

Flemming Rose, The Danish Cartoon Controversy,  
and the New European Freedom of Speech<sup>1</sup>

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Minnesota Law and Society Meeting  
October 2009

Abstract

Flemming Rose’s decision to run twelve cartoons of the Prophet Mohammed triggered an international controversy. In defending his decision, Rose relies on two arguments: (1) the cartoons were a necessary response to a growing atmosphere of self-censorship imposed by a totalitarian radical Islam and (2) the cartoons—far from being insulting—were actually a way to include Danish Muslims into a national “tradition of satire.” On examination both arguments are problematic. The fear of totalitarian censorship—if even it applies to Muslims—fits poorly with an American free speech discourse that counsels patience, not action in the face of totalitarian threats. Rose’s reference to a “tradition of satire” is rooted in the Danish practices of social informality (*hygge*) and teasing. But this argument is undercut by Rose’s own anti-immigrant rhetoric as well as the larger anti-immigrant mood in Denmark and Europe.

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<sup>1</sup> This is very much a work in progress. The author wishes to thank Jacqueline Baronian, David Patton, Jerry Organ, Rob Vischer, and Doug Dow for their helpful comments. An earlier version of this paper was presented as a University of St. Thomas Colloquium in September 2009. The paper is part of a larger project that looks at how the Danish cartoon controversy has changed the global debate over hate speech regulation. A second installment in the project, focusing on the debate in the American press over reprinting the cartoons, will be presented at a conference on Islam and the Media, to be held in January 2010 at the Center for Media, Religion, and Culture, located at the School of Journalism and Mass Communication, University of Colorado, Boulder.

## I. A Brave (Yet Inclusive) New World of Freedom of Speech

As a former correspondent in the Soviet Union, I am sensitive about calls for censorship on the grounds of insult. This is a popular trick of totalitarian movements. Label any critique or call to debate as an insult and punish the offenders.

Flemming Rose, "Why I Published Those Cartoons," *Washington Post*, Feb. 24, 2006.

[The cartoons were a]n act of inclusion. Equal treatment is the democratic way to overcome traditional barriers of blood and soil for newcomers. To me, that means treating immigrants just as I would any other Danes.

Flemming Rose, "Why I Published the Muhammad Cartoons," *Spiegel Online*, May 31, 2006.

Settled doctrine inspires feelings of comfort. In the late 1980s and 1990s, the debate between Americans and Europeans over the boundaries between free speech and hate speech had this quality.<sup>2</sup> Americans had a set of stock arguments for speech—speech helps in the search for truth, democracy, and individual self fulfillment;<sup>3</sup> restrictions on speech fall hardest on powerless groups;<sup>4</sup> and, more generally, tolerating speech helps generate tolerant citizens.<sup>5</sup> Europeans answered with their own concerns, mostly related to the unhappy course of the twentieth century. Hate speech threatened the political order

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<sup>2</sup> For an overview of the debate, see Sandra Coliver, *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION, AND NON-DISCRIMINATION* (1992). For a good country by country survey, see Louis Greenspan and Cyril Levitt eds. *UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES* (1993).

<sup>3</sup> For a good overview of the traditional bases for freedom of expression, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982) at 15-73 (discussing defenses of speech based on truth, democracy, the good life and individuality).

<sup>4</sup> For a generic version of this argument, see Sandra Coliver, *Hate Speech Laws: Do They Work?* In *STRIKING A BALANCE*, *supra* note \_\_\_\_, at 363, 368-69. One reason why American are especially receptive to this argument is the role freedom of speech played in the Civil Rights movement. For more, see SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* (1994) at 115-20 (describing speech restrictions imposed by Southern opponents of the movement were struck down by the Supreme Court in cases like *NAACP v. Alabama*, 357 U.S. 449 (1957) and *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

<sup>5</sup> See LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

of unstable democracies and, at worst, opened the door to a Nazi resurgence.<sup>6</sup> Despite disagreements, both positions shared a certain logic: If Europe's reluctance to tolerate hate speech reflected its own unstable past, then the passage of time should lead to a gradual weakening of European hate speech laws.<sup>7</sup>

Ironically, a major new European opponent of hate speech laws found his voice in a "crisis."<sup>8</sup> *Jyllands Posten* culture page editor, Flemming Rose's decision to call for Danish cartoonists to draw the Prophet Mohammed as they saw him triggered an international controversy.<sup>9</sup> Steadfastly defending his decision to run the cartoons, Rose relied on two main arguments. First, Rose saw the controversy from the vantage point of totalitarianism. He compared himself to *samizdat* authors who, faced with a totalitarian state, had a duty to speak out by publishing provocative work.<sup>10</sup> Second, Rose made the paradoxical case that the cartoons—by exposing Danish Muslims to same insults experienced by regular Danes—integrated Muslims into Danish society.<sup>11</sup>

