

FREE SPEECH OR HATE SPEECH? THE  
DANISH CARTOON CONTROVERSY IN  
THE EUROPEAN LEGAL CONTEXT

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By now, most people know the story of the Danish Cartoon Controversy. A Danish author claimed he had trouble finding an artist to draw the prophet Muhammad for a children's book he was writing. The editors of the conservative *Jyllands-Posten* newspaper believed that Muslims had succeeded in cowing illustrators and imposing a taboo that had no rightful place in a liberal democracy. So they asked the newspaper illustrators' union for images in order to uphold the value of free speech. On September 30, 2005, they published 12 illustrations under the heading "The Face of Muhammad." The reactions over the ensuing months ranged from protests and lawsuits within Denmark and Europe to boycotts, burned flags, and ransacked embassies abroad. The political manipulation of these depictions also generated violent unrest that led to over 200 deaths across the Muslim world (Hansen and Hundevadt 2008; Klausen 2009).

A number of scholars have discussed the political motives of the *Jyllands-Posten*, of the Muslim leadership in Denmark, and of Muslim leaders abroad. There have been extensive debates about whether it was acceptable to publish the cartoons or not. In this chapter, I focus on an aspect of the controversy that has not received extensive attention: the legal question of whether any of the images that were published to uphold free speech qualify as hate speech punishable under European law.

There are three basic positions in this discussion. Many Muslim leaders think that at least some of these images were illegal hate

speech. Muslim clerics in Denmark and France brought lawsuits against the *Jyllands-Posten* and the satirical magazine *Charlie Hebdo* for publishing these images. They viewed them as blasphemous, offensive, insulting, degrading, and as likely to stir up hatred or promote discrimination. For these Muslim leaders, these images are a form of hate speech that contravenes the law.

Hard-core liberals could not disagree more. Academics like Randall Hansen and Brendan O’Leary and journalists like Christopher Hitchens and Philip Gourevitch argue that there is no right in liberal democracies not to be offended (Modood et al. 2006).<sup>1</sup> They also believe that anyone who insists upon this right is antiliberal and shows a fundamental misunderstanding of the importance of free speech. There is a variation on this position that encompasses scholars like Robert Post and Steven Heyman who are not hard-core Millian liberals, but who base their stance on the assumption that these cartoons were legitimate criticisms of religious doctrine rather than targeted attempts to stir up hatred against Muslims as an ethnoracial group (Heyman 2008: 181–182; Post 2007). Of course, as Geoffrey Brahm Levey and Tariq Modood rightly point out, it is possible to interpret these cartoons as attacking *both* Islam-as-doctrine *and* Muslims-as-group—these are not mutually exclusive positions (2009, 429).

The third prominent position might be called multiculturalism without teeth. Scholars like Tariq Modood, Joseph Carens, David Cesarani, and Mary Matsuda have argued that it was inappropriate to publish these cartoons, but that it was not an actionable offense (Modood et al. 2006).<sup>2</sup> Modood captures the spirit of this position by suggesting that these images should be censured, not censored (4). This perspective rests on the assumption that these cartoons provoked deep offense, which is morally but not legally wrong, and which should, therefore, be punished through social tactics of condemnation rather than through court proceedings.

No prominent body of scholarship has made the case that any of these images were illegal. The dividing line over whether any of these images constitutes actionable hate speech has thus been drawn between “radical Muslim clerics” and “everybody else.” I argue that this line is drawn in the wrong place.

In European jurisdictions, free speech is an important value, but it has always been balanced against other values. Limiting racist speech is an important goal in most European countries, and it sometimes outweighs the right to free speech. In the European legal context, therefore, bringing suit over these cartoons was actually *in keeping*

with well-established European norms against hate speech, and it is surprising that no prominent, non-Muslim figure stood up to make this case. Whatever one thinks of these cartoons—that they are offensive or anodyne, that they should be punished or heralded—in the prevailing European legal context of the time, it was not radical to argue that some of these images constituted illegal hate speech.

