoken out, for instance, in favor of applying religious accommodation law to Muslim employees as well as to others.¹ I have condemned attempts to criticize Muslim office-holders for taking their oath of office on a Koran.² I have spoken in favor of extending mosques the same property rights extended to other property owners,³ and against attempts to exclude mosques from particular areas.⁴ And I agree that the government should take steps to make Muslim Americans, like Americans of all religions, feel welcome in America.

At the same time, attempts to make adherents of minority religions feel welcome should not end up suppressing the free speech rights of others who seek to criticize those religions. Islam, like other belief systems—Catholicism, Scientology, libertarianism, feminism, or what have you—merits evaluation and, at times, criticism. And under the First Amendment, even intemperate and wrong-headed criticism is fully constitutionally protected. Yet unfortunately attempts at suppression of criticism of Islam have been distressingly frequent.

Universities: Thus, for instance, San Francisco State University's College Republicans held an anti-terrorism rally at which they stepped on homemade replicas of Ha-

¹ See, e.g., Eugene Volokh, *Under the Veil: Religious Exemptions and Muslims*, NAT'L REV. ONLINE, June 22, 2007, at <http://www.nationalreview.com/articles/221360/under-veil/eugene-volokh>.

² Eugene Volokh, *Oh Say, Can You Swear on a Koran?*, NAT'L REV. ONLINE, Nov. 29, 2006, <http://www.nationalreview.com/articles/219360/oh-say-can-you-swear-koran/eugene-volokh>.

³ Eugene Volokh, "What Are D.C. Police Doing Enforcing Shariah Law?", Sept. 16, 2010, <http://www.volokh.com/2010/09/16/what-are-d-c-police-doing-enforcing-shariah-law/> (criticizing a column that asked that question).

⁴ Eugene Volokh, *Ground Zero Mosque (Actually, Two-Blocks-from-Ground-Zero Mosque)*, Aug. 9, 2010, <http://www.volokh.com/2010/08/09/ground-zero-mosque-actually-two-blocks-from-ground-zero-mosque/>.

mas and Hezbollah flags, which contain the word “Allah” in Arabic.⁵ The students were apparently unaware of the flags’ Arabic content, but the students’ symbolic expression of contempt for Hamas and Hezbollah would be constitutionally protected even if they knew what the flags contained—Hamas and Hezbollah are not immunized from such expressions by the religious content of their flags.

Yet offended students filed charges of “attempts to incite violence and create a hostile environment” and “actions of incivility,” prompting a university “investigation” that lasted five months.⁶ The university defended the process, noting that the complaint was not “about the desecration of the flag,” but about “the desecration of Allah.”⁷ It took a federal lawsuit and an injunction by a federal judge to strike down the unconstitutional speech code under which these complaints were filed.⁸

Likewise, at Century College, a public school in Minnesota, administrators ordered a professor to take down copies of the Mohammed cartoons that she had posted on a bulletin board outside her office.⁹ At Purdue University, Muslim students claimed that a professor’s statements criticizing Muslims on his Facebook page were “discrimination” and “harassment,” and called for his firing; it took several months for the university investigation to absolve the professor of these charges.¹⁰

At UC Santa Barbara, the student government refused to let the College Republicans participate in a program that funds student group events, apparently because the Republicans’ proposed event was a speech by the noted conservative and critic of radical Islam, David Horowitz.¹¹ This refusal likely violated the First Amendment, because the Supreme Court has held that student government groups may not discriminate based on viewpoint in such funding decisions.¹²

At UC Berkeley, the student government likewise tried to limit the student newspaper’s funding based on its viewpoint: When the newspaper ran a cartoon, not long

⁵ *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1007 (N.D. Cal. 2007).

⁶ *Id.* at 1009.

⁷ Debra J. Saunders, *S.F. State—Hecklers’ Paradise*, S.F. CHRON., Feb. 8, 2007, at B7 (quoting university spokeswoman Ellen Griffin).

