

4-1-2009

The Danish Cartoon Controversy And The Rhetoric Of Libertarian Regret

Robert A. Khan

Follow this and additional works at: <https://repository.law.miami.edu/umicl>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Robert A. Khan, *The Danish Cartoon Controversy And The Rhetoric Of Libertarian Regret*, 16 U. Miami Int'l & Comp. L. Rev. 151 (2009)

Available at: <https://repository.law.miami.edu/umicl/vol16/iss2/2>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

THE DANISH CARTOON CONTROVERSY AND THE RHETORIC OF LIBERTARIAN REGRET

Robert A. Kahn *

A. The Scandal That Wasn't.....	153
B. American and European Approaches to Toleration	156
C. The First Amendment and Libertarian Regret.....	159
D. Libertarian Regret in Action: The Cartoons in America	163
E. A Decision Without Regret.....	166
F. Muslim Migration and Culture War	169
G. Cartoons, Muslims, and the Totalitarian Threat... 	172
H. Religion and the Cartoon Controversy	177
I. Conclusion.....	180

* The author is an assistant professor at the University of St. Thomas School of Law. He would like to thank Douglas Dow, David Patton, and most of all Jacqueline Baronian for their help with this project. This paper grows out of a presentation he gave at a panel on “Rights, Riots and Responsibilities: The Mohammed Cartoons,” held at Manhattanville College in April 2006. Earlier versions of the paper were presented at the Northeast Regional Law and Society Association held at Amherst, Massachusetts in May 2007 and the Institute for Legal Studies Retreat held at Madison, Wisconsin, in September 2008.

SUMMARY

The publication of cartoons insulting the prophet Mohammed created a far greater controversy in Europe than it did in the United States. In this article, I attempt to trace this difference to broader differences in the way Americans and Europeans think about offensive speech. While Americans have developed a language of “libertarian regret,” which allows them to criticize speech that they nevertheless concede the legal system must protect, Europeans are much more concerned about the threat posed by acts of intolerance. As a result, Europeans tended to view Muslim protests against the cartoons as a potential harbinger of totalitarianism. By contrast, most American commentators—while defending the right of the Danish paper to run the cartoons—were more likely to trace the Muslim opposition to the cartoons to religious sensitivities. In a concluding section of the article, I link this to the European fears that Muslims will undermine secular norms.

A. THE SCANDAL THAT WASN'T

A striking aspect of the Danish cartoon controversy was its muted nature in the United States. The September 30, 2005 publication in *Jyllands Posten*, the largest newspaper in Denmark, of 12 cartoons portraying the prophet Mohammed in a negative light¹ unleashed a firestorm—first in Denmark, later in the rest of Europe.² Newspapers in Norway, Sweden, the Netherlands, Belgium, Germany, France, and Italy republished the cartoons³—often as an explicit act of solidarity with the “brave Danes.” On the other hand, the only three mainstream American newspapers that ran the cartoons (the *Philadelphia Inquirer*, the *Rocky Mountain News* and the *Austin American-Statesman*) published them solely because of their “news value.”⁴

¹ The best known of the cartoons featured a head of Mohammed with a bomb as his turban. For a detailed analysis of five of the cartoons, see Marion G. Müller and Ezra Özcan, *The Political Iconography of the Mohammed Cartoons: Understanding Cultural Conflict and Political Action*, PS: POLITICAL SCIENCE AND POLITICS, April 2007, at 287, 287-89.

² Shortly after the cartoons were published, Danish Imams tried unsuccessfully to meet with the Danish Prime Minister. After they were rebuffed, they sought support from the larger Islamic world. As a result, several Middle East countries boycotted Danish goods. In response to the escalating crisis, European newspapers, first in Scandinavia, later in France, Germany and Italy ran the cartoons. For an overview of the controversy see Jytte Klausen, *Rotten Judgment in the State of Denmark*, SPIEGEL ONLINE, Feb. 8, 2006, <http://www.spiegel.de/international/0,1518,399653,00.html>.

³ For a list of newspapers that published the cartoons, see *Media geopolitics of the Mohammed Cartoons*, EDITORS WEBLOG, Feb. 15, 2006, http://www.editorsweblog.org/newsrooms_and_journalism/2006/02/media_geopolitics_of_the_moham.php. Papers running the cartoons included *Le Monde*, *Liberation*, *Frankfurter Allgemeine Zeitung*, *Die Welt* and *La Stampa*. *Id.* Interestingly, no mainstream paper in the United Kingdom published the cartoons.

⁴ Joe Strupp, *Austin Paper was First Major Outlet to Publish 'Muhammed Cartoon'—and Drew Support*, EDITOR & PUBLISHER, Feb. 7, 2006, <http://oldcontent.newswatch.in/specials/the-cartoon-row/3628.html>. According to editor Rich Opper, the *American-Statesman* ran the cartoons “to inform readers.” *Id.*

Moreover, the tone of the two debates over the cartoons could not be more different. In Europe the cartoon controversy played into a clash of civilizations dialogue, in which newspapers, by censoring themselves, were surrendering their tolerant Enlightenment values to Muslim invaders. For example, describing the Danish cartoons and the debate over the Berlin Opera's production of Mozart's *Idomeneo*, which featured the severed head of Mohammed, Ralf Dahrendorf, member of the House of Lords and author of several books on European sociology, called for Europeans to stand up against the "invasion of Islamic taboos" into the "enlightened world."⁵

Finally, the European cartoon debate focused on making Muslims tolerant. *Jyllands Posten* editor Flemming Rose, explaining why he ran the cartoons, pointed to a number of instances of "self-censorship."⁶ But instead of printing a previously censored text, Rose commissioned several cartoonists to draw Mohammed as they saw him.⁷ Even though most Muslims believe Islam bans pictures of the Prophet, Rose asserted that Denmark's Muslim residents would benefit by being exposed to the cartoons. By treating "Islam the same way they treat Christianity, Buddhism, Hinduism and other religions,"⁸ the Danish cartoonists were sending the message to Danish Muslims that "you are part of our society, not strangers."⁹ Rose called this

⁵ Ralf Dahrendorf, *Today's Counter-Enlightenment*, PROJECT SYNDICATE, Oct. 2006, <http://www.project-syndicate.org/commentary/dahrendorf55>. Dahrendorf, whose books include *Society and Democracy in Germany* (1965)—a sensitive look at the post-1945 "German Problem"—is a committed democrat, who now sees European democracy threatened by Muslims. Likewise, former German Chancellor Helmut Schmidt has expressed regret over Muslim migration to Germany. See Robert A. Kahn, *The Headscarf as a Threat: A Comparison of U.S. and German Legal Discourses*, 40 VAND. J. TRANSNAT'L L. 417, 432 (2007).