Why has this perfectly reasonable statement never been made forcefully? For obvious reasons, nobody wanted to be on the side of Muslim “radicals” against free speech when the debate ballooned into the public sphere and when violence erupted. But with a little distance from the events, it is possible to assess more objectively whether these cartoons were free speech or hate speech. To do this, we need a working definition of hate speech. The next section provides one, and goes on to highlight some significant differences between the 12 cartoons in order to pinpoint the 2 that are most susceptible to charges of hate speech. The heart of this chapter is a discussion of the European legal context over the past few decades, which is detailed in the subsequent section. This illustrates the environment in which these cartoons were published, demonstrating that instances of racist and Islamophobic speech have been regularly punished in many European jurisdictions, including in Denmark. I conclude by discussing the broader implications of my argument and findings.

Most importantly, I stress that there is a very plausible case that at least *some* of these images constitute hate speech in the context of European legal developments and precedent. This context does not guarantee that an impartial observer will judge any of the cartoons hate speech, but a richer understanding of the legal context dispels the presumption that all backers of sanctions are radicals. It also opens up space for a more nuanced debate about similar incidents of hate speech in Denmark and beyond.

## HATE SPEECH AND THE TWELVE CARTOONS

Hate speech is notoriously difficult to define. It has a wide variety of meanings that depend on the country, time period, and context of the speech. Because I am interested in the legal context, I define hate speech as communications that contravene the law because they stem from or stir up hatred against people who belong to defined categories. Which laws are contravened? Many European countries have statutes against racial incitement, abuse, defamation, insult, provocation, or harassment, where the term “racial” is defined on

the grounds of categories like race, ethnicity, religion, or national origin. Some countries also have laws against blasphemy on their books, though these have rarely been applied in recent decades (Klausen 2009, 145–146). The precise formulations and varieties of laws differ country by country, but almost all European states have legislated against hate speech.

With that definition in mind, did the cartoons constitute hate speech? *Maus* cartoonist Art Spiegelman asked this question in a *Harper's* magazine review of the 12 images. In the article, he compellingly argued that most of the illustrations were simply not high quality cartoons and jokingly assigned each a varying number of lit bombs on a scale of 1–4 to designate their level of offensiveness. But like the scholars cited above, he certainly did not think any of them constituted hate speech (Spiegelman 2006).

This example highlights the fact that there are myriad ways to analyze these cartoons. No single individual's judgment will persuade everybody, and I do not assert that my own interpretation is more persuasive than anyone else's. Instead, my goal here is to point out what is obvious to everyone who has closely analyzed these cartoons—that there are significant differences among them—and also to suggest that reasonable people may read some of them as crossing the line into the terrain of legally actionable hate speech.

In my own interpretation of key differences among the cartoons, I sort them into several main categories. Some Muslims were offended because they believe there is a prohibition against any illustration of Muhammad. While it is commonly believed that all of these cartoons portrayed the prophet, in fact, not all of them did. One crude drawing depicted five veiled Muslim women saying “Prophet! Daft and dumb, keeping women under thumb,” while another showed “Muhammad” as a Danish schoolboy rather than as the prophet. At least in these two instances, the taboo against depicting the prophet was not contravened.

Other people were offended because of the mocking or degrading tone of some of the images. Many of them were indeed mocking or degrading. But not all of them were. One is completely anodyne, illustrating Muhammad as a shepherd figure in the Abrahamic tradition of Jesus or Moses. Others were also inoffensive and harmless, such as one representing the children's book author holding a stick-figure drawing—presumably of Muhammad—while wearing a turban into which an orange labeled “PR stunt” was falling. These cartoons contravene the taboo against depicting the prophet. As such, some devout Muslims may find them troublesome or even offensive, but

images like this clearly do not constitute hate speech by any European legal standard.