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<sup>6</sup> See Greenspan and Levitt, UNDER THE SHADOW OF WEIMAR, *supra* note \_\_\_\_, at 1-15. The concern about Nazi revival was strongest in Germany (which bans the Nazi party, the Nazi salute and the Swastika), see Robert A. Kahn, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY (2004) at 23-24, but similar concerns are also present in countries, such as France, which experienced Nazi rule. These concerns came to a head in the 1960s with the rise of neo-Nazi and other right-wing extremist groups. These same concerns also found expression in international treaties that either allowed, or required, member states to enact bans on hate speech.

<sup>7</sup> This perspective is in accord with Bollinger, who suggests that tolerating speech has the positive side effect of making the citizenry more tolerant. See *infra* notes \_\_ and accompanying text.

<sup>8</sup> The leading book on the cartoon controversy is JYTTE KLAUSEN, THE CARTOONS THAT SHOOK THE WORLD (2009). In addition see, Robert A. Kahn, *The Danish Cartoon Controversy and the Rhetoric of Libertarian Regret*, 16 U. OF MIAMI INT'L & COMP. L. REV. 151 (2009); Bent Nørby Bonde, *How 12 Cartoons of the Prophet Mohammed were Brought to Trigger an International Conflict* 28 NORDICOM REVIEW 33 (2007); Rachel Saloom, *You Dropped a Bomb on Me, Denmark—A Legal Examination of the Cartoon Controversy and Response as it Relates to the Prophet Muhammad and Islamic Law*, 8 RUTGERS JOURNAL OF LAW AND RELIGION 1 (2006).

<sup>9</sup> The actual decision process behind the publication of the cartoons is still in doubt. Klausen hints that the paper's editorial board made the decision, and left it to Rose to formally invite the cartoonists to participate. KLAUSEN, *supra* note \_\_ at 14. Rose, however, often describes himself as the publisher of the cartoons and has been an energetic defender of the decision to publish.

<sup>10</sup> See *infra* Part III and accompanying text.

<sup>11</sup> See *infra* Part IV and accompanying text.

From both European and American perspectives, these arguments are novel. Traditionally, the threat of totalitarianism was a reason to censor. During the McCarthy era, courts balanced the individual right to speak against the danger posed by the communism peril.<sup>12</sup> Likewise, the German concept of militant democracy restricts speech as a means of preventing a Nazi return to power.<sup>13</sup> For Rose, however, the “totalitarian threat” imposes a duty on the journalist to speak out.

Second, while the United States (unlike Europe) does not generally punish hate speech,<sup>14</sup> American opponents of hate speech laws generally accept that insulting speech harms the victim; they differ from their European counterparts only in arguing that this harm is not sufficient to justify legal sanctions.<sup>15</sup> Rose, however, argues that insulting speech—in this case the cartoons—helps rather than harms its intended targets.

This paper attempts to situate Rose’s defense of the cartoons in the Euro-American debate over hate speech. Part II gives a biographical sketch of Rose, discusses the political situation in Denmark at the time of the controversy, and traces Rose’s subsequent rise to free speech celebrity.

Part III discusses the totalitarian theme in Rose’s writings. While Rose’s rhetoric of totalitarianism most likely grew out of his personal experiences in the Soviet Union, it resonates with two larger discourses—one that views radical Islam as totalitarian, the other that applies the totalitarian label to hate speech restrictions (especially the bans on

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<sup>12</sup> For an excellent overview of the seditious libel debate in the United States during the 1940s and 50s, see HARRY KALVEN JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988) at 198-211.

<sup>13</sup> See DONALD P. KOMMERS, *THE JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (1998) at 37-38.

<sup>14</sup> For an overview, see SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* (1994).

<sup>15</sup> For example, Ronald Dworkin, writing in opposition to Germany’s laws banning Holocaust denial, concedes that denial “hurts” its victims, but argues that free speech requires sacrifices that “really hurt.” Ronald Dworkin, *The Unbearable Cost of Liberty*, 3 *INDEX ON CENSORSHIP* 43 (1995).

Holocaust denial enacted by many European countries in the 1990s).<sup>16</sup> Yet Rose’s anti-totalitarian rhetoric—especially when used to justify his decision to publish the cartoons (as opposed to simply defending his right to do so)—does not sit well with American free speech doctrine, which tends to counsel patience in the face of threats posed by speech.<sup>17</sup>

Part IV turns to Rose’s argument that insults can be inclusive. It traces this argument to the Danish cultural norm of *hygge*, a form of informal sociality characterized by joking and teasing.<sup>18</sup> Rose’s argument—if paradoxical at first glance—fits somewhat better with American free speech doctrine. But it is undercut by Rose’s own anti-immigrant rhetoric as well as the broadly anti-immigrant political culture in Denmark and Europe.

