The Irvine 11 Case: Does Nonviolent Student Protest Warrant Criminal Prosecution?

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Introduction

In 2011, a few months after Operation Cast Lead, the Israeli government's bombing campaign of the Gaza strip in Palestine, Osama Shabaik visited Gaza to deliver medical aid.[1] What he witnessed while he was there was complete and utter devastation.[2] "Many families still lived in the rubble of their destroyed homes" while "[t]hose still lucky enough to have homes lived with clear remnants of the war" in homes "riddled" with bullet holes.[3] While in Gaza, Shabaik met the Sammouni cousins, who were orphaned in the aftermath of Operation Cast Lead when a bomb fell on their home and killed their family.[4] The devastation and loss of human life that he witnessed compelled Shabaik to "speak out" and protest against the Israeli government's policy that led to the destruction in Gaza.[5]

On February 8, 2010, Michael Oren, Israeli Ambassador to the United States, delivered a speech to a packed audience at the University of California, Irvine.[6] With images of the devastation

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1. Osama Shabaik, Op-Ed., *Unprecedented Silencing of Dissent at UC Irvine*, JERUSALEM POST (Oct. 16, 2011), http://www.jpost.com/Opinion/Op-EdContributors/Article.aspx?ID=241870&R=R1; *see also* AMNESTY INT'L, ISRAEL/GAZA OPERATION 'CAST LEAD': 22 DAYS OF DEATH AND DESTRUCTION 1, *available at* http://www.amnesty.org/en/library/asset/MDE15/015/2009/en/8f299083-9a74-4853-860f-0563725e633a/mde150152009en.pdf ("Some 1,400 Palestinians" were killed, 300 of which were children, along with "hundreds of other unarmed civilians, and large areas of Gaza had been razed to the ground, leaving many thousands homeless and the already dire economy in ruins").

2. Shabaik, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. People's Opposition to Motion to Recuse the Office of the District Attorney at 4, California v. Herzallah, No. 11CM01351 (Cal. Super. Ct. Apr. 14, 2011)

in Gaza and the Sammouni cousins still fresh in his mind, Shabaik decided to make a "poignant statement" during the Ambassador's speech.[7] The disparities in communicative power between an individual and a nation state compelled him and his peers to express their grievances outside of the traditional question and answer framework of a university lecture[8] by loudly voicing their political dissent.[9] Shabaik and his peers got up one by one while the Ambassador was speaking and shouted statements that were critical both of Israel's policy leading to the destruction of Gaza during Operation Cast Lead and the Ambassador's role in shaping it.[10]

Shabaik was the first to interrupt the speech, and shouted "Michael Oren, propagating murder is not free speech."[11] Following his interruption, his peers joined in, shouting, "Michael Oren you are a war criminal," and "[i]t's a shame this University has sponsored a mass murderer like yourself!"[12] After shouting each statement, the students complied with orders to leave the auditorium, were subsequently arrested, and were subjected to university disciplinary proceedings.[13] Further, in what many called an unprecedented move, the Orange County District Attorney's Office pressed criminal charges against the students for their nonviolent political protest.[14]

The decision to criminally charge the eleven students, who have become known as the "Irvine 11," has generated major controversy.[15] On one end, the supporters of the prosecution argue that "[f]ailing to punish offenders appropriately"[16] will set a bad

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[hereinafter People's Opposition to Motion].

7. *See* Shabaik, *supra* note 1.

8. *Id.*

9. *Id.*

10. *See* Raymond Barrett, *Legal Battle Over Campus Protest, Raises Questions of Free Speech, Islamophobia*, WASH. DIPLOMAT (July 27, 2011), http://www.washdiplomat.com/index.php?option=com_content&view=article&id=7957%3Alegal-battle-over-campus-protest-raises-questions-of-free-speech-islamophobia&catid=1476&Itemid=428; *Profile: Michael Oren*, GEO. PROGRAM FOR JEWISH CIVILIZATION, http://pjc.georgetown.edu/77196.html (last visited Mar. 26, 2012) (noting Oren's service as a media relations officer for the Israeli Defense Forces during Operation Cast Lead).

11. People's Opposition to Motion, *supra* note 6, at 7.

12. *Id.*

13. *See* Nick Meyer, *Irvine 11 Conviction Sets a Dangerous Precedent, Attorney Says*, ARAB AM. NEWS (Oct. 8, 2011), http://www.arabamericannews.com/news/index.php?mod=article&cat=Community&article=4816.

14. *See id.*

15. *See* Barrett, *supra* note 10.

16. Adam Kissel, *Disruptive Protesters Face Disciplinary Consequences at UC Irvine*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Feb. 10, 2010), http://thefire.org/

precedent,[17] and will ultimately have the effect of inhibiting debate by encouraging groups to interrupt speakers with whom they disagree.[18] On the other end, critics have cried that prosecution will chill student activism and discourage students from engaging in controversial or political speech on campus.[19] University of California faculty members spoke out against the prosecution in a signed letter "urging the [D]istrict [A]ttorney to drop the charge and that university sanctions were punishment enough."[20] Prominent civil rights groups have cited Islamophobia and pressure from outside sources as reasons for the prosecution, and have questioned the District Attorney's motive for using a disproportionate amount of resources to pursue students, who were involved in a minor campus protest, with excessive zeal.[21]

This Article will analyze the prosecution of the Irvine 11 from a policy perspective.[22] Part I will discuss the theories underlying freedom of speech, and the importance of freedom of speech in the university context. Part II will provide a background on prosecutorial discretion and its potential abuses. Part III will discuss the California Penal Code, the prosecution of the Irvine 11, and other instances of distinguished speakers being heckled in Orange County. Part IV will examine the value of heckling as a form of protest. Part V will discuss how the Irvine 11 prosecution represents the danger of discriminatory enforcement, specifically discussing the role that biases and stereotypes can play in influencing prosecutorial discretion, and why the Irvine 11 prosecution is a bad policy decision. Finally, Part VI will provide solutions to the complex problems that the Irvine 11 prosecution presents for both prosecutors and universities.

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article/11560.html (concluding that failure to punish such offenders "is likely to threaten the free speech of future speakers by effectively condoning a 'heckler's veto' through disruptive actions. That would make a mockery of the First Amendment").

17. *See* Scott Jaschik, *Is Heckling a Right?*, INSIDE HIGHER ED (Feb. 27, 2010), http://www.insidehighered.com/news/2010/02/17/heckle#ixzz1fWjAbL4J.

18. *Id.*

19. *See* Hamed Aleaziz, *Should Heckling Be Illegal?*, MOTHER JONES (Sept. 26, 2011), http://motherjones.com/mojo/2011/09/should-heckling-be-illegal.

20. Josh Keller, *California Jury Convicts 10 Muslim Students of Interrupting Campus Speech*, CHRON. OF HIGHER ED. (Sept. 25, 2011), http://chronicle.com/article/California-Jury-Convicts-10/129159/.

21. *See* Barrett, *supra* note 10.

22. This Article will acknowledge constitutional arguments raised by the case, but will primarily focus on the policy implications of the prosecution, not its constitutionality.

I. The Importance of Free Speech in a University Setting

Freedom of speech is of the utmost importance in the university setting.[23] At college, students are encouraged to think critically both inside and outside the classroom by freely debating and discussing ideas.[24] "The public university has been acknowledged as an arena in which accepted, discounted—even repugnant—beliefs, opinions and ideas challenge each other."[25] The university is the quintessential marketplace of ideas.[26] Maximum exposure to a vigorous interchange of ideas "which discovers truth 'out of a multitude of tongues,' lies at the heart of a university education."[27] Among "the important and substantial purposes of the university" is to "facilitate a wide range of speech."[28] Exposing students to diverse ideas is at the core of a university's mission.[29] Further, university students are often encouraged to explore and challenge ideas in student-run organizations assembled around a common cause or idea that interests them.[30] These organizations range from general interest, ethnic, or religious groups, to groups assembled around a political cause.