⁸ *Id.*

⁹ See, e.g., Nat Hentoff, *‘Free Speech’ Cries Ring Hollow on College Campuses and Beyond*, USA TODAY, Apr. 19, 2006, at 11A; Foundation for Individual Rights in Education, *Century College: Censorship of Mohammed Cartoons*, <http://thefire.org/case/722.html> (also citing other sources and documents).

¹⁰ See Eric Weddle, *Purdue Professor Cleared in Free Speech Case*, JOURNAL & COURIER (Lafayette, Ind.), Feb. 28, 2012, at A1.

¹¹ See, e.g., Adam Kissel, Foundation for Individual Rights in Education, *UC Santa Barbara Student Government Tries to Derail David Horowitz Event, Lies About It*, May 26, 2011, <http://thefire.org/article/13226.html> (also citing other sources and documents that show that part of the concern about Horowitz was his viewpoint, and in particular his perceived hostility to Muslims).

¹² *Board of Regents v. Southworth*, 529 U.S. 217, 233–36 (2000).

after the 9/11 attacks, showing “two turbaned terrorists ready to ‘meet Allah and be fed grapes,’ but finding themselves instead burning in hell,” the student government demanded that the newspaper apologize; when the newspaper refused, the student government tried to raise the newspaper’s rent, with the coauthor of the bill arguing that the cartoon “perpetuated the kind of ignorance that would lead to harassment.”¹³ And at San Diego State University, some Muslim students seized and destroyed several thousand copies of the student newspaper because they “depicted Iraqi President Saddam Hussein and Palestinian leader Yasser Arafat as camels with President Bush in the middle, thinking, ‘Definitely time for a regime change.’”¹⁴

Likewise, at NYU, Muslim groups urged the school to ban the display of the Mohammed cartoons at a student group event held to discuss those cartoons. NYU ultimately prohibited the student group from displaying the cartoons, unless the group limited attendance to students only—an attendance restriction that the group was understandably unwilling to impose, given that it, like many groups, was trying to reach out to the community at large.¹⁵

Tufts University held that a student newspaper “harassed Muslim students at Tufts, and created a hostile environment for them” by publishing a critical parody of Islamic Awareness Week.¹⁶ A University of Chicago student faced university discipline for posting a cartoon of Mohammed, with the caption “Mo’ Mohammed, Mo’ Problems,” referring to the then-existing controversy about the Mohammed cartoons, though the investigation was stopped when the student apologized for his speech.¹⁷

The NYU, Tufts, and Chicago examples occurred at private universities, which are not themselves bound by the First Amendment. But the incidents still involved troubling violations of academic freedom principles; and, as the preceding paragraphs suggested, public universities have imposed similar restraints.

Moreover, the equation of anti-Muslim speech—including speech in a newspaper—with “harass[ment]” and creation of a “hostile environment” suggests that such speech *must*, by law, be restricted (since religious harassment and creation of a religiously hostile environment in education is prohibited by state antidiscrimination statutes¹⁸).

¹³ Debra J. Saunders, *University of Censorship’s Fall Semester*, S.F. CHRON., Oct. 11, 2001.

¹⁴ See Eleanor Yang, *Cartoons Stir Protest at SDSU: Students Cry Racism, Take Copies off Racks*, SAN DIEGO UNION-TRIB., Nov. 1, 2002.

¹⁵ See, e.g., Hentoff, *supra* note 7; Foundation for Individual Rights in Education, *New York University: Suppression of Discussion of Mohammed Cartoons*, <http://thefire.org/case/707.html> (also citing other sources and documents).

¹⁶ Foundation for Individual Rights in Education, *Tyranny at Tufts: Breaking Promises of Free Expression, University Punishes Student Publication for Political Satire*, May 11, 2007, <http://thefire.org/article/8045.html>.

¹⁷ John Leo, *Post-Cartoon Censorship*, USNEWS.COM, Mar. 8, 2006.

¹⁸ See, e.g., MASS. GEN. LAWS ANN. ch. 151C, §§ 1(b), 2(a) (barring discrimination based on religion in educational institutions, including private educational institutions); *College-Town, Division of Interco, Inc. v. Massachusetts Comm’n Against Discrimination*, 508 N.E.2d 587 (Mass. 1987) (concluding that statutory bans on discrimination should also be read as requiring organizations to prevent or suppress behavior that creates a hostile work environment).