Part V concludes by briefly speculating on the long-term impact of Rose and his theories. The contrast between Rose’s urgent anti-totalitarianism and traditional American defenses of speech explains why Rose and his supporters—despite many visits to United States—have won comparatively little support for the decision to run the cartoons. Europe may offer a more fertile ground, but ultimately the success of Rose’s views will hinge on his ability to reach beyond the hard anti-immigrant right. Whether he can do this remains to be seen.

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<sup>16</sup> This discourse dates back at least to 1990, when opponents of the French ban on Holocaust denial contrasted the collapse of the iron curtain in Eastern Europe with the rise of totalitarian laws in Western Europe. For more, see KAHN, HOLOCAUST DENIAL AND THE LAW, *supra* note \_\_\_ at 105-08.

<sup>17</sup> See *infra* part III and accompanying text. By free speech doctrine, I have in mind both the line of cases running from the dissent of Justice Holmes in *Abrams v. United States*, 250 U.S. 616 (1919) to *Brandenburg v. Ohio* 395 U.S. 444 (1969), that over time set out a broad defense of political speech in the United States as well as academic writing defending freedom of speech. See, e.g., KALVEN, THE WORTHY TRADITION, *supra* note \_\_\_ (describing the American speech cases in a sympathetic light); BOLLINGER, THE TOLERANT SOCIETY, *supra* note \_\_\_ (describing different models of speech protection).

<sup>18</sup> For a description of *hygge*, see STEVEN M. BORISH, THE LAND OF THE LIVING: THE DANISH FOLK HIGH SCHOOLS AND DENMARK’S NON-VIOLENT PATH TO MODERNIZATION (1991) at 276.

## II. The Strange Career of Flemming Rose

### *A. Flemming Rose, Denmark, and a Growing Fear of Radical Islam*

Born in 1958, Flemming Rose describes himself “as raised on the ideals of the 1960s” and someone who “adopting the hippie pose and the political superiority complex” of his generation, believed that “the West was imperialistic and racist.”<sup>19</sup> This attitude changed in 1980-81 when Rose spent ten months at the Institute for Russian Literature in Moscow.<sup>20</sup> He lived in a small apartment, had no personal privacy, and his girlfriend (and later wife), an editor for TASS, was kept under government surveillance.<sup>21</sup> The experience was critical for Rose: “I learned more about the Soviet system and Marxist-Leninist ideology from living in that apartment than from all the Sovietology I read.”<sup>22</sup>

Returning from the Soviet Union, Rose became a “committed Cold Warrior” with an “impressive grasp of Russian dissident literature.”<sup>23</sup> He pursued a career as a journalist. In 1990 Rose returned to the U.S.S.R. to cover the Chechen war as a journalist for *Berlingske Tidende*, a center-right Danish newspaper.<sup>24</sup> While Rose initially sympathized with the Chechens, especially during the first war in 1990, a second assignment in 1996 led to a changed view. Interviewing a Danish advisor to the Chechens named Ibn Wahab, Rose was, according to Laskin, “first confronted with radical Islam.”<sup>25</sup> Rose concluded that radical Islam was “a totalitarian ideology” which was “very

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<sup>19</sup> Flemming Rose, *Why I Published the Mohammed Cartoons*, SPIEGEL ONLINE, May 31 2006.

<sup>20</sup> *Id.*; see also Jacob Laskin, *The Controversialist*, Dec. 9, 2008 (available online at <http://americasfuture.org/doublethink/2008/12/the-controversialist/>, last accessed Aug. 10, 2009).

<sup>21</sup> Laskin, *The Controversialist*, *supra* note \_\_\_\_.

<sup>22</sup> *Id.* (quoting Rose).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (quoting Rose)

aggressive and framing itself in the same us-vs.-them dichotomy as Nazism and Stalinism.”<sup>26</sup>

To some extent, Rose’s transition mirrored that of his native land. Until the cartoon controversy erupted Denmark was best known as a progressive Scandinavian society noted most for its homogeneity.<sup>27</sup> The country’s small Muslim population, while a target for right-wing extremists, was not itself seen as threat.<sup>28</sup> As the 1990s progressed, however, and the number of Muslims in Denmark grew, attitudes became hostile, so that in 2001 a Danish academic could report that the new groups—including Muslims—“challenged the historical homogeneity of Danish society” leading to fears that “in the not-too-distant future Danes will be reduced to a minority in their own country.”<sup>29</sup>