The importance of freedom of speech is illustrated by the theories underlying the First Amendment: (1) the marketplace of ideas; (2) the balance between stability and change; (3) self-governance; and (4) individual autonomy.

A. The Marketplace of Ideas

First, according to the marketplace of ideas theory, freedom of expression promotes society's discovery of truth and advancement of knowledge by allowing individuals to reach the most

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23. *See* John L. Esposito, *The Irvine 11: Student Freedom of Speech and Dissent Under Siege*, HUFFINGTON POST (June 16, 2011), http://www.huffingtonpost.com/john-l-esposito/student-freedom-of-speech-irvine-11_b_877025.html.

24. *See id.*

25. Laura L. Goodman, *Shacking Up with the First Amendment: Symbolic Expression and the Public University*, 64 IND. L.J. 711, 716 n.39 (1989) (quoting Good v. Associated Students of the Univ. of Wash., 542 P.2d 762, 769 (Wash. 1975)).

26. See *infra* notes 31–42 for a discussion of the marketplace of ideas.

27. Goodman, *supra* note 25, at 716 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)); *see also* Mark J. Fiore, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915, 1948 (2002).

28. Fiore, *supra* note 27, at 1950 (quoting Bd. of Regents v. Southworth, 529 U.S. 217, 231 (2000)).

29. *See id.*

30. *See* Esposito, *supra* note 23.

rational decision through uninhibited discourse.[31] The theory specifically contends that individuals can only reach "the most rational and informed decision"[32] by "considering all facts and arguments" that support or defend a certain position.[33] The theory presupposes that the suppression of ideas "blocks the generation of new ideas, and tends to perpetuate error."[34] In the marketplace of ideas, "[t]he only justification for suppressing an opinion is that those who seek to suppress it are infallible in their judgment of the truth."[35] This justification is a legal fiction because "no individual or group can be infallible, particularly in a constantly changing world."[36]

Opponents of the theory contend that the marketplace of ideas is inherently unequal, because it only protects speech once it has already entered into the marketplace, without ensuring equal access to all types of speech to the marketplace itself.[37] They therefore argue that because only certain groups and individuals have access to the marketplace, some speech never makes it to the marketplace.[38] For example, unpopular ideas or ideas espoused by minority groups may never be heard in the marketplace of ideas because of the "disparities in communicative power" between minority and majority groups.[39] "The marketplace of ideas, these critics argue, is likely to reflect and justify the positions of powerful speakers, rather than the merit or 'truth' of the ideas they express."[40] Despite these criticisms, the marketplace of ideas doctrine remains the dominant justification for free speech in the United States.[41] Further, because the theory holds that no speech

31. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963). The theory of the marketplace of ideas was first introduced in constitutional jurisprudence in the United States by Justice Oliver Wendell Holmes, in his dissent in *Abrams v. United States*. Fiore, *supra* note 27, at 1915 n.1 (citing Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting)).

32. Eve H. Lewin Wagner, *Heckling: A Protected Right or Disorderly Conduct?*, 60 S. CAL. L. REV. 215, 227 (1986).

33. Emerson, *supra* note 31.

34. *Id.*

35. *Id.* at 882.

36. *Id.*

37. Nancy Whitmore, *First Amendment Showdown: Intellectual Diversity Mandates and the Academic Marketplace*, 13 COMM. L. & POL'Y 321, 327 (2008).

38. *See* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 832–33 (2008); Whitmore, *supra* note 37.

39. *See* Blocher, *supra* note 38, at 832.

40. *Id.* at 832–33.

41. *See id.* at 828.

can be infallible, it serves to guard all types of speech and prevents us from silencing those with whom we disagree.[42]

B. Balance Between Stability and Change

Second, freedom of speech can also serve as a means of social control.[43] According to Thomas Emerson, "the principle of open discussion is a method of achieving a more adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus."[44] Expressing dissent allows disaffected persons to release their frustration and energy.[45] Moreover, silencing certain types of speech can cause resentment in groups or can make the speech itself more appealing.[46] Therefore, freedom of speech can serve as a means of avoiding "social unrest or apathy" by allowing people to release their frustrations through their opinionated speech.[47]

C. Self-Governance

Third, the self-governance theory of free speech holds that "freedom of speech is a necessary prerequisite to democracy and self-governance."[48] In order for democracy to function properly, the governed must be able to make informed choices, which they can only do if they have free access to information.[49] Further, free expression is essential for people to participate in the decision-making process because it allows open and free discussions to take place.[50] Hence, freedom of speech helps the "democratic

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42. *See* MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 8 (2001).

43. Emerson, *supra* note 31, at 884.

44. *Id.*

45. *Id.* at 885.

46. Craig Anderson, *Political Correctness on College Campuses: Freedom of Speech v. Doing the Politically Correct Thing*, 46 SMU L. REV. 171, 178–79 (1992).

47. Wagner, *supra* note 32, at 228.

48. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970) ("Once one accepts the premise of the Declaration of Independence—that governments 'derive their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments . . . ."); Anderson, *supra* note 46, at 178.

49. Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigm of Free Expression*, 20 UCLA L. REV. 103, 116–17 (1992) ("[F]ree expression is indispensable for the promotion of the free flow of ideas that is necessary for a democratic polity to govern itself.").

50. *See* Massey, *supra* note 49, at 118 ("The reason for public debate is to enable every person within the polity to express his or her view in hope that it will convince others."); Wagner, *supra* note 32, at 228.

experiment" succeed by allowing individuals easy access to information and opinions, permitting them to make informed decisions.[51]

D. *Individual Autonomy*

Last, according to the individual autonomy theory, freedom of speech is a fundamental right of the individual that enables one to evolve as a person and achieve "self-realization."[52] Freedom of speech allows people to develop "individual judgment and personality through the free discussion of ideas."[53] To achieve self-realization a person's mind must be free, thus "suppression of belief, opinion, or other expression is an affront to the dignity of [a person]."[54] Therefore, the theory of freedom of expression "contemplates a mode of life that, through encouraging toleration, skepticism, reason and initiative," allows one to realize their full potential.[55]

The theories underlying freedom of speech emphasize the fundamental importance of free speech in American society. Given its importance, a policy that serves to chill freedom of speech, such as the criminalization of nonviolent speech, should be practiced with great caution.

II. The Exercise of Prosecutorial Discretion: Background and Dangers

> *"[Prosecutorial discretion is] the most dangerous power of the prosecutor [because it enables the prosecutor] to pick people he thinks he should get rather than pick cases that need to be prosecuted."*
> —Justice Robert Jackson[56]

A. *Prosecutorial Discretion: The Broad Discretion to Charge*

Before advocating a policy that proscribes nonprosecution, it is important to consider the discretion prosecutors have in

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51. BUNKER, *supra* note 42.

52. Wagner, *supra* note 32 ("In order for an individual to achieve self-realization, he or she must be able to express his or her views and discuss them openly with others.").

53. BUNKER, *supra* note 42, at 12–13.

54. EMERSON, *supra* note 48, at 6.

55. Emerson, *supra* note 31, at 886.

56. Greene, *supra* note 66, at 778.

deciding whether to initiate criminal proceedings. Prosecutors in the United States exercise broad discretion in criminal prosecutions.[57] Discretion provides prosecutors the flexibility to take into account the facts and circumstances of each individual case when making a decision to prosecute.[58] Prosecutors are not legally required to bring charges against individuals accused of crimes; the decision to do so is entirely within their judgment.[59] In some cases, even if there is sufficient evidence to convict an individual, a prosecutor can refuse to prosecute a case "for good cause consistent with the public interest."[60] Prosecutors can initiate a criminal prosecution of an individual if they believe there is probable cause that the accused committed a crime and if there is sufficient admissible evidence to support a conviction of the accused.[61] The decision to charge someone, the nature of the charge, the use of a grand jury, and the dismissal of charges are all discretionary decisions that prosecutors make when deciding what course of action to take in a criminal proceeding.[62] The discretion to prosecute therefore also includes the discretion to not prosecute.[63]

Given the broad powers prosecutors hold, prosecutorial discretion is also ripe for abuse. It can lead to inconsistent, discriminatory, and arbitrary decisions, and unequal treatment for similarly situated individuals.[64] Further, discretion can be particularly hazardous in cases where individuals are prosecuted

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57. *See* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2 (1971) (noting that prosecutors exercise considerable discretion); Conor Clark & Austin Sarat, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 389 (2008) (noting that prosecutors have substantial discretion in which enforcement strategy to use). The judiciary recognizes and defers to the broad prosecutorial discretionary power, partly due to the separation of power doctrine, which invests the enforcement of the law in the executive branch. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 14 (2007).