⁶ Flemming Rose, *Why I Published Those Cartoons*, WASHINGTON POST, Feb. 19, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/02/17/AR2006021702499_pf.html.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

practice “integrating” Denmark’s Muslims into “the Danish tradition of satire.”¹⁰

In contrast, the American debate over the cartoons focused on more general First Amendment values. This is even true of those who favored republishing the cartoons. For example, Eugene Volokh, whose blog “The Volokh Conspiracy” is widely read by law professors, after analyzing the cartoons and determining that some of them were indeed offensive to Muslims, nonetheless concluded that republishing the cartoons was legally allowable and editorially appropriate.¹¹ But he reached this conclusion without invoking a clash between Western and Islamic cultures.¹² In fact few, if any, American commentators debating the cartoons raised the possibility that “self-censorship” would be appeasing specifically an Islamic threat to American freedoms.¹³

Moreover, the response by Muslim American organizations such as the Council on American-Islamic Relations (“CAIR”) was muted. While taking offense at the depictions of Mohammed, these organizations also invoked the example of Mohammed to condemn acts of violence. For example, in the editorial “What Would Mohammed Do?,” CAIR advised Muslims to respond with “good character and dignified behavior in the

¹⁰ Rose, *supra* note 7.

¹¹ Eugene Volokh, *The Twelve Cartoons in Detail*, THE VOLOKH CONSPIRACY, Mar. 10, 2006, http://volokh.com/archives/archive_2006_03_05-2006_03_11.shtml.

¹² The closest Volokh comes is when he argues that “the West must resist this pressure to silence.” But from the context it is clear that what must be resisted is a general tendency to handle “some ideologies” with “kid gloves” rather than any explicit concern about Muslims. Volokh, *supra* note 11.

¹³ However, some American commentators—such as Daniel Pipes—have used this language to criticize *Europe’s* handling of the cartoon affair. See Daniel Pipes, *Cartoons and Islamic Imperialism*, NEW YORK SUN, Feb. 7, 2006, <http://www.danielpipes.org/3360/cartoons-and-islamic-imperialism>. This is part of a broader trend to American neoconservatives to sound the alarm against what they see as European “appeasement” and “surrender” to Islam. For a critical overview of this literature, see Francis Fukuyama, *Europe vs. Radical Islam: Alarmist Americans have mostly bad advice for Europeans*, SLATE, Feb. 27, 2006, <http://www.slate.com/id/2136964/>.

face of provocation and abuse."¹⁴ The Danish Ambassador met with American Muslims to discuss the controversy, a meeting which led Nihad Awad, CAIR's executive director, to remark: "The current escalation of this situation could have been prevented."¹⁵

This is a far cry from Europe where, in March 2006, a group of Muslim teenagers shut down an exhibit of anti-religious cartoons, including some that depicted Mohammed, in a working class Paris suburb,¹⁶ and the organizer of a rally in London for "free expression" had to tell supporters not to wear t-shirts depicting the Danish cartoons, lest they be confused for members of the far-right British National Party.¹⁷

B. AMERICAN AND EUROPEAN APPROACHES TO TOLERATION

In attempting to see why the Danish cartoon controversy did not gain traction in the United States, one explanation is easy to rule out: America is not especially popular in the Muslim world. From the moment President Bush called for a crusade in his "war against terrorism," America has been on a collision course with Islam (and, at times, with American Muslims). The post 9/11 history includes special registration of Muslim non-citizens, the invasions of Afghanistan and Iraq, the use of secret evidence laws against Muslims, and the scandal at Abu Ghraib prison. By contrast, most European states have taken more

¹⁴ Ibrahim Hooper, *What Would Muhammed Do? Muslim Response to the Cartoon Controversy*, CAIR FOR ABOUT.COM, Feb. 4, 2006, <http://islam.about.com/od/currentissues/a/cartoon.htm>.

¹⁵ *American Muslim Leaders Meet with Danish Ambassador*, Muslim Public Affairs Council, Feb. 7, 2006, <http://www.mpac.org/article.php?id=44>.

¹⁶ Euro-Islam.com, *Muslim Gang Forces Paris Café to Censor Cartoon Show*, <http://www.euro-islam.info/2006/03/31/muslim-gang-forces-paris-cafe-to-censor-cartoon-show/> (last visited Oct. 31, 2008).

¹⁷ Euro-Islam.com, *Muhammad Cartoons Appear At London Rally*, <http://www.euro-islam.info/2006/03/25/muhammad-cartoons-appear-at-london-rally/> (last visited Feb. 11, 2009).

moderate positions on issues of concern to the Islamic world, at least in the area of foreign policy.

I want to suggest that the explanation lies in a different place—how Americans and Europeans look at toleration. Speaking very broadly, Americans view freedom of speech and toleration as negative values. They tolerate offensive speech because they do not trust the state to censor it. This distrust is reflected in First Amendment doctrine, which protects a wide range of political speech, including much speech that the society as a whole abhors. The American tradition of protecting socially repugnant speech has, in turn, led the mainstream media to accept self-censorship as an American tradition, one that “has helped make America one of the most harmonious, multiethnic, and multi religious societies in the history of the world.”¹⁸

The broad acceptance of self-censorship has lessened the dilemma posed by “intolerant Muslims.” While Americans may disagree whether, as a practical matter, the cartoons should run, the idea of a major newspaper refusing to run the cartoons does not seem out of place in a society where “mainstream media outlets delete lots of words, sentences and images to avoid offending interest groups, especially ethnic and religious ones.”¹⁹ This is also why no major newspapers in the United States ran ads denying the Holocaust.²⁰

Most Europeans, especially on the Continent, have a radically different idea of toleration. This comes from a greater trust of the state as a censor and is reflected in a large number of laws banning offensive speech. This goes beyond laws outlawing hate speech and Holocaust denial. Most European countries also have extensive group libel laws. For example, the German protection of honor (*Ehre*) covers not only ethnic, racial and religious insults, but also protects members of professional groups

¹⁸ Robert Wright, *The Silent Treatment*, NEW YORK TIMES, Feb. 17, 2006, <http://www.nytimes.com/2006/02/17/opinion/17Wright.html>.

¹⁹ Wright, *supra* note 18.

²⁰ See ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY 134-35 (2004).

such as the military, big business and judges.²¹ As a consequence, the category of protected but reprehensible speech is smaller in Europe than in America.

In addition, the very power of the state (and the way the Nazis used the electoral process to gain power) has led to a great concern about tolerating the intolerant, especially in Germany. Ever since 1945, Europeans have been on the watch for future totalitarians and, whether it be Jehovah's Witnesses, the Cult of Scientology, or "political Islam," they often find what they are looking for. Concerns about Muslims as totalitarian extremists played a pivotal role in the European debate over headscarf wearing.²² Similar concerns arose in the cartoon controversy. For example, Flemming Rose, explaining to *Der Spiegel* why he ran the cartoons, complained that, "Europe's Left is deceiving itself about immigration, integration, and Islamic radicalism today the same way we young hippies deceived ourselves about Marxism and Communism 30 years ago."²³

In what follows, I flesh out the American idea of negative toleration by tracing the development of First Amendment doctrine over the course of the last century. Next I show "negative toleration" took the onus off American Muslims, even among those in the United States who favored republication. Turning to Europe, I first show the absence of libertarian regret in the ruling by the Danish state prosecutor's office to not file charges against the *Jyllands Posten* for running the cartoons. I trace this to a political context far more hostile to Muslim migrants, one that led Europeans to use toleration as a weapon in a "culture war" waged against European Muslims.²⁴ I then touch briefly on religious

²¹ See *Id.* at 181-84.