Of the images that many observers felt were mocking or degrading, some were attempting to be humorous, even if the humor might be edgy or offensive. One cartoon shows Muhammad on a cloud greeting a line of deceased suicide bombers with the plea “STOP STOP We have run out of virgins!” Another shows Muhammad holding his hand out to calm two followers who hold a drawn sword and a lit bomb, with the tag line “Easy my friends, when it comes to the point it is only a drawing made by a nonbelieving Dane.” For some people, these images are closer to the line in insinuating that Muslims are particularly prone to violence. Because they contain a humorous or playful element, however, they are in keeping with the long tradition of political or social satire, and it would be difficult to categorize them as hate speech under European laws.

In my judgment, the most controversial images link Muhammad with violence, terrorism, and the oppression of women, in ways that involve little or no ambiguity and no attempt at humor or satire. The best-known cartoon in this vein shows Muhammad wearing a turban that constitutes a lit bomb. Although the cartoonist subsequently argued that he was simply criticizing Muslim fanatics and not all Muslims (Brinch 2006; Westergaard 2009), the depiction itself shows the bomb as the entirety of what is going on in Muhammad’s head. Therefore, even if we accept the artist’s (self-interested) statements about his intent, the effect of the image is likely to be quite different from the artist’s stated goal.

A second image also falls into the most controversial category. It depicts a fierce-looking Muhammad standing with drawn scimitar in front of two frightened looking women clad in full head- and body-covering black garb. Where the women’s niqabs reveal their eyes, a similarly sized black band covers Muhammad’s eyes. As with each of the images, this one can be interpreted in different ways. But it is perfectly reasonable—and highly likely—that observers will look at this image and see Muhammad as both ready for violence and oppressive to women. I have made this point in earlier work, and I am not alone in making it (Modood et al. 2006, 21). Although Klausen and Levey and Modood differ on some of their specific interpretations, both find this image extremely problematic (Klausen 2009, 24; Levey and Modood 2009, 439).

For some, these images simply cannot constitute hate speech because they are aimed at religion or at a single religious figure, rather than at a particular racial group (Koch 2006; Modood et al.

2006, 22–33). It is true that European liberal democracies typically give wide latitude to criticism of religious doctrine and also undeniable that Muhammad was just one person. However, European hate speech laws typically forbid stirring up hatred against religious groups as well as racial groups. So legally, the crucial question is whether these cartoons constituted a criticism of doctrine, or an attack on Muslims as a group. Along with Tariq Modood, I have argued that depicting Muhammad as a violent terrorist, or as oppressive to women implicates all Muslims and is not simply a criticism of a narrow portion of Islamic doctrine. As Modood has written, “the cartoons are not just about one individual but about Muslims per se—just as a cartoon portraying Moses as a crooked financier would not be about one man but a comment on Jews” (2006, 4).

One may agree or disagree that these two images plausibly constitute hate speech. But the only way to judge whether there is a reasonable legal case against these cartoons is to examine them in the prevailing European legal context of 2005–2006.

## THE EUROPEAN LEGAL CONTEXT

By the time of the Danish cartoon controversy, European jurisdictions had a long history of dealing with hate speech as a political and legal issue. There are four loci of decision making that are worth examining to provide a picture of the legal context of this era: international and pan-European treaties and legislation; national legislation and enforcement in prominent European countries where developments are well-known outside their borders and, therefore, shape broader European discussions; enforcement decisions at the highest court of appeal in Europe for hate speech issues, the European Court of Human Rights (ECHR); and the context within Denmark itself.

### The International and Pan-European Context

European countries have long participated in international bodies like the United Nations and the Council of Europe that have explicitly deliberated over how to balance freedom of speech against other values such as fighting racism. The process of balancing goes back to the 1948 UN Universal Declaration of Human Rights. This document emphasizes the right to freedom of opinion and expression (Article 19). But it also says we should act toward others in a spirit of brotherhood (Article 1); it forbids discrimination or incitement to discrimination (Article 7); and it grants the right to protection against attacks

upon honor or reputation (Article 12). Each of these elements implies that there can be limits to racist speech.

In the mid-1960s, UN documents called even more explicitly for restrictions on racist speech. In 1965, Article 4 of the UN International Convention on the Elimination of All Forms of Racial Discrimination required countries to “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.” One year later, Article 20 of the International Covenant on Civil and Political Rights of that year declared: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” So the UN institutions clearly strive to balance upholding free speech and punishing hate speech.

