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## The Fundamentalism of Liberal Rights: Decoding the Freedom of Expression Under the European Convention for the Protection of Human Rights and Fundamental Freedoms

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**THE FUNDAMENTALISM OF LIBERAL RIGHTS:  
DECODING THE FREEDOM OF EXPRESSION UNDER THE  
EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN  
RIGHTS AND FUNDAMENTAL FREEDOMS**

Moenen Cheema\* & Adeel Kamran\*\*

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**I. Introduction**

On September 30th, 2005, Denmark’s leading newspaper, *Jyllands-Posten*, published twelve (12) caricatures of the prophet Muhammed of Islam (“P.B.U.H.”) depicting him in a manner blatantly offensive to followers of the Islamic faith.<sup>1</sup> These cartoons also appeared to conflate the categories of religion, race, and terrorism in a manner that implied causal connections between the former and the latter. The publication of the cartoons sparked a seemingly never-ending cycle of protests around the world, culminating in violent demonstrations in several Muslim-majority states.<sup>2</sup> In Europe, however, the publication of the cartoons was staunchly defended on the grounds of freedom of expression, with several other newspapers publishing them in a show of support for the principles

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<sup>1</sup> For a description of the cartoons, please see Martin Asser, *What the Muhammad Cartoons Portray*, BBC NEWS, [http://news.bbc.co.uk/2/hi/middle\\_east/4693292.stm](http://news.bbc.co.uk/2/hi/middle_east/4693292.stm) (last visited Feb. 9, 2006); see also Gwladys Fouche, *Danish Paper Rejected Jesus Cartoons*, THE GUARDIAN, <http://www.guardian.com/world/2006/feb/03/religion.uk> (last visited Feb. 6, 2006). (Earlier, in 2003, the same newspaper refused to publish cartoons of Jesus Christ on the grounds that they would ‘provoke an outcry’).

<sup>2</sup> See *Arab Ministers Condemn Cartoons*, BBC NEWS, [http://news.bbc.co.uk/1/hi/world/middle\\_east/4668068.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4668068.stm) (last visited Jan. 31, 2006); see also *Appeals for Calm Over Cartoon Row*, CNN, <http://edition.cnn.com/2006/WORLD/asiapcf/02/07/cartoon.protests/> (last visited Feb. 8, 2006).



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of free speech and democracy.<sup>3</sup> The refusal of European governments to proscribe the publication of the cartoons led to recriminations that this was tantamount to state protection of 'blasphemous' materials and was evidence of covert and overt 'Islamophobia.' The reduction of the defense of the Danish cartoons in the name of freedom of expression to such a strategic façade is clearly problematic because it ignores the troubled history and the complex and dynamic debates that have raged in Europe and the United States over the role of the state in regulating public discourse. The unleashed clash of reductionisms does, however, intuitively grasp deep philosophical tensions between the characterizations of religion and race, between free speech and hate speech, and between the freedoms of expression and of religion.

In this paper we will attempt to deconstruct the free speech defense of the Danish caricatures in order to highlight the tensions enumerated above, focusing particularly on the regulation of expression under the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). A scrutiny of the jurisprudence of the European Court of Human Rights ("ECtHR") reveals the difficulties inherent in defining permissible limits on expression, particularly as it involves the identification and prioritization of interests that are worthy of protection under a state's law. The struggles over the characterization of certain interests as fundamental rights, in turn, raise questions over the 'fundamentalness' of rights and the valuation of foundational social and political values that the rhetoric of rights presumes as incontrovertible. This study seeks to advance the argument that fundamental rights, such as the freedom of expression, are legal constructs whose value is contingent on the ends they are employed to serve in a given socio-political environment. While the contingency of fundamental rights is palpable in debates over their definition and over what they include or exclude, it is most clearly visible in the clash of fundamental rights, in particular the freedoms of expression and religion.

In order to deconstruct the nature of fundamental rights through a case study of the regulation of freedom of expression under the ECHR, we first present a brief overview of the philosophical debates over the nature of rights. In Part I, we also outline the constitutional jurisprudence on freedom of expression in the United States as the prototype of free speech 'absolutism,' which is the kind proclaimed by some of the defenders of the cartoons. In Part II, we compare the

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<sup>3</sup> The staunch defense of the Danish cartoons in Europe focuses primarily on the protection of the fundamental right to free speech guaranteed in all European countries. According to this point of view, the freedoms of expression and the press are near-absolute values at the core of European democracies. This argument has two facets: firstly, that European countries hold the freedom of expression very dearly as a primary political value and, secondly, that the European states have no legal basis to prohibit blasphemy against Islam - there is also a clear implication that Islamic (*shari'a*) law and Muslim countries devalue such fundamental freedoms and hence the protests do not deserve serious consideration. For example, Anders Fogh Rasmussen, leader of the Liberal (Venstre) Party, and the Prime Minister of Denmark refused to meet ambassadors from a number of Muslim countries and entertain their protests. The Prime Minister suggested that those who were aggrieved should take the matter to the courts. 'As prime minister, I have no power whatsoever to limit the press - nor do I want such a power. It is a basic principle of our democracy that a prime minister cannot control the press,' he added. See Paul Belien, *Europe Criticises Copenhagen over Cartoons*, THE BRUSSELS JOURNAL, <http://www.brusselsjournal.com/node/589> (last visited Mar. 11, 2014).

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American jurisprudence on freedom of expression, which avows its primacy over other competing rights to equality and freedom of religion, with the 'European' approach. We demonstrate that the domestic laws of many European states and the ECHR allows extensive limitations on the freedom of expression falling under the broad rubric of hate speech. We discuss two specific categories of limitations on expression, which are recognized by the constitutional laws of European states as well as the ECHR, namely: Holocaust denial and blasphemy. We argue that the refusal of European governments to accede to demands to curb the publication of the Danish cartoons was not defensible on the grounds that the applicable human rights law forbade such a limitation on the freedom of expression. We contend in Part III that the defense of the Danish cartoons is rooted in a liberal understanding of fundamental rights that is based upon distinctions between race and religion, between hate speech and blasphemy, and between the freedom of expression and the freedom of religion that are riveted with contradictions. The Danish case thus highlights the veracity of longstanding critiques of the liberal conception of rights. Lastly, we conclude that the defense of the Danish cartoons on the grounds of freedom of expression is inherently political and seeks to provide the cover of fundamental-ness and naturalness to a position that is inherently contingent.

### **II. Is there such a thing as an Absolute Fundamental Right?: Freedom of Expression and the Regulation of Hate Speech in the U.S.A.**

The position taken by many in Europe in the defense of the Danish cartoons appears to rely on the notion of the freedom of expression being a near absolute right. This position also appears to be rooted in a primarily liberal conception of rights wherein fundamental freedoms are designed to primarily protect spheres of private autonomy from governmental interference. In the liberal idea of rights, the evil that fundamental rights shield the citizens against is the evil of a repressive state. Thus, while fundamental rights protect the earmarked areas of private space from state intrusion, they are not structured to protect the individual citizen, or minority groups and communities, from the tyranny of fellow citizens. This state-centric conception of rights is by no means uncontroversial. Heated philosophical debates on the nature and content of rights and fundamental freedoms have taken place on at least three different planes.

On one level, the traditional liberal conception has been criticized for implicitly imbuing culturally and morally relative positions with an aura of naturalness and universality.<sup>4</sup> This is problematic for liberalism as it is an ideology that essentially seeks to provide all humans with the opportunity to pursue their vision of a good life, so long as that pursuit does not interfere with others' visions. In response, the advocates of liberal rights have advanced two strategies. First, a distinction is made between the "'right' and the 'good' - between a framework of basic rights and liberties, and the conception of good that people may choose to

<sup>4</sup> See Jeremy Waldron, *Nonsense Upon Stilts? - A Reply*, in *NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN* 166-68 (Jeremy Waldon ed., Methuen & Co., 1987).



