"Restrictions on Free Expression as a Counterterror Policy in the U.S. and France: Divergence by Design or Curious Convergence?

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RESTRICTIONS ON FREE EXPRESSION AS A COUNTERTERROR POLICY

Abstract

How do France and the United States – two countries facing a similar terrorist threat but which have different national, institutional, and legal traditions – respond to terrorism in the post-9/11 era? Why might these states respond with varying levels of repression? This paper specifically explores how restrictions on free expression - as a dimension of US and French counterterror policy - are realized given the political, cultural, and legal-procedural differences between the US and France. Drawing on theoretical predictions, we would expect that the US – with its strong constitutional free speech protections and a tradition of limited government – might respond less aggressively than France, which has a more flexible constitution and a long tradition of statism. This paper contends that while France does indeed criminalize and censor terror-related expression to a greater degree than the US, the US possesses many more tools to tackle terror-related expression than its constitution would suggest. This paper further holds that the primary explanation for less repressive US action does not stem from constitutional limits, but rather from the US proclivity for externally-focused, military-driven counterterrorism, which has taken focus away from domestic measures to disrupt terrorist propaganda. In both cases, "restrictions on free expression" is operationalized as 1) *Criminalization* of any verbal sympathy toward terrorist acts and 2) *Censorship* of pro-terror propaganda. This paper identifies what policies these two states *have and have not* pursued, and explains *why* this is so. In this way, this paper has implications for practitioners and academics – I shine light on unexplored strategies and I advance the theoretical literature on counterterrorism. Moreover, in an era where states struggle to develop effective counterterror strategies that also uphold the rule of law, this study also provides timely and warranted context on the interplay between security and civil liberties.

Foreword and Acknowledgments

This paper has been adapted from my 2017-2018 Honors Thesis in the Department of Political Science at the University of California, Berkeley. I would like to thank Professor Jonah Levy, who advises my thesis and provides me with valuable feedback. My thesis – titled "Counterterrorism in the United States and France in the post-9/11 era: Divergence by Design or Curious Convergence?" – is comprised of three chapters, each of which covers a different policy dimension (Restrictions on Free Expression, Powers of Detention, and Surveillance). This paper presents my chapter on Restrictions on Free Expression. On the dimension of Powers of Detention, I find that the US has transcended theoretical predictions and is responding more aggressively than France, while on the dimension of Surveillance, I find that both countries respond similarly. I have chosen to present my chapter on Restrictions on Free Expression because it contains a timely analysis of the profound differences between the American and European view of freedom of expression in the context of a growing terrorist threat, and it calls on other researchers to further contribute to developing policy solutions. My hope – in presenting this chapter instead my other chapters in front of an interested audience at the Claremont-UC Undergraduate Conference on the EU – is to provide a clear basis for further study on this topic and to inspire other students and researchers to build on my work, which has identified and explained clear policy gaps and thus has broad relevance for scholars, practitioners, and the public at large.

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Introduction

The complexity and lethality of terrorist attacks in Western states has intensified since 9/11. Accordingly, counterterror policies have taken on an increasingly preventive character - that is, they seek to *find and incapacitate* terrorists before they act, as opposed to the traditional model of simply *discouraging* terrorist activity through increased criminal penalties. This shift is especially apparent in the United States (US hereafter) and France, which have remained among the principal targets of Islamist terrorism. Given the political, cultural, and legal-procedural differences between the US and France, we would expect notable differences in how these two states realize such a shift. This paper specifically explores how restrictions on free expression - as a dimension of US and French counterterror policy - are realized given such differences. The US – with its strong constitutional free speech protections and tradition of limited government – might respond less aggressively than France, which has a more flexible constitution and a long tradition of statism. This paper contends that while France does indeed criminalize and censor terror-related expression to a greater degree than the US, the US possesses many more tools to tackle terror-related expression than its constitution would suggest. This paper thus holds that the primary explanation for less repressive US action does not stem from constitutional limits, but rather from the US proclivity for externally-focused, military-driven counterterrorism, which has taken focus away from domestic measures to disrupt terrorist propaganda. In this paper, I first define the term "repression" and I explain the theoretical bases for the US and France responding similarly or differently. Second, I examine *how* both countries have responded in practice and I provide explanations for their actions in two discussion sections, with the US first and France second. In both cases, "restrictions on free expression" is operationalized as 1) *Criminalization* of any verbal sympathy toward terrorist acts and 2) *Censorship* of pro-terror propaganda.

Defining "Repression"

This paper makes reference to "repression" in order to position the US and French responses within the existing scholarly framework. In general, the literature identifies three ways to classify approaches to counterterrorism - reconciliatory (soft measures to address the source of the threat), legal-judicial (regular criminal justice mechanisms to bring terrorists to trial) and repressive-coercive (hard power mechanisms to destroy the terrorist threat) (Crelinsten and Schmid, 1992; Epifanio, 2011; Pedahzur and Ranstorp, 2001; Perliger, 2012; Shapiro and Suzan, 2003). These classifications often serve as a point of departure for scholars, who refer to counter-terror policies in these terms. More recently, however, scholars argue that the distinction between legal-judicial and repressive-coercive models is fading - most states in practice increasingly use elements of both in order to deal with a dynamic and ever-growing threat. This paper thus assumes a consolidation of this debate, creating two working classifications - reconciliatory or repressive. This paper is concerned with the latter and holds that "repressive" policies are - for better or for worse - those that increase state power, reduce civil liberties, and use exceptional legal and judicial procedures to *proactively disrupt* the terrorist threat (Crelinsten and Schmid, 1992; Dragu, 2017; Epifanio, 2011; Martin, 2006; Pedahzur and Ranstorp, 2001; Perliger, 2012; Shapiro and Suzan, 2003). Repression is neither "good" nor "bad" – I use it as a neutral technical term in order to classify policies in accordance with the existing counter-terrorism literature. Indeed, as I will show, a "repressive" response may be effective in some cases but not others.