This balancing act at the UN level is mirrored at the pan-European level. Article 10 of the Council of Europe’s 1950 Convention for the Protection of Human Rights and Fundamental Freedoms enshrines freedom of expression as a core value. But Article 10(2) also says that freedom of expression comes with “duties and responsibilities” and can be restricted when necessary for things like “the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others.” Each of these reasons can justify limiting hate speech in the 47 member countries. Another pan-European body, the European Union, also recently concluded a “framework decision” that requires its 27 members to punish incitement to hatred or violence on the grounds of race, color, religion, descent, or national or ethnic origin.<sup>3</sup>

So there is significant justification for limiting hate speech at the UN and pan-European levels. It is worth noting that all of these international and European developments run against the grain of the US trajectory since the 1960s. Through decisions taken in the 1960s and 1970s, the Supreme Court of the United States leaned on the First Amendment of the Constitution to lift restrictions on hate speech (Walker 1994). The United States is by far the most tolerant country in the world with respect to racist speech (Hare and Weinstein 2009; Rosenfeld 2003). But it is an international outlier. While there is virtually no such thing as illegal racist speech in the United States, the rest of the international community gives more equal weight to each side when balancing the value of free speech against values such as dignity, honor, equality, tolerance, and nondiscrimination.

### National Developments in Europe

Looking more closely at individual European countries, we see that not only have they signed international documents, but have also restricted hate speech through dedicated national laws. In the 1960s and early 1970s, Germany, Britain, France, and other countries passed laws against racial incitement, racial defamation, and other forms of hate speech. These laws have not been very controversial. There have not been a great deal of prosecutions under most of these laws, but they are deployed every year in European countries to counter instances of hate speech.

In the 1980s and 1990s, Germany, France, Austria, Belgium, and a few other countries passed laws against Holocaust denial (Whine 2009, 544–545). These laws have been more controversial. They forbid people from saying the Holocaust never happened; or that it happened, but it was not that bad; or that it happened and it was a good thing it happened. Anyone who says these things can be arrested, tried, and convicted. Most convictions result in a fine or a suspended jail sentence, but David Irving famously spent over a year in an Austrian jail for his hard-core and repeated Holocaust denial. A small number of jail sentences have also been handed down in Switzerland, Germany, and France.

More recently—in the 1990s and in the past decade—laws against racial incitement have been expanded, and laws against hate crimes like racial harassment have been passed and enforced. Two examples of enforcement over the past 15 years illustrate the tone of European developments. Brigitte Bardot—fabulous French actress of yesteryear and ardent animal rights activist today—has five convictions for hate speech. Bardot is not a fan of the annual Muslim Eid sacrifice. This sacrifice involves draining the blood of a sheep by slitting its throat with no measures taken to ease its pain and suffering. For Bardot, this symbolizes Muslims’ brutality to animals and also the threat Muslims pose to French traditions and culture. In April 1996, Bardot wrote an opinion piece called “My Cry of Anger,” which was published in the major national newspaper *Le Figaro* during the Eid festival. It included a line that read “And now my country, France, my homeland, my land, is again being invaded, with the benediction of our successive governments, by a foreign overpopulation, especially Muslim, to which we pay allegiance! To whose law we bend in submission.”<sup>4</sup>

For some, this sounds tame. But French Muslim groups and antiracist organizations started legal proceedings against her. They argued that the tone of her article went beyond mere criticism of ritual slaughter. They believed she had contravened the 1972 French



law against hate speech, which forbids abuse, defamation, or provocation to discrimination, hatred, or violence against a person or group because of “their origin or their belonging or non-belonging to an ethnic group, a nation, a race, or a determined religion.”<sup>5</sup> In short, they thought Bardot was provoking hatred against Muslims.

The public prosecutor agreed and supported the case against Bardot. The court handed down its decision in January 1997. The judges ruled that her statements about the invasion of France were *not* illegal. Any other conclusion, they asserted, “would contravene our democratic principles by establishing a number of taboo subjects and by practically creating an ‘opinion crime,’ which the legislature did not intend.”<sup>6</sup> In other words, the initial ruling unequivocally upheld free speech.

