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The Freedom of Expression, The Harm of Expression, and The Danish Cartoons

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The controversy over the publication in Denmark of cartoons depicting and at times mocking the Prophet Mohammed raises profound issues about freedom of expression, and I would like to address three of them in this paper. The first issue relates to important differences among liberal democracies in the nature of the protection of freedom of expression, differences that are often ignored as we often only compare freedom of expression in liberal democracies, in the aggregate, with freedom of expression, in the aggregate, in totalitarian or otherwise non-liberal and non-democratic societies. Second, the protection of freedom of expression is closely connected with our understanding of the harms, if any, caused by acts of expression. As a result, the controversy over publication of the Danish cartoons causes us to consider what kind of harms, if any, the publication of these cartoons may have produced, and how those harms relate to the theory and the practice of freedom of expression. Third, and finally, the reaction to the Danish cartoon controversy in much of the Islamic world compels us to confront the question whether freedom of expression, properly understood, is a universal value (or a universal human right) or whether instead freedom of expression is one example of what in modern debates about development are referred to as “western values.” In suggesting that Islamic nations and individual Muslims ought to be more tolerant of the publication of the cartoons than they have been, are Western nations and many of their citizens expressing universal norms, or instead are they seeking to impose their own values on the practices of quite different cultures?

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I

I start with the United States, not (only) because I am an American, but because the United States represents a view at one end of a spectrum about the practice of freedom of expression, and thus the United States provides a useful point of comparison for a range of other views at different points on that spectrum

Under existing and well-settled American constitutional doctrine, the publication of these cartoons, and in fact of images considerably more offensive than these,² would present no serious legal issues, and their publication would plainly be, and in fact has been, permitted. And this conclusion and statement of American law is but a straightforward application of what has been established American constitutional doctrine since the 1960s. Thus, in 1969 the Supreme Court of the United States, in Brandenburg v. Ohio,³ held that speech alleged to cause illegal or violent acts could be subject to legal sanctions if and only if the speech were to be explicitly directed at inciting unlawful acts, and if and only if the speech were to explicitly urge that those unlawful acts take place imminently, and if and only if the unlawful acts urged by the speech were in fact likely to occur imminently. Abstract advocacy of illegality, of violence, or even of murder, and explicit advocacy of violent and illegal acts to be carried out in the indeterminate future, remain fully protected by the First Amendment.

Interestingly, although Brandenburg was in reality the Supreme Court's (belated, but arguably understandably belated, given the Court's focus at the time on the problem of racial

²I do not wish to be too explicit, but I do want to make clear that under American law these cartoons are not even close to the line, and that similar images that were very highly sexually explicit and that used highly vulgar language would be equally protected, unless those images were to appear on broadcast (not cable or satellite) television or radio, where the range of permissible prohibitions in the United States is uniquely greater.

³395 U.S. 444 (1969).

segregation) response to the excesses of McCarthyism, and although the issue of sanctions against those who would advocate socialism, syndicalism, anarchism, communism, or the violent overthrow of the government was very much on the Supreme Court's mind, the Brandenburg case itself involved a leader of the Ku Klux Klan who had urged a range of non-imminent and largely unspecified acts of violent "revengeance" against Blacks and Jews (those were not the designations Clarence Brandenburg in fact employed). As a result of the actual facts of the case, therefore, it has been clear at least since 1969 that prohibitions against the incitement to racial hatred, ubiquitous in almost all other liberal democracies and mandated by multiple international conventions (to which the United States has filed its reservations for exactly this reason), are unconstitutional in the United States.

Incitement to racial hatred is only one dimension of what is commonly referred to as "hate speech." The other dimension is racial (or religious, or ethnic) insult, and here, once again, the United States is, measured against international standards, extraordinarily permissive. In a rather benign case in 1971, the Supreme Court concluded that an anti-war protester named Paul Cohen, who had expressed his disapproval of the war in Vietnam and its accompanying conscription by wearing a jacket containing the words "Fuck the Draft" on the back, could not be punished for wearing that jacket in public (indeed, just outside of a courtroom), despite the harm, anguish, or offense (remember, it was 1969 when the case arose) that the message would have on unwilling viewers.⁴ But the principle that emerged from the Cohen case was broader than the innocuous facts of that case, and the consequence is the considerably more expansive principle that the effect of words, pictures, or images on unwilling viewers or listeners cannot in the United States be punished except in extremely narrow circumstances. As a consequence, when the American Nazi Party (perhaps again is a reaction against the excesses of McCarthyism, there can be no illegal political parties in the United States) proposed in 1977 to march -- with flags,