Literature Review

France and the US have many political and cultural differences. In their study on the US response to 9/11, Kroenig and Stowsky (2006) show that in the US, a tradition of limited government, separation of powers, and openness to interest groups in policy spheres prevents

major growths of state power, even in times of national crisis. Stemming from a tradition of limited government is the popular idea that the state is not always right and that it may not always be acting with the general will in mind, while separation of powers prevents the executive from taking arbitrary action in times of national panic (Kroenig and Stowsky, 2006). Meanwhile, interest groups looking to stop government encroachment of civil liberties remain strong in the US (Kroenig and Stowsky, 2006). This characterization of the US suggests that an aggressive response to terrorism would be restrained.

Conversely, the literature highlights the potential for more aggressive state action in France. Various authors characterize France as highly statist, meaning there is popular support in France for "the legitimacy and efficacy of state intervention," especially in crisis situations (Elgie, 2004; Saurugger and Grossman, 2006; Woll, 2009; Jaworski, 2011). In the context of counterterrorism, it would then follow that the French state is to be regarded as the bearer of the 'best' solution to fighting terrorism and non-state actors such as interest groups or civil society as being of limited use for technical matters such as restoring national security. Parallel to the idea of the primacy of the French state is a weaker separation of powers that privileges the president - Elgie (2004) notes that the president in France is granted broad, discretionary powers under the Constitution of 1958 and tends to drive national policy agendas. In the context of counter-terrorism, it would follow that a more subservient, 'rubber stamp' Parliament and a stronger president in France would provoke a more aggressive response to terrorism than the US.

On the legal-procedural front, Masferrer and Walker (2013) outline the ways in which different legal traditions (common law versus civil law) can produce varying levels of repression. Common law systems (such as the US) use statutes, legal precedent and judicial opinion as sources of law (and are thus more flexible) and operate with a principle of neutral arbitration in

which both sides are subjected to the same rules (Masferrer and Walker, 2013). In contrast, civil law systems (like France) do not typically consider legal precedent to be a source of law - codified statutes are designed to be all-encompassing and more rigid. As for arbitration, Shapiro (2008) adds that terrorism investigations in France are handled by specialized magistrates, who "act like prosecutors but have the powers of a judge" to authorize searches, warrants, and detentions, making them potentially biased toward one outcome (para.8). This arrangement stands in contrast to the US, where a stricter separation between judges and prosecutors exists.

Another potential driver of cross-national variation is the role of judicial review – that is, "the power to nullify statutes enacted by the legislative body by declaring them in conflict with the provisions of the constitution" (Shapiro, 1989). In France, a variant of judicial review is carried out by the Constitutional Council, an executive "advisory body" (Creelman, 2010) that "has no other function than determining constitutional questions" and can traditionally only exercise review power *before* laws are promulgated (Shapiro, 1989). Unlike the arrangement in the US, "individuals [in France] do not have the right to petition the Council" – this right is reserved for the President, Prime Minister, Members of Parliament, and certain other heads of the Senate (Elgie, 2004). Moreover, "the Council has no appellate power," meaning that it can publish opinions only on laws that it has been requested to analyze (Elgie, 2004). In this way, if sufficient agreement on a bill among the legislative and executive branches is established and the bill is not forwarded to the Council, even unconstitutional counterterror policies can be passed, with "no [additional] recourse…within the French judicial system" (Creelman, 2010).

Whereas the Constitutional Council in France is seen as an outer part of the *legislative* process, the judiciary in the US – and specifically the Supreme Court – acts as an *independent, juridicial* check on legislative and executive actions (Creelman, 2010). *After* laws are passed,

their constitutionality can be challenged by individuals, not just by "specially designated holders of political authority," as in France (Shapiro, 1989). Even if an unconstitutional counterterror law enjoys wide support from the President and Congress, the Supreme Court can strike it down following complaints initiated by *individual citizens* (Shapiro, 1989). Thus, we can expect that the US will be more active in restraining constitutionally questionable counterterror policies.

The two states' varying levels of experience in fighting terrorism could also produce a different response. Rees and Aldrich (2005) contend that cross-national policy convergence or divergence is often a product of how much experience government agencies have in dealing with terrorist threats. Whereas France has been afflicted by many waves of terrorism since roughly the 1960s, terrorism became a major concern in the US only after 1995 (Rees and Aldrich, 2005). In this way, France has had more time to develop its counterterror apparatus than the US.

Despite these differences, there are also valid reasons to expect that the US and France would be similarly repressive. The theoretical bases for similarity draw on contemporary understandings of the terrorist threat that many Western democracies currently face. For example, in his comparative study of counterterrorism in Britain and France, Foley (2009) contends that when states are faced with a similar threat that is of comparable lethality, is growing in terms of material capability, and is underpinned by "hostile and unrestrained" anti-West sentiment, they will draw the "same broad implications" about the threat and will respond in similar ways. More specifically, if the US and France are both facing a new type of threat that is more globalized and thus harder to detect, then we can expect both states' responses to be similarly intrusive. This so-called "new terrorism" – a concept introduced by Bruce Hoffman in 1998 and further developed by other scholars – has several dimensions to it that constrain states' options for fighting terrorism and may push even radically different states into developing the

same response. First, the "religious" or "extremist" element of "new terrorism" has transformed terrorism from a form of violent *political communication* to a perceived *duty* to kill as many people as possible, which pushes states to respond more forcefully since the cost of mistakes is higher (Hoffman, 1998). Second, this 'duty to kill' motivates both "foreign and locally based operatives" to carry out attacks, meaning that states must develop both a domestic and an international response (Foley, 2009). Finally, this "new terrorism" is characterized by self-radicalization via internet propaganda and the departure of foreign fighters to training camps. These processes tend to target those who do not have a violent history, which makes detection and flagging of suspects harder, leading to more sweeping surveillance and preemptive state intervention (Hellmuth, 2015). In short, the dynamic and globalized nature of the post-9/11 terrorist threat could be producing policy convergence between the U.S. and France.