But the state appealed the decision. The appellate court overturned the verdict in October 1997. They found that Bardot had presented Muslims in France as a menace and they sentenced her to a 10,000 Francs fine (about \$2,000).<sup>7</sup> Bardot was subsequently convicted for anti-Muslim statements made in 1997, 1999, 2003, and 2006. Her last conviction was for publishing a 2006 letter she had written to Nicolas Sarkozy, which alluded to Muslims as “this population that is destroying us, destroying our country by imposing its acts.” She was fined €15,000 (about \$20,000), but the court declined to impose the two-month suspended sentence requested by the prosecutor.<sup>8</sup>

The second example comes from Great Britain. Shortly after 9/11, Mark Anthony Norwood, a far right party member, put up a poster in the first floor window of his apartment in a village in Shropshire where it stayed for approximately two months. The poster contained a photograph of the Twin Towers in flames, the words “Islam out of Britain—Protect the British People” and a symbol of a crescent and star in a prohibition sign. A member of the public complained, and the police removed the poster. They then charged Norwood with religiously aggravated harassment (Weinstein 2009, 44–45).<sup>9</sup>

In Britain, it is illegal to display “any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby,” and it is considered racially or religiously aggravated if it is “motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.”<sup>10</sup> Norwood argued that the poster referred to Islamic extremism and was not abusive or insulting, and that to find him guilty would infringe his right to freedom of expression. The judge disagreed, convicting Norwood in December 2002 and fining him £300 (about

\$500). The High Court dismissed Norwood's appeal in July 2003. Lord Justice Auld held that the poster was "a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people."<sup>11</sup>

One may agree or disagree that Bardot and Norwood should have been convicted. But by 2005–2006, it was clear that anti-Muslim expression was legally actionable in high-profile cases in prominent European countries.

### **Pan-European Enforcement at the European Court of Human Rights**

The cases from France and Britain provide an important context for decisions made by groups and prosecutors in other countries, but their laws are not directly applicable to cases in Denmark. Before we look at Danish laws, it is important to examine the decisions of the ECHR. This body enforces the Council of Europe's 1950 Convention on Human Rights, and it serves as the high court of human rights in Europe. The Court hears appeals from citizens who believe their freedom of expression—protected by Article 10—has been unduly infringed. It has the power to overrule national decisions, and, therefore, its findings are important for all member countries, including Denmark.

If the ECHR were extremely hostile to speech-restrictive rulings at the national level, any conviction in Denmark would be set aside and a prosecution would be pointless. But, in general, ECHR rulings have upheld the rights of member states to restrict freedom of expression in order to punish hate speech. It has done this in prominent Holocaust denial cases, such as when it let stand Roger Garaudy's French court convictions in 2003, reasoning that "disputing the existence of crimes against humanity was... one of the most severe forms of racial defamation and of incitement to hatred of Jews."<sup>12</sup>

It has also done this in cases of anti-Muslim expression. Norwood appealed his conviction to the European Court of Human Rights. In November 2004, the Court found the appeal inadmissible. It unanimously agreed with the findings of the British courts, stating "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>13</sup>

So if Danish courts had found the cartoons were “severe forms of racial defamation [or] incitement to hatred” against Muslims, or if they had found them a “general, vehement attack against a religious group,” or if they had found that they linked Muslims “as a whole with a grave act of terrorism,” the European Court would likely have agreed they constituted unprotected hate speech. Naturally, nothing guarantees that they would have ruled in this way. There are good arguments to be made that none of these circumstances applied to any of the Danish cartoons. But there is also a strong argument that they do apply. If Danish courts had ruled the cartoons hate speech, it is likely—given the ECHR’s propensity to give latitude to national courts in close cases—that the ECHR would have upheld the conviction.

