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Evolving Boundaries of Freedom of Speech and Press

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What began ironically as an attempt in 2005 to foster religious tolerance and understanding of Islam among Danish children six months later degenerated into an international crisis of violence by angry Muslims against Denmark and Western liberalism.

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What began ironically as an attempt in 2005 to foster religious tolerance and understanding of Islam among Danish children, six months later degenerated into an international crisis of violence by angry Muslims against Denmark and Western liberalism. Writing a children's book about religious diversity, Kare Buitgen could find no one to supply depictions of the prophet Muhammad. Islamic tradition treats as blasphemy any artistic rendering or image of him or other prophets. Denmark's largest newspaper, Jyllands-Posten, learned of Buitgen's predicament and through its cultural editor, Flemming Rose, invited cartoonists to submit drawings, even in satiric form. In September 2005, the newspaper published twelve caricatures of Muhammad, and exacerbating this sacrilege for Muslims were images ridiculing the founder of Islam as a terrorist. Denmark's population is only two percent Muslim, and their immediate reaction (in the form of scattered demonstrations and boycotts) was hardly international news. Slighted by both the press and the Danish government, local Muslim leaders seeking at least an apology looked to Muslim leaders elsewhere to pressure Copenhagen. In what evidently was a show of liberal solidarity behind free speech and press, other European newspapers republished in early 2006 the same cartoons. Freedom of speech thus translated into further insult and insensitivity to Islam, inciting a furious rampage of violence against Denmark and the West, in more than twenty countries from West Africa to East Asia.

What seemed like a crisis of endless riots ostensibly pitted liberalism's treasured freedom of speech against a non-Western religion apparently so sensitive that insults found in cartoons can induce spontaneous eruptions of rage and resentment. Extremist Muslims hating the West unleashed their anger in ways that undermine Islam in the West. In the United States some of cable TV's most vocal talking heads wondered aloud how Muslims could be infuriated enough by mere cartoons to burn effigy of leaders in the West, torch European embassies in Damascus and Beirut, attack Christians and burn their churches in Nigeria, and offer rewards for killing the cartoonists. It was not that long ago that Salman Rushdie's The Satanic Verses provoked death threats from the Iranian government and induced Western leaders and intellectuals to speculate about just how extreme fanaticism can become. The cartoon crisis no doubt confirmed for many the "clash of civilizations" thesis launched by Samuel Huntington in 1993.[1] However, appearing on PBS's News Hour, Professor Fouad Ajami, of The Johns Hopkins University's School of Advanced International Studies, tried to reduce the stakes: "This is not about religion; it's not about the prophet. It's not about these cartoons. It's about the determination of the Syrian regime to use cynically this episode and to sew disorder in Lebanon and to make Syria itself, which is under the gun for all kinds of high crime, to make it seem like the

embattled heart of the Arab and the Islamic world."[2] The early violence did, indeed, take place in Beirut and Damascus, but when it ricocheted into Nigeria and Indonesia, it was difficult to defend a claim that the crisis was attributable simply to a band of local instigators backed by President Bashar al-Assad.

The liberal West is certainly familiar with, and has grown accustomed to, legally protected but distasteful and insulting expression. Scathing portrayals of public figures, statesmen, and religious leaders and symbols are routine in the American mass media. "This Week in God" on John Stewart's The Daily Show subjects religion in general, and specific religions in particular, to disrespectful and irreverent humor to amuse the show's millions of viewers. Other entertainment outlets have produced crudely defaced images of Jesus, no doubt offensive to devout Christians. Jews confront reminders of the Holocaust brandished by neo-Nazis and by some who question its historical reality, to mention only the most obvious affronts. Arabs have had to contend for decades in the United States with media stereotypes portraying them as innately terrorists or unprincipled thieves. Many other groups in diverse ways have had to live with deeply repugnant images and symbols emblematic of secularization or, in some case, jingoism. In most of the liberal Western world this recurrent problem of offensive speech versus dignity, equality, and diversity has been legally resolved by leaving odious expression, whether cartoons or attempts to seem serious, to the marketplace of ideas, no matter how immature, insulting, disgusting, or barren of ideas. The United States government officially objected to the European cartoons as irreverent and, indeed, harmful, but had these publications appeared in the American press, either as cartoons intended as humor or expressions with more disdainful purposes, under current constitutional law the government could do very little to suppress or punish the media. In an interview with correspondent Bob Simon of CBS's 60 Minutes, Denmark's Prime Minister Anders Fogh Rasmussen acknowledged the same about his own country: "Well, what I've done is to insist on the principle of free speech, the principle of free press. And I have made it clear that the government has no means whatsoever to interfere with a free and independent newspaper."[3]