Protecting free speech requires a rejection of the arguments that universities such as Tufts have endorsed.

Off-the-Job Speech by Government Employees: Attempts to restrict anti-Muslim speech are not limited to universities. A New Jersey public transit employee was fired for his off-the-job burning of a Koran; it took an ACLU lawsuit for the employee to get his job back, with back pay and a \$25,000 settlement.¹⁹

Speech in Public Places: Likewise, Terry Jones, the anti-Muslim minister, was barred by a court from organizing a demonstration outside a Dearborn, Michigan mosque.²⁰ Some time later, Dearborn also refused to issue Jones a demonstration permit unless he indemnified the city against “any and all claims, liabilities, or lawsuits, including legal costs and reasonable attorney fees, resulting from their activities on the City of Dearborn property.” A federal court held this unconstitutional, because “permittees cannot be required to waive their right to hold the City liable for its otherwise actionable conduct as a condition of exercising their right to free speech,” and because permit recipients cannot be required “to assume legal and financial responsibility even for those activities at the event that are outside of the permittee’s control, including activities of the City.”²¹

Also in Dearborn, Christian missionaries were prosecuted for allegedly inciting a hostile crowd by “proselytizing to Muslims at the Dearborn Arab International Festival.”²² And Dearborn set up rules that banned leafleting on the sidewalks near the Arab International Festival; Christian proselytizers had to sue to have those rules set aside.²³

In New Jersey, an atheist marcher in a Halloween parade dressed up as a “Zombie Mohammed,” shouted “I am the prophet Mohammed, zombie from the dead,” and apparently carried a sign that said “Muhammed of Islam” on one side and “only Muhammed can rape America” on the other. (A fellow marcher had dressed up as a “Zombie Pope” who “wants your boys,” apparently as a reference to the Catholic Church’s child sexual abuse scandals.) The marcher was then attacked, apparently by a man who was upset by the sign; the police concluded that the guilty party was Talaag Elbayomy, and he was prosecuted.

¹⁹ Larry McShane, *Derek Fenton, Koran-Burning Transit Worker Fired from His Job After Ground Zero Protest, Re-Hired*, N.Y. DAILY NEWS, Apr. 22, 2011.

²⁰ Niraj Warikoo, *Terry Jones Goes Free on \$1 Bond After Jailing; Judge Bars Him from Mosque for 3 Years*, DETROIT FREE PRESS, Apr. 23, 2011. The ACLU of Michigan strongly criticized the result; a spokeswoman said, “This is a complete abuse of the court process, and all those involved should be ashamed. . . . The prosecutor’s office and the Dearborn court turned the First Amendment on its head. What happened today should never have happened.” *Id.*

²¹ *Stand Up America Now v. City of Dearborn*, 2012 WL 1145075 (E.D. Mich. Apr. 15) (internal quotation marks omitted).

²² Naomi R. Patton & Niraj Warikoo, *4 Missionaries Acquitted of Inciting Crowd*, DETROIT FREE PRESS, Sept. 25, 2010, at A4; see also Steve Pardo, *Missionaries Want Case Tossed*, DETROIT NEWS, Aug. 31, 2010, at A4.

²³ *Saieg v. City of Dearborn*, 641 F.3d 727 (6th Cir. 2011).

But the trial judge acquitted Elbayomy for lack of evidence, in the process berating the *victim* of the attack for his speech:

Then what you have done is you have completely trashed [Muslim observers'] essence, their being. They find it very, very, very, offensive. . . . I find it offensive. I find what's on the other side of this [sign] very offensive. But you have that right, but you're way outside your bounds of first amendment rights."²⁴

This understandably made those who are critical of Islam concerned that they would not be legally protected against attacks, and the Pennsylvania Judicial Conduct Board ultimately formally rebuked the judge.²⁵

Speech in Ads on Government Property: In New York and D.C., transit agencies—which, under the Supreme Court's precedents, may not discriminate based on viewpoint in selecting ads—refused to run an ad saying, "In any war between the civilized man and the savage, support the civilized man. / Support Israel / Defeat Jihad."