58. *See* DAVIS, *supra* note 57, at 13 (noting that if prosecutors lacked discretion they would have to bring charges in cases that were "frivolous" or "where the evidence is weak"); Abrams, *supra* note 57.

59. *See* DAVIS, *supra* note 57 (noting that no law requires someone to be charged if they commit a crime).

60. CRIMINAL JUSTICE STANDARDS § 3-3.9(b) (3d ed. 1993) (listing factors that a prosecutor may consider in deciding whether to prosecute a case).

61. *Id.* § 3-3.9(a).

62. *See* 35 GEO. L.J. (ANN. REV. CRIM. PROC.) 203 (2006).

63. *See* People's Opposition to Motion, *supra* note 6, at 15. The decision not to prosecute can involve a determination of whether there is an alternative to formal criminal prosecution. *Id.*

64. *See* DAVIS, *supra* note 57, at 15; Abrams, *supra* note 57, at 3; Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 388, 391 (1975).

under laws that are not normally enforced.[65] Finally, discretion can serve as a potential source of injustice against racial and ethnic minorities, whose views are often underrepresented in prosecutorial decision-making.[66] The potential abuse of prosecutorial discretion is highlighted by social cognition theory,[67] Islamophobia,[68] and the discriminatory enforcement of statutes that penalize speech.[69]

B. *The Danger of Bias and Stereotypes Influencing Prosecutorial Decision-Making*

1. Social Cognition Theory

Most modern day discrimination results from unconscious cognitive psychological processes, rather than motivational psychological processes.[70] "According to social cognition theory, we all possess subconscious or implicit biases" that are based on stereotypes about groups.[71] "These biases shape how we perceive, make decisions about, and interact with others."[72] "[E]ven though we may consciously reject negative stereotypes about other groups" and may not be aware that we hold such biases, these biases have a strong effect on our subconscious.[73] Unconscious stereotypes and biases held by the general public can also influence prosecutorial discretion.[74] Because biases can potentially affect the decision-making of prosecutors, it is particularly important that they take affirmative steps to ensure that their decisions are not influenced by biases.[75]

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65. Cox, *supra* note 64, at 388–89 (citing laws that were created for a moral purpose and social control as examples of laws that are still on the books, but are rarely enforced by law enforcement officials).

66. *See* Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 741 (1991).

67. See *infra* notes 70–75 and accompanying text for a discussion on social cognition theory.

68. See *infra* notes 76–83 and accompanying text for a discussion on Islamophobia.

69. *See infra* notes 84–92 and accompanying text.

70. Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1188 (2008).

71. *Id.* at 1186.

72. *Id.*

73. *Id.* at 1187.

74. *See* Greene, *supra* note 66, at 780 ("[P]rosecutors as a group are not presumptively less prejudiced than other [W]hite Americans in respect to race, gender and class biases.").

75. *See infra* notes 198–204.

2. Islamophobia[76] in the United States

The treatment of Muslims after the September 11, 2001, attacks is an example of race, ethnicity, and religion playing a role in the unequal treatment of persons by law enforcement.[77] After the September 11 attacks, Muslims and people of Arab and South Asian descent were subjected to "government policies such as 'voluntary' questioning, special registration, and airport sweeps" as a result of their ethnicity and religious beliefs.[78] Most of the examples of racial profiling of the Muslim community are carried out in the realm of terrorism prevention; however, this does not mean that stereotypes and biases do not influence prosecutors in other realms of law enforcement.[79] Recently, the Public Research Institute found that "45 percent of Americans agree that Islam is at odds with American values."[80] Further, according to the Gallup Center for Muslim Studies, "43 percent of Americans admit to feeling some prejudice toward followers of Islam."[81]

In state legislatures, discrimination against Muslims is being perpetuated in the form of anti-Sharia bills, which prohibit state courts from applying or considering Islamic or Sharia law. Oklahoma was the first state to introduce an anti-Sharia measure on its ballot, which was approved by voters in 2010 by seventy percent.[82] A preliminary injunction was granted by a federal district court in Oklahoma and later upheld by Tenth Circuit

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76. "Islamophobia is close-minded prejudice against or hatred of Islam and Muslims. An Islamophobe is an individual who holds a closed-minded view of Islam and promotes prejudice against or hatred of Muslims." COUNCIL ON AM.-ISLAMIC RELATIONS, ISLAMOPHOBIA AND ITS IMPACT IN THE UNITED STATES: JANUARY 2009–DECEMBER 2010, at 6 (2010), *available at* http://crg.berkeley.edu/sites/default/files/islamophobiareport2009-2010.pdf [hereinafter CAIR ISLAMOPHOBIA REPORT].

77. Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 128 (2003).

78. Sunita Patel, *Performative Aspects of Race: "Arab, Muslim, and South Asian" Racial Formation After September 11*, 10 ASIAN PAC. AM. L.J. 61, 62 (2005).

79. *See* Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413 (2002) ("[R]acial profiling is more likely to mean security checks or federal investigations that target Muslim men from Middle Eastern countries, in order to try to catch terrorists.").

80. CAIR ISLAMOPHOBIA REPORT, *supra* note 76.

81. *Id.* at 24. In August 2010, a *Time* magazine poll found that twenty-eight percent of voters believe that a Muslim should not be eligible to sit on the Supreme Court and nearly one-third of Americans believe that Muslims should not be allowed to run for President. *Id.* at 6.

82. Stephen Ceasar, *Appeals Court Affirms Order Blocking Oklahoma Sharia Law Ban*, L.A. TIMES (Jan. 10, 2012), http://articles.latimes.com/2012/jan/10/nation/la-na-oklahoma-sharia-20120111.

Court of Appeals, which found that the law raises serious constitutional issues including interference with a Muslim's ability to freely practice his or her religion.[83] Prejudice and bias against Muslims is pervasive in the United States and in some instances is even state sanctioned.

3. Discriminatory Enforcement of Speech Crimes

Statutes that criminalize speech are prone to discriminatory enforcement by law enforcement. Traditionally, "lesser crimes" such as breach of the peace statutes were written in vague terms, thus granting broad discretionary powers to law enforcement officers.[84] These statutes were written in broad terms because human behavior is often "so diverse that not all forms [of human behavior] can be anticipated."[85] Courts have traditionally viewed these statutes with "skepticism" to ensure that law enforcement officials do not violate individual rights because of the broad and vague language of the statute.[86] But even when these statutes are tailored by courts to make sure that they do not violate individual rights, the statutes can still be used improperly by law enforcement officials.[87] For decades, "breach of the peace" statutes have been discriminatorily enforced by law enforcement to criminalize speakers who espouse unpopular views.[88] For a breach of the

83. Awad v. Ziriax, No. 10–6273, 2012 WL 50636 (10th Cir. Jan. 10, 2012); CAIR ISLAMOPHOBIA REPORT, *supra* note 76, at 48–49 (providing a detailed discussion of the factual background and district court ruling of the case); Ceasar, *supra* note 82.

84. *See* John B. Phillips, *The Proposed Criminal Code: Disorderly Conduct and Related Offenses*, 40 TENN. L. REV. 725, 725 (1973).

85. *Id.*

86. *Id.*; *see also* Elena Kagan, *Private Speech, Private Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 456–61 (1996) (discussing cases where the court has invalidated laws that, by conferring "standardless discretion," "effectively delegate[] to administrators the power to make decisions about speech on the basis of content").