⁴Cohen v. California, 403 U.S. 15 (1971).

swastikas, jackboots, and all the rest -- in Skokie, Illinois, a community disproportionately populated by survivors of the Holocaust, the right of the Nazis to do so over the community's objections was considered such a well-settled proposition that the Supreme Court did not even find it necessary to consider the case in full before affirming the lower state and federal court rulings allowing the march.⁵

Against the background of this state of the well-settled law,⁶ it is not at all surprising that in the United States there has been essentially no suggestion whatsoever that publication of the cartoons should be subject to legal sanctions, although there has been a lively debate about whether newspapers and magazines should -- as a matter of ethics, morality, decency, and the illumination of public debate -- publish them. And in this sense the American debate about the cartoons -- and it has been extensive -- is less complex than the debate in Europe, where the questions of the desirability or propriety if publication have been more interwoven with questions of legality.

Yet although the legality of publication of the cartoons has obviously been more on the agenda in Europe than in the United States, it is a mistake, common in much of the Arab world and elsewhere as well, to assume that European countries have a uniform view even about the issues of legality. Indeed, a common manifestation of the mistake is the frequent charge that Danish non-prosecution of the publishers (and authors) of the cartoons is tellingly inconsistent

⁵National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977).

⁶On what may have caused the United States to depart so much in its approach to freedom of expression from the approach that prevails even in other open Western liberal democracies, see Frederick Schauer, "The Exceptional First Amendment," in Michael Ignatieff, ed., American Exceptionalism and Human Rights (Princeton: Princeton University Press, 2005), pp. 29-56. See also Frederick Schauer, "Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture," in Georg Nolte, ed., European and U.S. Constitutionalism (Cambridge: Cambridge University Press, 2005), pp. 49-69.

with Austria's prosecution of David Irving for denying the existence of the Holocaust, the inconsistency, it is alleged, being strong evidence of deep anti-Arab (and pro-Jewish, perhaps) European views. But even putting aside the obvious reasons why Austria has a quite different history from Denmark with respect to the Holocaust and thus why Austria has decidedly non-Danish reasons to treat Holocaust denial as a special danger, it is simply not the case that Denmark and Austria have similar freedom of expression cultures, values, and laws, the harmonizing effects of the European Convention on Human Rights notwithstanding. Along the same spectrum that finds the United States as a permissive outlier, it seems plain that France, which has imposed penalties for racial insult, incitement to racial hatred, and Holocaust denial with some frequency (as witness the successful actions against Brigitte Bardot and Jean-Marie LePen and the ultimately unsuccessful prosecution of Michel Houellebecq), Austria, and Germany, to a differing extent and at various times on different issues, are less tolerant of racist expression than the United Kingdom, which in turn is less tolerant than Denmark. Some of these differences pertain to different views about race and racism, and about equality more generally, but most of the differences relate to cross-national variations in the value of freedom of expression. For even among nations that take freedom of expression seriously, there are differences about the extent to which freedom of expression should prevail when it finds itself in conflict with other important values, such as the value of equality, the value of privacy, the value of a criminal defendant's right to a fair trial, and the value of civility in public discourse. And it is also the case that the value of freedom of expression, especially in conflict with other values, is at least partly a function of the value of liberty more generally. Just as it is not surprising that generally libertarian (not the same as liberal, but that is for another day) nations like the United States have a strong commitment to freedom of expression, even less libertarian countries than the United States will value freedom of expression to a greater extent when they find themselves valuing, especially, liberty over community, and, perhaps to a lesser extent, liberty over equality or liberty over social justice.