In response to these pressures, in 2001 Danes voted in a right-wing coalition led by Anders Fogh Rasmussen whose the Liberal (*Venstre*) Party depended on the anti-immigrant Danish People’s Party for support.<sup>30</sup> The election, which broke over seventy years of center left coalitions in Danish politics,<sup>31</sup> resulted in the passage of harsh new immigration laws including a new citizen test and oath requiring potential citizens to

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<sup>26</sup> *Id.*

<sup>27</sup> KNUD J.V. JESPERSEN, A HISTORY OF DENMARK (2004) at 6-7 (discussing common view of Denmark as a small, homogeneous country). The Danes reputation as a brave tolerant people is also based in part on the rescue of Denmark’s 8,000 strong Jewish population from the Nazi Holocaust during the World War II. For a fascinating account of how the rescue shapes Danish national identity, see ANDREW BUCKSER, AFTER THE RESCUE: JEWISH IDENTITY AND COMMUNITY IN CONTEMPORARY DENMARK (2003) at 171-87.

<sup>28</sup> See BORISH, THE LAND OF THE LIVING, *supra* note \_\_\_ at 320-25.

<sup>29</sup> Jørgen Bæk Simonsen, *Globalization in Reverse and the Challenge of Integration: Muslims in Denmark*. In Yvonne Yazbeck Haddad ed. MUSLIMS IN THE WEST: FROM SOJOURNERS TO CITIZENS, 121, 126.

<sup>30</sup> Despite its name, the Liberal Party is on the conservative end of the Danish political spectrum. The Danish People’s Party, despite its strong anti-immigrant stance, is also a staunch supporter of the welfare state.

<sup>31</sup> From 1924 to 2001 the Social Democrats were the largest party in parliament, yet they never obtained a clear majority. JESPERSEN, HISTORY OF DENMARK, *supra* note \_\_\_ at 165.

swear allegiance to liberal ideals.<sup>32</sup> The government's culture minister, Brian Mikkelsen, called for opening a "new front of the cultural battle" against "immigrants from Muslim countries who refuse to accept Danish culture and European norms."<sup>33</sup>

Against this backdrop, in 2004 Rose was hired as the culture page editor of the *Jyllands Posten*., the largest circulation paper in Denmark, and a firm supporter of the governing Liberal Party.<sup>34</sup> Despite this support, however, the paper has not consistently pursued an anti-immigrant line. In fact, in early 2005 it ran a series of articles portraying immigrants in a positive light.<sup>35</sup> It is unclear, however, whether Rose played any role in the decision to run these articles.

#### *B. Rose Publishes the Cartoons and the Controversy Builds*

Rose ran the cartoons in the September 30, 2005 edition of the *Jyllands Posten*. In an article accompanying the cartoons, Rose referred to growing "self-censorship" and listed a series of incidents, most notably the case of a children's book illustrator who would draw Mohammed only on the condition of anonymity.<sup>36</sup> He noted that "people living in totalitarian societies are sent off to jail for telling jokes or for critical depictions

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<sup>32</sup> For more, see Robert A. Kahn, *The Danish Cartoon Controversy and the Exclusivist Turn in European Civic Nationalism*, 8 STUDIES IN ETHNICITY AND NATIONALISM 524, 528-30 (2008).

<sup>33</sup> Mikkelsen's comments, made in 2005, are reprinted in Bonde, *How 12 Cartoons of the Prophet Mohammed were Brought to Trigger an International Conflict*, 28 NORDICOM REVIEW at 36.

<sup>34</sup> Jytte Klausen, *Rotten Judgment in the State of Denmark*, SPIEGEL ONLINE, Feb. 8, 2006.

<sup>35</sup> Pennille Ammitzbøll and Lorenzo Vidino, *After the Danish Cartoon Controversy*, MIDDLE EAST QUARTERLY, (2007)(describing how in May 2005 the *Jyllands Posten* won a European wide award for "its coverage of successful cases of Muslim immigration in Denmark).

<sup>36</sup> See KLAUSEN, *supra* note \_\_\_ at 14-20. Although Rose does not mention it in his article, he may have also been motivated by the November 2004 murder of Dutch filmmaker Theo van Gogh by a Muslim extremist in response for the film *Submission*, a statement against domestic violence, in which bodies of thinly veiled naked women are superimposed over passages from the Quran. The shooting triggered a vigorous anti-Muslim response in the Netherlands. See IAN BURUMA, *MURDER IN AMSTERDAM* (2007).

of dictators.”<sup>37</sup> Rose also added that “in a secular democracy,” one “has to be ready to put up with scorn, mockery, and ridicule.”<sup>38</sup>