²² See Kahn, *supra* note 6, at 433.

²³ Flemming Rose, *Why I Published the Mohammed Cartoons*, SPIEGEL ONLINE, May 31, 2006, <http://www.spiegel.de/international/spiegel/0,1518,418930,00.html>.

²⁴ This is how Danish Minister for Cultural Affairs, Brian Mikkelsen, described Denmark's relationship to its Muslim minority in a speech made shortly before the *Jyllands Posten* ran the cartoons. Klausen, *supra* note 3. While many Danes opposed Mikkelsen's culture war rhetoric, the overall climate remained one in

differences between the United States and Europe. While the United States has experienced religious fundamentalism since its founding, the development of a religiously devout Muslim population has de-centered Europe's idea of its own post 1945 secular identity.²⁵ This further explains why the cartoon controversy took on such a strong form in Europe.

C. THE FIRST AMENDMENT AND LIBERTARIAN REGRET

Since the First World War, the key point in American First Amendment doctrine has been the idea that only speech that directly threatens the state is punishable. This was evident in *Schenck v. United States*²⁶ where Justice Holmes first enunciated the "clear and present danger" test and even more so in *Abrams v. United States*,²⁷ where, dissenting against a speech prosecution, Holmes referred to anarchists who supported the Bolshevik Revolution as "poor and puny anonymities." While the court during the McCarthy era would backtrack, even *Dennis v. United States*²⁸ focused on "the gravity of the evil" posed to the state. What was missing was any concern about the "bad tendencies" of the speech. By the time the excesses of the McCarthy era were sorted out in *Brandenburg v. Ohio*,²⁹ the court returned to the idea of direct harm. The state could only ban speech that incites "imminent lawless action."³⁰

which Muslims were "closed off" from the rest of Danish society. See Robert A. Kahn, *The Exclusivist Turn in European Civic Nationalism*, 8 *STUDIES IN ETHNICITY AND NATIONALISM* 524, 528-30 (2008)

²⁵ For a contrast between American and European religious attitudes at the turn of the twenty-first century from a Catholic perspective, see GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD* 24-28 (2005).

²⁶ 249 U.S. 47, 52 (1919).

²⁷ 250 U.S. 616, 629 (1919).

²⁸ 341 U.S. 494, 510 (1951).

²⁹ 395 U.S. 444 (1969).

³⁰ *Id.* at 447.

Most of the “minor provinces” of First Amendment law are quite similar. In contrast to Germany, which bans speech that denigrates the target’s honor, the American “fighting words” doctrine, set forth in *Chaplinsky v. New Hampshire*³¹ only bans speech that would lead the listener to respond violently. Likewise, in *Feiner v. New York*,³² the Court upheld the arrest of a youth attempting to give an inflammatory speech on a street corner, resting its decision on concerns about an immediate breach of peace.³³ Even the recent *Virginia v. Black*³⁴ decision does not ban all cross burning, rather only those acts of cross burning that intimidate others.³⁵

The common thread across the cases is a disinterest in the *content* of speech. What the speaker says is irrelevant—the only question is whether it will cause a severe, immediate disturbance. If the answer is no, courts will protect the speech. (This disinterest can also be seen in the doctrines of “content” and “viewpoint” neutrality, which forbid the state from discriminating against speech in a public forum). The focus on harm, in turn, forces the courts and society to tolerate a great deal of speech they do not like. Over time this has led to the development of a discourse of remorse in which the court expresses regret for the speech it protects.

³¹ 315 U.S. 568, 572 (1942).

³² 340 U.S. 315 (1951).

³³ The court focused on the “rise up in arms and fight for their rights” part of *Feiner’s* speech, concluding that his First Amendment rights had not been violated because his arrest came when the police reasonably believed that a riot would occur. *Id.* at 320.

³⁴ 538 U.S. 347, 363 (2003).

³⁵ Justice Thomas, in an eloquent dissent, takes the position that given the role of the Ku Klux Klan in American history, cross-burning by its very nature intimidates; this is a more European position because it focuses on the societal evil posed by cross burning, rather than viewing it as a source of immediate harm. For more, see Robert A. Kahn, *Did the Burning Cross Speak? Virginia v. Black and the Debate Between Justices O’Connor and Thomas over the History of Cross Burning*, 39 STUDIES IN LAW, POLITICS AND SOCIETY 75 (2006).

Take *National Socialist Party of America v. Village of Skokie* ³⁶ for example. In 1978 a group of American Nazis wanted to march through Skokie, Illinois, a city that had a high percentage of Holocaust survivors.³⁷ The planned march and protests by Holocaust survivors captured nationwide attention. The Seventh Circuit, upholding the right of the Nazis, nonetheless understood how to express regret appropriately:

The preparation of this opinion has not been an easy task...We...feel compelled to...express our repugnance at the doctrines which the Appellees [the Nazis] desire to profess publicly. [We also] regret that after several thousand years of strengthening the thin coating of civilization...which hides the brutal, animal-like instincts...there would still be those who resort to hatred and vilification...³⁸

Judge Pell, however, did not apologize for his ruling. Instead he linked it to a broader libertarian tradition. Thus, if “civil rights are upheld at all” they must also protect “those whose ideas it [society] justifiably rejects and despises.”³⁹

This type of language helps explain why, according to Lee Bollinger, America has become a “tolerant” society that has developed a social practice of living with offensive speech.⁴⁰ This works in two ways: first, language like Judge Pell’s sends a signal to private actors—especially newspapers and other media outlets—that a given speech act, while legally protected, should

³⁶ *National Socialist Party of America v. Village of Skokie*, 366 N.E.2d 347 (Ill. App. Ct. 1977), *cert. denied*, 432 U.S. 43 (1977) (The “*Skokie case*”).

³⁷ For an excellent oral history of the Skokie affair, see DONALD A. DOWNS, *NAZIS IN SKOKIE: FREEDOM, COMMUNITY AND THE FIRST AMENDMENT* (1985).

³⁸ *Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978).

³⁹ *Id.*

⁴⁰ LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 9-11 (1986).

be subject to informal censorship. Second, the language provides a model for those private actors that decide to publish the speech in question to justify their actions.

These ideas were put to the test during the early 1990s when Bradley Smith, leader of the Committee for Open Debate on the Holocaust, sought to place advertisements in college newspapers denying the Holocaust.⁴¹ Although there have been no court rulings on the subject,⁴² First Amendment doctrine as it currently stands most likely protects Holocaust denial. Even though they were free to run the ads, a number of college newspapers refused to do so. For example, the *Harvard Crimson*, rejecting the ads wrote:

By choosing not to run an ad, or an editorial for that matter, we are not imposing censorship; we are simply refusing to offer our privately-owned assets – our printing press, our circulation network, our readership, our limited number of pages, and the name of *The Harvard Crimson*, for that matter.⁴³

A number of other papers that ran the ads added statements of explanation and regret. For example, the *Queens College Quad*, which returned Smith's money but ran his ad as an editorial, explained to its readers that: "Printing the ad doesn't legitimate its content; it legitimates the threat his [Smith's] words carry."⁴⁴

Sometimes the language of regret becomes compressed, so that Phil Donahue, running a program on Holocaust denial found it sufficient to say: "I believe there should be intellectual freedom on this issue. That is why you're [the Holocaust deniers] on the

⁴¹ I discuss this subject at length in my book on Holocaust-denial litigation. See KAHN, *supra* note 20, at 121-35.