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pursue within that framework.”<sup>5</sup> A fair framework of rights thus comes before the liberal pursuit of individual ends. In regards to freedom of expression, for example, “it is one thing to defend the right to free speech so that people may be free to form their own opinions and choose their own ends, but something else to support it on the grounds that a life of political discussion is inherently worthier.”<sup>6</sup> In adopting the former justification traditional liberals can claim a certain degree of value neutrality and universality for their position. Secondly, liberals increasingly seek to rely on public morality, or the shared foundations of rights-claims beneath superficial disagreements over the justification for and content of specific rights.<sup>7</sup> Often, it is possible to argue that these shared foundations of public morality are found in constitutional documents, judicial decisions, and/or majoritarian agreement.<sup>8</sup> This becomes problematic where there is a threat of a clash between majoritarian democracy and constitutionally entrenched judicial review mechanisms. In such a scenario, the debate on the nature and justification for rights appears to crystallize around the narrower and more specific issues of constitutional structure and institutional competence, which may dictate whether courts or legislatures are better suited to safeguard the interests and values characterized as fundamental rights.<sup>9</sup>

The second plane on which the liberal conception of rights is critiqued is on account of its negativity. It is alleged that while this conception imposes negative obligations or constraints, it does not entail positive obligations upon the state to create the socio-political conditions necessary for the fulfillment of the interests and values that are classified as fundamental rights.<sup>10</sup> Thus, for example, while the state may be barred from suppressing free speech, it cannot be called upon to stop private individuals or non-state groups from creating an environment which has an indirect chilling effect on others’ expression. This negative conception of fundamental rights is motivated by a fear that if the state is granted such a power to interfere with private action, it will abuse that authority to serve its own ends and expand its coercive power. Further, even if the state uses that power benevolently to safeguard one group’s freedom, it may be seen as discriminating at the expense of others, thereby sowing the seeds of social discord. The problem for the liberal position, however, is that the social terrain everywhere is marked by enormous disparities in wealth, socio-political power and opportunities for advancement.<sup>11</sup> The state is often the only player capable of challenging the centers of socio-economic power and with the constraints imposed upon it there is little guarantee that these private social and economic networks will not exercise the coercive powers that are being denied to the state.

<sup>5</sup> Michael J. Sandel, *The Political Theory of the Procedural Republic*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY?* 88 (Hutchinson & Monahan eds., Carswell, 1987).

<sup>6</sup> *Id.*

<sup>7</sup> See Waldron, *supra* note 4, at 163-66.

<sup>8</sup> See Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (Harvard Univ. Press, 1977).

<sup>9</sup> See Jeremy Waldron, *A Rights-Based Critique of a Bill of Rights*, 13 *OJLS* 18 (1993).

<sup>10</sup> See David P. Forsyth, *HUMAN RIGHTS AND WORLD POLITICS* 167-172 (Univ. of Nebraska Press, 2d ed. 1989) for a brief overview of the philosophical foundations of the liberal conception of rights.

<sup>11</sup> *Id.* at 169-71.

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The third plane on which the liberal conception of rights is critiqued is on account of its allegedly rampant individualism. Communitarian and civic republican critics of the liberal notion of rights argue that it is liberalism itself which, by promoting the idea of humans as atomistic beings, cultivates a fragmented social environment in which discussion of collective aims and ideals becomes secondary: “[r]ights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead towards consensus, accommodation, or at least the discovery of common ground.”<sup>12</sup> The problem again for both the liberal and communitarian perspectives, however, is that of the inequalities in the distribution of socio-political power and economic resources. If the state remains withdrawn from the role of an equalizer there is no guarantee that particular social groups, especially those that enjoy a disproportionate share of influence and power, will voluntarily cede that advantage even if communitarian politics flourishes in localized discourses. This will particularly be the case where sub-national groups are constituted along distinct racial, ethnic, religious and/or cultural lines.<sup>13</sup> In an influential advance in liberal thinking, Will Kymlicka argued that liberalism can accommodate the interests of minority groups while also taking on board communitarian insights, but that would require the recognition of an entirely new set of group rights that impose both negative and positive obligations on the state to facilitate the preservation of distinct ‘societal cultures’ of minority groups.<sup>14</sup>

These controversies are not entirely theoretical. Nowhere are the philosophical tensions inherent in a strong form of liberal rights conception and its dissonance with minority interests more evident than on the issue of hate speech regulation in the leading constitutional democracy in the world: the United States of America. The regulation of hate speech, which may be defined as “epithets conventionally understood to be insulting references to characteristics such as race, gender, nationality, ethnicity, religion, and sexual preference”<sup>15</sup> has been a hotly debated issue in the United States and much has been written on this topic. Arguments in support of hate speech regulation and curtailment of the First Amendment rights usually arise in the context of racist and sexist speech;<sup>16</sup> through constitutional arguments advocating the primacy of the Fourteenth Amendment’s guarantee of equal protection before the law over the First Amend-

<sup>12</sup> Mary Ann Glendon, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (The Free Press, 1991).

<sup>13</sup> Will Kymlicka, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 92 (Clarendon Press, 1995).

<sup>14</sup> *Id.* at 75-115.

<sup>15</sup> Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 *CONST. COMM.* 71 (1996).

<sup>16</sup> Representative examples of work that discuss hate speech in the context of racist speech include critical race theorists such as Mari J. Matsuda. See Mari J. Matsuda, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (Mari J. Matsuda *et al. eds.*, 1993). See also Richard Delgado & Jean Stefancic, *MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY AND THE NEW FIRST AMENDMENT* (New York Univ. Press, 1997); Richard L. Abel, *SPEAKING RESPECT, RESPECTING SPEECH* (Univ. of Chicago Press, 1998). For a leading example of discussion on hate speech in terms of sexist speech, see Catherine MacKinnon, *ONLY WORDS* (Harv. Univ. Press, 1996).

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ment's free speech protection.<sup>17</sup> Such advocacy, however, faces a challenging constitutional obstacle, as the text of the First Amendment of the U.S. Constitution is seemingly absolute on its plain reading:<sup>18</sup>

Amendment I - Freedom of Religion, Press, Expression: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .<sup>19</sup>

The weight of judicial opinion in the United States appears to favor a conception of the freedom of expression guaranteed by the First Amendment of the U.S. Constitution as a near-absolute right, which trumps other competing values.<sup>20</sup> This view is rooted in the belief that words cannot harm and free expression can only be beneficial since it fortifies democratic values.<sup>21</sup> As one commentator notes, "[c]onstruing freedom of expression as an absolute right, the view held by many U.S. citizens when issues of freedom of expression arise, is perhaps meant to be captured by the adage: 'Sticks and stones may break my bones, but words will never hurt me.'"<sup>22</sup> Nonetheless, it has been contended that a number of doctrines recognized by the U.S. Supreme Court allow exceptions to the freedom of expression. Notable amongst these are allowances for restrictions based on the threat or likelihood of violence such as for 'clear and present danger' or 'imminent lawless action,'<sup>23</sup> and 'fighting words,'<sup>24</sup> as well as legitimate "time,

<sup>17</sup> See R. George Wright, *Traces Of Violence: Gadamer, Habermas, And The Hate Speech Problem*, 76 CHI.-KENT. L. REV. 991, 994-95 (2000).

<sup>18</sup> See Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 959-70 (2004).

<sup>19</sup> U.S. CONST. amend. I.

<sup>20</sup> See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256, 258 (1974).

<sup>21</sup> To cite Justice Holmes' famous oft-quoted dissent:

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

*Abrams v. United States*, 250 U.S. 616, 630 (1919). Academic opinion on this count is also well-entrenched. For representative examples, see Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 251-53 (1992); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 116-17 (1992); Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 195-96 (1996); Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?* 46 CASE W. RES. L. REV. 449, 454-55 (1996); Alexander, *supra* note 15, at 73; Gary Goodpaster, *Equality and Free Speech: The Case Against Substantive Equality*, 82 IOWA L. REV. 645, 668-70 (1997).

<sup>22</sup> J. Angelo Corlett & Robert Francescotti, *Foundations of a Theory of Hate Speech*, 48 WAYNE L. REV. 1071, 1074 (2002).