This episode has become a global case in point of the inherent dilemma of modern liberalism itself. This situation, however, is greatly magnified because of the prominence of Islam in the global media in the aftermath of the terrorist attacks of "9/11" and the Bush Administration's highly controversial invasion of Iraq, dramatic events intensifying mutual distrust and the divide between the Muslim world and the West. The dilemma is a conflict between the freedom to say what you want in public and liberalism's equality principle: that individuals and groups deserve dignity and public respect regardless of religion, ethnicity, gender, sexual orientation, or some other trait or characteristic.[4] In the United States in the 1980s and 1990s many liberals who emphasized the equality principle invoked official authority to protect individuals and groups by regulating and punishing traditionally offensive "hate speech," epithets and degrading speech uttered by illiberal segments of society. One of the most poignant examples of this was the Skokie Case of the 1970s when the American Civil Liberties Union lost nearly half its national membership in choosing to defend the American Nazi party in fighting off—successfully—local city regulations to stop a Nazi march through a suburb of Chicago inhabited by thousands of survivors of the Holocaust. American colleges and universities soon thereafter confronted the same dilemma in the era of "political correctness" when faculty and administrators created codes of behavior to curb hurtful expression on campus. This dilemma may have faded from attention in current constitutional discourse in part because the judiciary, emphasizing the liberal principle of free speech, has seemed resolute in invalidating under the First Amendment almost all of these understandable but illegal efforts to punish derisive and often abhorrent expression. However, the dilemma remains, inherent in liberalism itself, as exemplified in the current international debate ignited by the Danish cartoons.

Legal authority to speak is always restrained by social conformity or common sense. People have a right to be provocative, despicable, obnoxious, or even hateful in what they say. They may express themselves merely to demonstrate that they have a right to do so. Many others nonetheless restrain themselves either in the name of good taste or from fear of social reprisals. This international crisis and its myriad casualties could have been averted had freedom of speech been treated as a responsibility, not just a right, of living in a free, liberal society. Former Danish foreign minister and newspaper editor Uffe Elleman told correspondent Bob Simon: "When you use the freedom of speech to make jokes of other people's religions and you do it with the single purpose of demonstrating that you have the right to do so, then you are undermining the freedom of speech as I see it."[5] Indeed, Jyllands-Posten earlier had refused to publish a satire of the resurrection of Jesus because the editors believed it would be too insulting to Christians. Extremist Muslims, too, who overreacted to the European cartoons, have helped erode the inherent liberal obligation to respect Islam, even though many responsible Muslim leaders have publicly condemned the violence. Commenting on a report aired via his television broadcast describing and depicting the violence in Beirut and Damascus, Pat Robertson of the Christian Broadcasting Network, for instance, felt no inhibition in letting his understandable criticism of the extremists' behavior slide into general scorn of Islam itself. In short, a little more of the self-restraint that the Danish press had practiced about insults to Christianity might have averted what has become a crisis in loss of life, property, and mutual respect and trust.