⁴² On the other hand, Mel Mermelstein, a Holocaust survivor, successfully sued the deniers in civil court for breach of contract. For more, see KAHN *supra* note, 20 at 22-30.

⁴³ *Id.* at 129.

⁴⁴ *Id.* at 131.

program.”⁴⁵ At other times, over-eager college editors ran the ads without any explanation.⁴⁶ And the publication of the ads aroused bitter controversy. However, even here, two points are noteworthy. First, in the debates that followed, even the most hardened advocates of free speech showed basic respect for Holocaust survivors. Second, no one repeated the argument, favored by Flemming Rose, that exposing a person to offensive speech is a good thing.

D. LIBERTARIAN REGRET IN ACTION: THE CARTOONS IN AMERICA

Doonesbury cartoonist Garry Trudeau epitomized the American perspective on the cartoons. After announcing that he would not draw images of Mohammed or mock Jesus Christ, Trudeau added: “It’s not censorship, it’s editing. Just because a society has almost unlimited freedom of expression doesn’t mean we should ever stop thinking about its consequences in the real world.”⁴⁷

The distinction between the scope of the First Amendment and a paper’s responsibility to the “real world” was a central theme of the American debate over the cartoons. Most of this debate centered on the cartoons’ news value. The vast majority of American papers agreed with *Cleveland Plain-Dealer* editor Doug Clifton who, while concerned about political correctness and self-censorship, did not see “any need to put the image in the paper” given the ability to describe the images with words.⁴⁸

The papers that ran the cartoons asked the same questions, but simply reached a different answer. Thus, Rich Opiel, editor of *Austin American-Statesman*, defended the decision to run the cartoons as inviting readers to “see an example of a drawing that

⁴⁵ *Id.* at 133.

⁴⁶ This was the case at both the University of Michigan and Brandeis University. See KAHN, *supra* note 20, at 123-26, 129-31.

⁴⁷ KAHN, *supra* note 20 at 131.

⁴⁸ See Strupp, *supra* note 5.

offended Muslims and find out why it has."⁴⁹ Likewise, Acton H. Gorton, the editor of the *Daily Illini*, which also ran the cartoons, did so "to raise a healthy dialogue about an important issue...so people would learn more about Islam."⁵⁰ Still, the decision to publish was not easy. Oppel called the decision to publish "a close call" that split his newsroom.⁵¹ Gorton was suspended by the paper for running the cartoons.⁵²

Meanwhile, many Americans condemned the publication of the cartoons. Former President Clinton called the cartoons "appalling" and warned that Europe, after having spent 50 years fighting anti-Semitism, now risked lapsing into anti-Islamic prejudice.⁵³ One conservative blogger compared the turban cartoon to "a cartoon of Christ's crown of thorns transformed into sticks of TNT after an abortion clinic bombing."⁵⁴

There were also statements of regret, especially from those who supported republication. For example, Eugene Volokh, refers to some of the cartoons as "unfair" and "rhetorically excessive."⁵⁵ He then turns to language that echoes Judge Pell's response to the Skokie affair:

⁴⁹ Strupp, *supra* note 5.

⁵⁰ Monica Davey, *Illinois Student Paper Prints Muslim Cartoons, and Reaction is Swift*, NEW YORK TIMES, Feb. 17, 2006, <http://www.nytimes.com/2006/02/17/national/17cartoons.html>.

⁵¹ Strupp, *supra* note 5.

⁵² See Davey, *supra* note 51. On the other hand, the publication of the cartoons at the student newspaper at the University of Southern Alabama, the *Vanguard*, followed European model. Rejecting a demand from the school's Muslim Students Association to apologize, the editors responded that: "A truly free press must not cower down to extremists." First Amendment Center, *Muslims Upset After Campus Newspaper Prints Muhammad Cartoon*, <http://www.firstamendmentcenter.org/news.aspx?id=16599> (Last visited, Mar. 7, 2009).

⁵³ Muslim American Society, *Muslims Denounce Cartoon Caricature of Prophet*, <http://www.masnet.org/news.asp?id=3148> (last visited Oct. 31, 2008).

⁵⁴ See Wright, *supra* note 18.

⁵⁵ See Volokh, *supra* note 11.

Of course, I realize that some disagree, and see any even possibly pejorative reference to Mohammed—or for that matter any depiction of Mohammed as a horrible emotional injury. But their subjective feelings, real as they may be to them, are not sufficient reasons for the rest of us to change the way we talk or write. “I’m offended” cannot be justification enough, either in law or in manners, for the conclusion “therefore you must shut up.”⁵⁶

Although Volokh’s reference to Muslims’ “subjective feelings” can be taken as a bit condescending, it is miles away from the position of Rose and his supporters, who argued that Europe’s Muslims must accept insults against the Prophet as the price of entry to European society.

The passage from Volokh is also noteworthy for the way it shifts the argument away from Muslims to a broader “we” that must craft general laws for society to live by. The shift from the specific to the general is a common theme of most supporters of republication. For example, Paul K. McMasters, an ombudsman at the First Amendment Center, related the cartoon controversy to an earlier Doug Marlette cartoon about Mohammed, Thomas Nast, a Tom Toles cartoon lampooning Donald Rumsfeld, and *Hustler* magazine’s 1983 ad parody attacking Jerry Falwell.⁵⁷ Likewise, Charles Haynes, a senior scholar at the First Amendment Center, related the controversy to college speech codes and restrictions on funding controversial art.⁵⁸

Moreover, neither McMasters nor Haynes target Muslims as intolerant. Like Volokh, they preferred instead to use more general language. Thus Haynes concluded that, “[t]he right to

⁵⁶ See Volokh, *supra* note 11.

⁵⁷ Paul McMasters, *Drawing fire and blood: free speech and religion*, FIRST AMENDMENT CENTER Feb. 12, 2006, <http://www.firstamendmentcenter.org/commentary.aspx?id=16451>.