<sup>23</sup> For an analysis of the evolution of the incitement to violence categories of permissible restrictions, see William B. Fisch, *Hate Speech in the Constitutional Law of the United States*, 50 AM. J. COMP. L. 463, 471-76 (2002); see also David G. Barnum, *The Clear and Present Danger Test in Anglo-American and European Law*, 7 SAN DIEGO INT'L L.J. 263, 263-81 (2006).

<sup>24</sup> Fisch, *supra* note 23, at 476-79.

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place, and manner restrictions.”<sup>25</sup> Expression may also be legitimately suppressed when it is found to be obscene or pornographic,<sup>26</sup> or on grounds of national security.<sup>27</sup> Therefore, one commentator concludes: “[i]t is unarguable that there should be absolute freedom to think what one wants; it does not follow, however – either legally, logically, or philosophically – that one may openly express whatever one thinks, whenever and wherever one desires.”<sup>28</sup>

However, while there is no denying that some restrictions on speech are allowed as contended above, a judicious review of the jurisprudence of the U.S. Supreme Court reveals that such limitations on the freedom of expression are very narrowly construed.<sup>29</sup> For example, although at one time the U.S. Supreme Court allowed limits on speech which presented a “clear and present danger” to society, *i.e.* speech that may incite unlawful violence,<sup>30</sup> in *Brandenburg v. Ohio* the court narrowly interpreted this standard, restricting its applicability to speech that was likely to cause or incite *imminent* violence.<sup>31</sup> Similarly, in *Chaplinsky v. New Hampshire*, the Supreme Court laid down the doctrine of “fighting words,” making it illegal to “address any offensive, derisive, or annoying word to any person who is lawfully in any street or any public place . . . [or] make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy

<sup>25</sup> However, “[i]f government regulates the time, place or manner of speech, it must regulate in a way that does not take sides between competing ideas.” See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 226, 231 (1992).

<sup>26</sup> See Annalisa Siracusa, *Sixth Annual Review Of Gender And Sexuality Law: I. Constitutional Law Chapter: Obscenity*, 6 GEO. J. GENDER & L. 347, 349-51 (2005); Nasoan Sheftel-Gomes, *Your Revolution: The Federal Communications Commission, Obscenity And The Chilling Of Artistic Expression On Radio Airwaves*, 24 CARDOZO ARTS & ENT. L.J. 191, 199-207 (2006); Cara L. Newman, *Eyes Wide Open, Minds Wide Shut: Art, Obscenity, And The First Amendment In Contemporary America*, 53 DEPAUL L. REV. 121, 132-140 (2003). For a critique of restriction of speech on the charge of obscenity and pornography, see generally Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499 (1996); and Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS J. OP. 21 (2005). For a critique that the restrictions of speech to counter the harms of pornography do not go far enough, see Morrison Torrey, *Thoughts About Why the First Amendment Operates to Stifle the Freedom and Equality of a Subordinated Majority*, 21 WOMEN'S RTS. L. REP. 25 (1999). For a comparison of the U.S. and Canadian approaches towards the regulation of obscene speech, see Justin A. Giordano, *The United States Constitution's First Amendment vs. The Canadian Charter Of Rights And Freedoms: A Comparative Analysis Of Obscenity And Pornography As Forms Of Expression*, 26 N.C. CENT. L.J. 71, 72-73 (2004).

<sup>27</sup> See Matthew Silverman, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information*, 78 IND. L.J. 1101 (2003); Laura Barandes, *A Helping Hand: Addressing New Implications Of The Espionage Act On Freedom Of The Press*, 29 CARDOZO L. REV. 371 (2007); and see also Emily Posner, *The War On Speech In The War On Terror: An Examination Of The Espionage Act Applied To Modern First Amendment Doctrine*, 25 CARDOZO ARTS & ENT. L.J. 717 (2007).

<sup>28</sup> See Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 68-69 (1997).

<sup>29</sup> See Alexander Tsesis, *The Empirical Shortcomings Of First Amendment Jurisprudence: A Historical Perspective On The Power Of Hate Speech*, 40 SANTA CLARA L. REV. 729, 732-39 (2000).

<sup>30</sup> See Charles Lewis Nier III, *Racial Hatred: A Comparative Analysis of the Hate Crime Laws of the United States and Germany*, 13 DICK. J. INT'L L. 241, 266 (1995); Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 348 (1998).

<sup>31</sup> See generally *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see also Fisch, *supra* note 23, at 474-75.

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him.”<sup>32</sup> However, the court stated that it would hold speech to constitute fighting words only if there were a reasonable risk of violence.<sup>33</sup> This doctrine was further restricted in practice when in *Cohen v. California*, the Court required that the fighting words must be directed at a specific individual.<sup>34</sup> Most recently, in *R.A.V. v. City of St. Paul*, the court declared hate speech legislation to be unconstitutional that proscribed the placing on public or private property of “a symbol, object, appellation characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>35</sup> The Court ruled that the ordinance violated the principle of content neutrality as it targeted specific viewpoints only.

The First Amendment jurisprudence of the U.S. courts thus appears to be based on the liberal conception of fundamental freedoms as negative liberties outlined at the outset. It focuses on state action, and consistently upholds a distinction between public and private domains. As such, the state is barred from interfering in the private domain and may not restrict any expression (or at least the content thereof) by individuals.<sup>36</sup> This is a manifestation of the distrust of government that is at the heart of American constitutional politics.<sup>37</sup> It is further argued that while legislation may be effective in preventing harmful action, hate speech legislation is generally ineffective and any benefits that may be availed from banning hate speech are countered by the risk of the state’s abuse of speech regulation to suppress critical expression. This is in essence a ‘slippery slope’ argument.<sup>38</sup> A similar argument cautions against hate speech laws because of their chilling effect on expression in general. Advocates of this position express concerns that hate speech legislation hinders the establishment of an efficient market for ideas and insist that absolute freedom of speech is in fact beneficial for minority viewpoints.<sup>39</sup> Before we critique this liberal reconstruction of the freedom of expression in U.S. constitutional jurisprudence, it may be helpful to see if this view is shared across the Atlantic.

<sup>32</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942).

<sup>33</sup> See Fisch, *supra* note 23, at 478-79; see also Dorsett, *supra* note 21, at 266-67.

<sup>34</sup> See generally *Cohen v. California*, 403 U.S. 15 (1971); see also Dorsett, *supra* note 21, at 267-68.

<sup>35</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992).

<sup>36</sup> See W. Bradley Wendel, “*Certain Fundamental Truths*”: A Dialectic On Negative And Positive Liberty In Hate-Speech Cases, 65:2 LAW & CONTEMP. PROBS. 33, 67-68 (2002).

<sup>37</sup> *Id.*

<sup>38</sup> See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 363 (1985); see also Kathleen E. Mahoney, *Hate Speech: Affirmation Or Contradiction Of Freedom Of Expression*, 1996 U. ILL. L. REV. 789, 802 (1996).

<sup>39</sup> See Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era*, 46 VAND. L. REV. 865, 898 (1993). For rebuttal, see Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid?*, 23 N. KY. L. REV. 475, 479-80 (1996); Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737, 742 (1993); see also Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438 (1990). It is also countered that hate speech regulation detracts from the real task of countering racism itself. See generally Dorsett, *supra* note 21.