The Supreme Court and the First Amendment

What follows is a brief overview of the evolution and current meaning of provisions of the First Amendment to the United States Constitution, which was ratified in 1791 and states in part: "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 . . . ." The focus here is on the constitutional dimensions of free expression emerging from the decisions of the United States Supreme Court, which has proclaimed

itself the "ultimate interpreter" of the nation's fundamental legal document. The First Amendment has also been interpreted to apply against the fifty states through the Due Process Claus of the Fourteenth Amendment which became part of the Constitution in 1868.

A good starting point is the jurisprudence of Justice Hugo Lafayette Black. One of the 20th century's most influential jurists on the Court, serving from 1937 as President Franklin D. Roosevelt's first appointee until his resignation and death in September 1971, Black insisted that the First Amendment was an "absolute," written in "plain language" designed to protect the people of the new American republic from any governmental intrusion into free speech and religion. To him "no law" in the First Amendment's text meant NO LAW, and it absolutely protected free speech. However, according to Black, it did not protect "conduct." This "speech-conduct" dichotomy is too facile for practical use. Neither the amendment's language nor its "original intent" tells judges what to do in real cases. Are the offensive depictions of the Prophet a form of "speech" or "conduct"? If the publishers intended to provoke violent demonstrations either in Copenhagen or Damascus, are these cartoons protected speech or punishable conduct? Many "actions" can be literally silent and yet protected as speech, while some expression that is verbal can be punished as conduct. First Amendment history is filled with issues and legal problems showing that absolutism is unworkable in practice because the issues are far too complicated to be resolved by invoking its language or by recourse to "original intent," assuming one exists and judges have the capacity to discover it. No judge, including Black, would ever have held that lying under oath—perjury—is constitutionally protected speech, even though it is a crime committed by speech. Yet the judiciary does protect many forms of libel and slander, which are by definition false and defamatory statements. Black absolutely protected libel, no matter how deliberate or injurious the lie might be. A literal reading of the First Amendment cannot account for the mix of results in the case law of the Court, or in Black's jurisprudence.

While the Court has never accepted absolutism, it has nonetheless developed doctrines that today endow speech with very broad constitutional safeguards. However, despite the prominence of freedom of expression in American life and history, it was not until 1919 in criminal prosecutions stemming from public dissent against the United States involvement in World War I that the Court first ruled on the meaning of the free speech guarantee. In Schenck v. United States (1919) a unanimous Court upheld, under the federal Espionage Act of 1917, the conviction of a man for advocating, through leaflets, that young men should resist military conscription. Here the famous "clear and present danger" test was first announced and applied in a way that assured the man's conviction. The Court's spokesman, Justice Oliver Wendell Holmes, insisted that when a nation is at war critical expression loses protection because it can be dangerous. The Court made no effort to link Schenck's speech, in fact, to any "clear and present danger." The justices simply presumed that because his advocacy occurred in wartime, Schenck's speech against the draft obstructed the war effort—conduct proscribed by the Espionage Act. Such an approach assures that only the heartiest critics would venture to criticize the government's war efforts. Would that same test be sufficient to punish the editors who published the blasphemous cartoons? Unless one subscribes to absolutism, reasonable interpretation of the free speech guarantee requires a theory or some staring point to guide judges. One fundamental theory implicit in the First Amendment is that in a democratic society the right to comment or dissent on "matters of public affairs" is the central meaning of freedom of expression. Schenck was participating in a public debate and opposed the war and urged young men to resist the draft. He was imprisoned under an argument that would suppress any dissent in wartime.[6]