The agencies took the view that this ad labeled all Muslims as "savages," a view that I think is incorrect: Israel is not in a "war" with all Muslims, but only with terrorists who engage in what most American observers would view as "jihad," which is to say armed "holy war" against Israelis, including against Israeli civilians. Such attacks are indeed "savage," in the same sense that Secretary of State Clinton described the Libyan consulate attackers—who likely saw themselves as indeed waging "jihad," though against America rather than Israel—as a "small and savage group."²⁶ But even if the ad was generally seen as condemning all Muslims (something that I certainly would not endorse), the exclusion of the ad was a First Amendment violation, as two federal district courts ultimately held.²⁷

Proposals to Criminalize Speech: Some legal commentators have argued for even broader restrictions. In the wake of the "Innocence of Muslims" anti-Islam video, Prof. Eric Posner of the University of Chicago,²⁸ Prof. Noah Feldman of Harvard,²⁹ Prof.

²⁴ See Eugene Volokh, *Charges Dismissed in Pennsylvania Prosecution for Attack on Zombie Mohammed Atheist Parader*, Feb. 24, 2012, <http://www.volokh.com/2012/02/24/charges-dismissed-in-pennsylvania-prosecution-for-attack-on-zombie-mohammed-atheist-parader/>.

²⁵ Pennsylvania Judicial Conduct Board, Letter to John P. McTernan, June 6, 2012, <http://www.volokh.com/wp-content/uploads/2012/08/MartinRebukeLetter.pdf>.

²⁶ Secretary of State Hillary Clinton, *Remarks on the Deaths of American Personnel in Benghazi, Libya*, Sept. 12, 2012, <http://www.state.gov/secretary/rm/2012/09/197654.htm>.

²⁷ *American Freedom Defense Initiative v. Metropolitan Transp. Authority*, 2012 WL 2958178 (S.D.N.Y. July 20, 2012); *American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority*, 2012 WL 4845643 (D.D.C. Oct. 12, 2012). A different case, *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation*, 2012 WL 5258999 (6th Cir. Oct 25, 2012), upheld the exclusion of another ad that expressed disapproval of Islam, but only because the court concluded that the transit agency generally excluded all political messages, regardless of viewpoint.

²⁸ Eric Posner, *The World Doesn't Love the First Amendment: The Vile Anti-Muslim Video Shows That the U.S. Overvalues Free Speech*, SLATE, Sept. 25, 2012.

²⁹ Noah Feldman, *Feldman: Should the Internet Age Change Free Speech?*, NEWSDAY, Sept. 28, 2012.

Peter Spiro of Hofstra,³⁰ and the Carnegie Endowment’s Sarah Chayes, former special assistant to the chairman of the Joint Chiefs of Staff,³¹ all argued that such speech should be criminalizable. (These suggestions were all made during the weeks when many believed that the murders of our Ambassador to Libya and three other Americans developed from protests against the video; it is now known that the murders were instead preplanned terrorist attacks.³²) The rationale, which is that the speech could lead to murderous attacks on American interests by those offended by the speech, is formally religion-neutral. But given the events of the past decades (at least since then the riots and murders triggered by disapproval of the *Satanic Verses*), it’s clear that the speech suppressed under such proposals would be almost entirely speech that is offensive to Muslim extremists.

Now some of these actions have been motivated by a concern about protecting Muslims from offense,³³ and others by a concern about violent reactions by Muslim extremists.³⁴ But, either way, we are seeing attempts to restrict the First Amendment rights of those who want to express views critical of Islam and of Muslims.