⁵⁸ See McMasters, *supra* note 55.

offend is, in fact, at the heart of religious freedom in America."⁵⁹ Likewise, McMasters quoted Peter Sheer of the California First Amendment Coalition who expressed his fear that failing to show the cartoons will give into "the censorship of the mob."⁶⁰ The "mob" can be anyone. By contrast Dahernorf feared an invasion of "Islamic taboos."⁶¹

Because of the culture of libertarian regret, the American debate has not become a clash of civilizations. Most newspapers rejected the cartoons, and the debate over them focused on the First Amendment, not the place of Muslims in American society. This may be why the Muslim Public Affairs Committee, in a statement at the height of the controversy, referred to the "rich tradition in classical Islamic thought for the preservation of the mind and the right to free expression."⁶² This could also be why Junaid Aleef, a Muslim lawyer specializing in civil rights law, felt comfortable representing Acton H. Gorton, the *Daily Illini* editor who ran the cartoons, in an action against the paper for making allegedly libelous statements about Gorton's handling of the cartoon controversy.⁶³

E. A DECISION WITHOUT REGRET

The specifically libertarian nature of the American response to the cartoon controversy grows clearer when one compares it to the Danish prosecutor's written opinion justifying

⁵⁹ Charles Haynes, *In defense of the right to offend*, Feb. 19, 2006, <http://www.firstamendmentcenter.org/commentary.aspx?id=16492>

(Interestingly, this is the type of claim Europeans, because of their secular identity, find difficult to make).

⁶⁰ Paul McMasters, *supra* note 58.

⁶¹ Dahrendorf, *supra* note 6.

⁶² Muslim Public Affairs Council, American Muslim Leaders Meet with Danish Ambassador, <http://www.mpac.org/article.php?id=44> (last visited Oct. 31, 2008).

⁶³ Jodi Heckel, *Daily Illini publisher blasts suspended editor's decision in letter*, EAST CENTRAL ILLINOIS NEWS GAZETTE, Feb. 2006, available at www.news-gazette.com (last accessed Oct. 31, 2008).

its decision not to bring charges against the *Jyllands Posten* under Denmark's blasphemy and hate speech laws.⁶⁴ The ten page document was issued on March 15 2006, just six weeks after the controversy boiled over into violence in the Middle East and a full month after *Jyllands Post* itself issued a public apology for any harm caused by the cartoons. Given these circumstances, one might have expected the state prosecutor's office—even as it justified the decision not to go forward with criminal charges—to say something about why it was necessary to protect cartoons that so many Muslims in Denmark and around the world had found offensive. Or perhaps the prosecutor's office could have talked about the “high cost of liberty.”⁶⁵ In other words, one might have expected some note of regret.

This was completely missing from the prosecutors' ruling. The closest it came to expressing sympathy for Muslims was when it discussed the cartoon featuring the prophet Mohammed with a bomb as a turban. The ruling noted that “the drawing can be taken to depict the Prophet...as a violent person and as a rather intimidating or scary figure.”⁶⁶ And - at least when the bomb is “understood to imply terrorism” - this was an “incorrect depiction” of the Prophet. Furthermore, this understanding was one that might, “with good reason,” be seen as “an affront and insult to the Prophet who is an ideal for believing Muslims.”⁶⁷ But this concession was soon taken back. The turban cartoon, the

⁶⁴ *Decision on possible criminal proceedings in the case of Jyllands-Posten's article “the Face of Muhammed,”* Director of Public Prosecutions 2006 [hereinafter “*Decision on possible criminal proceedings*”], available at <http://www.rigsadvokaten.dk/ref.aspx?id=890>.

⁶⁵ Ronald Dworkin, *The Unbearable Cost of Liberty*, INDEX ON CENSORSHIP 43 (1995). While Dworkin used this phrase in the context of Holocaust denial, he has supported the right of the *Jyllands Posten* to publish the cartoons in similar language. See Kahn, *supra* note 24, at 534.

⁶⁶ *Decision on possible criminal proceedings*, *supra* note 65, at 7.

⁶⁷ *Decision on possible criminal proceedings*, *supra* note 62, at 7.

prosecutor concluded, was “not an expression of mockery or ridicule and hardly scorn” as defined by the criminal code.⁶⁸

Instead of viewing the cartoons as part of the “high cost” of liberty, the prosecutor’s office refused to recognize the scope of the injury. The prosecutor did not explain why the turban cartoon, while “incorrect,” was not scornful. Instead, the prosecutor pointed out that punishment under the blasphemy laws is reserved for “serious” cases.⁶⁹ In reaching this conclusion, the prosecutor viewed the cartoons as an attempt to start a debate over whether “special considerations should be made for the religious feelings of certain Muslims in a secular society.”⁷⁰ Because neither this debate nor the cartoons were degrading, the prosecution declined to bring charges.

The prosecutor also rejected the argument that the cartoons were offensive by the very act of depicting the Prophet Mohammed. The prosecutor claimed, without any scholarly support, that “the religious writings of Islam” contain no “general and absolute prohibition against the drawing of the Prophet Mohammed.”⁷¹ In reaching this conclusion, the prosecutor ignored the possibility that the act of drawing the Prophet could be offensive to certain subsets of the Muslim community. Taken as a whole, the prosecutor’s discussion of the blasphemy issue offered little solace to those offended by the cartoons.

The discussion of the hate speech charges followed the same pattern. The prosecutor focused first on the text that accompanied the twelve cartoons. The *Jyllands Posten* editors claimed they published the cartoons because “some” Muslims rejected secular society and insisted on “special consideration of

⁶⁸ Section 140 of the Criminal Code makes it illegal to “mock” or “scorn” religious doctrines or acts of worship. *Decision on possible criminal proceedings, supra* note 62, at 5. The court noted that the law had been used only three times since its inception in 1930. *Decision on possible criminal proceedings, supra* note 62, at 5.

⁶⁹ *Id.*

⁷⁰ *Id.* at 8.

⁷¹ *See id.* at 5.

their own religious feelings.”⁷² According to the state prosecutor, this language fell outside the scope of the hate speech laws because it did not target Muslims in general. The same applied to the turban cartoon, which—the prosecutor claimed—neither referred to Muslims in general nor was “degrading.”⁷³

While the prosecutor’s office explained a need to read Denmark’s hate speech laws narrowly,⁷⁴ it expressed no sympathy for Danish Muslims offended by the cartoons. Instead, Muslims were wrongdoers who, by seeking special privileges, were upending the norms of secular Danish society. This, in turn, reflected the larger Europe-wide movement that saw the Danish cartoons as an important battleground in a culture clash between extremist Muslims and the tolerant West. This clash also saw freedom of speech emerge as a defining characteristic of what it now meant to be a European.⁷⁵

F. MUSLIM MIGRATION AND CULTURE WAR

This new linking of freedom of speech and a European identity constructed in opposition to a Muslim Other was on display in the defense of the cartoons mounted by *Jyllands Posten*’s then-features page editor Flemming Rose which appeared in *Der Spiegel* in May 2006.⁷⁶ Writing for a European audience after the furor began to subside, Rose explained how the “unbalanced reaction to the not-so-provocative caricatures...unmasked

⁷² *Id.* at 2, 9.

⁷³ *Id.* at 9. For an argument that the turban is a classic trope to portray Muslims, see PETER GOTTSCHALK AND GABRIEL GREENBERG, *ISLAMOPHOBIA: MAKING THE MUSLIMS THE ENEMY* 67-69 (2008). The authors have studied the use of Muslim imagery in Western cartoons from the 1950s to the present day. They conclude that the turban cartoon would have been less offensive had it portrayed a specific Muslim actor associated with terrorism—such as Osama Bin Laden. Without this linkage, however the cartoon could not be read as anything other than “a claim that all Muslims are essentially violent.” *Id.* at 69.