### The Danish Context

Denmark is well known for being one of the strongest supporters of free speech principles in Europe. But merely having a free speech tradition does not guarantee that hate speech will be protected, as proven by Norwood’s conviction in the country famous for Speakers’ Corner in Hyde Park. Like Great Britain, Denmark has a domestic law against hate speech. Danish Penal Code §266b—enacted in 1939 amidst a wave of Nazi-inspired anti-Semitism—makes it illegal to “issue public utterances ‘threatening, insulting or degrading to a group of persons due to their race, skin color, national or ethnic origin, faith or sexual orientation.’”<sup>14</sup>

This law was famously applied in the Jersild case.<sup>15</sup> Jens Olaf Jersild was a Copenhagen-based journalist who interviewed three members of a racist group in 1985. The aired segment contained virulently racist statements. In response, the state initiated a prosecution against the three racists and against Jersild for aiding and abetting the publication of their statements. The Copenhagen City Court convicted the racists and Jersild in 1987. The East Denmark Court of Appeal and the Danish Supreme Court upheld the convictions in 1988 and 1989 respectively. The Jersild case thus demonstrates that Denmark is willing to use its statutes to prosecute and convict hate speech. As in most countries, these laws are not frequently used, but neither are they dead letters.

Jersild’s next step was to appeal to the European Court of Human Rights. The Danish government strongly supported upholding the convictions. The Court unanimously agreed that the racists were rightly convicted. But, by a 12 to 7 vote, the Court overturned the

conviction of Jersild in 1994. The European Court concluded that Jersild could not be held accountable for several principal reasons. First, he disassociated himself from the racist views and rebutted some of the racist claims. Second, the racist views were themselves the subject of the story, and so the press was playing a “watch dog” function in bringing the social problem of racism to light. Finally, the purpose of the broadcast was not to perpetuate racism by insulting minorities.

In the *Jyllands-Posten* case, however, these conditions do not apply. There was no disassociation from the most contentious cartoons. The point of the project was not to serve as a watchdog exposing anti-Muslim prejudice as a social problem. In fact, the purpose of the project was precisely to insult minorities, and by appealing to the cartoonists union, it was eminently foreseeable that some of the images would fulfill this goal. The *Jyllands-Posten* editors are undoubtedly not hard-core racists. But the reasons the Jersild conviction was overturned would not protect them in this case. There were thus no external European constraints on prosecuting the *Jyllands-Posten* for publishing these cartoons. Moreover, even if Danish authorities were skittish about pursuing the newspaper, the fact that the individual racists were convicted in the Jersild case suggests that it may have been possible to prosecute the individual cartoonists for hate speech separately from the editors.

Nor was the late 1980s the last time Denmark had flexed its muscles against perpetrators of racist speech. In fact, in the months preceding the publication of the cartoons, the Danish state moved on two cases of anti-Muslim speech. It removed the broadcast license from a radio station whose announcer called for expelling Muslims from Europe or “exterminat[ing] the fanatical Muslims.” It also pursued criminal charges against a politician who compared Muslims to a cancer on society that had to be “cut out” (Klausen 2009, 157). These statements are certainly more provocative and rabble-rousing than the illustrations, but they also fall well short of the United States’ standard for punishable speech (Kahn 2006).

In the end, of course, Danish authorities declined to prosecute anybody in the cartoon affair. The prevailing interpretation of the Danish statute is more speech-restrictive than the American standard, but Article 266b has typically been reserved for racist speech deemed to threaten social peace.<sup>16</sup> At the same time, the Director of Public Prosecutions warned the *Jyllands-Posten* that there were limits to free speech in Denmark, and that the paper was wrong to assert that religious groups had to be ready to put up with “insults, mockery and ridicule.”<sup>17</sup>

## IMPLICATIONS

When the images were published, the *Jyllands-Posten* cultural editor Fleming Rose claimed:

Some Muslims reject modern, secular society. They make demands for special treatment when they insist on special consideration for their religious feelings. That stance is irreconcilable with a secular democracy and freedom of expression where you have to be ready to accept insults, mockery and ridicule.<sup>18</sup>

This kind of argument implies that asking the government to prosecute the cartoons is simply further evidence that Muslims are demanding special consideration that is incompatible with democracy and freedom of speech.