Whether these attempts are motivated by respect for peaceful Muslims or fear of violent extremist Muslims does not matter. Just as the government must never suppress Muslim speech and religious practice on the grounds that such speech and religious practice might lead to violent retaliation from a few bigoted extremists, so it must never suppress anti-Islam speech on the grounds that such speech might lead to similar violent retaliation.³⁵

Implications: As I said at the outset, I firmly support the free speech, religious freedom, and property rights of Muslims. My concern is simply that all speakers and religious observers be protected, whether they are Muslim or non-Muslim, or pro-Islam or anti-Islam. Nor does this need to be difficult: The government should tell Muslims (as it tells other groups), “We respect you and your rights, and we will defend you and your rights from violence and government oppression, but if you find certain

³⁰ Peter Spiro, *US Envoy Killing Bolsters Case for Hate Speech Ban*, Sept. 12, 2012, <http://opiniojuris.org/2012/09/12/us-envoy-killing-bolsters-case-for-hate-speech-ban/>.

³¹ Sarah Chayes, *Does ‘Innocence of Muslims’ Meet the Free-Speech Test?*, L.A. TIMES, Sept. 18, 2012.

³² David D. Kirkpatrick, *Election-Year Stakes Overshadow Nuances of Libya Investigation*, N.Y. TIMES, Oct. 16, 2012, at A6.

³³ See, e.g., the Zombie Mohammed case and the SFSU and Tufts controversies.

³⁴ See, e.g., the Terry Jones Dearborn incident, the Washington anti-Islam ad incident, and the calls for criminalizing blasphemous speech in the wake of the “Innocence of Muslims” videos.

³⁵ For instance, the fear of a violent reaction to a demonstration can’t justify even the modest burden of requiring the demonstrators to pay more for their permit in order to cover security costs. See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (concluding that such a greater fee on “[t]hose wishing to express views unpopular with bottle throwers” is unconstitutional). It follows that such a fear can’t justify the much more severe burden of suppressing the speech outright.

kinds of speech offensive you should respond with speech of your own; we cannot respond by trying to suppress such speech.”

But the government ought not try to define political and religious speech as “discrimination” or “harassment,” and then suppress it in the name of civil rights. Nor should the government conclude that the speech is stripped of protection because it is supposedly constitutes “hate speech”; the Supreme Court’s precedents solidly reject the view that there is a “hate speech” exception to the First Amendment.³⁶ Nor should it surrender to the threat of violence, a course of action that only encourages more such threats in the future.³⁷ Instead, the government should protect the civil rights of all, regardless of their religion or ideology.

Some foreign countries, to be sure, do indeed seem to prohibit speech that is perceived as blasphemy or undue criticism of religion—not just Islam but also, for instance, Christianity: Consider, just over the last two years, foreign incidents involving *Jesus Christ Superstar*,³⁸ a parody of the venerated Greek Orthodox monk Elder Paisios,³⁹ mockery of the Bible,⁴⁰ and a painting of Jesus with a Mickey Mouse head.⁴¹ But in America, such speech is of course fully protected against government suppression. That must remain so, whatever religion is targeted.

Please let me know if I can elaborate further on these statements.

Sincerely Yours,



Eugene Volokh

³⁶ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

³⁷ See Eugene Volokh, *Why Punishing Blasphemous Speech That Triggers Murderous Reactions Would Likely Lead to More Deaths*, Sept. 15, 2012, <http://www.volokh.com/?p=65062>.

³⁸ Eugene Volokh, *Sales of Tickets for Jesus Christ Superstar Blocked by Russian City Government*, Sept. 30, 2012, <http://www.volokh.com/2012/09/30/sales-of-tickets-for-jesus-christ-superstar-blocked-by-russian-city-government/>.

³⁹ Eugene Volokh, *Blasphemy Prosecution*, Sept. 24, 2012, <http://www.volokh.com/2012/09/24/blasphemy-prosecution/> (describing prosecution in Greece).

⁴⁰ Eugene Volokh, *Another Conviction in Europe for Insulting Religion*, Jan. 17, 2012, <http://www.volokh.com/2012/01/17/another-conviction-in-europe-for-insulting-religion/> (describing conviction in Poland).

⁴¹ Eugene Volokh, *Mickey Jesus Banned in Russia*, Aug. 28, 2011, <http://www.volokh.com/2011/08/28/mickey-jesus-banned-in-russia/>.