⁷⁴ *Decision on possible criminal proceedings, supra* note 62, at 8.

⁷⁵ See Kahn, *supra* note 63.

⁷⁶ Rose, *supra* note 7.

unpleasant realities about Europe's failed experiment with multiculturalism."⁷⁷

By "multiculturalism" Rose meant more than American-style political correctness. Thus Rose warned his readers that it was time to "face facts" about "immigration, integration, and the coming Muslim demographic surge."⁷⁸ Rose also drew attention to a "cult of victimology" which blamed Denmark for "the immigrants' unwillingness to adapt culturally."⁷⁹ This same cult obscured other reasons for "lagging integration" of "some immigrant groups" such as "high crime rates, the suppression of women, and forced marriage."⁸⁰

While the concerns about treatment of women and forced marriage fit into a larger set of concerns about gender equality and Islam that have emerged in the debate over the headscarf, the link between the cartoons and crime rates suggests a broader anti-immigrant agenda on Rose's part. So, too, does his comparison of American immigrant groups (who he describes as Latinos) who pay for the services they use, and Danish immigrants (presumably Muslims) who do not.⁸¹

Rose's arguments reflect his political context. *Jyllands Posten* has strong links to Denmark's ruling Liberal Party, which depends on parliamentary support on the anti-immigrant People's Party.⁸² Unlike in the United States, where "Liberal" is still used as a synonym for progressive or Left, the Danish Liberal Party is an agricultural party that has profited by anti-immigrant calls in the

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Rose, *supra* note 7.

⁸² Klausen, *supra* note 3.

past.⁸³ This was especially true of the 2001 elections in which the nationalist Right made major gains.⁸⁴

The publication of the cartoons fits neatly into the plans of Danish Culture Minister Brian Mikkelsen for a “culture war” against Muslims.⁸⁵ In a speech in early September 2005 he told a Liberal Party audience: “We have gone to war against the multicultural ideology that says everything is equally valid.”⁸⁶ Concluding that the first round was won, the next step was a war against Muslim ways of thought.⁸⁷ This involved a program of cultural restoration. Meanwhile, two members of the People’s Party, speaking in parliament, called Muslims “a cancer on society.”⁸⁸

Nor, despite Danes reputation as “the little tolerant people,”⁸⁹ was the cartoon controversy the first time Danish Muslims faced religious discrimination. In 1999, as Denmark was celebrating the 150th anniversary of the Danish Constitution and public speakers repeatedly congratulated themselves on the country’s tradition of openness and toleration, the two largest supermarket chains in Denmark refused to let Muslim women

⁸³Daniel Skidmore-Hess, *The Danish Party System and the Rise of the Right in the 2001 Parliamentary Election*, 78 *INTERNATIONAL SOCIAL SCIENCE REVIEW* 89, 94 (2003) (The main Left party in Denmark, the Social Democrats, has lost electoral support in recent years).

⁸⁴ *Id.* at 94.

⁸⁵ Klausen, *supra* note 3.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* According to Klausen, herself a Dane, that image, rooted in the rescue of Danish Jews in 1943, “died” with the cartoon controversy. *Id.* Klausen may be a bit harsh here. The identity of Danes as a tolerant people goes back to the country’s Lutheran heritage. See Per Mourtsen, *The Particular Universalism of a Nordic Civic Nation; Common Values, State Religion and Islam in Danish Political Culture*, in 70 *MULTICULTURALISM, MUSLIMS AND CITIZENSHIP: A EUROPEAN APPROACH* 79 (Tariq Modood, Anna Triandafyllidou & Ricard Zapata-Barrero eds.) (2006).

wearing headscarves work at check out desks or other public areas of the stores because the headscarves were “unhygienic.”⁹⁰

Behind these policies is the fear that “in the not-too-distant future Danes will be reduced to a minority ‘in their own country.’”⁹¹ While the 200,000 Danish Muslims make up only five percent of the country’s population, the concern echoes a broader fear of Eurabia—a fear illustrated by an *Economist* cover in June 2006 with a crescent moon on top of the Eiffel Tower.⁹² Concerns about “culture war” and “Eurabia”, however, do not explain why anti-immigrant activism took the form of “cartoons” — it is to that subject we now turn.

G. CARTOONS, MUSLIMS, AND THE TOTALITARIAN THREAT

Writing in the *Washington Post* to defend the cartoons to an American audience, Flemming Rose stated “[i]f a believer demands that I, as a nonbeliever, observe his taboos in a public domain, he is not asking for my respect, but for my submission.”⁹³ He then added that this “is exactly why Karl Popper, in his seminal work ‘The Open Society and Its Enemies’ insisted that one should not be tolerant with the intolerant.”⁹⁴ He added that “[a]s a former correspondent in the Soviet Union”⁹⁵ he had experience with “calls for censorship” based on “insult.”⁹⁶ Just as the Soviets

⁹⁰ See Jørgen Bæk Simonsen, *Globalization in Reverse and the Challenge of Integration: Muslims in Denmark*, in 121 MUSLIMS IN THE WEST: FROM SOJOURNERS TO CITIZENS 127-28 (Yvonne Yazbeck Haddad ed.) (2002); Islamic Human Rights Commission, *Briefing: Good Practice on the Headscarf in Europe*, Mar. 9, 2004, <http://www.ihrc.org.uk/show.php?id=1030> (To its credit, the labor and immigration ministers of the Social Democrat led government spoke out against the policy and some business created special uniforms that incorporated the headscarf).

⁹¹ SIMONSEN, *supra* note 88, at 126.

⁹² *Eurabia: The Myth and Reality of Islam in Europe*, *ECONOMIST*, June 24-30, 2006, at cover.

⁹³ Rose, *supra* note 7.

⁹⁴ *Id.*

⁹⁵ Rose told his European readers he was a correspondent from 1990-2000, hardly the height of the Cold War. *See Id.*

⁹⁶ *Id.*

accused “Andrei Sakharov, Vladimir Bukovsky, Alexander Solzhenitsyn, Natan Shransky [and] Boris Pasternak” of “anti-Soviet propaganda” some Muslims were labeling the 12 cartoons “anti-Islamic.”⁹⁷ He then reminded Americans of the “lesson” from the Cold War: “If you give into totalitarian impulses once, new demands follow.”⁹⁸

The references to Popper, totalitarianism, and the Soviet Union seem less calculated to win over an American audience—whose lesson from the Cold War is more likely some version of the triumphal “We Won!”—and more a reflection of the role the totalitarian threat plays in European discourse over speech. The idea that Europe must defend itself against its totalitarian enemies arose as a reaction to the experience of the Weimar Republic which, on this view, did not do enough to stop Adolph Hitler’s rise to power.

While the actual reasons for the Nazi’s political success are many—and include the economy, the impact of the First World War and the Versailles treaty⁹⁹—two arguments are relevant in the toleration context: (1) the Nazis seized power because the Weimar era tolerated too much speech; and (2) the Nazis seized power because the civil service elite was insufficiently committed to using the laws it had to defend the Republic against its enemies.