In relation to the dynamics of the threat, diplomatic pressure to craft similar policies could also generate similar levels of repression. Neumayer et al (2014) - in their study on how "peer groups of countries" respond to terrorism - find that countries sharing strong diplomatic ties or belonging to the same alliance "cannot ignore" new counterterror laws in other "peer" states and thus enact similar policies through a process called the "Peer Effect." Given strong ties between the US and France, it is conceivable that both countries may in effect "copy" each other.

Restrictions on Free Expression - A Key Dimension of US and French Counterterrorism

The freedom of association, expression, and media that characterizes most democratic states is both a strength and source of vulnerability. In the context of "new terrorism" (Hoffman, 1998), terrorists can exploit these freedoms – especially as they relate to media and the free flow of information – to spread pro-terror propaganda and incite self-radicalization (Heymann, 1998). The degree to which democratic states have flexibility to regulate potentially dangerous

expression is not uniform and is set in a particular socio-political context. The following sections reveal that France is more repressive due to a historical proclivity for regulating expression and a more flexible statutory and constitutional framework to do so. Conversely, the US is less repressive because it lacks explicit mechanisms to restrict even virulent expression, but more importantly because the post-9/11 US doctrine of fighting terrorism *abroad* and with *military* mechanisms directs attention away from addressing domestic diffusion of terrorist propaganda.

1. United States

The United States has a long history of restricting civil liberties - and specifically free expression - in times of national crisis and war. In particular, verbal support for an "enemy" and public dissent against wartime governance were on several occasions from the Civil War to the Vietnam War met with little tolerance and subsequently criminalized (Stone, 2009). A prominent example of this is the passage of the Espionage Act during World War I, through which over 2,000 individuals were prosecuted for diffusing "disloyal or seditious expression" (Stone, 2009). In response to the 9/11 attacks – which killed around 3,000 people – discourses of war had re-emerged, with President Bush declaring a "War on Terror" and reminding the public that "you are either with us or with the terrorists" ("President Bush's Address," 2001). Given the US intolerance for dissent during the Civil War, the World Wars, and finally the Vietnam War, one might expect the US to continue restricting free expression and to broaden the definition of what constitutes "disloyal" discourses, as it had done in previous crises. However, the post-9/11 record shows something different - despite Bush's hardline rhetoric, the US ultimately exercised restraint and defended expression that would not be tolerated in the French context. That said, the US still can - through careful maneuvering between statutes and the Constitution - restrict terror-related expression, but not nearly to the degree that France can. In this section, I explain

the US approach and position it in relation to "new terrorism." First, I provide an overview of the jurisprudence and legal doctrines governing free expression in the US (The Brandenburg Standard and the First Amendment). Second, I draw on case studies to explain how the US has worked around jurisprudence in order to criminalize pro-terror expression (Material Support, Seditious Conspiracy, and Immigration Law). Third, I explain the anomalous US approach to censorship and why the US has been reluctant to stop the circulation of pro-terror propaganda.

A. Jurisprudence

I. The Brandenburg Standard

The US view of free expression is governed by the so-called "Brandenburg Standard," which asserts that speech can only be restricted if it incites "imminent lawless action" (*Brandenburg v. Ohio, 1969).* Charles Brandenburg - a Ku Klux Klan (KKK) leader - was assigned criminal charges in Ohio for inviting media reporters to cover a rally in Ohio which called for "violence or unlawful methods of terrorism" against Jews, African-Americans, and their allies (*Brandenburg v. Ohio, 1969).* The Supreme Court invalidated the charges and ruled that such expression is protected by the US Constitution, thus asserting that while US authorities have the right to "place restrictions on the time, place, and manner of a protest or rally," content-based restrictions are not constitutional (Wolfe et. al, 2017). In the post-9/11 context, the "Brandenburg Standard" and its narrow definition of what constitutes unlawful expression has impeded US efforts to control the flow of pro-terror speech. To this day, the US remains one of very few Western democracies that still has not been able to pass legislation to explicitly address pro-terror expression (Tsesis, 2017). *Brandenburg* suggests "almost no room for prohibitions on speech aimed at supporting terrorist acts or terrorist organizations, let alone, of incitement to terrorism, or glorification of terrorism" (Barak-Erez and Scharia, 2010, p.16).

II. The First Amendment

In practice and on paper, this arrangement stands in contrast to the free speech paradigm inscribed in the French Declaration of Rights of Man and Citizen, which asserts that statutes can limit the extent of free speech, while the First Amendment of the US Constitution "categorically rejects this possibility with two words - "*no law"* [can prohibit free speech]" (Zoller, 2009). In the context of studying responses to "new terrorism" - for which one of the primary proliferatory mechanisms are physical and online propaganda - the above constitutional provision combined with the jurisprudence stemming from it offer an important takeaway: the US government "may not regulate expression that advocates the use of force or the violation of the law" unless it can be proven that such expression is *intended* to incite *imminent* unlawful action (Boyne, 2009). It is through this distinction that the US and France have produced widely different outcomes.