The "clear and present danger" doctrine prevailed for some three decades as the Court's leading, though not exclusive, test for resolving free speech claims. Justices Holmes and Louis D. Brandeis, in fact, shifted their focus within six months of Schenck to the actual facts of cases, demanding—albeit now in dissenting opinions—that the evidence show some real and imminent danger before government could suppress and punish political expression. By the 1940s the Court's First Amendment jurisprudence had matured to the point that free speech was the rule and punishment the exception. That decade was a high point in free speech history in the United States. In 1949, however, two of the Court's reliable liberals suddenly died and were replaced by conservative justices. This personnel change occurred just as the Court confronted issues resulting from nationwide anti-communism and "McCarthyism," domestic weapons launched to fight the Cold War between the United States and the Soviet Union. It was during this period that an impatient Justice Black launched his absolutist view of the First Amendment. The 1950s was a parlous period in the life of free speech in the marketplace, and the reverberations of McCarthyism and fear of communism spread throughout American society. Governmental suppression was measured in a series of laws designed to uproot communism from American society, but the greatest repression was felt in social life. Communists or suspected communists or people who knowingly or unknowingly worked for or associated with organizations deemed subversive by the federal government lost their jobs and other means of support, or were shunned and ostracized by their friends and neighbors. It was a gloomy period for liberalism's revered freedom of expression.

After the crusade against domestic communism had burned itself out, coupled with a change in the Court's membership in the 1960s, political expression was reemphasized and restored to its prominent place in American democracy. Building on what is still the leading case in this vein of First Amendment jurisprudence, Brandenbug v. Ohio (1969), the Court has ever since insisted that government may punish political advocacy or dissent made through "speech" only

when facts show that the speech will incite imminent and illegal conduct. Today it is virtually inconceivable that the Court, in the face of established First Amendment doctrine, would tolerate suppression of dissent even as the United States wages an undefined and unlimited war against terrorism. However, echoes of the Schenck version of "clear and present danger" can be heard in President George W. Bush's and Vice President Richard Cheney's intermittent warnings that, while political debate is indispensable for the health of a democracy, critics should be wary of aiding terrorists indirectly by criticism of the administration's war policies.

The constitutional boundaries of political speech in the United States today give critics, dissenters, commentators, and comedians a wide berth in voicing opinions about or ridiculing government or public figures. The Brandenburg doctrine, in effect, protects political advocacy or dissent until it becomes, or at least borders on, lawless action. It is arguable, at least, that publishing the cartoons of Muhammad in the United States could be made a criminal offense if the publisher's purpose is shown to incite the kind of violence seen across the Muslim world almost daily in February 2006. On the other hand, in a case involving a magazine's deliberate lampooning of one of America's most politically active Protestant ministers, the Supreme Court held that a "parody" (like a cartoon) is not a matter of fact and as opinion, however "outrageous," is protected virtually absolutely by the First Amendment. In this case Hustler Magazine portrayed the Reverend Jerry Falwell and his mother engaging in a drunken, incestuous relationship in an outhouse. At the bottom of the page, and in small print, the magazine disclaimed: "ad parody—not to be taken seriously."[7] A unanimous Court, in an opinion written by a very conservative Chief Justice William H. Rehnquist, ruled that this cartoon or parody was protected by the First Amendment because it was not to be taken seriously.

Current constitutional doctrine vigorously supports the right to dissent and to voice even vulgar opinions, but constitutional history also suggests that whether written in absolutist language, etched in stone, or scrolled in gold, the First Amendment is always subject to interpretation by politically appointed judges who face ever changing political landscapes. The concept of "strict interpretation of the law" has never been of any use except to politicians seeking to stack courts with judges who agree with them on policy issues. Changing political climates and judicial personnel affect the meaning of freedom of speech as much as anything else. Given the state of the law today, it is difficult to imagine that the Court would allow government in this country to prohibit the publication of the troublesome Danish cartoons.