87. *See* Kagan, *supra* note 86, at 462. Law enforcement officials are not allowed to penalize views or content of speech; however, laws that criminalize speech such as hostile audience laws are prone to abuse. *Id.*

88. *See, e.g.*, Feiner v. New York, 340 U.S. 315, 317, 321 (1951) (holding that petitioner was properly arrested after making a speech that endorsed racial equality, criticized public officials, and nearly resulted in rioting by the audience); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (affirming the conviction of Chaplinsky for using "profane" or "libelous" speech attacking religion and government); Kagan, *supra* note 86, at 462 ("[I]n case after case, decade after decade, police officers have responded hastily, to say the least, to the risk of disorder caused by disfavored speech."). *But see* Cohen v. California, 403 U.S. 15, 26 (1971) (holding that a state could not make the public display of speech attacking the draft a criminal offense).

peace to occur there must be some kind of a public disturbance.[89] In the case of a speech, it is the content of the speech that usually triggers the public disturbance.[90] For instance, if a speaker is giving a speech advocating an unpopular view that the majority does not agree with, the audience may react by causing a public disturbance, constituting a breach of the peace.[91] Hence, a breach of the peace statute effectively penalizes speakers who hold unpopular views.[92]

III. The Prosecution of Speech: Background on the Irvine 11 Case

A. California Penal Code Section 403 Interpreted

The Irvine 11 students were charged under California Penal Code section 403 ("section 403"), willful disturbance of assembly.[93] The language of the penal code reads: "[e]very person who, without authority, willfully disturbs or breaks up any public assembly or public meeting, not unlawful in its character, is guilty of a violation of Penal Code § 403, a misdemeanor."[94] The statute penalizes disturbances that "substantially impair[] the conduct of a public assembly."[95] Section 403 has been considered by California courts in two recent cases,[96] *In re Kay*[97] and *McMahon v. Albany Unified School District*.[98]

In the case *In re Kay*, the California Supreme Court overturned the conviction of farm workers who were convicted under section 403 for willfully disturbing a lawful meeting by "engag[ing] in rhythmical clapping and some shouting for about

89. *See* Kagan, *supra* note 86, at 463.

90. *See id.*

91. *See id.*

92. *See id.*

93. CAL. PENAL CODE § 403 (West 1999).

94. *Id.* Each of the following elements must be proved: (1) the defendant substantially impaired the conduct of a public assembly or public meeting by committing acts in violation of implicit customs or usages applicable to the type of meeting being held, or in violation of explicit rules for the conduct of that meeting; (2) the defendant knew, or as a reasonable person should have known of these customs, usages or rules; (3) the defendant's acts were intentionally committed; and (4) the defendant's activity itself, and not the content of the activity's expression, substantially impaired the effective conduct of the meeting. *See* In re Kay, 464 P.2d 142, 150 (Cal. 1970).

95. *In re Kay*, 464 P.2d at 150.

96. For an example of an earlier consideration of the provision, see *Farraher v. Superior Court of Kern County*, 187 P. 72 (Cal. 1919).

97. 464 P.2d at 142.

98. 129 Cal. Rptr. 2d 184 (Cal. Ct. App. 2002).

five or ten minutes" during an outdoor speech by then Congressman John V. Tunney.[99] Acknowledging the value of heckling, the California Supreme Court stated:

> Audience activities, such as heckling, interrupting, harsh questioning, and booing, even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment. For many citizens such participation in public meetings, whether supportive or critical of the speaker, may constitute the only manner in which they can express their views to a large number of people . . . .[100]

Noting that "[a] cogent remark, even though rudely timed or phrased, may 'contribute to the free interchange of ideas and the ascertainment of truth,'"[101] the court invoked the marketplace of ideas theory to emphasize the importance of audience expression and viewpoints during public assemblies.[102] Because the First Amendment contemplates "*debate* of important public issues" it "can hardly be narrowed to the meeting at which the audience must passively listen to a single point of view."[103] This holding acknowledged that "heckling may serve a useful function in the political process by forcing a speaker to discuss difficult issues and might aid in the correction of evils which would otherwise escape opposition."[104] *In re Kay*, therefore, recognizes the importance and value of heckling as a form of protest, and can be construed to uphold the right to do so in certain instances.[105]

By contrast, the California Court of Appeals in *McMahon* upheld the conviction of a man accused of violating section 403 by

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99. *In re Kay*, 464 P.2d at 145. Congressman Tunney even acknowledged the protestors' right to free speech, paused until they finished protesting and "told them to be grateful that they live in a country whose Constitution protects their right to demonstrate in that manner." *Id.*; *see also* Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 448 n.187 (1999).

100. *In re Kay*, 464 P.2d at 147. The court also noted that "heckling and harassment of public officials and other speakers while making public speeches is as old as American and British politics." *Id.*

101. *Id.* (citing Garrison v. Louisiana, 397 U.S. 64, 73 (1964)).

102. *Id.* ("The First Amendment does not merely insure a marketplace of ideas in which there is but one seller.").

103. *Id.*; *see also* Wagner, *supra* note 32, at 222–23 (noting courts' recognition of a right to heckle in several cases, including *In re Kay*).

104. *See In re Kay*, 464 P.2d at 148 ("The very possibility of adverse audience reaction may aid in the correction of evil which would otherwise escape opposition. . . . The public interest in an active and critical audience has long been recognized."); Wagner, *supra* note 32, at 223.

105. While the *In re Kay* court recognized the right to heckle, it also noted that in certain circumstances where a heckler "substantially impairs the effective conduct of the meeting" by violating the customs and usages of the respective meeting, a conviction would be upheld. *In re Kay*, 464 P.2d at 150; *see also* Wagner, *supra* note 32, at 223.

dumping garbage on the floor during a school board meeting.[106] The court applied the same construction of the statute as *In re Kay*, concluding that by dumping garbage on the floor, the defendant violated the customs and usages of the school board meeting and substantially impaired the effective conduct of the meeting.[107] However, *McMahon* is not factually similar to *In re Kay* or the Irvine 11 case, because it does not involve hecklers interrupting a meeting by shouting.[108] Rather, it involves the disruption of a meeting through physically damaging conduct.[109] Thus, based on the precedent, when pure speech is involved, California courts recognize the importance of using heckling as a form of protest during a public assembly.

B. The Irvine 11 Case: Facts and Verdict

On February 8, 2010, Michael Oren, the Israeli Ambassador to the United States, spoke at an event at the University of California - Irvine (UCI).[110] During Mr. Oren's speech, ten students stood up one by one and shouted harsh statements criticizing Israel's foreign policy.[111] Police officers subsequently escorted each student out of the auditorium.[112] The disruptions culminated "in a loud walkout by the disrupting group and a chanting demonstration outside the auditorium."[113] Despite the time that was lost during the disruptions, Mr. Oren ultimately concluded his speech.[114] As a result of the incident, the individual students involved faced university disciplinary proceedings.[115] UCI

106. McMahon v. Albany Unified Sch. Dist., 129 Cal. Rptr. 2d 184, 187 (Cal. Ct. App. 2002).

107. *Id.* at 188–89.

108. *Id.* at 185–87 (describing MacMahon's interruption of a meeting through the dumping of garbage); *In re Kay*, 464 P.2d at 143–46 (detailing the *In re Kay* defendants' interruption of a meeting through clapping and shouting).

109. *McMahon*, 129 Cal. Rptr. 2d at 185–87.

110. People's Opposition to Motion, *supra* note 6.

111. *Id.* at 7–9. According to one of the participants of the protest, the protest lasted for seven minutes during a ninety minute speech. Shabaik, *supra* note 1. The students accused Israel and Mr. Oren of violating international law and committing human rights violations during Operation Cast Lead. *See* Amriah Mizrahi et al., *Irvine 11 Conviction Reveals Double Standard and Bias*, MONDOWEISS (Oct. 11, 2011), http://mondoweiss.net/2011/10/irvine-11-conviction-reveals-double-standard-and-bias.html.