B. Criminalization

I. Working Around the First Amendment with the Material Support Clause - The Case of Holder v. Humanitarian Law Project (2010)

Despite this distinction, the US is not without means to restrict expression. Before 9/11, the Antiterrorism and Effective Death Penalty Act (AEDPA) already criminalized *intentional* material support for terrorist acts, such as offering money, logistical support, or efforts to conceal terrorist activity (Doyle, 2010). In 2001, the Patriot Act amended Sections 2339A/B of the AEDPA to increase maximum penalties for material support, to incorporate "expert advice or assistance" into the definition of "material support," and to subject "attempts or conspiracies" to violate the AEDPA to the maximum penalty established by this statute (Doyle, 2010).

These modifications played a primordial role in the Supreme Court case of *Holder v. Humanitarian Law Project (2010)*, which greatly clarified the ways in which restrictions on free

expression remain a key dimension of US counterterror policy, despite constitutional limits. The Humanitarian Law Project (HLP) - a non-governmental organization - came under government scrutiny while providing legal training to the Kurdistan Workers Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE") (Tsesis, 2017). Since 1997, both the PKK and LTTE have been designated by the US as terrorist organizations, putting HLP's legal advisory services within the reach of Sections 2339A/B (*Holder v. HLP, 2010)*. HLP argued that Sections 2339A/B were unconstitutional, while several *amicus curiae* briefs countered this by saying that even if HLP's efforts were *well-intentioned,* the PKK and LTTE could still exploit HLP's assistance in order to perpetrate attacks (*Holder v. HLP, 2010)*. Ultimately, the Court ruled against HLP, saying that Sections 2339A/B are constitutional because "material support" is not an issue of "speech," but of "conduct," permitting the court to avoid the highest "strict scrutiny" judicial standard, reserved only for "sacred" rights such as free speech (*Holder v. HLP, 2010).*

II. Working Around the First Amendment with Seditious Conspiracy - The Cases of US v. Rahman (1999) and US v. Al-Timimi (2006)

Apart from invoking material support clauses, US authorities can also bring forward the charge of "seditious conspiracy" – that is, conspiring "to overthrow, put down, or to destroy by force the Government of the United States, or to levy war" (18 § U.S.C 2834). In the context of terrorism, this means that the act of *planning* an attack and discussing the details - not actually *carrying out* an attack - is a crime (18 § U.S.C 2834). Barak-Erez and Scharia (2010) identify two prominent cases *(US v. Rahman, 1999; US v. Al-Timimi, 2006)* in which the US was able to convict persons engaging in verbal incitement to terrorism because such expression was tied to *some* sort of tangible action, even if it was not necessarily the *cause* of such action.

Abdel Rahman - an Islamic scholar and cleric - came to the attention of US authorities

after instructing his followers to "do jihad with the sword, with the cannon, with the grenades, with the missile...against God's enemies" *(US v. Rahman, 1999).* In line with the Brandenburg standard, this speech on its own was not enough to charge Rahman. It was not until after Rahman was linked to the 1993 World Trade Center bombing attempt that charges of seditious conspiracy were brought forth, landing him a life prison sentence *(US v. Rahman, 1999).* Rahman did not necessarily participate in the technical aspects of the planned attacks, but rather dispensed ideological validation and motivation among his followers (Barak-Erez and Scharia, 2010, p.17). If the same speech were given in France - even without the accompanying evidence of a planned attack - it is very likely that Rahman would have been charged with incitement to terrorism.

The case of Ali Al-Timimi similarly couples speech *with actions* as a basis for conviction under the seditious conspiracy statute. Al-Timimi - an American-born principal lecturer at the Dar al-Arqam Islamic Center in Virginia - met with several members of the Virginia Jihad Network in the days after the 9/11 attacks and advised them that it was "necessary to defend Islam by engaging in violent jihad against enemies of their faith, including the United States military in Afghanistan," after which several followers departed the US for a training camp in Pakistan (*US v. Al-Timimi, 2006).* Because the followers' departure occurred almost immediately after Al-Timimi's statement, it was argued that Al-Timimi was responsible for his followers' decision to join a terrorist organization in order to "levy war" against the US, and thus he engaged in seditious conspiracy, for which the minimum sentence is life in prison. (*US v. Al-Timimi, 2006).* The presiding judge lamented that while the punishment of life in prison is "very draconian," she also asserted that Timimi's First Amendment rights were not violated, famously saying "this is not a case about speech. This is a case about intent" (Markon, 2005).

If the Rahman and Al-Timimi cases were not about speech, then they were exempt from the

Brandenburg precedent, making them "untouchable" from the perspective of *criminal* law.

III. Working Around the First Amendment with Immigration Law and Deportation

There is yet another mechanism - concerning administrative law - through which such remarks could have conceivably been punished. The punishment for immigration offenses such as providing material or verbal support for terrorist acts (INA, Sec. 212), is not imprisonment but deportation, precisely because immigration is seen as a matter of "administrative law" and not criminal law ("Do Noncitizens Have," 2001). In this way, Rahman - as a noncitizen - could have simply been deported to Egypt on the basis of his statements, and the Brandenburg standard would not apply. Yet, US authorities waited until Rahman became involved in planning an attack so as to create a justification to put him behind bars and to contain his interactions with followers. In this sense, the US strategy of waiting until *speech turns into action* helps sort out threatening cases of potential terrorists from the non-threatening ones, and in the Rahman case actually helped foil an attack. As I will show later in this paper, France is much less successful with this – prosecutors tend to look narrowly at what is being *said* but not what is being *done*.