It is worth briefly mentioning the cartoons themselves and why Muslims might feel offended by them. The cartoons ran the gamut from inside jokes among Danish elites to explicit attacks on Muslims.<sup>39</sup> For examples of the first category, one cartoon depicted a man, presumably Mohammed, unable to pick out Pia Kjaersgaard, head of the anti-immigrant Danish People’s Party, of a police line-up; another cartoon features Mohammed as seventh grade boy who has written on the blackboard in Arabic “Jyllands Posten’s journalists are a bunch of reactionary provocateurs.”<sup>40</sup> On the other hand, one cartoon arguably portrayed Muslims as misogynistic.<sup>41</sup> Finally, one that would become infamous later featured Mohammed with a bomb in his turban.<sup>42</sup>

Potential Muslim objections to the cartoons fell into two categories. First, some Muslims observe a general prohibition against depicting the Prophet Mohammed.<sup>43</sup> Muslim concerns about physical depictions of the prophets have, in earlier instances, led to removal of sculptures of Mohammed from American buildings.<sup>44</sup> A second set of concerns related to content. In particular, many Muslims objected to the image of

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

<sup>38</sup> *Id.* at 2. Interestingly, “scorn, mockery and ridicule” are the terms mentioned under the definition of blasphemy under sec. 140 of the Danish Penal Code.

<sup>39</sup> Except where otherwise indicated, the description of the cartoons is taken from the DPP Decision at 2-3.

<sup>40</sup> *Id.* The “agent provocateur” language is from Klausen, *Rotten Judgment in the State of Denmark*, *supra* note \_\_\_\_.

<sup>41</sup> The cartoon featured a bearded man with a sword flanked by two women wearing black gowns that covered everything except their eyes. DPP Decision at 3.

<sup>42</sup> *Id.* The turban cartoon is generally held up as an example of a cartoon that gratuitously offends Muslims.

<sup>43</sup> See Saloom, *You Dropped a Bomb on Me, Denmark*, *supra* note 1 at 23-27 (describing strong prohibition against physical depiction in Sunni Islam).

<sup>44</sup> Kahn, *The Danish Cartoon Controversy and the Rhetoric of Libertarian Regret*, *supra* note \_\_\_\_ at 177.

Mohammed with a bomb in his turban which was seen as suggesting either that Islam was a violent religion or that all Muslims were terrorists.<sup>45</sup>

The cartoon controversy was slow to develop. At first, tensions were confined to Denmark, as Danish Muslims complained both about the cartoons and other racist incidents.<sup>46</sup> In early October a group of eleven ambassadors from Muslim countries sought to meet with Prime Minister Rasmussen to combat “the ongoing smear campaign in Danish public circles and media against Islam and Muslims.”<sup>47</sup> Prime Minister Rasmussen refused the meeting, arguing that it was up to the courts to resolve any issues involving hate speech and that otherwise he had no power to intervene.<sup>48</sup>

Over the next months the controversy became internationalized.<sup>49</sup> In late 2005 a group of Danish imams visited the Middle East with a dossier that included the twelve cartoons as well as other, more offensive cartoons.<sup>50</sup> There soon followed a boycott on Danish goods by several Muslim countries including major Danish trading partners such as Saudi Arabia and Iran; the publication of the cartoons by papers in other European papers (first Norway, then other countries); and, finally, in February 2006 violent

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<sup>45</sup> See Saloom, *You Dropped a Bomb on Me, Denmark*, *supra* note \_\_\_ at 34-35.

<sup>46</sup> Bonde, *How 12 Cartoons of the Prophet Mohammed were Brought to Trigger an International Conflict* at 40-41.

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

<sup>48</sup> *Id.* In effect, Rasmussen took the position that any criticism of the paper would interfere with freedom of speech. This view may reflect the outcome of the 1994 *Jersild* case, in which the European Court for Human Rights held that Denmark violated the free speech by prosecuting a journalist for violating the hate speech code for airing an interview in which right-wing youths used explicitly racist language. *Jersild v. Denmark* 298 Eur. Ct. H.R. (ser. A) (1994). For more, see Stéphanie Lagoutte, *The Cartoon Controversy in Context: Analyzing the Decision Not to Prosecute Under Danish Law*, 33 BROOK J. INT’L L 379, 398 (2007).

<sup>49</sup> For an overview of the how the controversy escalated, see Risto Kunelius & Elisabeth Eide *The Mohammed Cartoons, journalism, free speech and globalization*. In Risto Kunelius, Elisabeth Eide, Oliver Hahn & Roland Schroeder (eds.) *READING THE MOHAMMED CARTOONS CONTROVERSY: AN INTERNATIONAL ANALYSIS OF PRESS DISCOURSE ON FREE SPEECH AND POLITICAL SPIN* (2007) at 10; Saloom, *You Dropped a Bomb on Me Denmark*, *supra* note \_\_\_ at 6-12.