This is not the place to analyze in any detail the remaining categories of expression included or excluded in the Court's First Amendment jurisprudence, but a brief discussion will help to identify some dimensions of expression beyond political speech. The Court's libel doctrine, developed in a different line of cases, protects even false statements that attempt serious criticism of public officials or public personalities—such as Michael Jackson, Tom Cruise, or Jerry Falwell—as long as these false statements of "fact" are not made knowingly or with reckless disregard for the truth. The theory here is that the public has a right to debate matters of public concern.[8] While not given any protection at all until the 1970s, commercial speech, in the form of advertisements, is also protected today by the First Amendment as long the advertisements promote legal products and are not themselves false or misleading. Unimaginable and prohibited almost everywhere in the United States thirty-five years ago, advertisements by the pharmaceutical industry promoting prescription drugs are now routine in magazines and on television, and are protected by the First Amendment. The theory supporting this inclusion of once excluded expression is based on the importance of the free exchange of information for consumers.[9] The Court still does not recognize pornography as constitutionally protected because "patently offensive" depictions and descriptions of explicit sex are considered worthless.[10] However, the "porn" business has developed into a multi-billion dollar market largely unaffected by government. The Court's operating definition of legally identifiable pornography (developed by the Court in 1973) is so difficult to prove in court that government's limited law enforcement resources are channeled to address other, more serious issues.

One class of expression still unprotected by the First Amendment is "fighting words" and what some today might call "hate speech." This is unprotected because it is, in effect, a form of punishable conduct that takes place through abusive and derogatory epithets usually hurled face to face specifically to harm people with certain characteristics—such as race, gender, ethnicity, religion, or sexual orientation. It is not difficult to surmise what these words include. Governmental regulations punishing this kind of expression, however, must be carefully written to avoid legal attacks of vagueness and overbreadth (where the law targets this specific form of unprotected verbal abuse but sweeps too broadly into other areas covered by the First Amendment). The Court, in general, tolerates no official "viewpoint discrimination" unless the government can demonstrate that its action is the least drastic way to further a compelling state interest.[11]

Symbolic expression has long been protected by the Court, though symbols that constitute illegal action specifically forbidden by law are outside the pale of the First Amendment. Symbols, as Justice Robert H. Jackson once explained, are messages, "shortcuts" from mind to mind. Wearing black armbands, a cross, the Star of David, the swastika, the peace symbol, or any other emblem silently sends a message without words or speech and enjoys First Amendment protection, no matter how offensive to some, as long as the factual context does not reveal illegal conduct. No one would suggest that

disgruntled university students have a constitutional right to desecrate the administration building as a form of protest. Burning an American flag in protest, however, the Court has twice ruled in split (5-4) decisions, is a form of expression protected by the First Amendment.[12] In earlier cases involving issues similar to flag burning, Justice Black concluded that such action is not speech at all, but conduct. To a literal absolutist, symbolic expression, even peaceful and on matters of public concern, cannot be protected at all because it cannot be protected absolutely.

Technological changes have always affected First Amendment doctrine, as the judiciary has had to make adjustments in light of the development of new ways to express ideas and opinions. When the First Amendment appeared in 1791 as part of the Constitution, the primary means of publication available consisted of handwritten documents, word of mouth, and a rudimentary rotary press. Inventions and discoveries during the next two centuries drastically altered the character and speed of modern communications and the nature and size of the audience: telegraph, telephone, celluloid film, radio, television, videotape, fiber-optic cable, computers, satellites, microchips, and wireless laser pulses. When first confronted with motion pictures, an imperceptive Court obtusely refused to treat them as expression within the meaning of the First Amendment. Eventually the justices recognized the communicative power of films and placed them—except for pornographic movies—under constitutional shelter.

In 1934, Congress created the Federal Communications Commission (FCC) to regulate radio broadcasting and, later, television. The physical structure of broadcasting —limited space on the electromagnetic spectrum—restricts the number of broadcasting outlets; otherwise jamming could occur. Broadcasters therefore need a license from the FCC, which, in turn, gives the federal government more discretion to regulate the broadcast media than the print media. In 1976, the Court upheld as constitutional a reprimand issued by the FCC to a licensed radio station for airing at two o'clock in the afternoon comedian George Carlin's recorded monologue satirizing the use of "filthy words" in public and in broadcasts. Even though the words themselves were not legally pornographic and were thus protected under established legal definitions, the Court agreed that the FCC had the authority to confine broadcasts of such "indecent" language to times when children are unlikely to be listening.[13] Cable television is less restricted principally because the limited space argument does not apply; it is more like a magazine, which anyone can start as a business, than a radio or television broadcast station. Congress has to date been on the losing end of Supreme Court decisions evaluating legislation regulating sexually explicit images on the Internet. The Court has insisted that established standards of constitutional law apply to this phenomenal medium, just as if it were a newspaper or magazine. Efforts to protect people, even children, from explicit sexual images on the Internet must comport with the Court's difficult and uncertain definition of pornography.