C. Censorship

I. Terrorist Propaganda on the Internet: An Overview of the Anomalous U.S. Approach

Despite the above efforts to control and criminalize terrorist speech in light of the First Amendment and *Brandenburg*, there remain areas in which the US is ostensibly without *any* restrictive mechanisms, thus weighing greatly on this paper's calculation of repressiveness. Consider the case of terrorist propaganda on the internet - a key driver of self-radicalization that was responsible for motivating Jihadist attacks such as those in San Bernardino, California in November 2015 and in Orlando, Florida in June 2016, which together killed close to 80 people (Tsesis, 2017). In these cases, the perpetrators were radicalized through lectures by radical

imams on YouTube and ISIS propaganda on Facebook and Twitter, while also consulting online tutorials to learn how to construct explosives and use automatic firearms (O'Brien and Ingram, 2016; Whitcomb, 2017). Recent estimates reveal a disturbing rate at which groups such as ISIS can mobilize through social media - for example, the Brookings Institution reports that there are currently upwards of 46,000 active Twitter accounts that pledge support to ISIS, each with an average of 1,000 followers, all "retweeting" at a rate 10 times higher than the average Twitter user (Berger and Morgan, 2015). Facebook continues to allow ISIS to operate an active page, while YouTube remains a key platform for housing lectures and tutorials. Among the handful of Western democracies that have been afflicted by terrorism - and even those such as Canada that have suffered comparatively few attacks - the United States is the only state that still does not have explicit statutory means to block pro-terror propaganda and training materials circulated on the Internet (Tsesis, 2017). Perhaps unsurprisingly, the underlying barrier to such a law stems from a contemporary understanding of the First Amendment and the *Brandenburg* precedent.

II. Explaining the US Reluctance to Censor Pro-Terror Propaganda

Yet this is puzzling because as Tsesis (2017) notes, the context in which the *Brandenburg* incident played out is very different from what occurs in cyberspace - Brandenburg's rally was attended only by KKK members and the reporters that he invited, and thus the Court reasoned that their isolated speech among "insiders" posed no *imminent* threat to the public at large (p.667). In this way, the Court claims that statements pose either an "imminent" or "vague" threat based on an assessment of *who* the audience is. In the current context however, terrorist groups use online platforms for "recruitment, propaganda, fund raising, indoctrination, data mining, and for sharing strategies for attacking and destroying targets," all within the reach of the public (Berger and Morgan, 2015). In the *Brandenburg* case, the audience was contained and

all members present were deemed to be 'allies' of the KKK. In the context of terrorist propaganda on social media, the audience is uncontained, global, and diverse.

Even if the Supreme Court refuses to recognize this distinction in the future, companies such as Twitter, Facebook, or YouTube - as privately-owned communication platforms - remain free to set their own content standards without being beholden to First Amendment guarantees and legal precedent (Softness, 2016). Conversely, US legislators - in crafting means to remove pro-terror propaganda - would be bound by the First Amendment. Given these restrictions, perhaps the only viable tool is self-regulation by companies such as Facebook, Twitter, and YouTube. On paper, all three companies claim that posting terrorist propaganda is a violation of their terms of use and is subject to removal ("The Twitter Rules;" "Terms and Policies;" "Community Standards," 2018). To their credit, some posts have been removed, such as San Bernardino attacker Tashfeen Malik's pledge of allegiance to ISIS on Facebook, which was removed after the attack ("Bill Would Require," 2015; H.R. 4628, 2015). In practice, most content remains, especially high-volume items such as ISIS's Twitter and Facebook accounts, while questionable posts will likely only be removed *after* an attack happens.

Progress to address this reluctance of technology companies has been remarkably slow, with verbal calls to action by politicians and stalled legislative proposals being the extent of action on this issue. For example, Hillary Clinton pleaded with Silicon Valley technology companies to "disrupt" ISIS (Sanger, 2015), while Senator Dianne Feinstein proposed a bill in 2015 that would build on existing child pornography censorship laws so as to require companies to flag terrorist activity, but still does not permit the government to remove terrorist propaganda ("Bill Would Require," 2015; H.R. 4628, 2015). Even Feinstein's bill – which seemed tailored around the First Amendment – died in Congress in 2016 amid concerns over unconstitutionality

and government encroachment on private enterprise ("Bill Would Require," 2015; H.R. 4628, 2015). In this way, it seems nearly impossible for Congress to legislate the removal of pro-terror propaganda on electronic platforms *and* for the Court to uphold such legislation.

However, the US has on other occasions successfully punished those who house and disseminate the materials of terrorist organizations, all while remaining in perfect compliance with the Brandenburg standard. Consider the 2006 case of Javed Iqbal - operator of television service provider HDTV, Ltd. - who received payments from Hezbollah in order to broadcast Al-Manar, Hezbollah's television station (Barak-Erez and Scharia, 2010). Given that Hezbollah has been recognized as a terrorist organization by the US since 1997, this exchange quickly caught the attention of US authorities (Barak-Erez and Scharia, 2010). In line with *Brandenburg,* which prohibits content-based restrictions, the court did not charge Iqbal based on the *content* of Al-Manar, but rather based on Iqbal's *material support* - that is, *providing a technological platform* - for spreading terrorist propaganda (Barak-Erez and Scharia, 2010). Iqbal was assigned a prison sentence of five years and there was no subsequent constitutional challenge. Much like what Iqbal did, social media companies provide an open platform to attract internet traffic - including traffic from terrorist organizations - and then collect revenue based on that traffic. For example, Facebook "share[s] revenue with ISIS for its content and profit[s] from ISIS postings through advertising revenue" (O'Brien and Ingram, 2016). As such, citing the *Brandenburg* precedent – while a useful starting point – is not sufficient to explain why the US is reluctant to stop the spread of pro-terror propaganda. Alternative explanations are therefore in order.