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**III. The 'European' Conception of Fundamental Rights: Freedom of Expression under the European Convention on Human Rights****A. Regulation of Hate Speech and Holocaust Denial Laws in Europe**

The position adopted by the defenders of the Danish cartoons appears to be very much in line with the status of freedom of expression as a near absolute right in American constitutional law. This has not historically been the European standpoint on the freedom of expression, to the extent an over-arching European agreement or understanding on the freedom of expression exists. European states - despite increasing economic, political, cultural and legal integration - have separate legal systems and have written constitutions that provide for the protection of fundamental rights, with the notable exception of the United Kingdom.<sup>40</sup> However, most European states, including those where the cartoons were published, are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the 'European Convention' or simply the 'Convention').<sup>41</sup> The Convention was the brainchild of the Council of Europe, a transnational political organization created in the aftermath of the Second World War in 1949 with the aim of creating a common platform for the promotion of democracy, the rule of law and fundamental human rights all over Europe.<sup>42</sup> It came into force in 1953 and presently has forty-six member states, eight hundred million citizens of which have the right of individual petition to the European Court of Human Rights, the adjudicatory body created under the Convention.<sup>43</sup> The Court's judgments are binding on the member states. The Convention may thus be described as representing the "minimum human rights standards" agreed upon by the European states, or the "Basic Law of Europe;" and the Convention system may be considered "the most successful human rights

<sup>40</sup> In 1998, the United Kingdom finally passed the Human Rights Act, thereby incorporating the European Convention directly into domestic law. This is the U.K.'s statutory Bill of Rights. Human Rights Act, 1998, c. 42 (U.K.).

<sup>41</sup> Council of Europe, Convention For Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, CETS No. 005, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf). For a list of member states of the Council of Europe that have signed and ratified the agreement, see Convention for the Protection of Human Rights and Fundamental Freedoms, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (last visited Apr. 8, 2014). Specifically, Denmark ratified the Convention on 13th April, 1953; Norway ratified on 15th January, 1952; France ratified on 3rd May, 1974; Germany ratified on 5th December, 1952; Italy ratified on 26th October 1955; and Spain ratified on 4th October, 1979.

<sup>42</sup> See The Statute of the Council of Europe, art. 1, May 5, 1949, 87 U.N.T.S. 103, available at <http://conventions.coe.int/treaty/en/treaties/html/001.htm>. For an overview of the debates contextualizing the drafting of the Convention and its approach towards hate speech regulation, see Stephanie Farrior, *Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 3, 63 -78 (1996).

<sup>43</sup> See generally Lord Woolfe, REVIEW OF THE WORKING METHODS OF THE EUROPEAN COURT OF HUMAN RIGHTS, (Eur. Ct. H. R., 2005). The right of individual petition is provided under Article 34 of the Convention to "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation." Council of Europe, Convention For Protection of Human Rights and Fundamental Freedoms art. 34, Apr. 11, 1950, CETS No. 005, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).



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system in the world.”<sup>44</sup> The enforcement of the Convention has been further strengthened by its incorporation into European Union law.<sup>45</sup>

Article 10 of the Convention guarantees the freedom of expression to the citizens of all the European states that are a party to the Convention and its Protocols.<sup>46</sup> A plain reading of the above provision indicates that, in sharp contrast to the First Amendment of the U.S. constitution, freedom of expression is subject to limitations on a number of grounds:

#### Article 10

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . .

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>47</sup>

Given the expansive array of grounds on which free speech may be curtailed, it is not surprising that expression is subject to a number of legal limitations in most European countries that would not be countenanced in American constitutional law.<sup>48</sup> It is also notable that the text of Article 10 of the Convention does not see an inherent tension between such limitations on free speech and democracy.

In contrast to the United States, most European states have laws that forbid hate speech. In fact, the United States appears to be the only Western state that

<sup>44</sup> See Philip Leach, *TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS* 4 (Blackstone, 2001).

<sup>45</sup> See Consolidated Version of the Treaty on European Union art. 6, 2010 O.J.C 83/01, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:en:PDF>; see also *European Convention on Human Rights: Accession of the European Union*, COUNCIL OF EUROPE, <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention> (last visited May 5, 2014).

<sup>46</sup> Convention For Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, Council of Europe, 213 U.N.T.S. 221, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>. (Since the Convention's entry into force, thirteen (13) Protocols have been adopted some of which - Protocols 1, 4, 6, 7, 12 and 13 - have added additional rights and freedoms to the original text. Protocol 11 restructured the enforcement machinery).

<sup>47</sup> *Id.* art. 10.

<sup>48</sup> This difference in the European and American approaches towards the freedom of expression has been attributed to a number of factors, including a greater confidence in America on the outcomes of the battle of ideas, such as during the civil rights era and the Vietnam War protests, as opposed to Europe whose history does not support such optimism. On the flip side, the American public generally does not trust the government and its officials enough to entrust them with such powers of censorship as opposed to Europe where there is greater confidence in the government's ability to provide social direction. See Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 14 (2002).

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allows such extended protection to hate speech.<sup>49</sup> For example, recent legislation in Germany,<sup>50</sup> enacted in response to a rise in neo-Nazi activities, criminalizes attacks on human dignity through incitement to hatred and dissemination of writings aimed at instigating hatred.<sup>51</sup> The law also creates lesser offenses of insult, ridicule, and defamation.<sup>52</sup> This legislation adds to the offence of insult against personal honor, which has been on the statute books since 1871.<sup>53</sup> In the U.K., a state closest to the U.S. in terms of a shared political ideology, incitement to racial hatred is a specific offence under various sections of the Public Order Act, 1986.<sup>54</sup> The Act substituted similar provisions in the Public Order Act of 1936, and the Race Relations Act of 1965, and is in addition to the surviving common law relating to the breach of peace.<sup>55</sup> To give another example, while the freedoms of expression, press, and assembly are constitutionally guaranteed in Sweden, the Instrument of Government also places explicit restrictions on these freedoms.<sup>56</sup> The *Riksdag* (parliament) may restrict free speech but such restric-

<sup>49</sup> For a comparison between the minimal intervention permissible under US Constitutional jurisprudence and the differing approach in several other Western democratic states, including Canada, UK and Germany, see Michel Rosenfeld, *Hate Speech In Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1542-54 (2003). For an overview of the historical reasons for the differing approaches, see Kevin Boyle, *Hate Speech – The United States Versus the Rest of the World?*, 53 ME. L. REV. 487, 491-93 (2001). It is interesting to note that Canada allows much more stringent regulation of hate speech than is constitutionally permissible in the U.S.A., even though the Canadian Charter of Rights and Freedoms, 1 S.C. V (1982), accords free speech protection in language similar to the First Amendment. Canada has a number of criminal provisions that proscribe advocacy of genocide, incitement of hatred threatening a breach of the peace, and public and willful expression of ideas intended to promote hatred against an identifiable group. See Canadian Criminal Code, R.S.C. 1985, c.C-46, § 319. For an overview of the international and Canadian positions on hate speech, see Kathleen E. Mahoney, *supra* note 39, at 804-06 (1996). See also Roy Leeper, *Keegstra And R.A.V.: A Comparative Analysis Of The Canadian And U.S. Approaches To Hate Speech Legislation*, 5 COMM. L. & POL'Y 295, 308-20 (2000), wherein the author underscores the difference between the communitarian and libertarian traditions underpinning Canadian and American judicial approaches, respectively.

<sup>50</sup> The German Constitution expressly recognizes limitations, *albeit* of a different kind, on the freedom of expression. Art. 5(1) declares that “everybody has the right freely to express and disseminate their opinions orally, in writing or visually” and that “There shall be no censorship.” However, this freedom is limited by two important provisions: “limitations embodied in the provisions of general legislation, statutory provisions for the protection of young persons and the citizens’ right to personal respect.” See the GRUDGENSETZ FÜR DIE BUNDESREPUBLIK DUETSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, at Art. 5(1) - (3) (Ger.). For an overview of the German constitutional jurisprudence on hate speech and relevant legislation, see Laura R. Palmer, *A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo*, 26 YALE J. INT’L L. 179, 200-06 (2001); Brugger, *supra* note 48, at 5-15; and see also Bradley A. Appleman, *Hate Speech: A Comparison Of The Approaches Taken By The United States And Germany*, 14 WIS. INT’L L.J. 422, 429-34 (1996).

<sup>51</sup> See STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, FEDERAL LAW GAZETTE 130, (Ger.).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* § 185. (The offence carries a punishment of imprisonment of up to one year and fine).

<sup>54</sup> Public Order Act, (1986) §§ 18, 19, 23 (U.K.).