The first explanation is easy to discredit.¹⁰⁰ During the 1920s the Nazis were often prosecuted under laws banning hate speech and religious extremism; in fact the state of Bavaria banned the Nazi party for two years (1923-25). It still, however, plays a role in explaining why European states today ban a wide variety of speech. For example, in Germany it is illegal to give the Hitler salute, display a Swastika or sing the first verse of *Deutschland Über Alles*.¹⁰¹ The concern is that any use of Nazi

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ For a short historical overview of Weimar Germany, see RUTH HENIG, *THE WEIMAR REPUBLIC, 1919-1933* (1998).

¹⁰⁰ ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* 160 (1979)

¹⁰¹ KAHN, *supra* note 20, at 15.

symbols risks a right wing revival. Similar arguments have been made about the Muslim headscarf as a symbol of political Islam.¹⁰²

The second explanation goes to the heart of the matter. While the Weimar laws banned extremism of the Right and Left, the judges themselves were “blind in the Right eye” – meaning that they often found ways to acquit Nazis or let them off lightly.¹⁰³ This can be seen in the short sentence Hitler received for staging the 1923 Munich coup and the tendency of German courts to acquit Nazis charged with insulting Jews.¹⁰⁴ The fear of totalitarians led postwar Germany to ban both Nazis and Communists, while making sure that there were no radicals in the civil service.¹⁰⁵ The extent of the anti-totalitarian discourse was shown by its use in a 2003 decision in which the Federal Constitutional Court held that German states could, if they wished, ban headscarf wearers from serving as public school teachers.¹⁰⁶

Layered onto this was a tradition of crafting judicial opinions in speech cases very different from the American model. As we have seen, Americans express regret over allowing offensive speech, while describing freedom of speech in general terms. The tendency in Europe (at least in France and Germany) is to debate the speech “on the merits.” This brings courts to the center of the political debate. For example, in the infamous Weimar era case, the Federal Supreme Court held that the phrase “Jew Republic” was not anti-Semitic, but simply reflected the disproportionate number of Jews in German political life.¹⁰⁷ This a far cry from Justice Holmes, who in the *Abrams* case, referred to

¹⁰² Kahn, *supra* note 6, at 433.

¹⁰³ KAHN, *supra* note 20, at 15.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 148.

¹⁰⁶ Kahn, *The Headscarf as Threat*, *supra* note 6, at 426-29 (citing Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] Sep. 24, 2003, 108 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 282, (283-84) (F.R.G.) (describing background of the *Ludin* case)).

¹⁰⁷ KAHN, *supra* note 20, at 67.

the speech he was protecting as the work of “puny anonymities.”¹⁰⁸

The need to discuss speech “on the merits” was also on display in French Holocaust denial litigation. In 1979 a coalition of civil rights groups and Holocaust survivors sued literature professor Robert Faurisson after he had written an op-ed piece in *Le Monde* denying the Holocaust.¹⁰⁹ The suit was brought under § 1382 of the Civil Code, a general tort provision that requires professionals to fulfill their duties. While both the trial and appellate courts ruled for the survivors, neither court was willing to say that Faurisson had, in fact, falsified history or say that the Holocaust happened. The decisions were poorly received by French society and led to the 1990 Gayssot law which punishes Holocaust denial directly.¹¹⁰

What’s striking about the Faurisson case from an American perspective is the way the courts brought trouble on themselves. If they had doubts about their ability to judge history (which seems to have been the driving force behind their refusal to acknowledge the Holocaust) they could have held that § 1382 was never intended to cover “falsifying history.” Likewise, the failure to make a clear statement recognizing the Holocaust, even as they ruled in favor of the survivors, stands in marked contrast to Judge Pell who, in the *Skokie* case, allowed the speech but excoriated the Nazis.

What connects the “Jew Republic” and Faurisson cases is a concern about the *content* of the speech. When Europeans think about censoring speech they do not ask: “what are the consequences?” but rather: “what does the speech mean?” So, instead of asking whether the Danish cartoons would cause a ruckus, Europeans asked what the cartoons meant. To Flemming Rose the cartoons were a means to fully integrate Danish Muslims into the “Danish tradition of satire.”¹¹¹ They were also a “moment

¹⁰⁸ 250 U.S. at 629 (Holmes, J., dissenting).

¹⁰⁹ KAHN, *supra* note 20, at 31-37.

¹¹⁰ *Id.* at 31, 101.

¹¹¹ Rose, *supra* note 7.

of truth" in the struggle against totalitarianism. Rose made this point explicitly when defending the turban cartoon: "[s]ome individuals have taken the religion of Islam hostage by committing terrorist acts in the name of the prophet. They are the ones who have given the religion a bad name."¹¹²

Unlike his American defenders, Rose cannot defend the cartoons without criticizing Islam. This is perhaps clearest when, at the height of the controversy, it became known that three years earlier *Jyllands Posten* refused to run cartoons lampooning Jesus Christ.¹¹³ The cartoonist, Christopher Zeiler, described the cartoons as "an innocent joke" the type his "Christian grandfather" would enjoy.¹¹⁴ Calling charges of a double standard "ridiculous," *Jyllands Posten* Sunday editor, Jens Kaiser replied: "In the Muhammad drawings case, we asked the illustrators to do it. I did not ask for these cartoons."¹¹⁵ In other words, what distinguishes the cartoons from anti-Christian cartoons is that they were part of an organized effort to "take back" Denmark (and Europe) from the Muslims.¹¹⁶

However, this is not the entire story. Defending against charges of a double standard, Rose noted that his paper has printed satirical cartoons of Jesus Christ in the past, including one with him on the cross with dollar signs in his eyes.¹¹⁷ In describing the atmosphere of "self-censorship" he complained that "a Danish standup comedian said...he had no problem urinating on the Bible in front of the camera, but dared not do the same thing with

¹¹² Rose, *supra* note 7.

¹¹³ Gwladys Fouché, *Danish paper rejected Jesus cartoon*, THE GUARDIAN, Feb. 6, 2006, available at <http://www.guardian.co.uk/media/2006/feb/06/pressandpublishing.politics> (last accessed Oct. 31, 2008).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ There were dissenting voices. The *Financial Times Deutschland* raised the possibility that freedom of speech and the press were tools for the weak to stand up against the authorities, not an instrument for "idiots" to harass a countries' minority population. Daryl Lindsey, *Cartoon Kampf*, SPIEGEL ONLINE, Feb. 8, 2006, available at <http://www.spiegel.de/international/0,1518,399722,00.html> (last accessed Oct. 31, 2008).

¹¹⁷ Rose, *supra* note 23.

the Koran.”¹¹⁸ So, when Rose claims he is treating Islam the same way he treats Christianity (and other religions) he may have a point, but it is one that highlights the difference between a secular Europe and an America far more comfortable with expressions of religious belief.

