

# Is it winter in Paris for free speech?

By Mitchell Keiter

The Paris catastrophe transcends ordinary criminal law issues. But the California Supreme Court has developed doctrines that sensibly address a wide range of antisocial behavior. Although we causally use words like “cause” and “provoke” in everyday conversation, their precise criminal law meanings can offer much-needed guidance as the West responds to terror.

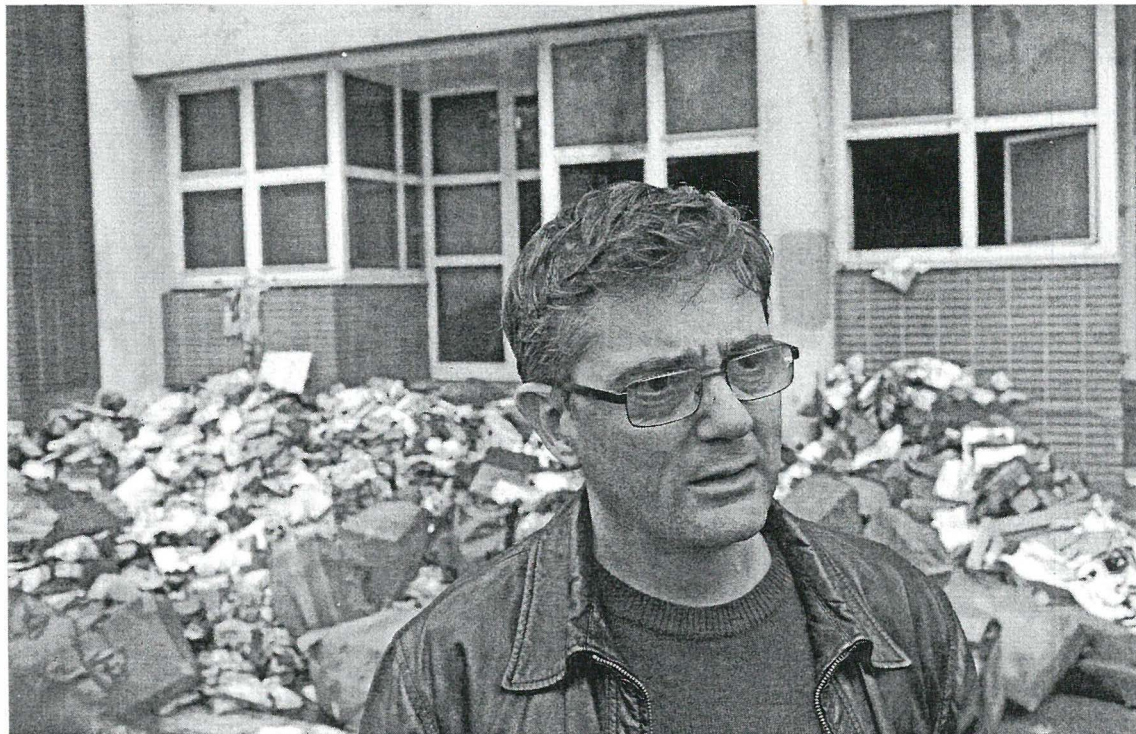
## Causation

Some have contended the cartoons “caused” the murders at Charlie Hebdo. The law distinguishes between the “legal” or “proximate” cause and the “actual” or “direct” cause. A party legally causes harm, even when she does not directly inflict the injury, by setting in motion a course of events that naturally and probably produces the harmful result. A potential example is the maxim describing the limits of free speech, that one may not falsely shout “Fire!” in a crowded theater. Many have suggested this maxim applies to Charlie Hebdo.

If A’s false shouts induce panic in B, who then tramples C to death, the law may deem A, not B, the legal cause of death. A may be liable for murder (or manslaughter) depending on her mental state, because such a fatal response may be a natural and probable result of the false alarm — for which the actual killer (B) is blameless.

But this massacre is different. An antecedent cause is not responsible for a killing that is intentional, felonious and committed with malice aforethought. *People v. Cervantes*, 26 Cal. 4th 860 (2001). Such malice breaks the chain of causation, because murder (unlike a fatal accident) is not a natural result. Although the trampling “B” is blameless, the terrorists were not. The cartoon no more “caused” the murders than a woman’s dress causes her rape.