<sup>55</sup> See for example, *Arrowsmith v. United Kingdom*, App. No. 7050/75, 3 Eur. H.R. Rep. 218, 219-20, 243 (1978), where a pacifist was arrested and prosecuted for incitement to disaffection after she distributed leaflets to members of the armed forces advocating the abandonment of military service. The European Commission declared her complaint inadmissible holding that the prosecution was a reasonable limitation on her freedom of expression.

<sup>56</sup> See REGERINGSFORMEN [RF] [CONSTITUTION] 2:1 (Swed.).



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tions “may be imposed only to satisfy a purpose acceptable in a democratic society. The restriction may never exceed what is necessary having regard to the purpose which occasioned it, nor may it be carried so far as to constitute a threat to the free formation of opinion as one of the foundations of democracy.”<sup>57</sup> Further, the Swedish Penal Code specifically prohibits racist speech.<sup>58</sup> The most pertinent example, however, is Denmark. The Danish Criminal Code provides a penalty of imprisonment for up to two (2) years, and a fine, for the dissemination of a statement by which a group of people are “threaten[ed], insult[ed], or degrad[ed] on account of their race, colour, national or ethnic origin, religion, or sexual inclination.”<sup>59</sup> The fact that the offence is in the nature of propaganda activities shall be considered “an aggravating circumstance” at the sentencing stage.<sup>60</sup>

Many European states also have laws which criminalize the denial of the Holocaust.<sup>61</sup> Many commentators in the United States argued to make the denial of the Holocaust a *per se* category of hate speech, *i.e.* denial of Holocaust should be prohibited whether or not such denial presents a clear and present danger of “imminent lawless action” or constitutes “fighting words.”<sup>62</sup> Such arguments have found little favor in American jurisprudence, which is dominated by the primacy of the First Amendment as discussed in the previous section. In contrast to the United States, the denial of the Holocaust is a serious criminal offence in a number of European countries.<sup>63</sup> A British historian, David Irving, was recently convicted and sentenced to a term of three years of imprisonment for the denial of

<sup>57</sup> See REGERINGSFORMEN [RF] [CONSTITUTION] 2:20(1) and 2:22 (Swed.).

<sup>58</sup> BROTTSBALKEN [BrB] [PENAL CODE] 16:8 (Swed.).

<sup>59</sup> See *Straffeloven* (Strfl) § 266 b (1).

<sup>60</sup> *Id.* § 266 b (2). For elaboration of these provisions, see the opinions of The Committee on the Elimination of Racial Discrimination in the case of *Kamal Quereshi v. Denmark*, Communication No. 33/2003, U.N. Doc. CERD/C/66/D/33/2003 (2005) available at <http://www1.umn.edu/humanrts/country/decisions/33-2003.html>; and the case of *Mohammed Hassan Gelle v. Denmark*, Communication No. 34/2004, U.N. Doc. CERD/C/68/D/34/2004 (2004), available at <http://www.unhcr.ch/tbs/doc.nsf/0/6715d3bdbeff3c0dc125714d004f62e0?OpenDocument>; and the case of *Ahmad Najaati Sadic v. Denmark*, Communication No. 25/2002, U.N. Doc. CERD/C/62/D/25/2002 (2003), available at <http://www1.umn.edu/humanrts/country/decisions/25-2002.html>.

<sup>61</sup> See Peter R. Teachout, *Making Holocaust Denial a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 657 (2005). For a review of Germany’s Holocaust denial laws, see Eric Stein, *History Against Free Speech: The New German Law Against the ‘Auschwitz’ - and Other - ‘Lies’*, 85 MICH. L. REV. 277, 285-87 (1986); Lasson, *supra* note 28. In the U.K. the Labour Party proposed the creation of an offence punishable with imprisonment for Holocaust denial before its 1997 election victory. However, the Labour governments of the last decade have not followed through on this proposal. Canadian law also treats Holocaust denial as hate speech *per se*. For example, in the landmark case of *R. v. Zundel*, [1992] R.C.S. 731, 732 (Can.), the defendant, was charged with violating the Canadian criminal code by publishing false statements ‘likely to cause injury or mischief to a public interest’ under Canadian Criminal Code R.S.C. 1970, c. C-34, s. 177 (Can.).

<sup>62</sup> Some academics have argued that Holocaust denial should be automatically recognized as a form of hate speech since it results in immediate psychological and emotional harm to the Jews. It is contended that the intended victims of Holocaust denial often fear the onslaught of violence and many suffer from post-traumatic stress disorders as a result. Therefore, some have advocated that the denial of Holocaust should be recognized as a distinct tort since the victims of such actions have been ‘grievously hurt’ by such speech. See Lasson, *supra* note 28, at 70.

<sup>63</sup> See Teachout, *supra* note 61, at 657.





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Rhetoric can often trigger action. Speech can turn into conduct. Words can migrate into ‘sticks and stones’ which do, indeed, harm us. It is no accident that German narrative depicting Jews as evil preceded and justified the Nazi genocide.<sup>72</sup>

It is pertinent to note that all of the above arguments apply equally to racist as well as blasphemous speech involving the disparagement of a minority religion.<sup>73</sup> If the first argument does not apply to hate speech against a defined group, such as the Muslim, North African, and Arab minorities, it is because there has not yet been a definite history of discrimination and violence against these minorities in Europe. It is a weak argument to hold that ‘group defamation’ against Muslims will be barred only after discrimination against them has reached a historical threshold of genocide, or at least persecution, when a sufficient number have demonstrably suffered. The alternative is for European Muslims to protest and resort to such violence as to thereby create a ‘history’ of their own.

### B. Freedom of Expression and Blasphemy Laws in Europe

A broad survey of the laws of European states reveals that while there are a number of states which have no blasphemy laws on the statute books, including France, Spain, and Portugal, other European states attach criminal sanctions to blasphemous libel. Austria,<sup>74</sup> Germany, Netherlands, Switzerland, and Italy have blasphemy and/or disparagement of religion laws on the statute books.<sup>75</sup> The prohibition on blasphemy has been explicitly recognized as a limitation on free speech in the Irish Constitution, and the Republic of Ireland has enforced its blasphemy law in the recent past.<sup>76</sup> However, in many of the states that have blasphemy laws, these laws have not been enforced in recent history. For exam-

<sup>72</sup> Yonover, *supra* note 64, at 78, referring to Michael Blain, *Group Defamation and the Holocaust*, in *GROUP DEFAMATION AND FREEDOM OF SPEECH* 54 (Monroe H. Freedman & Eric M. Freedman eds., 1995).

<sup>73</sup> See *International Law—Genocide—U.N. Tribunal Finds That Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity*, 117 HARV. L. REV. 2769 (2004) for a discussion of *Prosecutor v. Nahimana, Barayagwiza, and Ngeze* (the Media Case), Case No. ICTR-99-52-T (Int’l Crim. Trib. for Rwanda Trial Chamber I Dec. 3, 2003). Mary J. Matsuda concludes that racist hate speech is “so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond” and is “a mechanism of subordination, reinforcing a historical vertical relationship.” See Mary J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2357 (1989).

<sup>74</sup> STRAFGESETZBUCH [StGB] [PENAL CODE] § 188 lays down the offence of disparaging religious precepts. This provision was at issue *Otto-Preminger Institut v. Austria*, 19 Eur. Ct. H.R. 34, 41 (1994). For the text of § 188, see paragraph 25. The section reads:

Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who or an object which is being venerated by a church or religious community established within the country, or a dogma, a legally authorised custom or a legally authorised institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.

<sup>75</sup> See *Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread*, PEW RESEARCH, (Nov. 21, 2012), <http://www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/>.

<sup>76</sup> See IR. CONST., 1937, art. 40.6.1.i. For a history of the blasphemy laws in Ireland see generally Paul O’Higgins, *Blasphemy in Irish Law*, 23 MOD. L. REV. 151 (1960).

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ple, while the U.K. has non-statutory common law blasphemous libel provisions, it has been pointed out that after the Human Rights Act 1998:

“it is a reasonable speculation that as a consequence of that legislation any prosecution for blasphemy today . . . would be likely to fail or, if a conviction were secured, would probably be overturned on appeal . . . on grounds either of discrimination, of denial of the right to freedom of expression, or of the absence of certainty. Such an outcome would, in effect, constitute the demise of the law of blasphemy.”<sup>77</sup>

Notably, the Human Rights Act was designed to give effect to the ECHR in U.K.’s domestic law.