<sup>50</sup> Ammitzbøll and Lorenzo Vidino, *After the Danish Cartoon Controversy* *supra* note \_\_\_.

demonstrations against the cartoons in the Arab/Muslim world which culminated in the burning of Danish embassies in Syria and Gaza.<sup>51</sup>

### *C. Rose in the Eye of the Storm*

These events brought Rose and the *Jyllands Posten* back to center stage. As editor of the paper that triggered the controversy, Rose became an overnight celebrity. These were heady times for Rose. Interviewed on the CNN Situation Room, Rose explained how, despite threats to kill those who offended the Prophet, he “was not scared.”<sup>52</sup> Rose also refused to apologize for “the [act of] publication itself” even though he would “apologize for the feelings it has caused.”<sup>53</sup>

In defending the cartoons, Rose made a number of points. First he stressed that his intention was not to harm, instead it was to speak out against “self-censorship.” Rose also argued that the cartoons could have a positive effect on their Muslim recipients. Answering a question about whether he would do it all over again, Rose explained:

If you make a religious cartoon, we do that with Jesus Christ, with the royal family, with public politicians...that does not mean you thereby denigrate their religion, you humiliate, you make fun of them. In fact, by that, you are part of Denmark. You are treated like everybody else in our society. You are not strangers and outsiders.<sup>54</sup>

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<sup>51</sup> See Kunelius & Eide, *The Mohammed Cartoons* at 10. Interestingly, in October 2006 the cartoons ran in an Egyptian paper without incident. *Id.* Jytte Klausen ties the escalation of the controversy to developments to Middle Eastern politics—in particular the desire of the Egyptian government to show the West that democratization would lead to violent Islamist protests. See *A Conversation with Jytte Klausen about European Islam*, BRANDEIS NOW, Mar. 10, 2009. Klausen expands on this idea in her book, *TWELVE CARTOONS THAT SHOOK THE WORLD* (2009).

<sup>52</sup> The Situation Room, Transcript, Feb. 7, 2006 (available at <http://edition.cnn.com/TRANSCRIPTS/0602/07/sitroom.o3html> last accessed Jul. 16 2009).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Later in the interview Rose described the cartoons as part of “Danish customs, traditions of satire and humor.”<sup>55</sup>

Eventually, the pressure seemed to get to Rose. Three days after appearing on CNN, however, Rose said the newspaper would consider running the cartoons that came out of Iran’s proposed contest for cartoons depicting the Holocaust.<sup>56</sup> In response, Carsten Juste, editor-in-chief of the paper, asked Rose to take vacation time. He explained that Rose had recently been working under “inhumanly hard pressure.”<sup>57</sup> Rose for once admitted error and stated that he was now “100% behind the newspaper’s line.”<sup>58</sup>

Despite his enforced vacation, Rose continued to defend his position that he was right to publish the cartoons. In a mid February op-ed piece in the *Washington Post*, Rose lectured an American audience about self-censorship and the danger of giving into “totalitarian” impulses—which Rose called “*the*” lesson of the Cold War.<sup>59</sup> In a novel twist, Rose justified calling for and running the cartoons as a way of covering “the legitimate news story” of self-censorship in Denmark.<sup>60</sup> Rose also referred to the Danish “tradition of satire when dealing with the royal family and other public figures” and talked at length about how the cartoons opened the debate up in Denmark by encouraging Muslims to speak out.<sup>61</sup>

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<sup>55</sup> *Id.* ,

<sup>56</sup> *Cartoon Row Editor Sent on Leave*, BBC News, Feb. 10, 2006. (available at <http://newsvote.bbc.co.uk>.)

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Flemming Rose, *Why I Published Those Cartoons*, WASHINGTON POST Feb 19, 2006.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

Writing for a European audience a few months later, Rose's stressed the same themes but with a slightly harsher tone.<sup>62</sup> He described his personal journey from "hippie" to "Cold Warrior" but also in a much more systematic way drew a direct comparison between his old and new enemies: "Europe's left is deceiving itself about immigration, integration and Islamic radicalism today, the same way we young hippies deceived ourselves about Marxism and communism 30 years ago."<sup>63</sup> He then chided Denmark's Muslim minority for their high birth rates, high crime rates, and cult of victimology.<sup>64</sup> Next he turned his focus to Europeans who, he claimed, need to take "a leaf—or a whole book—from [the] American experience" of absorbing newcomers.<sup>65</sup>

#### *D. Free Speech Celebrity*

As the controversy started to subside, Rose settled into his new role as defender of free speech. In 2007 Rose received the first ever Sappho prize from the Danish Free Press Society.<sup>66</sup> The uncovering of a bomb plot directed at Kurt Westergaard, who drew the turban cartoon, led to a new round of interview requests and speaking engagements in early 2008.<sup>67</sup> Later that same year, Rose traveled to the United States and spoke at a number of forums, including university campuses.<sup>68</sup> The following year, Rose traveled to

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<sup>62</sup> Flemming Rose, *Why I Published The Muhammad Cartoons*, SPIEGEL ONLINE, May 31, 2006.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Gwladys Fouché, *Danish cartoons editor wins award*, GUARDIAN, Mar. 20, 2007.