112. *See* People's Opposition to Motion, *supra* note 6, at 1.

113. *Id.* at 8.

114. *Id.*; *see also* Shabaik, *supra* note 1 ("[Ambassador Oren] completed his remarks and was left with nearly 15 minutes to answer questions from the audience. Instead of fielding questions, however, he left early to attend a Los Angeles Lakers basketball game and to meet their star player, Kobe Bryant.").

115. Erwin Chemerinsky, *Criminal Charges Against Hecklers Go Too Far*,

also suspended the Muslim Student Union (MSU), the university's Muslim student organization, for an academic quarter and placed the organization on two-year probation.[116]

The Orange County District Attorney's Office did not immediately press charges against the Irvine 11.[117] However, on April 5, 2010, an anonymous source sent the District Attorney's Office a package containing emails between various MSU members discussing details of their planned protests of the event.[118] After reading the emails, the District Attorney's Office began to consider charging the students with conspiracy to commit a crime, on the grounds that the students had "meticulously planned [a] conspiracy to disturb an assembly or meeting."[119] On February 4, 2011, almost a year after the crime occurred, the District Attorney formally charged each of the students with two misdemeanor counts.[120] The first count accused the students of violating section 403's provisions against willfully disturbing an assembly; the second count accused the students of participating in a conspiracy to disrupt a meeting.[121]

The Irvine 11 case touched upon "competing free speech claims, with both sides arguing they have the Constitution on their side."[122] On one hand, the defense argued that the student protest was an exercise of free speech, protected by the First Amendment.[123] The defense also questioned the constitutionality of section 403, contending that the "current law makes lawful protest unlawful."[124] On the other hand, the prosecution contended

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ORANGE COUNTY REG. (Feb. 8, 2011), http://www.ocregister.com/opinion/students-287394-criminal-charges.html. The specific sanctions imposed by UCI against the students cannot be revealed due to privacy of educational records. *Id.*

116. Meyer, *supra* note 13; *see also* Jennifer Medina, *Charges Against Muslim Students Prompt Debate Over Free Speech*, N.Y. TIMES, Feb. 10, 2011, at A12.

117. *See* Medina, *supra* note 116.

118. *See* People's Opposition to Motion, *supra* note 6, at 9.

119. *Id.*

120. *See* Medina, *supra* note 116 (noting the length of time between the event and the filing of charges); Eugene Volokh, *Prosecution of Students Who Disrupted UC Irvine Speech by Israeli Ambassador*, VOLOKH CONSPIRACY (Feb. 9, 2011), http://volokh.com/2011/02/09/prosecution-of-students-who-disrupted-uc-irvine-speech-by-israeli-ambassador/.

121. Medina, *supra* note 116.

122. Justin Elliott, *Criminalizing Campus Protest*, SALON (Feb. 9, 2011), http://www.salon.com/2011/02/09/uc_irvine_charges_israel_protest/.

123. *See* Nicole Santa Cruz, *L.A. Now: Irvine 11 Students Appeal Conviction*, L.A. TIMES (Oct. 19, 2011), http://latimesblogs.latimes.com/lanow/2011/10/irvine-11-students-appeal-conviction-.html.

124. *Id.* Dan Stormer, an attorney for the defense, also noted that "[w]hen we censor free speech we are taking away one of the fundamental issues that has made our democracy, not survive, but thrive."

that the students violated Mr. Oren's First Amendment right to free speech by substantially disrupting his speech.[125] The case went to trial, and on September 23, 2011, the students were found guilty of both counts and sentenced to community service, fines, and probation.[126] On October 19, 2011, the defense filed notices of appeal to contest the students' convictions.[127] As of April 2012, the case is still pending.[128]

C. Recent Instances of Distinguished Speakers Being Heckled

Similar instances involving the heckling of distinguished speakers have taken place in Orange County and even on the UCI campus.[129] At UCI, the College Republicans disrupted a speech by getting on stage with premade signs, surrounding the speaker, and taking his microphone.[130] In Orange Country, the former Vice President of the United States, Dick Cheney, was also confronted by audience members during a speaking tour for his book.[131] One of the protestors interrupted his speech, stating that she was making a citizen's arrest against Cheney for committing war crimes.[132] None of these incidents, however, led to a prosecution.[133]

IV. The Value of Heckling

A. Heckling Advances First Amendment Values

To determine whether heckling, the form of protest conducted by the Irvine 11, should warrant prosecution, it is helpful to examine how heckling fits into the greater free speech framework.[134] Methods of protests such as heckling can arguably further the goals articulated in the theories underlying the First

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125. *See id.*

126. *Id.*

127. *Timeline of Events*, STAND WITH THE ELEVEN, http://www.irvine11.com/timeline/ (last visited Mar. 3, 2012).

128. *See id.*

129. *See* Esposito, *supra* note 23; Matt Coker, *[UPDATED with Ex-Veep's "Arrest":] Dick Cheney Greeted by Protestors at Nixon Library*, OC WEEKLY (Sept. 8 2011), http://blogs.ocweekly.com/navelgazing/2011/09/dick_cheney_protest_nixon_libr.php.

130. *See* Esposito, *supra* note 23.

131. *See* Coker, *supra* note 129.

132. *Id.* Cheney acknowledged the protestor's right to free speech, stating that "[t]here is nothing more important than the right of people to express their opinions. Their freedom to speak is guaranteed by the Constitution."

133. *See* Esposito, *supra* note 23; Coker, *supra* note 129.

134. *See* Aleaziz, *supra* note 19.

Amendment.[135] First, heckling offers an important contribution to the marketplace of ideas. As the California Supreme Court acknowledged, expressing political dissent through heckling, "even though rudely timed or phrased," may advance the purposes of the First Amendment by promoting the exchange of ideas.[136] Heckling can force a speaker to discuss and acknowledge important issues, allowing listeners to reach "more informed and rational decisions."[137] Further, heckling can equalize the disparities in communicative power within the marketplace of ideas.[138] Through heckling, groups with less communicative power can access the same venue and audience as groups that have greater communicative power.[139]

Second, from a social control perspective, heckling can serve as a means by which disaffected persons can release their frustration and energy, thus maintaining the balance between stability and change.[140] Third, heckling can further self-governance by giving people the opportunity to participate in the political decision-making process by expressing their opinions on issues of public importance.[141] For example, in today's increasingly globalized world, foreign political and human rights issues are of great concern domestically. Therefore, voicing political dissent about an issue of concern both domestically and internationally—such as human rights abuses in Palestine, as the Irvine 11 did—may contribute to the democratic decision-making process by exposing the audience to a different point of view.[142] Last, by allowing individuals to express views that impassion them, heckling allows one to evolve as a person, thus advancing individual autonomy.[143] Expressing political dissent through heckling can consequently advance the values underlying freedom of speech.

Of course, if participants constantly heckle during an assembly and speak at the same time, no one will be able to communicate effectively and express their First Amendment

135. *See* Wagner, *supra* note 32, at 229.

136. In re Kay, 464 P.2d 142, 147 (Cal. 1970).

137. Wagner, *supra* note 32, at 230; *see In re Kay*, 464 P.2d at 147 ("The very possibility of adverse audience reaction may aid in the correction of evils which would otherwise escape opposition. . . . The public interest in an active and critical audience has long been recognized.").

138. *See supra* note 39–40 and accompanying text.

139. *See id.*

140. *See* Wagner, *supra* note 32, at 230; *supra* notes 43–47 and accompanying text.

141. *See* Wagner, *supra* note 32, at 230.

142. *See id.* at 229–30.