First, legal experts claim that companies such as Twitter, Facebook, and YouTube are immune from liability for supporting terrorism under the Federal Communications Decency Act, which states that such companies cannot be responsible for content posted by users (O'Brien and

Ingram, 2016). This is a point of considerable outrage among the families of the victims of the San Bernardino and Orlando attacks, who lost loved ones while the companies housing the messages that incite such attacks were collecting revenue. It is for this reason that the victims' families from both of these tragedies have since filed lawsuits against Twitter, YouTube, and Facebook for providing material support to terrorists, citing a violation of Sections 2339A/B of the AEDPA (O'Brien and Ingram, 2016; Whitcomb, 2017). Both cases have yet to be decided, but they do present an opportunity for US authorities to break the illusion that the Brandenburg precedent is somehow standing in the way of countering homegrown terrorism.

Second, the response to the San Bernardino and Orlando attacks - as with most other attacks on US soil – once again fell within the framework of the military-centric and externally-focused US War on Terror, even though the perpetrators of these attacks were either US citizens or legal permanent residents. Indeed, President Obama's first reaction to these attacks was *not* to call on Congress to re-evaluate regulation of terrorist propaganda, but rather to promise to increase the frequency of airstrikes against ISIS in Syria and to strengthen the effectiveness of terrorist finance tracking programs (Harris, 2015). Ironically, these attacks were *ISIS-inspired* but not *ISIS-coordinated*, the perpetrators had no direct ties to Syria, and social media platforms are one of the leading ways in which terrorist organizations rally support for financing their operations. It is hard to imagine that restricting pro-terror propaganda will be a high priority for the US under the outward, military-centric conception of counterterrorism that has prevailed since 9/11. If this is to change in the future, these efforts will be initiated from the bottom-up and not from Congress or the President, as the previous examples of the two lawsuits demonstrate.

2. France

The French Declaration of Rights of Man and Citizen (1789) – embedded in the French

Constitution – provides a very particular conception of free expression, stipulating that "any citizen may… speak, write and publish freely, *except what is tantamount to the abuse of this liberty in the cases determined by Law*" (Article 11). In this way, the French Constitution establishes a clear mandate for the state to use statutes to restrict certain content. The 1881 Law on the Freedom of the Press - a foundational regulatory statute that still remains in effect today - has been the subject of dozens of modifications which in their aggregate restrict hate speech, propaganda relating to atrocities such as the Holocaust, and threats of violence based on one's race, ethnicity, or sexual orientation (Loi du 29 Juillet 1881, Art. 24). France has over several decades entrenched a strong and institutionalized procedure for criminalizing defamatory or offensive remarks, thus standing in contrast to the US, where there are much fewer constitutional or statutory exceptions to free expression. When 9/11 and subsequent events sent shockwaves around the world, France did not face a constitutional or legal dilemma as to how to deal with those who engaged in verbal, written, or pictorial glorification of terrorist acts.

In this section, I first explain the jurisprudential mechanism governing free expression in France (Leroy v. France). Second, I discuss France's approach to criminalization (governed by statutes on "Incitement and Glorification of Terrorism") and I explain why this avenue unfolds the way it does. Third, I discuss France's radically different approach to censorship of pro-terror propaganda. Finally, I reflect on the overall differences between the US and French use of restrictions on free expression as a counterterror mechanism.

A. Jurisprudence

I. Leroy v. France (2001)

On September 13, 2001, French cartoonist Denis Leroy published a cartoon in the Basque weekly newspaper *Ekaitza* depicting the scene of the collapse of the World Trade Center on

9/11, followed by a caption saying "We have all dreamt of it... Hamas did it" *(Leroy v. France, 2008).* Charges against Leroy were quickly brought forth, and the cartoonist was found guilty of "glorification of terrorism" and incitement to terrorist acts, pursuant to the 1881 Law on the Freedom of the Press (Voorhoof, 2009). In the absence of an explicit requirement to prove that the cartoonist *intended* to glorify the 9/11 attacks - as would be required in the US – a French appeals court was able to make its judgment based solely on the content of the cartoon, arguing:

> "....by making a direct allusion to the massive attacks on Manhattan, by attributing these attacks to a well-known terrorist organisation and by idealising this lethal project through the use of the verb 'to dream', [thus] unequivocally praising an act of death, the cartoonist justifies the use of terrorism...*(Leroy v. France, 2008).*

While Leroy's true intention will not be known, it is worth noting that he attempted to validate his actions as a "political and activist expression" of his anti-American beliefs, which is protected by the French Declaration of Rights (Voorhoof, 2009). Indeed, when Leroy filed a grievance with the European Court of Human Rights (ECHR) - the EU's common supranational judiciary whose rulings and precedent have binding force on French soil - the ECHR acknowledged that while Leroy has the right to express his political views, he does not have the right to do so in conjunction with "moral support" for terrorists and an open endorsement of the "violent death of thousands of civilians" (Barak-Erez and Scharia, 2011). The ECHR – with the memory of the propaganda-driven destruction of Europe during World War II in mind – places the idea of "human dignity" above absolute liberty, meaning that speech can be restricted if it can be linked to violence (Voorhoof, 2009). As such, the ECHR upheld the French ruling, which should not be a puzzling outcome given that the ECHR follows a similar conception as France on the issue of free speech. This case of *Leroy v. France* would henceforth form the basis for further restrictions on expression in France and subsequent controversies that would test the logic of the French free speech paradigm established in the midst of a growing terrorist threat in Europe.