The application of the blasphemy laws in a number of European countries, especially in U.K., have been challenged on the grounds that these violate the freedom of expression and the freedom of religion protected under the European Convention. However, contrary to the opinion expressed in the Select Committee Report noted above, the European Commission of Human Rights, defunct since 1998, and the European Court of Human Rights, adjudicatory institutions created under the Convention, have consistently ruled that the enforcement of blasphemy laws in European states is a legitimate restriction of the freedom of expression. In *Whitehouse v. Lemon*, for example, the defendant was prosecuted for the common law offence of blasphemy in U.K. after he published an illustrated poem describing certain homosexual acts involving Jesus Christ.<sup>78</sup> He was convicted of publishing a blasphemous libel and both the Court of Appeal and the House of Lords upheld the conviction.<sup>79</sup> The defendant filed an application before the European Commission of Human Rights on the grounds that his freedom of expression and freedom of religion had been violated by the prosecution. The Commission rejected the application as “manifestly ill-founded” and held that the prosecution was a proportionate measure for the protection of the religious sensibilities of others.<sup>80</sup>

*Wingrove v. United Kingdom*, another case from the U.K., arose from the censorship of the film “Visions of Ecstasy,” which depicted the supposed erotic fantasies of St. Teresa.<sup>81</sup> The British Board of Film Classification rejected the application for a classification certificate on the grounds of blasphemy. The producers claimed that this violated their freedom of expression.<sup>82</sup> The case was

<sup>77</sup> SELECT COMMITTEE ON RELIGIOUS OFFENCES IN ENGLAND AND WALES, FIRST REPORT, 2003, H.L. 79 ¶ 20, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrel0f/95/9505.htm#a2>.

<sup>78</sup> *Whitehouse v. Lemon* (1979) 1 A.C. 617 (H.L. 1978) (consolidated appeals).

<sup>79</sup> *Id.* at 618.

<sup>80</sup> *Gay News Ltd. v. United Kingdom*, 5 Eur. Ct. H.R. 123 (1982).

<sup>81</sup> *Wingrove v. United Kingdom*, 24 Eur. Ct. H.R. 43 (1996), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58080>.

<sup>82</sup> *Id.*; Compare Yonover, *supra* note 64, at 80-81, where the example of a Model Group Defamation Statute that won first prize in a student contest at Hofstra University was considered. According to the author, “. . .the Model Statute’s requirement is chilling. The statute requires a state agency to review films or movies before they can be shown and, if found to be defamatory, the movie shall, by court order sought by the reviewing agency, not be shown.”



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declared admissible by the Commission, but was rejected by the Court. The aim of the interference, the protection of Christians against serious offence to their beliefs, was held to be fully consonant with the aims of Articles 9 and 10 of the Convention. The Court noted that blasphemy legislations are still in force in various European countries, although these are rarely applied, and ruled that the national authorities were best placed (subject to final supervision by the Court) to decide what restrictions were necessary and appropriate. The Court stated that:

Strong arguments have been advanced in favour of the abolition of blasphemy laws, for example, that such laws may discriminate against different faiths or denominations - as put forward by the applicant - or that legal mechanisms are inadequate to deal with matters of faith or individual belief . . . However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention.”<sup>83</sup>

Article 9 of the European Convention guarantees the freedom of religion to the citizens of Europe.<sup>84</sup> This fundamental freedom is also subject to limitation on various grounds, including “the protection of the rights and freedoms of others,” although fewer limitations on the freedom of religion are enumerated as opposed to those on the freedom of expression.<sup>85</sup> In *R v. Chief Metropolitan Magistrate ex parte Choudhury*, the petitioner claimed that the U.K. violated his freedom of religion by allowing him to be subjected to blasphemy.<sup>86</sup> The case arose when the U.K. Court of Appeal turned down a judicial review petition filed by a Muslim citizen against the refusal of the magistrate to issue a summons for blasphemy and seditious libel against Salman Rushdie, for insults to Islam in his book “The Satanic Verses.”<sup>87</sup> The Court of Appeal held the Magistrate’s decision to be correct since the Common Law offence of blasphemy is limited to

<sup>83</sup> *Wingrove v. United Kingdom*, 24 Eur. Ct. H.R. 43 (1996), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58080>.

<sup>84</sup> Council of Europe, Convention For Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, CETS No. 005, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

<sup>85</sup> Convention For Protection of Human Rights and Fundamental Freedoms art. 9(2), Apr. 11, 1950, Council of Europe, 213 U.N.T.S. 221, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

<sup>86</sup> *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*, 1 All E.R. 306, 313 (Q.B. 1991).

<sup>87</sup> *Choudhury v. United Kingdom*, App. No. 17439/90, Eur. Comm’n H.R. Dec. & Rep. 12 (1990), available at <http://echr.ketse.com/doc/17439.90-en-19910305/view/>.

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attacks on Christianity.<sup>88</sup> The complainant's subsequent application to the European Commission of Human Rights was declared inadmissible.<sup>89</sup> The Commission ruled that there was no violation of Article 9 in the lack of any criminal sanctions against those who publish material offending the religious sensibilities of non-Christians.<sup>90</sup>

The above jurisprudence of the European Commission of Human Rights and the European Court of Human Rights, binding upon all member states in Europe, compels the conclusion that any member state of the European Convention may enact and enforce blasphemy laws. The enactment of blasphemy laws is considered a legitimate and sometimes a desirable limitation on the freedom of expression. However, the freedom of religion guaranteed in Article 9 of Convention does not impose a positive obligation upon the member states to enact blasphemy laws if they do not have such laws already in place. This is so even if, as in the Salman Rushdie case, the blasphemy laws do not provide equal treatment to all religions. The above approach of the European Court is in consonance with traditional rights theory, which holds that it is not a fundamental right of those who believe in a religion, even if they form a majority of the population, to be protected from blasphemy. This would be the case since those who do not believe in the religion blasphemed also have a belief which they have a right to express. This may indeed be true if blasphemy were defined as the expression of an opinion contrary to an established religion, as was the case as recently as the early part of the last century in most countries in Europe. However, the modern legal definition of blasphemy, where such a definition is relevant, focuses on the manner and form, rather than the content of the offending speech, as well the likelihood of such speech to create a hostile environment for those espousing a certain belief.<sup>91</sup>

Another traditional argument against recognizing a right to protection from blasphemy is that it would be tantamount to giving undue preference to the freedom of religion over the freedom of expression.<sup>92</sup> In the case of *Otto-Preminger-Institut v. Austria*, the European Court discussed the legality of the seizure and forfeiture of a movie ("*Das Liebeskonzil*") for attempted violation of §188 of the Austrian penal code, the offence of disparaging religious precept.<sup>93</sup> The Court

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> In *Whitehouse v. Lemon*, Lord Scarman in the House of Lords adopted the definition of blasphemy given in *Stephen's Digest of the Criminal Law*, 9th edition (1950) Article 214:

Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves.

*Whitehouse v. Lemon*, (1979) 1 A.C. 617, 665 (H.L. 1978) (consolidated appeals).

<sup>92</sup> See, for example, Nicholas Smith, *The Crime of Blasphemy and the Protection of Fundamental Human Rights*, 116 S. AFRICAN L. J. 162, 169-70 (1999). It has been argued that "if the believer asks to be spared the pain of vigorous disagreement of others, it amounts to asking for special treatment."

<sup>93</sup> *Otto-Preminger Institut v. Austria*, 19 Eur. Ct. H.R. 34, 37 (1994).



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analysed the situation as one which presented a conflict between the freedom of religion and the freedom of artistic expression.<sup>94</sup> The Court, having stressed that in democratic societies the followers of a particular religion, even if the majority religion, must be prepared to face opposing opinions, proceeded to state:

However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.<sup>95</sup>

The Court found the film to be an artistic expression that was “gratuitously offensive to others and thus an infringement of their rights.”<sup>96</sup> Hence, the censorship was justified.