143. *See id.* at 230; *supra* notes 52–55 and accompanying text.

rights.[144] Further, heckling should not be used as a means to try to intimidate a speaker or shut down a speaker. In instances where the interruption is short, the audience is able to hear the speaker, and the speaker is able to finish the speech, heckling will not substantially disrupt the primary speaker's ability to speak or the audience's ability to listen.[145] "The heckler will be allowed to express his or her position, the primary speaker will then be able to continue with his or her message, and the audience will be able to hear all viewpoints."[146] Thus, allowing rude and untimely outbursts from the audience can enhance the rights of all in a public assembly.[147]

B. The Importance of Heckling to Minority Groups

Heckling holds special significance in the public assembly setting as a form of protest for groups with less communicative power. Public assembly is of "special and crucial significance for radical, unpopular or underprivileged individuals and groups."[148] This is because:

> [P]ublic assemblies possess important advantages for effective expression that do not inhere in other forms of communication. They permit face-to-face contact between the speaker and his audience, thereby increasing the flexibility of the interchange and enhancing the power of the communication. For the participants they evoke feelings of solidarity and mutual support. For the audience they evidence the intensity and dedication with which the views expressed are held.[149]

Public assembly serves as an unmatched platform, particularly for minority groups because they lack equal access to the "mass media of communication."[150] Therefore, public assembly gives minority groups access to a wider audience that may not otherwise have an opportunity to hear the groups' point of view.[151] Countering or responding to a speaker through heckling serves as a powerful means of communication. It allows the audience to hear an opposing viewpoint immediately after a remark is made and

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144. *See* Wagner, *supra* note 32, at 235.

145. *See id.*

146. *Id.*

147. In re Kay, 464 P.2d 142, 147 (Cal. 1970) (citing Garrison v. Louisiana, 397 U.S. 64, 73 (1964)).

148. Kevin Francis O'Neill & Raymond Vasvari, *Counter-Demonstration as Protected Speech: Finding the Right to Confrontation in Existing First Amendment Law*, 23 HASTINGS CONST. L.Q. 77, 121 (1995).

149. EMERSON, *supra* note 48, at 286.

150. *Id.*

151. *Id.*

experience the passion with which those views are held. Further, "[t]he reporting of [the minority groups'] activities in the mass media, despite the unfavorable slant which may be given," can enlarge the particular audience that will hear their views.[152]

For some minority groups, such as the Irvine 11, heckling as a form of protest also holds symbolic value. The Irvine 11 saw themselves as giving a "voice to the voiceless" Palestinians who were murdered during the Gaza massacre.[153] Critics of the method of protest used by the Irvine 11 argue that students have ample opportunity to voice their dissent by asking constructive questions during the "question and answer" session of a university lecture.[154] However, the Irvine 11 contend that they wanted to "make a poignant statement" by challenging the established framework of the "question and answer" session.[155] One of the Irvine 11 students elaborated on this point:

> An effective protest must voice its opposition in a manner that challenges the policies Oren represents and the framework through which those policies are propagated. Protesters who threw tea into the Boston Harbor, who sat-in at segregated lunch counters, who marched against South African apartheid, and who are now protesting for their basic human rights across the Arab world all understood this crucial distinction.[156]

Hence, through heckling, the Irvine 11 saw themselves as not only challenging the status quo and raising awareness on Palestinian issues in the United States, but also as speaking on behalf of Palestinians who were massacred as a result of Israel's siege in Gaza.[157] Accordingly, for the Irvine 11, another form of protest such as picketing outside of the auditorium or holding up signs did not hold the same significance or power as heckling.[158] Heckling served as a powerful means of protest for the students because "a remark made immediately following a speaker's statement has much more force than that same remark made out of context."[159] Heckling allowed the students to challenge the powerful position

152. *Id.*

153. Nora Barrows-Friedman, *The Irvine 11: Giving Voice to the Voiceless*, AL-JAZEERA (Sept. 26 2011), http://www.aljazeera.com/indepth/opinion/2011/09/2011926103946574233.html. One of the Irvine 11 described what inspired him to protest: "I intend to . . . give a voice to the voiceless, including [those of] my cousins who died during the Gaza massacre. And the 1,400 other civilians who lost their lives during that massacre as well." *Id.*

154. *See* Shabaik, *supra* note 1.

155. *Id.*

156. *Id.*

157. *See* Barrows-Friedman, *supra* note 153.

158. *See* Wagner, *supra* note 32, at 232.

159. *Id.*

of the speaker and the policies that the speaker represented by having a face-to-face, direct, and immediate impact upon the speaker and the audience. Considering the potential value that heckling has within the greater free speech framework, and the significance it has for groups that lack communicative power, the criminalization of heckling seems inherently unfair and contrary to the values of the First Amendment.

V. Prosecuting the Irvine 11: The Selective Enforcement of Section 403

A. Stereotypes and Biases Influenced the Irvine 11 Prosecution

Prosecutors are no less biased than the average American; presumably, prosecutors are just as prone to harboring biases against certain groups as the general population.[160] Prejudice and bias against Muslims are prevalent within the United States, and in some instances it is even state sanctioned.[161] In fact, our "public discourse has deteriorated to the point" where members of the general public, including politicians and other reputable figures, can speak derogatorily about Muslims "with complete impunity."[162] Many Americans admit to holding prejudice against Muslims and generally have an unfavorable opinion of Muslims.[163] According to social cognition theory, these biases against Muslims can influence the decision-making process and perception of those who hold them, both consciously and subconsciously.[164] Because prosecutors, like the general public, sometimes hold biases against Muslims, social cognition theory supports the idea that these biases may influence prosecutors' decision-making, both consciously and subconsciously.

Sometimes, bias and prejudice against minorities influence prosecutorial decision-making. Of course, in some cases involving the prosecution of minorities, prosecutors may be blamed for having discriminatory intent when they in fact do not. In the Irvine 11 prosecution, the facts suggest that the prosecution may have been influenced by bias and prejudice against Muslims. The Irvine 11 prosecution highlights how prosecutorial discretion can

160. *See* Greene, *supra* note 66, at 780.

161. See *supra* notes 77–83 and accompanying text for a discussion on Islamophobia in the United States.

162. CAIR ISLAMOPHOBIA REPORT, *supra* note 76, at 24.

163. *See supra* notes 80–81 and accompanying text.

164. *See supra* notes 70–74 and accompanying text.

lead to the unequal treatment for similarly situated defendants. For instance, prominent speakers, including former Vice President Dick Cheney, have been heckled in Orange County.[165] The College Republicans at UCI have severely disrupted an event, to the point of shutting it down, on the UCI Campus.[166] Yet none of these groups or individuals have faced criminal prosecution for similar, or arguably more offensive, disruptions.[167] The nonprosecutions of these cases—which both involved heckling during a public assembly—lend credence to the assertion that prosecuting willful disturbance of an assembly is not the norm in Orange County; rather, it is the exception.[168] Further, concerns about prejudice against Muslims influencing the prosecution are bolstered because the Orange County District Attorney's Office referred to the Irvine 11 case as the "UCI Muslim Case" in internal office emails.[169] Additionally, some have noted that the Orange County District Attorney may have pursued charges against the Irvine 11 as a political tool to "pander . . . to the right-wing conservative community in Orange Country because he is up for reelection this year."[170] Although factors such as race, religion, and politics should not be taken into account when a prosecutor makes his or her decision to charge a defendant, such biases, when they are taken into account, can lead to unfair treatment and discriminatory enforcement of crimes.[171] Therefore, to guard against abuse of discretion, prosecutors must take affirmative steps to make sure that biases and prejudices do not influence their decision-making process.[172]

B. Irvine 11: An Example of the Potential for Discriminatory Enforcement of Speech Crimes

Statutes that prosecute types of speech are prone to discriminatory enforcement.[173] The Irvine 11 students were charged under section 403 for a willful disturbance of assembly.[174] This statute is different from a breach of the peace statute because instead of penalizing the speaker, it penalizes an audience

165. *See supra* notes 131–33 and accompanying text.
166. *See* Esposito, *supra* note 23.
167. *See supra* notes 131–33 and accompanying text.
168. *See* Esposito, *supra* note 23.
169. *Contra* People's Opposition to Motion, *supra* note 6, at 19.
170. Barrett, *supra* note 10.
171. *See* Greene, *supra* note 66, at 756–57.
172. *See infra* notes 198–204 and accompanying text.
173. See *supra* notes 84–92 and accompanying text.
174. Medina, *supra* note 116.