But the contemporary historical pattern shows that prosecutions for hate speech are not uncommon in the European legal context. Some jurisdictions have outlawed Holocaust denial while others have not. Prominent states like France and Great Britain have prosecuted cases of incitement to racial or religious hatred that may seem questionable or even reprehensible to ardent liberals. Convictions are attainable, even in Denmark. And the highest national and international courts have upheld these convictions.

Recognizing the disjuncture between the rhetoric of upholding free speech and the legal precedent of curbing hate speech has several significant implications. First, it reveals that asking for prosecutions was not radical. In fact, it was perfectly consistent with the prevailing trends toward convictions for provocative anti-Muslim speech or for Holocaust denial. This suggests that Muslims who advocated prosecution for the cartoons were relatively well-integrated into the institutional framework of their liberal democracies. The Danish cartoon controversy did reveal radical elements within several Muslim communities, both inside and outside of Europe. But most Muslims either did not react, or reacted within the normal bounds of social mobilization and standard legal initiatives such as calling for prosecution of the cartoons.

Second, the overwhelming public and scholarly approval of the *right* to publish the cartoons (even if there was criticism about the *choice* to publish them), suggests a limited understanding of the prevailing legal context in Europe. At least two of these cartoons would potentially count as hate speech in many European jurisdictions. There is no irrefutable case for conviction, but there is a plausible argument that they crossed the legal line. In the hate-speech-restrictive European

context, Muslims may feel slighted or even wronged that more people did not stand up and say these cartoons may constitute actionable hate speech. The absence of prominent and numerous non-Muslim voices calling for prosecutions at the time was likely due to the intensity of the controversy and to the violence associated with radical reactions to the images. With some distance from the events, however, it is possible to recognize that there is more than one defensible position in this debate. Reasonable people may differ over whether they view the two most incendiary images as illegal hate speech, but one does not have to be a radical to argue that they were.

With the aid of hindsight, a sober assessment of the European legal context may help minimize the danger that the Danish Cartoon Controversy will continue to be misread on both sides. Free speech proponents assert that Muslims were acting out of step with prevailing liberal democratic norms, when initiating lawsuits was actually in keeping with European institutional practices. And Muslims may believe that they cannot get justice through the law, when the general European trend has actually been toward punishing anti-Muslim speech.

Yet, a discussion of the European legal context cannot overcome a different and significant problem facing Europeans. Unfortunately, there is simply no political or societal consensus over how to determine what counts as hate speech. Even though European legal decisions are increasingly punishing anti-Muslim expressions, public attitudes may be headed in the opposite direction. If law and public opinion continue to diverge, we will have to brace ourselves for similar controversies in the years to come.

## NOTES

1. See also the contributions to the October 18, 2006, *NPR Intelligence Squared U.S. Debate* "Weighing the Limits of Freedom of Expression." <http://www.npr.org/templates/story/story.php?storyId=6249980>, accessed January 3, 2011.
2. *ibid.*
3. See Council of the European Union, Press Release 16325/1/08 REV 1 (Presse 344), 27 and 28 November 2008, 37.
4. Letter reprinted in Bardot (1999, 693–694).
5. Law no. 72–546 of July 1, 1972.
6. Quoted in "Poursuivie pour 'provocation à la haine raciale' Brigitte Bardot relaxée," *Le Figaro*, 24 January 1997.
7. "JUSTICE; Brigitte Bardot condamnée," *Le Figaro* October 10, 1997.
8. AFP, "Deux mois avec sursis et 15 000 euros d'amende requis contre Brigitte Bardot," *Le Monde* June 4, 2008.