It is evident that in the Court’s view the evil in blasphemy is not the expression of a contrary opinion but rather the manner and form of such expression which interferes with a religious group’s ability to practice their religion. The concerns with such speech ought to be heightened when the target religion is the religion of a minority rather than the majority. Legal allowance of blasphemy would then be tantamount to the majority, as distinct from the state, denying the minority their freedom of religion. The liberal view of the freedom of religion and fundamental freedoms generally as negative liberties and the stress upon preventing the state from limiting opportunities of following a particular religion miss the mark in this context: the majority would be allowed to achieve extra-legally what it cannot achieve through an indirect control of state power.

The message that was clearly disseminated by the cartoons was that all Muslims are terrorists. If Muslims in Europe have to look over their shoulders at all times for the fear of being branded as terrorists, then such speech would have a chilling effect on the worship, practice, and observance of their religion. This would be a violation of Article 9 as per the European Court’s own analysis, which suggests that all states ought to have a positive obligation to protect their citizens’ freedom of religion. Unfortunately, the Court has not yet taken the argument to its logical conclusion by holding that citizens have a right to protection from such gratuitous blasphemy. Blasphemy against a minority’s religion is an even more sinister wrong and states should be obliged to prevent such abuse of the freedom of expression.

<sup>94</sup> The freedom of religion is provided in Article 14 of the Austrian Constitution (Basic Law), whereas artistic freedom is protected under Article 17a. The leading precedent of the Austrian Supreme Court pertained to the censorship of another film. The Supreme Court suggested ‘that if a work of art impinges on the freedom of religious and worship guaranteed by Article 14 of the Basic Law, that may constitute an abuse of the freedom of artistic expression and therefore be contrary to the law’ (judgment of 19 December 1985, *Medien und Recht (Media and Law)* 1986, no. 2, p. 15). *See id.* at 41.

<sup>95</sup> *Id.* at 55.

<sup>96</sup> *Otto-Preminger Institut v. Austria*, 19 Eur. Ct. H.R. 34, 43-44, 57 (1994).

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**IV. A Clash of Categories?: Race, Religion, and Liberal Fundamental Rights**

Another difficulty inherent in permitting blasphemy against a minority's religion is that such acts often conflate the categories of race and religion to such an act that it is impossible to make meaningful distinctions between hate speech and blasphemy, and between the race or ethnicity and the religion of the minority communities whose religious beliefs are the target of abuse. The Danish cartoons provide a quintessential example of such a phenomenon. The main image published by *Jyllands-Posten* depicts a man failing to identify the prophet of Islam in a criminal identity line-up as all the suspects, presumably belonging to different religions and creeds, are dressed up similarly.<sup>97</sup> Ironically, all of the other caricatures published on that page effectively advise on how to identify the Muslim-terrorist in such a line-up in reality. He is a bearded Arab, dressed in a distinctive garb, supports a turban and compels his women to be covered from head to toe. The religion, race and culture of the Muslim-Arab-terrorist are the *leitmotif* of the caricatures. What the cartoons do not inform the viewer is how to distinguish the Muslim terrorist from the Muslim pacifist, or an immigrant citizen of Europe with whom he shares his religion-race-culture. Is this blasphemy or is this hate speech?<sup>98</sup> If the newspaper wished to publish cartoons depicting 'Arab terrorists' in exactly the same manner it would not have to change a thing except the title of the piece. The publication of such cartoons would have been legitimately suppressed as hate speech.

The fine distinction between hate speech and blasphemy against a minority community's religion, especially when that minority community also has distinct racial or ethnic and cultural commonalities, enables the creation of an environment of abuse, ridicule, and social persecution that cannot be achieved directly. The ridicule of religion, only one of the inseparable facets of identity, does not

<sup>97</sup> For an archived image, see *Jyllands-Posten, Muhammad Cartoons Controversy*, WIKIPEDIA <http://upload.wikimedia.org/wikipedia/en/7/75/Jyllands-Posten-pg3-article-in-Sept-30-2005-edition-of-KulturWeekend-entitled-Muhammeds-ansigt.png>.

<sup>98</sup> In January 2006, the regional public prosecutor for Viborg (*Statsadvokaten i Viborg*) decided not to initiate criminal proceedings against the newspaper under Article 140 of the Danish Criminal Code. Article 140 provides that any person who publicly mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community may be punished with imprisonment for a term of up to four months. On appeal the Director of Public Prosecutions (*Rigsadvokaten*) upheld the decision in March 2006. The DPP's decision makes for interesting reading. First, in a disingenuous understanding of Islam the DPP held that ridiculing prophet Muhammad (P.B.U.H.) was not tantamount to a mockery of the "religious doctrines or acts of worship" in Islam. Article 140, it was held, did not "encompass religious feelings which are not tied to a community's religious doctrines or acts of worship." Secondly, the DPP stretched logic to breaking point over the analysis of specific cartoons. Specifically, as regards the caricature depicting prophet Muhammad (P.B.U.H.) with a bomb as his turban, the DPP admitted it could also "be taken to depict the Prophet Muhammad as a violent person and as a rather intimidating or frightening figure. . . . This depiction might with good reason be understood as an affront and insult to the Prophet, who represents an ideal for believing Muslims. However, such a depiction is not an expression of mockery or ridicule, and almost certainly not of scorn within the meaning of Article 140 of the Danish Criminal Code. The concept of scorn covers contempt and debasement, which in their usual meaning would not cover situations depicting a figure such as that shown in drawing. . . ." See Ben el Mahi v. Denmark, App. No. 5853/06, Eur. Ct. H.R. (2006), available at <http://echr.ketse.com/doc/5853.06-en-20061211/>.

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render such an attack on the social position of a minority community any less grave than an act of bigotry which focuses on the racial identity markers of that community. In fact, it is arguable that such an act of blasphemy is a particularly sinister form of hate speech or “aggravated discrimination,”<sup>99</sup> and the “conflation of racial, cultural and religious factors” may be “highlighted as one of the central causes of the resurgence of racism and its increasing complexity.”<sup>100</sup> In the context of increasing Islamophobia, the aggravated meeting points of racial and religious discrimination are often manifested in the “stereotypical association of Islam with violence and terrorism - an association which is bolstered by intellectual constructs, used in political rhetoric and exaggerated by the media and which has a profound impact on the popular imagination.”<sup>101</sup>

The emergent liberalism of the European conception of fundamental rights displayed an inability to deal with the complexities of discrimination against minority communities constituted through overlapping identities of race, religion and culture. The primary defect in the liberal conception of the rights to free speech and religion is its exclusive focus on the state’s interference in the minority communities’ fundamental rights. The inherent negativity of the liberal conception not only disables the state from discriminating against minority individuals on the basis of religion but also from preventing offensive speech by private individuals that stifles the free exercise of religion by the minority community. However this approach, constructed through the defense of the Danish cartoons, sits uncomfortably with the historically more communitarian ethos the European conception of rights as less fundamental and rigid than recently professed. This communitarian ethos is reflected in the more robust action against hate speech and Holocaust denial that is permissible to states under the ECHR. Such an approach provides a sounder basis for mediating the conflicting values and political aims underlying the freedoms of expression and religion by enabling the state to proscribe ridicule of a minority’s religion that amounts to aggravated discrimination and hate speech.

The freedom of expression is not the overarching value in European social construction and the state has certain other responsibilities including the mandate of ensuring the free exercise of religion by minority communities. This may include the suppression of certain expression that creates an environment of hostility towards distinct racial-ethnic-religious communities by non-state actors. Furthermore, Article 17 of the ECHR stipulates that:

Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein

<sup>99</sup> See U.N. Secretary-General, *Reports, Studies, and Other Documentation for the Preparatory Committee and the World Conference*, ¶ U.N. Doc. A/CONF.189/PC.1/7 (Apr. 13, 2000).