The point here is not to explain all of the causes of a particular approach to freedom of expression in various countries. It is, however, to situate the controversy over the Danish cartoons in larger differences about freedom of expression across cultures and across nations. Ronald Dworkin, in a recent commentary in The New York Review of Books about the Danish cartoon controversy, asserts confidently that the freedom to ridicule important social actors, including Islam generally and particular Islamic leaders more particularly, is a trans-cultural and trans-national fundamental premise of democracy itself. But there is no reason to believe that conceptions of democracy should be any more uniform than conceptions of freedom of expression. It is true, of course, that there are minimum conditions for democracy, and bridleing at the way in which North Korea now and East Germany previously have described themselves, officially, as “democratic” is not just an American affectation. Still, a more plausible view than Dworkin’s is that there is a margin of appreciation for conceptions of democracy, and although that margin of appreciation might not include derogations of the basic right to vote, universal adult suffrage, freedom to criticize the policies of one’s political opponents, and freedom to criticize the performance of government, it seems more reasonable to believe that it does include varying national approaches to the inclusion within political debate of ridicule of one’s political opponents on the basis of their race, religion, ethnicity, national origin, gender, and the like. Denmark has chosen a position within this margin of appreciation different from that of at least some other European countries, but whether Denmark has chosen the correct position depends, in part, on how we think about freedom of expression generally, and about the various harms, if any, that expression may cause. And it is to this question that I now turn.

II

There is in the United States a common slogan relevant to freedom of expression, and it is a slogan, taught to most Americans by their parents at a young age. In order to discourage us from fighting or being excessively anguished at every schoolyard taunt, we are told that “Sticks and stones may break my bones, but names will never hurt me.” And so we are encouraged as

children, when other children call us names, to turn the other cheek.

This slogan may well serve its intended purpose of discouraging physical retaliation for young children in the United States, and it may serve as well to lessen the sting of the schoolyard taunt, but as we get older we come to an important realization: The slogan is false. Our mothers lied to us. In reality, expression⁷ is an other-regarding and not self-regarding act, and in its other-regarding aspect, expression – or communication – has the capacity to cause harm as well as having the capacity to do good.

There are two common but unsatisfactory responses to this seemingly banal observation. One is the claim that although communication can cause harm, the principal remedy for that harm is more communication. In other words, the harms that come from false or misleading or offensive expression are largely eliminated, or at least better eliminated than by any other remedy, by true or accurate or non-offensive counter-expression, this because, in the so-called “marketplace of ideas,” the truth of true expression enables truth to prevail over falsity, good ideas to win out over bad ones, and sound arguments to triumph over unsound ones. So even if it is true that it is harmful to Muslims to portray them in the cartoons and elsewhere as terrorists or as backwards or as sexist, and thus even if publication of the cartoons is, in isolation, harmful to

⁷It is common in Europe, unlike in the United States, to refer to “freedom of expression” rather than to “freedom of speech,” presumably because the word “speech” seems too narrow, except in a technical sense, to encompass writing, printing, publishing, painting, photography, and all of the other things that the right seems plainly to include. But substituting “expression” for “speech” carries its own complications, because many forms of expression are not at all communicative, and the core of the right is about communication and not about non-communicative acts of self-expression, however much such acts are or ought to encompassed by a more general conception of liberty. “Freedom of communication” may avoid both pitfalls, as long as it is recognized that the right to freedom of communication no more encompasses all of communication than the right to freedom of expression encompasses all of expression or the right to freedom of speech encompasses all speech. See Frederick Schauer, “The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience,” Harvard Law Review, vol. 117 (2004), pp. 1765-1809.

Muslims because of the impressions of Muslims that the distribution of the cartoons will foster, an equal liberty for the opposing views, it is commonly argued, will enable truth to prevail in the long run.

Once again, the problem with this argument, essentially an empirical and not a philosophical argument, is that it is false. The question, put precisely, is whether the truth (or falsity) of a proposition has the greatest explanatory power in determining which propositions will be accepted and which rejected, at least when compared to other potential explanatory variables, including the charisma or other rhetorical power of the communicator of the proposition, the frequency with which the proposition is repeated, the antecedent beliefs of the audience about the truth or falsity of the proposition, and much else. And when put this way, it is clear that the romantic vision of the truth winning out because of its truth has little strong empirical support, and numerous anecdotal examples (to say nothing of the examples provided by the entire advertising industry) to suggest that it may very well be false.