<sup>67</sup> The plot was uncovered in February 2008. *Police foil plot to kill Muhammad cartoonist*, Feb. 12, 2008. Interestingly, while Westergaard spoke of fear, anger and resentment, Rose asserted that the atmosphere in Denmark was "pretty calm" and that he did not fear for his life. *Interview: "I Don't Fear for My Life,"* SPIEGEL ONLINE, Feb. 12, 2008.

<sup>68</sup> Rose spoke at Stamford University in May 2008 and at Duke the following October. See *Cartoon Editor Disillusioned With U.S. Press*, NEW YORK SUN, May 9, 2008; The Committee for Free Speech, *Mr. Flemming Rose, Publisher of Danish Muhammad Cartoons, to Speak at Duke University* (flyer), Oct. 30, 2008. Rose was also interviewed by Radio Free Europe / Radio Liberty in March 2008. See *Interview:*

Israel where—despite his unwillingness to run cartoons about the Holocaust—he called a lifting of laws banning the publication of *Mein Kampf*.<sup>69</sup>

In these appearances, Rose began to broaden his concerns beyond the cartoons. He now expressed opposition to all laws punishing insults—a category that went beyond genocide denial bans to also encompass the hate speech laws that most European countries have adopted.<sup>70</sup> In making these arguments, Rose warned of the “offense fundamentalist” who insists that people “have a right not to be offended.”<sup>71</sup> These people, Rose argued (tongue in cheek?), should be given “insensitivity training.”<sup>72</sup> Rose also criticized those who make the argument—“If you respect my taboo, I’ll respect yours.”<sup>73</sup> This, according to Rose, “was the rule of the game during the Cold War” until people like “Vaclav Havel, Lech Walesa [and] Andrei Sakharov” replaced it with the idea that rights belong to “human beings” not “cultures, religions or political systems.”<sup>74</sup> In opposing hate speech and genocide denial laws, Rose has company. For example, Timothy Garton Ash has become a vocal critic of genocide denial laws, arguing that in light of the cartoon controversy, Europeans cannot afford to be seen as censors.<sup>75</sup>

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*Editor Behind Cartoon Controversy Discusses Free Speech*, RADIO FREE EUROPE / RADIO LIBERTY, Mar. 29, 2008.

<sup>69</sup> Nir Magal, *Muhammad cartoons editor: There’s a problem with Muslims in Europe*, Apr. 22, 2009 (available at ynetnews.com).

<sup>70</sup> Sometimes, Rose’s reach was even broader. In his 2008 *Spiegel* interview, Rose called on “people in favor of free speech...to unite in order to get rid of all kinds of laws around the world that limit the right to free speech” a category that included “blasphemy laws, laws protecting dictators, [and] laws being used to silence people who are critical.” *Interview: “I Don’t Fear for My Life,”* SPIEGEL ONLINE, Feb. 12, 2008.

<sup>71</sup> *Israel: Flemming Rose on free speech*, ISLAM IN EUROPE (blog), Apr. 26, 2009. Rose spoke at panel discussion held at Hebrew University.

<sup>72</sup> *Id.*

<sup>73</sup> See Flemming Rose, *Free Speech and Radical Islam*, WALL STREET JOURNAL, Feb. 15, 2008.

<sup>74</sup> *Id.*

<sup>75</sup> Timothy Garton Ash, *This is the moment for Europe to dismantle taboos, not erect them*, THE GUARDIAN, Oct. 19, 2006.

Rose also took his American hosts to task for not running the cartoons<sup>76</sup> For example, speaking at Stanford University in May 2008 he said: “It reads on the top of the New York Times ‘All the News That’s Fit to Print,’ but it’s very hard to argue that this [the cartoon controversy] was not news on February 1, 2006.”<sup>77</sup> While he won some converts—for example, Debra Saunders of the *San Francisco Chronicle*<sup>78</sup>—he and his supporters often struggle with American audiences, who defended his right to publish but not his judgment.<sup>79</sup>

Meanwhile, for Rose, his supporters and—surprisingly even some of Danish critics—the cartoons themselves became a symbol of resistance to totalitarian censorship.<sup>80</sup> For instance, when the bomb plot against cartoonist Kurt Westergaard was revealed, several Danish papers ran the cartoons as show of support.<sup>81</sup> For his part, Rose has taken up the cause of defending cartoonists who depict Mohammed. For instance, in

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<sup>76</sup> For instance, Rose told his audience at Stanford University that he was “disappointed” that American papers did not run the cartoons. *Cartoon Editor Disillusioned With U.S. Press*, NEW YORK SUN, May 9, 2008.