In the winter of 2005-06 the Bush Administration issued subpoenas to global search giants, such as Google, which maintains records of Internet inquiries of every user in the world. The government's ostensible reason is to map cyberspace to help locate and evidently remove child pornography, but Google and its users have an interest in keeping their footprints in cyberspace away from the government. How the judiciary will react depends very much on who the judges are and how they construe or deconstruct established principles of First Amendment jurisprudence. Child pornography is certainly not protected expression—for any number of reasons, one of which is that such a trade usually involves actual child abuse. However, cyberspace may contain pictures of "children" who are not real people, and the Court has already dealt significant blows to federal efforts to punish online peddlers of explicit sexual images, whether using real people or computer-generated artifacts.[14]

What is said anywhere on earth might be suddenly heard by the entire global community, and people have instantaneous access to information available anywhere online, even in political systems once seemingly closed off to the outside world.

Conclusion

With little to guide them beyond the inconclusive words of the First Amendment, the judiciary, led by the Supreme Court, has had to adapt 18th century concepts to rapidly changing contemporary reality. What is said anywhere on earth might be suddenly heard by the entire global community, and people have instantaneous access to information available anywhere online, even in political systems once seemingly closed off to the outside world. The furor over the cartoons that almost defined the month of February, 2006, suggests that the meaning of a nation's domestic law, at least during the indefinite "war against terrorism," should now be appraised in the broader context of repercussions beyond the nation's borders. The televised violent reactions in the Muslim world teach an essential lesson: judges guarding the domestic balance between free speech and undesirable local or national consequences may now have to factor in impacts stemming from the reach of a speedy, permanent, and global news industry. Cartoons perhaps intended only to entertain, or for xenophobic Danes weary of Muslim immigrants to vent their resentment of different customs, can become global time bombs beyond Denmark that, if and when they explode, pose serious dangers at home and abroad, as they evidently did here. Denmark has already suffered a swelling and serious boycott of Danish products on the market, not to mention the torched embassies in at least two Middle East capitals and the official plea from Denmark for Danes abroad to return to safe havens at home. Though American constitutional law is not likely to adjust quickly to the implications of globalization on free speech and American national interests, it is clear from history that adjustments are inevitable given the language of the First Amendment, changing judicial personnel, and new and unpredictable contexts such as the world after "9/11" and the war on terrorism.

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1 Samuel P. Huntington, "The Clash of Civilizations?" 72 Foreign Affairs 22 (Summer 1993).

2 "Clash Over Cartoons," PBS News Hour, February 6, 2006, transcript.

3 "The State of Denmark," CBS's 60 Minutes, February 19, 2006, transcript.

4 One of the best accounts of this dilemma is Owen M. Fiss, The Irony of Free Speech (Cambridge MA: Harvard University Press, 1996).

5 "The State of Denmark," CBS's 60 Minutes, February 19, 2006, transcript.

6 One of the best comprehensive overviews of free speech in American wartime history is Geoffrey R. Stone, Perilous Times: From the Sedition Act to the War on Terrorism (New York: W.W. Norton & Co., 2004).

7 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1989).

8 New York Times v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 324 (1974).

9 Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

10 Miller v. California, 413 U.S. 15 (1973).

11 The most recent case exploring these issues is R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992).

12 Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).

13 FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

14 See, e.g., Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

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