The other response to the potential harmfulness of expression is the conclusion that freedom of expression protects only harmless and not harmful expression. But such a conclusion renders the right to freedom of expression superfluous. We do not need a right to freedom of expression to tell us that it is wrong for the state to restrict harmless and/or self-regarding conduct, and thus the bite of a genuinely efficacious and non-superfluous right to freedom of expression come from the way in which it protects expression not because the expression is harmless, but despite the harm that (some protected) expression may cause.⁸

Once we understand this latter point, we see that the largely accurate observation that the

⁸For the full version of this argument, see Frederick Schauer, Free Speech: A Philosophical Enquiry (Cambridge: Cambridge University Press, 1982).

cartoons are harmful cannot be understood as a sufficient condition for control in any state in which freedom of expression is taken as protecting behavior not otherwise protected by a more general conception of liberty. So the fact that the cartoons are in fact harmful, and the fact that this harm is unlikely to be alleviated by expression presenting a different point of view (if that is even relevant to some of the types of harm at issue), are not themselves sufficient to justify a restriction, although they might be sufficient to justify a legally un compelled act of restraint on the part of a prospective publisher.

But although harmfulness is not a sufficient condition for control consistent with a regime of freedom of expression, nor does it follow that all expression-created harms must be tolerated in a society that respects freedom of expression. And here it might be useful to consider the three principal types of expression-created harm that the publication of the Danish cartoons may reasonably be thought to create.⁹

The first harm to consider is the harm, recognized by the widespread prohibitions throughout the democratic world on incitement to racial hatred, that comes when actually or potentially sympathizing listeners (or readers, or watchers, or whatever) are encouraged to unlawful or otherwise undesirable acts by the persuasive expression of some speaker, typically with some actual or rhetorical authority over the hearers. France focused on Jean-Marie Le Pen and Brigitte Bardot rather than on every ordinary bistro racist precisely because of Le Pen's and Bardot's presumed action-producing power, and thus one type of harm comes from the way in which expression may often be causal of acts – racial (and ethnic and religious) violence, racial discrimination, and many others – whose illegality is not itself controversial. If we can punish those who provide the weapons or other instrumentalities for others, in their exercise of partial

⁹For a more abstract and philosophical discussion, see Frederick Schauer, "The Phenomenology of Speech and Harm," *Ethics*, vol. 103 (1993), pp. 635-53.

free will, to commit unlawful acts, then so too might we, so the argument goes, do the same thing for those whose words bear much the same secondary but not very much less consequential relationship to illegal acts.

The kind of harm coming from racial incitement is importantly distinct from the harm that comes when racial epithets or insults cause direct distress to those who see or hear them. Jewish witnesses to neo-Nazi marches are not, in contrast to the victims in the examples in the previous paragraph, at any risk of being persuaded to action by the Nazis.¹⁰ Rather, the Nazi images and rhetoric causes the Jewish viewers and listeners a degree of distress not unlike, so the argument proceeds, direct physical contact. Just as spitting on someone causes a harm not explainable by the physical impact of saliva on skin, so too does a racial epithet or insult cause a harm to its target that is often no less harmful because of its lack of physical contact between perpetrator and victim. In the context of the cartoons, therefore, there is a harm that comes to those depicted or insulted by the very fact of their perceiving the images. To see a member of our own group mocked hurts us, it is said, and with good reason, and the harm of the racial or religious epithet or caricature is a harm done directly to those who are mocked -- just as an insult does a harm to the individual insulted -- rather than through those who are incited by words or pictures to take violent or otherwise illegal action.

Overlapping both of these harms is the less immediate harm that comes from falsity simpliciter. And although it is implausible to suppose that governments can deal with falsity in all of its manifestations, it is nevertheless the case that laws against libel and slander, against misleading advertisements, against deceptive offerings of stocks and bonds, among others, all make clear that total legal toleration of all communicated factual falsity is not something that even nations most committed to freedom of expression are willing to undertake. And once we

¹⁰Except, of course, action against the Nazis.