member.[175] However, like breach of peace statutes, willful disturbance statutes are also prone to discriminatory enforcement. The Irvine 11 case highlights the inherent flaw in willful disturbance of assembly statutes. Even though section 403 is content-neutral,[176] it can still be discriminatorily enforced by prosecutors when they take legal action against individuals based on the content of their speech. Speakers have been heckled in public assemblies in Orange County, yet individuals who heckle are usually not charged and prosecuted for a misdemeanor crime.[177] Only those audience members that disturb an assembly by making controversial remarks may end up being penalized under the statute. This is precisely what happened in the Irvine 11 case; the students made politically controversial and contentious remarks against the Israeli Ambassador, a high profile diplomat, during his discussion of a controversial topic—the Israel-Palestine conflict.[178] The views that the Irvine 11 espoused were so objectionable to some that an anonymous source delivered a detailed packet of information to the various stakeholders who could potentially investigate the incident, in order to prompt legal action and punishment against the Irvine 11.[179] Those who sought to prosecute the Irvine 11 succeeded because the anonymous packet eventually spurred the Orange County District Attorney's decision to press charges.[180] The Irvine 11 prosecution exposes an inherent flaw in willful disturbance of assembly statutes: even though law enforcement officials are prohibited from penalizing individuals based on the content of their speech, they can use willful disturbance of assembly statutes to charge people based on content.[181]

175. *See supra* notes 84–92 (discussing breach of the peace statutes).

176. *See* CAL. PENAL CODE § 403 (West 1999).

177. *See supra* notes 129–33 and accompanying text.

178. *See supra* notes 11–12. At UCI, Ambassador Michael Oren was speaking about Israel's invasion in Gaza in 2008, known as "Operation Cast Lead," during which he served as spokesman for the Israeli government. *See* Esposito, *supra* note 23 ("[Ambassador Oren] did not just speak about history, culture or economics, but a very contentious political conflict and set of issues that has taken the lives and shattered the families of Israelis and Palestinians and in which each side has accused the other of engaging in illegitimate forms of violence and terror.").

179. *See* People's Opposition to Motion, *supra* note 6, Ex. 1. The packet was sent to members of Congress, the District Attorney's Office, and various UCI officials, among others. *Id.*

180. *See id.* at 9.

181. *See* Kagan, *supra* note 86, at 462.

C. *A Decision to Prosecute the Irvine 11: A Matter of Bad Policy*

The decision to prosecute the Irvine 11 was bad policy because it will alienate minority groups, chill free speech and student activism on college campuses, and undermine the university ethos. Muslim students at UCI had previously been alienated by law enforcement officials because of prior Federal Bureau of Investigation (FBI) presence involving surveillance of the Muslim community on campus and in the greater Orange County area.[182] The prosecution of the Irvine 11, given its selective nature, will further alienate Muslim students who already feel targeted by law enforcement because of their religious affiliation.[183] In the aftermath of the prosecution, students at UCI have expressed fear of involvement with MSU out of "fear of repercussions."[184] An MSU student leader at UCI commented on the effect of the Irvine 11 prosecution on the MSU: "People are afraid to be seen as with [MSU], . . . it's like [law enforcement] went after them, how do we know they aren't going to come after us next?"[185]

The prosecution of the Irvine 11 will also chill speech and curb student activism on college campuses across the nation.[186] Public universities "value and foster" free speech on campus[187] and traditionally have been a place for students to "exercise their own right to protest nonviolently, as well as to participate actively in our democracy by questioning authority and institutions."[188] The

182. *See* Ron Campbell, *FBI Says It Wasn't Investigating UCI*, OC REG. (May 21, 2007), http://www.ocregister.com/articles/campus-131610-agent-fbi.html (describing an incident where an FBI agent followed an MSU student on the UCI campus); Cindy Carcamo & Sonya Smith, *Muslims Leery of FBI Activity: Assurances that the Community Isn't Under Watch Meet with Skepticism*, OC REG. (June 17, 2006), http://www.ocregister.com/articles/community-43648-fbi-muslim.html (describing incidents of FBI surveillance in Orange County).

183. *See, e.g.*, Carcamo & Smith, *supra* note 182 (noting that a Muslim student at UCI believes that "the fact that she's Muslim is the reason she's been singled out for searches at airports and been scrutinized by police at anti-war demonstrations.").

184. *See* Medina, *supra* note 116.

185. *Id.*

186. *See* Tim Fucci, *Students Sit-In and Speak Out Over Irvine 11 Guilty Verdict*, UC SANTA BARBARA: THE BOTTOM LINE (Oct. 18, 2011), http://thebottomline.as.ucsb.edu/2011/10/students-sit-in-and-speak-out-over-uc-irvine-11-guilty-verdict (noting that a professor is concerned about the "potential silence effect" of the Irvine 11 prosecution).

187. *Id.*

188. Catharine Debelle, *The UC Irvine 11: District Attorney Attacks Free Speech Rights of Students Nationwide*, IMAGINE 2050: RACE, IDENTITY, DEMOCRACY (Oct. 13 2011), http://imagine2050.newcomm.org/2011/10/13/the-uc-irvine-11-district-

Irvine 11 prosecution, however, sends the opposite message to students: if you participate in nonviolent political protest, you may face harsh penalties, including criminalization or even prosecution.

Finally, the prosecution of the Irvine 11 is bad policy because it undermines the university ethos, which not only encourages students to challenge ideas and assemble around issues that impassion them, but also aims to expose students to diverse viewpoints.[189] A fundamental aspect of college education is the ability to engage in critical discourse and evaluation of ideas, which can only be done if students are given the opportunity to freely communicate and exchange ideas.[190] Even outside the classroom, students are encouraged to continue the discourse and evaluation by putting their "ideas into action" through student organizations.[191] However, criminalizing students for voicing political dissent through a nonviolent political process, as the Irvine 11 did, undermines the university ethos. In an environment where such assembly is encouraged, it is almost "unreasonable" not "to expect students . . . to become involved and act on issues of concern from global politics and the economy to human rights and ecology."[192]

Tolerance of others, including respect for different political beliefs, is another fundamental aspect of the discourse in college communities.[193] Students should not use speech as a form of promoting intolerance, nor should students use speech as a tool to silence a speaker with whom they do not agree. However, students should not be prosecuted when they assemble to air their grievances regarding human rights abuses abroad and express political dissent in a peaceful way. Freedom of speech, therefore, deserves more protection in the university setting because it is a vital aspect of a well-rounded university education. Any policy that criminalizes speech should be weighed against the importance of freedom of speech in the university environment.

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189. *See supra* notes 23–30 and accompanying text.

190. *See* Anderson, *supra* note 46, at 177–78.

191. *See* Esposito, *supra* note 23.

192. *Id.*

193. *Freedom of Expression: Rights with Responsibilities*, UCI POLICE DEPARTMENT, http://www.police.uci.edu/safety/publications/speech.pdf (last visited Mar. 16, 2012) (listing "Principles of Community" as: "Tolerance, civility and mutual respect for diversity of background, gender, ethnicity, race, and religion is a crucial [sic] within our campus community as is tolerance[,] civility and mutual respect for diversity of political beliefs, sexual orientation, and physical abilities").

VI. The Prosecution of the Irvine 11: Solutions to Curb a Bad Policy

The prosecution of the Irvine 11 and the controversy surrounding the incident present a problem that is twofold. First, abuse of prosecutorial discretion must be prevented so that section 403 cannot be selectively enforced. Second, universities must take steps to promote dialogue and discourse among students on campus in an effort to ensure that students do not resort to heckling to air their grievances.