<sup>100</sup> Human Rights Council Res., Rep. of the Human Rights Council, 7th Sess., 20 Feb. 2008, A/HRC/7/19 at ¶ 54 (20 Feb. 2008).

<sup>101</sup> *Id.* at ¶ 57.

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or at their limitation to a greater extent than is provided for in the Convention.<sup>102</sup>

The ECtHR frequently reads Article 17 in conjunction with other provisions as the basis for the restriction of rights provided in the ECHR. While the ECtHR has held in the past that there is neither a positive obligation on the state to protect citizens from blasphemy against their religion nor a right to the equal protection of blasphemy laws, there is indeed an obligation on the state to protect its citizens from hate speech. In *Norwood v. United Kingdom*, the ECtHR declined the protection of Article 10 to a member of the anti-immigration British National Party who had been charged with an aggravated offence under section 5 of the Public Order Act 1986 for “displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it.”<sup>103</sup> The applicant displayed a poster with a picture of the Twin Towers in flame and the statement “Islam out of Britain – Protect the British People.”<sup>104</sup> The ECtHR held that “the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.”<sup>105</sup>

In a more recent case, *Féret v. Belgium*, the ECtHR denied, by a narrow majority of 4:3, the protection of Article 10 to a member of the Belgian parliament who had been disqualified from holding public office pursuant to a conviction for incitement to racial discrimination.<sup>106</sup> The applicant produced leaflets carrying anti-immigration and Islamophobic slogans such as “[s]tand up against the Islamification of Belgium” and “Stop the sham integration policy.”<sup>107</sup> Although the majority on the Court did not find a violation of Article 17, the judges found sufficient basis for restricting incitement to discrimination and hatred on the basis of race and ethnic origin in the provisions of Article 10 itself.<sup>108</sup> The only meaningful distinction between the cases mentioned above and that of the Danish cartoons was that in the classification of offending speech. All of these cases conflated religion with race as is evident from the offending statements. How-

<sup>102</sup> Convention For Protection of Human Rights and Fundamental Freedoms art. 17, Apr. 11, 1950, Council of Europe, 213 U.N.T.S. 221, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

<sup>103</sup> See *Norwood v. United Kingdom*, App. No. 23131/03, Eur. Ct. H.R. (2004), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67632#{%22itemid%22:\[%22001-67632%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67632#{%22itemid%22:[%22001-67632%22]}).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See *Féret v. Belgium*, 573 Eur. Ct. H.R. (2009), available at [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2800730-3069797#{%22itemid%22:\[%22003-2800730-3069797%22\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2800730-3069797#{%22itemid%22:[%22003-2800730-3069797%22]}).

<sup>107</sup> See Press Unit, Fact Sheet – Hate Speech, Eur. Ct. H.R. (2013), available at [http://www.echr.coe.int/Documents/FS\\_Hate\\_speech\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf).

<sup>108</sup> See *Féret v. Belgium*, 573 Eur. Ct. H.R. (2009), available at [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2800730-3069797#{%22itemid%22:\[%22003-2800730-3069797%22\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2800730-3069797#{%22itemid%22:[%22003-2800730-3069797%22]}).



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ever, in *Norwood v. United Kingdom* and *Féret v. Belgium* the state parties classified the offensive statements and actions as hate speech while the Danish cartoons were classified as blasphemy and disparagement of religion. To the extent that gratuitous blasphemy and ridicule of a minority's religion effectively translates into aggravated hate speech, the state should not be allowed to hide behind such artificial distinctions and a newfound liberalism as Denmark chose to do in defense of the caricatures.

Another problem with the liberal conception of fundamental rights highlighted by the free speech defense of the Danish cartoons is the impoverishment of political discourse that may result from over-zealous rights talk.<sup>109</sup> Fundamental rights are all too frequently used in liberal discourse as trumps not only against offending state action but also as trumps against opposing viewpoints, essentially as debate-stoppers. The moment rights are brought up any discussion of conflicting values becomes frivolous, for a right is a right. In the liberal understanding rights are *apriori* and any discussion on political and social values must take place within the framework of rights. The primary justification of rights is that not that they promote certain socio-political goods but rather that they help constitute fair processes within which individuals can choose their own values and aims. As such, in liberal political and legal discourse rights act as trumps to preempt any consideration of values that fall foul of rights as conceived by the defenders of liberal rights. This is regardless of the fact that the advocates of liberal rights "notoriously disagree about what rights are fundamental, and about what political arrangements the ideal of the neutral framework requires."<sup>110</sup> This is essentially problematic in pluralistic societies where distinct racial-religious-cultural minorities are facing demands for integration or assimilation that they are wont to resist. It is self-defeating to adopt a 'take it or leave it' approach, or 'take it or leave' as regards immigrants, when it comes to discussion of overarching political structures and values. An open, inclusive and civil political discourse, with a view to reach a shared understanding on social ordering is the need of the moment, rather than a restrictive reliance on fundamental rights.

## V. Conclusion

The free speech defense of the publication advanced by the Danish authorities falters on a number of grounds. The laws of many European states, including those of Denmark, allow substantial limitations on the freedom of expression as regards the prohibition on incitement, hate speech and insult. In addition, it is within the prerogative of European states to limit the freedom of expression in order to ban Holocaust denial, blasphemy and even the disparagement of a minority religion. Therefore, the Danish government could have prosecuted *Jyllands-Posten* for publishing the cartoons under its existing laws, or if the existing laws were held to be inadequate to cover the specific facts of this case, then in the least the Danish government could have enacted laws that would prohibit

<sup>109</sup> See Glendon, *supra* note 12, at 12-17.

<sup>110</sup> Sandel, *supra* note 5, at 89.

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such publications in the future. The case is stronger against the subsequent publication of the caricatures in Denmark and other European nations. Having been put on notice that the publication of this material causes serious insult and injury to Muslims, and consequently creates a risk of violence, the re-publication of the cartoons was clearly the dissemination of hate speech and those newspapers who indulged in such willful propagation of this speech were clearly guilty of the offences of causing instigation and insult to the religious sentiments of European Muslims. Even if it is accepted that neither the initial nor the subsequent publication fell foul of existing hate speech laws, the failure of the legal case would in no way detract from the strength of the moral argument against the publication of these cartoons. The failure on the part of state parties to prohibit the publication is a gross violation of the letter as well as the spirit of the European Convention of Human Rights.

It is of note that major newspapers in the United States generally refused to follow in the footsteps of European news media, even though the United States accords protections to the freedom of speech similar to those claimed by the defenders of the caricatures in Europe. As has been demonstrated in this paper, contrary to the strenuous assertions of some European leaders and news personalities, such a freedom of expression, absolute in its application and primary amongst other fundamental rights and freedoms, is not a European value. The European conception of the freedom of expression falls far short of absolutism and allows for restrictions in the interest of maintaining social harmony and discouraging racism, sexism and insult to the religious sentiment of the citizens. There is no denying that there is a distinct segment in the European polity that believes that the freedom of expression should be accorded a primary status amongst all fundamental values, but this viewpoint is far from being the consensus position in Europe. The European path towards the goal of creating open, democratic, and multicultural societies has been, in the aftermath of the tragic failures of the World War II era, the path of ensuring that bigotry and hateful speech is censored. Unfortunately, now that the targets of the bigotry are the immigrant Muslim minorities in Europe, the standards appear to be changing.

The success of the free speech defense of the Danish cartoons thus represents an unwelcome development in the European human rights discourse. As Europe becomes ever more diverse and pluralistic the resulting challenges can only be met by solutions devised through open, inclusive, civil, and meaningful engagements. A robust political discourse that is mindful of histories of colonialism and socio-economic deprivation that is at the heart of immigration, as well cultural and religious disagreements underlying social and economic conflicts, is the need of the moment. A political strategy grounded in fundamentalist liberalism that presents choices in 'take it or leave it' terms to minority viewpoints in the new Europe will not only fracture and polarize the debate but also exacerbate these conflicts. If Europe has learned anything from its histories of violence against minority communities, the path of open and inclusionary discourse will be adopted in the hope that humans have the capacity to develop shared foundations of co-existence through such engagement.