In Friday’s Daily Journal, Julie Kessler offered additional “causes” for the murders: France’s involvement in the campaign against Daesh



Associated Press

Charlie Hebdo’s editor in chief, Stephane Charbonnier, in Paris in 2011.

(ISIS), and pervasive poverty/unemployment in Muslim neighborhoods. Neither caused the terror. If there were a causal link such that overseas violence would naturally result in Parisian murder, it would run the other way. French Christians, observing the rape and slaughter of thousands of their brethren by Daesh and Boko Haram, would rise up and take revenge against Muslims in France. That never happened.

Likewise, there are millions of unemployed people throughout Europe. None conducted a paramilitary assassination of journalists. And unemployment doesn’t explain the targeting of a kosher market for the taking and murdering of hostages. (After CNN reported it wasn’t an attack on Jews because Muslims also shopped there, the terrorist Amedy Coulibady himself confirmed by phone that he selected the store to target Jews.)

## Provocation

A related concept is “provocation,” which serves as a mitigating factor in evaluating homicides. A defendant’s homicidal response may be manslaughter rather than murder if the victim engaged in legally adequate provocation. But the state Supreme Court has explained that provocation involves an objective standard: no one “may set up his own standard of conduct” in claiming provocation. *People v. Beltran*, 56 Cal. 4th 935 (2013). Although some advocate a subjective, culture-specific standard, California fortunately has declined to adopt it.

Such a defense would create a slippery slope. Some Muslim patriarchs are willing to kill their daughters who “dishonor” the family, sometimes for merely marrying the man of their choice. Should such a killing be only manslaughter, a relative slap on the wrist? Others may subjectively

feel “provoked” by an unveiled woman, a gay bar, or a market selling pork. But such reaction is objectively unreasonable. Louis XIV famously declared France had “un roi, une loi, une foi.” (One king, one law, one faith.) Today’s California has many faiths, but still one law of homicide, which applies to all of them.

But this objective standard is often absent from the public debate, which tends to see provocation as being in the eye of the beholder. Although the law treats all cultures equally, the media do not. CNN never refers to “Moses our Rabbi/Teacher” or “Jesus our Savior,” yet refers to “the Prophet Muhammad” or just “the Prophet,” as if there were no others. The New York Times, which not only showed photographs of a crucifix dipped in urine and the Virgin Mary covered in dung but insisted that taxpayers subsidize such imagery, refused to show the Charlie Hebdo cartoons. The

New York Daily News showed a cartoon (in a photograph of a deceased editor) that satirized an imam and a rabbi, but blurred one subject and not the other. (Guess which.)

Our political leaders have been no better. After laughing it up on Broadway at “The Book of Mormon,” Secretary of State Hillary Clinton condemned an anti-Muslim video for seeking to “denigrate a great religion,” and promised to have its producer arrested. President Barack Obama told the United Nations that “The future must not belong to those who slander the prophet of Islam.”

He was wrong. The future must not belong to countries where blasphemy is a capital crime — *de jure* or *de facto*. The future will undoubtedly belong to countries where speech and religious practice are not constrained by intimidation.

Europe is no longer such a place. A German paper that reprinted the car-

toons was an arson victim the next day. Paris’ Great Synagogue was closed this Sabbath for the first time since World War II, and Jews have long been advised not to wear distinctive clothing in public. Is buying kosher food also a “provocation,” or “cause” of violence?

A ubiquitous slogan since the murders is “Je suis Charlie,” “I am Charlie.” If only. Editor Stephane Charbonnier defiantly stated he would rather die standing than live on his knees. Few in today’s media agree. Newspapers should show the cartoons every day, not just for their news value but as a tribute to those who were martyred for their commitment to freedom, and as a disincentive to those who would use violence to censor. Yet the media organs that are most critical of a “fear of Islam” are the ones most paralyzed by it. Methinks the “Grey Lady” doth protest too much.

Just last month, the media warned that we needed to see “The Interview,” lest even nonlethal terror succeed. But neither Hollywood nor Broadway would even contemplate a Muslim equivalent of “The Interview,” or “Book of Mormon.” There are not enough terrorists to silence directly every “infidel.” But if we silence ourselves, they won’t need to.

**Mitchell Keiter** is a certified appellate law specialist at Keiter Appellate Law. (Keiter.Appellate.Law.com) He is the author of “Fifty Years of the Washington-Gilbert Provocative Act Doctrine: Time for an Early Retirement?” to be published later this month in California Legal History.