9. See also *Norwood v. United Kingdom* Appl. No. 23131/03, November 16, 2004.
10. See section 5 of the Public Order Act 1986 and sections 28 and 31 of the Crime and Disorder Act 1998, as modified in 2001.
11. Quoted in Weinstein (2009, 49).
12. See the declaration of inadmissibility, *Garaudy v. France* (no. 65831/01).
13. *Norwood v. United Kingdom* Appl. No. 23131/03, November 16, 2004.
14. Quoted in Læggaard (2007, 485); see also Koch (2006).
15. For a summary of the case, see *Jersild v. Denmark* (1995) 19 EHRR 1.
16. Henning Koch, personal communication with the author, February 4, 2010.
17. “Muslim Groups ‘Surprised’ by Danish Decision Not to Prosecute in Cartoon Case,” *BBC Monitoring Europe* March 15, 2006.
18. Quoted in John Hansen and Kim Hundevadt, “The Cartoon Crisis—How It Unfolded,” *Jyllands-Posten* March 8, 2008. “Insult” is in the *Jyllands-Posten*’s own translation, but the original Danish word “hån” has also been translated as “sarcasm” (Klausen 2009, 16) and most popularly by the media and scholars as “scorn” (Lindekilde et al. 2009, 291). I thank Sune Læggaard and Jytte Klausen for discussions that helped to clarify the meaning of the word hån.

## BIBLIOGRAPHY

- Bardot, Brigitte. 1999. *Le Carré de Pluton*. Paris: Bernard Grasset.
- Brinch, Jannik. 2006. “The Cartoonist: The Reason for the Bomb in the Turban.” *Jyllands-Posten* February 28.
- Hansen, John and Kim Hundevadt. 2008. “The Cartoon Crisis—How It Unfolded.” *Jyllands-Posten* March 8.
- Hare, Ivan and James Weinstein (eds.). 2009. *Extreme Speech and Democracy*. Oxford: Oxford University Press.
- Heyman, Steven J. 2008. *Free Speech and Human Dignity*. New Haven: Yale University Press.
- Kahn, Robert A. 2006. “Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany.” *University of Detroit Mercy Law Review* 83, 163–194.
- Klausen, Jytte. 2009. *The Cartoons That Shook the World*. New Haven: Yale University Press.
- Koch, Henning. 2006. “Freedom of Speech and Faith.” In *Gudebilleder*, edited by L. Christoffersen. Copenhagen: Tiderne Skifter.
- Læggaard, Sune. 2007. “The Cartoon Controversy: Offence, Identity, Oppression?” *Political Studies* 55:3, 481–498.
- Levey, Geoffrey Brahm and Tariq Modood. 2009. “The Muhammad Cartoons and Multicultural Democracies.” *Ethnicities* 9:3, 427–447.

- Lindekilde, Lasse, Per Mouritsen, and Ricard Zapata-Barrero. 2009. "The Muhammad Cartoons Controversy in Comparative Perspective." *Ethnicities* 9:3, 291–313.
- Modood, Tariq, Randall Hansen, Erik Bleich, Brendan O' Leary, and Joseph H. Carens. 2006. "The Danish Cartoon Affair: Free Speech, Racism, Islamism, and Integration." *International Migration* 44:5, 3–62.
- Post, Robert. 2007. "Religion and Freedom of Speech: Portraits of Muhammad." *Constellations* 14:1, 72–90.
- Rosenfeld, Michael. 2003. "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis." *Cardozo Law Review* 24:1, 523–567.
- Spiegelman, Art. 2006. "Drawing Blood: Outrageous Cartoons and the Art of Outrage." *Harper's Magazine* June, 43–52.
- Walker, Samuel. 1994. *Hate Speech: The History of an American Controversy*. Lincoln: University of Nebraska Press.
- Weinstein, James. 2009. "Extreme Speech, Public Order, and Democracy: Lessons from the Masses." In *Extreme Speech and Democracy*, edited by I. Hare and J. Weinstein. Oxford: Oxford University Press.
- Westergaard, Kurt. 2009. "Why I Drew the Cartoon: The 'Muhammad Affair' in Retrospect." *Daily Princetonian* October 1.
- Whine, Michael. 2009. "Expanding Holocaust Denial and Legislation Against It." In *Extreme Speech and Democracy*, edited by I. Hare and J. Weinstein. Oxford: Oxford University Press.