H. RELIGION AND THE CARTOON CONTROVERSY

Another striking difference between the American and European responses to the cartoons relates to religion. Simply put, Americans were much more sensitive to the harm posed by the cartoons than their European counterparts. McMasters, ombudsman of the First Amendment Center and republication supporter, nonetheless acknowledged “the deep insult to their [Muslims’] faith caused by the cartoons.”¹¹⁹ This was true, even though the United States had not seen a blasphemy prosecution in over thirty years and the stronger view is that the Constitution no longer allows such prosecutions.¹²⁰

What the American record does reveal is a tradition of understanding of Muslim religious beliefs (at least pre-9/11). This is especially true of the Muslim tradition of not showing images of the Prophet. In 1955, New York officials removed a statue from a court building after representatives from Muslim countries complained.¹²¹ Likewise, in 1997 American Muslims met with officials at the Supreme Court to discuss a frieze that included Mohammed and 17 other famous lawgivers. While the Court

¹¹⁸ *Id.*

¹¹⁹ McMasters, *supra* note 55.

¹²⁰ See LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED FROM MOSES TO SALMAN RUSHDIE* (1993) at 522-33. In *Burstyn v. Wilson*, 343 U.S. 495 (1952) Justice Clark wrote that it was “not the business of the government in our nation to suppress real or imagined attacks on a religious doctrine” *Id.* at 505. The last blasphemy prosecution in the United States took place in 1971. LEVY, *supra* note 118, at 530.

¹²¹ Jocelyne Zablitz, *Mohammed Sculpture at top US court*, MIDDLE EAST ONLINE, Feb. 8, 2006, available at www.middle-east-online.com (last accessed Oct. 31, 2008).

refused to remove the frieze, they agreed to revise the literature about the frieze to refer to Mohammed as the “prophet” not the “founder” of Islam.¹²²

The situation in Europe is quite different. Even though there are laws against blasphemy in many European countries, they are not consistently enforced. The Gay News Case, in which a series of British courts upheld a blasphemy prosecution against the author of an erotic poem about Jesus, was noteworthy because such prosecutions are rare.¹²³ This is why Rose could plausibly state that in Denmark everyone should be fair game, including Muslims.

There is a second difference as well. One of the main fears Europeans have of Muslims is that they are religiously conservative. This, in turn, corresponds to Europe’s uneasiness about its secular identity. This can be seen in the debate over whether to include any reference to Europe’s “Christian” background in its new constitution.¹²⁴ While opponents argued that referring to Europe as “Christian” would encourage anti-Muslim discrimination,¹²⁵ the cartoon controversy suggests that Islam’s strongest European defenders will be religious conservatives. Thus the one body that explicitly condemned the publication of the cartoons was the Vatican.¹²⁶ Meanwhile, European secularists worry that “intolerant” Muslims will roll back the “hard won gains” of the last century.

This is already happening. According to Jytte Klausen, a new coalition is forming “between religious folks—Catholics, American-style Evangelicals, and Muslims—who are increasingly issuing common complaints about bioethics, abortion and other issues.”¹²⁷ In fact, Anglicans, Catholics, and Muslims in the United

¹²² *Id.*

¹²³ LEVY, *supra* note 118, at 535.

¹²⁴ WEIGEL, *supra* note 25, at 56-63

¹²⁵ *Id.*

¹²⁶ Haynes, *supra* note 57.

¹²⁷ Jytte Klausen, Research Associate, The Center for European Studies at Harvard University, Remarks at the Euro-Islam: The Dynamics of Effective

Kingdom teamed up to block a law that would allow gay couples to adopt children.¹²⁸ Meanwhile, there has been “a strange rapprochement between European conservatives and feminists.”¹²⁹ Even the right-wing Danish Peoples’ Party has taken up the secular cause. According to Rose, they have called upon the Danish people to distinguish between “radical” Muslims, who insist on the Sharia, and the “moderates” who accept secular law.¹³⁰

While understandable, there is something strange about all this. Europeans worry Muslim religious conservatives will undermine their modern secular society. Americans, however, have lived through two decades of conservative social change inspired by the Moral Majority, Pat Robertson’s political movement, and groups like the Promise Keepers. Furthermore, as an article in the “Eurabia” issue of the Economist rightly put it, “[W]hatever weapons the parties in America’s religious arguments try to use, they do not usually include attempts to deny the other side’s right to speak.”¹³¹

The Danish Cartoon controversy asked Europeans, in the midst of confusion about their own secular identity,¹³² to respect the tradition of another religion. Rose responded that Denmark (and Europe) respected no one’s religious traditions. In doing so, they were claiming that Europe was a “post-Christian” society, and insisting that Muslims not change it. By contrast, Americans, who are generally uncomfortable with the Muslim world, were

Integration Conference at the Woodrow Wilson Center for Scholars (Jun. 21, 2006), available at www.wilsoncenter.org (last accessed Oct. 31, 2008).

¹²⁸ *Id.*

¹²⁹ Jytte Klausen, Research Associate, The Center for European Studies at Harvard University, *Islamic Challenge: Politics and Religion in Western Europe*, Speech delivered at the Carnegie Council (Apr. 6, 2006), available at www.cceia.org/resources/transcripts/5340.html (last accessed Oct. 31, 2008).

¹³⁰ Rose, *supra* note 7.

¹³¹ *Look out, Europe, they say: Why so many Muslims find it easier to be American than to feel European*, THE ECONOMIST, Jun. 24, 2006 at 29.

¹³² According to Klausen, even in secular Europe, 55% of respondents believe in God and continue to rely on church for life-cycle events. Klausen, *supra* note 127.

more comfortable with Islam as a religion. The ban on visual depictions of the Prophet was well within the zone of toleration for a society that, to quote the *Economist*, “places huge importance on the right to religious difference, including the right to displays of faith [and prohibitions] which others might consider eccentric.”¹³³

I. CONCLUSION

The cartoon controversy has often been cast as a clash of civilizations between the tolerant West and intolerant Islam. One could argue, however, that the greater differences are within the West, itself. Here one has, for example, the difference between a culture that views offensive speech as the product of “puny anonymities” and one that sees it as the work of totalitarians in waiting. Likewise, there is a difference between a culture that, whatever its outbreaks of puritanical ardor, respects strong statements of religious faith, and one that feels constrained if it is unable to make fun of religious beliefs. There are many areas where Europe outshines the United States—its generally non-militaristic foreign policy and social welfare state come to mind. And even on the subject of civil rights for Muslim Americans, the record is far from perfect (as the Florida case of Sultaana Freeman shows).¹³⁴

That said, there is something unfortunate in the gratuitous way the editors of *Jyllands Posten* found it necessary to trample on the faith of Europe’s largest minority group. As has been said, it recalls the anti-Semitism of an earlier century. One hopes that the controversy will lead to a greater understanding of Islamic religious beliefs and a greater sensitivity in distinguishing between specific religious practices that pose legitimate social

¹³³ Klausen, *supra* note 131.

¹³⁴ Freeman, who wears a niqab (which covers all her face except her eyes) was denied the use of a photo-free drivers license, even though Protestant sects with similar beliefs had been allowed to use them. *Freeman v. Florida*, 2003 WL 21338619 at *1 (Fla. Cir. Ct. Jun. 6, 2003); *see also* Kahn, *supra* note 6, at 434-43.

issues for the larger society (such as forced marriages and honor killings) and those which properly belong within the purview of the religious group in question.