recognize that some untruths will be taken as justifying restrictions even in the most expression-protective of societies, we can see why Holocaust-denial is understood as a special problem in countries which have good reason to fear just that denial. And we can also see that part of the anger about the Danish cartoons is about the propagation of the view that Muslims are especially likely to be terrorists. It is true that much of the anger was articulated in the quite different terms of the Islamic prohibition on depicting the image of the Prophet Mohammed. But although doing something that will violate someone else's religious (or other deeply-held) beliefs will often justify an act of self-restraint -- I will not have a pig roast on my front lawn if my neighbors are observant Jews, devout Muslims, or even fervent vegetarians -- it may be too much to expect any society to prohibit practices that offend the religious sensibilities of members of minority religions. It may not be too much, however, to expect societies to try to prevent the circulation of dangerous factual falsehoods about vulnerable groups. This might suggest why restrictions on depicting Muslims as terrorists (or publishing The Protocols of the Elders of Zion) are less incompatible with freedom of expression than might be thought, especially given the frequency with which factual falsity is punished in even the most expression-tolerant of democratic and liberal nations.

III

This brief survey of various types of expression-caused harm suggests, however, that the issue may be even deeper. Once we recognize that communicative acts can be helpful or harmful, valuable or dangerous, liberating or constraining, we can see that it is no easy task to justify a satisfactory account of the foundations of a distinct right to freedom of expression. There may well be sound accounts of quite particular communicative freedoms, including domain-specific or institution-specific accounts of the special importance of political criticism, or artistic freedom, or journalistic independence, and the like, but these justifications and what the justifications attempt to justify fall short of a genuinely comprehensive justification for freedom of expression itself. Traditional justifications in terms of individual freedom typically

fail to explain why other-regarding and harm-producing communications should not be subject to sanctions in just the same way as other-regarding and harm-producing behavior in general. Epistemic accounts, of which the one contained in John Stuart Mill's On Liberty is the most famous, are premised on empirical assumptions about human cognitive processes that modern science, psychology, sociology, and communications theory have shown to be increasingly tenuous. And most of the other standard and not-so-standard justifications for freedom of expression as providing a distinct protection for at least some other-regarding and harm-producing communicative acts have analogous deep problems.

This is not to say, at least yet, that there can be no satisfactory basis for a distinct right to freedom of expression. It is to say, however, that the right, properly understood, is hardly self-evident.¹¹ And if that is so, then it should come as no surprise that the existence of the right is less widely accepted than most Western observers realize. The Qu'ran is notoriously riddled with prohibitions on communication, but so too are the Bible, the Code of Justinian, and the corpus of rules that existed in ancient Athens. In a world prior to Milton, Mill, Spinoza, and the other earliest theorists of freedom of expression, a discontinuity between speech acts and other sorts of behavior is nowhere to be found. Communication was often free in these worlds, but so too was much of the rest of human conduct. And if there were distinctions between the punishable and the immune, between the regulable and the free, as there certainly were, these were not distinctions marked by the distinctions between speech and action, or between expression and conduct, or between communication and other types of behavior.

From this perspective, it is possible to comprehend an important difference between the worldview of the Qu'ran and the worldview underlying both the European Convention on

¹¹Justice Oliver Wendell Holmes, Jr., after all, famously noted, before issuing a ringing defense of freedom of speech, that “[p]ersecution for the expression of opinions seems to me perfectly logical.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Human Rights and the First Amendment to the Constitution of the United States. The latter draw a distinction that is more philosophically and empirically fragile than is commonly assumed, that is more modern than many people suppose, and that has few roots in non-Western culture. This is not to say that the distinction is wrong, or that societies not recognizing it are worse off for just that reason. It is to say, however, that cordoning off harmful communicative or expressive acts from the universe of harmful acts in general is more counter-intuitive than most Westerners believe, and more in need of serious justification and explanation than is often provided.

Those who condemn the publication of the Danish cartoons, therefore, are frequently doing so from a perspective whose roots are deeply embedded in much of the world's history and whose motivations are hardly self-evidently misguided. If publication of racially or religiously or ethnically charged political ridicule is to be legally permitted – and the complexity of European views on this exact question makes clear that this is a very open question – then it is the obligation of those who would permit such potentially harmful ridicule to explain more than they have so far to the people who are harmed by it why this form of harm must be tolerated, and why the cost of that toleration must be disproportionately born by those of certain races, religions, ethnicities, and national origins. There may well be such a justification, but assuming that there is without bothering to explain it to its victims appears to be at least part of the cause of some of the current tensions.