A. Preventing the Abuse of Prosecutorial Discretion

The most effective way to prevent the selective enforcement of section 403 is for the California Legislature to repeal the law. However, prosecutors can also take steps to ensure that bias and prejudice do not influence their decisions. For example, prosecutors can initiate dialogue with minority communities, such as Muslims, who feel targeted and threatened by law enforcement. This small action would provide them with an opportunity to gain a different perspective and make them aware of any conscious and unconscious biases that they may possess.

1. Heckling Legislation

Section 403 is problematic because it criminalizes heckling. A law that criminalizes speech such as heckling is ripe for discriminatory enforcement and has little benefit.[194] Heckling as a form of speech can also serve to further the values of the First Amendment and effectively enhance the rights of all: the heckler, the primary speaker, and the audience.[195] Further, heckling can function as an important form of protest for minority groups who may not otherwise have the opportunity to have their voices heard.[196] As demonstrated by the Irvine 11 case, the risks of criminalizing heckling greatly outweigh the benefits. Heckling a speaker may be rude, but rude conduct alone should not warrant criminalization.[197]

194. *See supra* notes 173–79 and accompanying text.
195. *See supra* notes 134–43 and accompanying text.
196. *See supra* notes 148–59 and accompanying text.
197. In re Kay, 464 P.2d 142, 147 (Cal. 1970).

2. Dialogue Between Prosecutors and Minority Communities

Given that bias and prejudice may have played a role in the Irvine 11 prosecution, in the future prosecutors should initiate and maintain dialogue with minority communities in order to enhance their awareness of—and help eliminate—bias and prejudice in their decisions. Dialogue with communities, particularly those like Muslims, who feel especially targeted by law enforcement,[198] can expose prosecutors to outside community perspectives on prosecutorial decisions.[199] Further, such interaction can help balance the "prosecutors' biased majoritarian perspective with outsider community perspectives."[200] Hopefully, dialogue with minority communities will educate prosecutors about bias and prejudice in their own actions, and will enable prosecutors to institute reforms.[201]

Some prosecutorial offices already have programs to initiate dialogue with the Muslim community. The United States Attorney's Office in Washington, D.C. has a Muslim Outreach Initiative that fosters dialogue between Muslim and Sikh communities and the United States Attorney's Office.[202] Part of the initiative includes programs giving members of the Muslim community the opportunity to speak with prosecutors about their issues with law enforcement, including their feelings of victimization by the police.[203] The Muslim Outreach Initiative is a step in the right direction for prosecutors' offices; other prosecutors' offices, especially state prosecutors, should adopt similar programs. Similar initiatives will expose prosecutors to outside perspectives on how their charging decisions are viewed by Muslims and how they affect communities both negatively and positivity. Further, outreach initiatives can serve as a platform to educate prosecutors on their conscious and unconscious biases by providing them with an alternate perspective on their decisions,

198. It is important for prosecutors to build dialogue with all minority communities that are affected by law enforcement. However, for the purposes of this Article, this section will focus specifically on Muslims, the population involved in the Irvine 11 case.

199. *See* Greene, *supra* note 66, at 739.

200. *Id.*

201. *Id.* at 799.

202. *See Community Prosecution: Community Outreach Programs*, U.S. ATT'Y'S OFF. D.C., http://www.justice.gov/usao/dc/programs/cp/cp_outreach_programs.html (last visited Feb. 19, 2012).

203. *See id.*

which can serve to counteract their dominant and powerful voices.[204]

B. *Promoting Discourse and Dialogue Within the University*

The Irvine 11 prosecution also presents complex challenges for universities, and the reasons why students choose to resort to heckling to have their voices heard. The criticism of the marketplace of ideas may offer one explanation as to why. Critics of the marketplace of ideas contend that the marketplace reflects disparities in communicative power, where mainstream ideas or those with power to control the marketplace to the disadvantage of nonmainstream views.[205] If certain students do not have equal access to the marketplace on campus, the option of engaging in civil discourse may not be available to them.[206] Even before the protest, Muslims students at UCI felt that their voices were marginalized within the greater discourse on campus.[207] Without the option to engage in civil discourse, some students may resort to other methods, such as heckling, to communicate their views, as was witnessed in the Irvine 11 case.[208]

Universities can play an important role in removing disparities in communicative power and ensuring that all students have equal access to discourse on campus. After the Irvine 11 protest, instead of fostering dialogue between groups on campus, UCI suspended the MSU for a quarter and placed the organization on probation for two years.[209] The suspension and probation further alienated the organization on campus because new members were afraid to join the organization due to its tarnished reputation.[210] Instead of penalizing students for protesting in such

204. *See Greene*, *supra* note 66, at 795.

205. *See* BUNKER, *supra* note 42, at 8; *supra* notes 37–40 and accompanying text.

206. Beena Ahmad, *Universities Struggles to Respond to Student Outrage*, BLOG NAT'L COALITION AGAINST CENSORSHIP (Feb. 23, 2010), http://ncacblog.wordpress.com/2010/02/23/universities-struggle-to-respond-to-student-outrage/.

207. *See* Medina, *supra* note 116 ("Muslim students say that they have faced stricter scrutiny from the administration than other student groups"); Ahmad, *supra* note 206 (noting that Muslims groups had complained that the university had rejected their requests to have speakers come discuss the Palestine issue, and that "tensions had been building among the university's Muslim students from the constant threat of FBI surveillance they face in Orange County and their campus community").

208. *See* Ahmad, *supra* note 206 ("[C]ivil discourse may not be available to students who feel pushed to the margins of their academic community.").

209. *See* Meyer, *supra* note 13.

210. *See* Medina, *supra* note 116.

a harsh manner, universities should use protests to create a learning opportunity for students, implement programs that foster dialogue among groups to resolve conflict, and help students understand both sides of an issue.[211]

The Difficult Dialogues National Resource Center, which provides faculty and staff with the tools to promote dialogue on contentious issues, has recently initiated a program at UCI.[212] The project seeks to build on attempts to protect academic freedom, and will use "techniques drawn from peace-building and respect initiatives already under way to foster productive dialogue on campus."[213] The project includes developing new courses, including one on issues surrounding the Israel-Palestine conflict; seminars, which equip faculty members with the tools to facilitate dialogue amongst students on sensitive issues; and lectures and public events that focus on conflict, peace-building, and "successful collaborations that have grown out of situations once dominated by conflict."[214] Universities should use the tools provided by programs such as Difficult Dialogues to promote and foster civil dialogue between student groups, as well as to give students a platform to discuss their viewpoints on issues that impassion them. However, universities must ensure that minority groups, and the views that they espouse, are equally represented in these educational programs. In order to have meaningful dialogue, disparities in communicative power need to be removed and groups that are marginalized by the campus community need to be given the platform to speak.

Conclusion

Muslim students in the United States are increasingly subject to surveillance by law enforcement on account of their religion.[215] The Irvine 11 case highlights how Muslim students can also be subject to selective prosecution. The legal system must guard against abuse in the form of selective prosecution so that groups do not face discriminatory and unequal treatment due to

211. *About*, DIFFICULT DIALOGUES: NAT'L RESOURCE CENTER, http://www.difficultdialogues.org/about/ (last visited Apr. 1, 2012).

212. *Difficult Dialogues: Project / University of California, Irvine: Overview*, NAT'L RESOURCE CENTER, http://www.difficultdialogues.org/projects/university_of_california_irvine/ (last visited Apr. 1, 2012).

213. *Id.*

214. *Id.*

215. *See* Associated Press, *NYPD Monitored Muslim Students All over the Northeast*, USA TODAY (Feb. 18, 2012), http://www.usatoday.com/news/nation/story/2012-02-18/NYPD-Intelligence/53143776/1.

characteristics such as religion. A prosecution policy that criminalizes students for expressing political dissent is extremely alarming because it will have the effect of alienating minority students, chilling speech, and creating tension on campus, a place where freedom of speech is of the utmost importance. Universities must also take steps to ensure that Muslim students are not alienated on campus. When students engage in nonviolent protest, instead of penalizing them, universities should create an opportunity for dialogue on campus. The prosecution of the Irvine 11 is bad precedent and should not be followed by prosecutors in other jurisdictions.