B. Criminalization

I. Incitement and Glorification of Terrorism

France has been developing its counter-terror arsenal since the mid-1980s with a long-term and domestic focus, meaning that in the post-9/11 era, France already has much statutory material to work with. As a result of France's early start, one general trend that has persisted is to amend existing counterterror codes not necessarily in terms of their content, but by simply increasing punishments in the hopes that potential perpetrators will rethink their plans to attack. An example of this is a series of amendments passed in 2012 and 2014 to refine and bolster the incitement statute initially used to punish Denis Leroy (Hellmuth, 2015, p.983). The 1881 Law evolved from being a tool to regulate press publications to a criminal statute, making verbal incitement to terrorism an offense punishable with a fine of up to 75,000 euros and up to five years in prison (Code Pénal, Art. 421-2-5, 2014) and also "criminalized searching, attaining, or creating material that could be used in an individual's terrorist activity" (Hellmuth, 2015, p.983). The effectiveness of these statutory changes is difficult to quantify, but they have produced notable consequences that reveal potential weaknesses in France's strategy.

After moving "incitement to terrorism" to the criminal code, prosecution is much more swift and suspects can be easily detained for an initial period of up to 96 hours while evidence is gathered against them (Shapiro, 2008). In the two weeks following the January 2015 attacks at *Charlie Hebdo,* some 298 cases were brought forth concerning "incitement to terrorism," while in the weeks following the November 2015 Paris attacks, some 570 new cases emerged on this matter (Jacquin, 2015). In line with the highly centralized nature of French counterterror prosecutions and the lack of a hard requirement to prove intent, the entire criminal justice "machine" was reportedly moving at unprecedented speeds in the weeks following the 2015

attacks, with 45% of suspects being brought up for immediate trial (Jacquin, 2015). This unusual swiftness attracted the attention of human rights groups and the media, shedding light on the ways in which French free speech laws do not make make a true distinction between the "glorification" of terrorist acts and "provocation" of terrorist acts (Soullier and Leloup, 2015).

Notable cases include a 14-year old girl in Nantes who claimed - during an altercation with tramway ticket officers - that she was a "sister of the Kouachis" and would "bring out the Kalachnikovs," making reference to the perpetrators of the *Charlie Hebdo* attacks, the "Kouachi Brothers" ("Nantes: une mineure," 2015). Other cases involve a drunk man in Lille who reportedly told a ticket officer that he would "make everything burst" and that President "François Hollande should not have bombed Syria," while another man in Béthune claimed that "one should not be surprised if people die with Kalachnikovs" (Soullier and Leloup, 2015). All of the above were charged with incitement to terrorism.

Despite the threat of violence contained in the above statements, the rather basic and rushed manner in which the current prosecutorial arrangement is treating these cases appears to be weakening France's response. Data released from the French Ministry of Justice shows that prosecution spiked after the January and November 2015 attacks and that prosecution was moving at speeds never before seen in the French judicial system (Soullier and Leloup, 2015). In this context, magistrates in charge of incitement cases seem to be looking more at the immediate content of suspects' statements rather than scrutinizing their profile as a whole and attempting to link such statements to broader connections with terrorist cells. This is why - for example - among the 129 cases of "glorification of terrorism" brought forth in December 2015, only 2 cases were referred for further investigation for potential links to terrorist cells, while the rest were put on immediate trial based on evidence readily available (Soullier and Leloup, 2015). In

this way, the above cases did not involve a more thorough investigation either because there was in fact no evidence to suggest terrorist links, or because the unprecedented rush to prosecute after two major attacks in 2015 took focus away from conducting proper investigations that could reveal links to terrorist cells. France thus seems to be more concerned about the optics of prosecution rather than identifying those that pose an immediate threat to national security.

II. Explaining France's Response to Incitement and Glorification of Terrorism

There are a number of possible explanations for what we see. First, as alluded to previously, the law does not require proof of intent, does not require that the expression be substantiated by action, and does not make distinctions between "glorification" and "incitement" or "imminent" versus "vague" threats of violence in the same way that the US does. Any condonation of terrorist acts – however vague and whether it was intentional or not - is a crime.

Second, the massive public response to the 2015 *Charlie Hebdo attacks* - taking the form of the *Je Suis Charlie (I Am Charlie)* movement - could not be ignored by the courts. *Charlie Hebdo* was seen as an attack not just on the lives of 14 journalists, but also on French values of secularism and free speech. In this context, to *be Charlie* was to condemn the attacks and to support the newspaper, while *to not be Charlie* was to effectively condone the attack - there is no middle ground (Sayare, 2016) The courts adopted this binary logic and put people into one of two categories, thus facilitating speedier and also more voluminous prosecution.

Third, the most recent modifications to anti-incitement statutes are increasingly vague, which is not typical of civil law jurisdictions. While vague statutes are understandable in a common law context like the US - where judges factor in precedent and their own interpretation of the law - civil law countries like France in theory have clear, all-encompassing civil codes, and thus judges play the mere bureaucratic role of applying them. In the context of the above

cases, judges are in practice weighing the statements in question against an unusually broad statute, and in this way prosecution of even vaguely related statements is fast and sweeping.

Finally, constitutional limits greatly differ from those of the US - the French Declaration of Human Rights allows for statutory limitations on free speech, and legal precedent at the ECHR would likely repeat the logic used in *Leroy v. France* if complaints were to be filed at the EU level. Under this arrangement, France must only prove that a statement - whether intended to do so or not - glorifies terrorism. The US - by contrast - must show that such speech contains an *imminent* threat of violence, directly leads to violent acts, and that it was intended to do so.

Perhaps the most telling example of this distinction lies in the handling of the case of Dieudonné, a French comedian notorious for his anti-Semitic remarks. During the January 11, 2015 demonstrations in Paris in which 4 million people came to support the *Je Suis Charlie* movement, Dieudonné used Facebook to say: "Know that tonight, for my part, I feel like Charlie Coulibaly," thus mocking the movement and making reference to Amedy Coulibaly, the attacker responsible for a deadly attack on a Jewish supermarket two days after the *Charlie Hebdo* shootings (Sayare, 2016). Dieudonné was later convicted and sentenced to two months in prison for "sympathizing with terrorist gunmen" (Tsesis, 2017). If this event had played out in the US, it is almost certain the Dieudonné would have been found innocent, simply because the US requires that there be an "imminent" threat of violence *followed by plans for action* - even "vague threats" of violence are protected by free speech provisions (Tsesis, 2017).

C. Censorship

I. Blocking Pro-Terror Propaganda Online

Dieudonné's statement was also concerning to French authorities because it was posted online, in the sight of viewers around the world who may identify with Dieudonné's condonation

of terrorist acts. As of late, tackling the diffusion of online propaganda has been given priority in France's counterterror strategy – punishments for online comments (100,000 euros and up to 7 years in prison) are thus set higher than for verbal comments (Code Pénal, Art.421-2-5, 2014). Internet radicalization bears some responsibility for attacks taking place in France between 2012-2015 (prison radicalization also factors in), but the more pressing concern about internet propaganda stems from recent estimates claiming that roughly 1,900 French citizens have been recruited online to leave France and to join ISIS in Syria ("Reinforcing internal security," 2017). In response, France has equipped itself with new mechanisms through which to physically dismantle the terrorist propaganda that pushes some to leave for training camps in the first place.

Much like Feinstein's proposed bill in 2015, Interior Minister Cazeneuve's Decree n˚2015-125 also builds on existing legislation for censorship of child pornography, but goes much further by granting the Ministry of Interior the authority to completely block access to websites that "promote or praise acts of terrorism"(Goodman, 2016). The Ministry of Interior is given full authority - with no judicial oversight - to determine which sites are to be shut down, and Internet service providers (ISPs) are required to comply (Goodman, 2016). In contrast to the US, online promotion of terrorism in France does not need to be coupled with imminent plans to attack in order for French authorities to shut it down. The Decree does not provide a full definition as to what constitutes a "terrorist website," the Interior Ministry has not provided any additional details, and the judiciary has been given no room to help interpret (Goodman, 2016).

Naturally, this vagueness has led to a sweeping and chaotic application of the law. Apart from documented administrative failures in which pro-terror websites were not properly blocked while "innocent" websites were subject to a block, this Decree suffers from a more crucial, rather ironic problem (Goodman, 2016). The Decree can only block access for internet users in France,

meaning that in the absence of a similar law in the United States - where domains for major platforms such as Twitter, Facebook, and YouTube are based - the content can still be accessed in other parts of the world and even in France through relatively easy (albeit illegal) tools such as proxy servers (Goodman, 2016). From the perspective of those diffusing and consuming terrorist propaganda, making sure that online materials are housed on US-based platforms is a top priority, simply because the risk of its removal is exponentially lower. In other words, the principal target of radical Islamist terror - the United States - is also the safest place for terror networks to communicate and plan attacks without government interference.

Seeing that efforts to approach the US government would probably be futile, Cazeneuve - much like Clinton and Feinstein - directly called on Twitter, Facebook, and Google to flag and remove terrorist propaganda in accordance with their own company policies, which has thus far been met by empty promises by company spokespeople and inconsequential progress (Goodman, 2016). There are no known estimates as to how much revenue is made by housing terrorist propaganda (and even if there were it would be hard to prove causality), yet the behavior of Twitter, Facebook, and Google suggest that they may have an interest in keeping high-traffic pages in operation. In this way, despite the rather ironic limits imposed by US ownership of web domains, restricting speech online is much more swift and less controversial in France than in the US, albeit more sweeping and unorganized, thus making France the more repressive one.

Conclusions: Reflecting on Restrictions on Free Expression in the US and France

France and the US are operating at two opposite extremes. The US - even with tough constitutional protections for free expression - remains well-equipped to criminalize terrorist propaganda. By creatively maneuvering between statutes and the First Amendment using seditious conspiracy, material support, and immigration provisions, the US has not only

criminalized dubious expression but also foiled attacks. The case of Al-Timimi demonstrates that because US authorities must wait until speech *turns into plans for terrorist actions*, the US has greater success in stopping terrorists before they act. That said, when faced with online terrorist propaganda – perhaps the most threatening and fastest-growing mechanism that is responsible for recent attacks – the US has done close to nothing, which has implications both in the US *and France* (due to heavy US ownership of web domains). Decades-old jurisprudence that cannot account for the role of the internet in 21st century life partly explains this, but the externally-focused and military-centric conception of counter-terrorism that prevails in the US – which targets foreigners even as the threat becomes increasingly domestic – is arguably the overarching explanation. As I have shown, the US can work around the Constitution, but remains reluctant to give up the idea of a *global* War on Terror. By contrast, the French arrangement – born out of the destruction following WWII – is very responsive to any verbal incitement of violence, however subtle or unintentional. In the context of an ever-growing, diffuse, and propaganda-driven threat that has produced unprecedented deaths in the last five years especially, France has engaged in sweeping prosecutions of terror-related expression to the point where authorities have reduced their own capacity to investigate whether individuals truly have ties to terrorist groups, thus increasing repression while reducing the effectiveness of such a policy. These outcomes thus demonstrate that "repression" is not a "good" or "bad" thing. The US proclivity for globally-focused, military-centric counterterrorism – even as the threat is increasingly homegrown – and France's anxious and sweeping approach produces the net result of not being able to fully address the dynamics of "new terrorism." Studying how to develop a more pragmatic regime to more accurately identify truly threatening expression – given the constitutional and political contexts of both the US and France – would be a valuable area for future research.

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