<sup>77</sup> *Cartoon Editor Disillusioned With U.S. Press*, NEW YORK SUN, May 9, 2008.

<sup>78</sup> See Debra J. Saunders, *Stand Up to Intimidation*, SAN FRANCISCO CHRONICLE, May 11, 2008. Before meeting Rose, Saunders viewed the cartoons as “the journalistic equivalent of waiving a red flag in front of a bull,” in part because she had seen “too many pundits express snide and ignorant opinions about devout Christians[.]” But after speaking with Rose, hearing about his Cold War experiences, and the murder of Theo Van Gogh, Saunders changed her tune, ending her article by warning about the dangers of “giv[ing] into intimidation.” *Id.*

<sup>79</sup> For example, in May 2007 Jorgen Ejboel, head of the holding company that publishes the *Jyllands Posten* (as well as several other Danish papers), gave a speech at which he chided American newspapers for not running the cartoons. Jorgen Ejobel, *At the Center of the Storm: The 19<sup>th</sup> Annual Anderson-Ottaway Lecture*, WORLD PRESS FREEDOM COMMITTEE (2007) at 12-23. During the question and answer session, however, several audience members asked whether knowing what he knew today, Ejobel would still run the cartoons, and one member explained to him that defending journalists does not imply an endorsement of that journalist’s actions. *Id.* at 23-34.

<sup>80</sup> This echoes the broader European trend in January and February 2006, when papers across Europe ran the cartoons as an act of “solidarity” with the Danes.

<sup>81</sup> *Danish Muhammad cartoon reprinted*, BBC NEWS, Feb. 14, 2008. This differs from the position of Jytte Klausen who sought to include the cartoons (and other images of the cartoons) in her book on the controversy because her Muslim friends, as well as leaders and activists felt that the controversy was “misunderstood.” See Patricia Cohen, *Yale Press Bans Images of Muhammad in New Book*, NEW YORK TIMES, Aug. 13, 2009.

his 2008 *Spiegel* interview defending Westergaard, Rose also discussed a Swedish artist accused of depicting Mohammed as a dog.<sup>82</sup>

### *E. Hero or Huckster?*

The issue here is not Rose’s sincerity—his role in the cartoon controversy flows out of his past experiences in the Soviet Union and deeply held concerns about Islam. What is more, the controversy clearly changed his life and given Rose a mission—to repeal all “insult” laws in the name of free speech.<sup>83</sup> But are his ideas coherent? Do they mark out a cognizable theory of free speech, or are they merely a cobbled together *post-hoc* justification for his decision to run the cartoons?<sup>84</sup> The next two sections attempt to answer these questions with a detailed look at his two main reasons for running the cartoons—standing up to totalitarianism and initiating Muslims into the Danish tradition of satire. Are these concerns viable? How do they compare to traditional American rationales for defending speech?

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<sup>82</sup> Rose, “*I Don’t Fear for my Life*,” SPIEGEL ONLINE, Feb. 12, 2008.

<sup>83</sup> This remains the case, even if—as some critics argue—Rose ran the cartoons for other, less idealistic reasons. See Klausen, *Rotten Judgment in the State of Denmark* (arguing that the cartoons “started out as a gag, the kind you do when the news is slow”). Klausen also said that she had no interest in her book being used as “a demonstration for or against the cartoons.” *Id.*

<sup>84</sup> The impression that Rose shoots from the hip is fostered by his blunt, informal language. For example, in his *Spiegel* article defending the cartoons, Rose found time to call the song “Imagine” by John Lennon “stupid.” Rose, *Why I Ran the Muhammad Cartoons*, SPIEGEL ONLINE, May 31, 2006. When asked whether he had any regrets about running the cartoons, Rose often responds by comparing himself to a rape victim. See CNN Transcript, *supra* note \_\_\_\_ (question is “like asking a rape victim if she regrets wearing a short skirt at the discotheque”).

### III. The Anti-Totalitarian Imperative

From an American perspective, what is most striking about Rose's totalitarian argument is its urgency—Rose calls on his readers to act now, before it is too late. Rose's call to action reflects the difficult nature of his task. He was not simply arguing that the *Jyllands Posten* had a legal right to publish the cartoons. This was not really in dispute, although the Danish prosecutor's office did investigate the possibility of bringing formal charges against the paper.<sup>85</sup> Rose was also arguing that the decision of the *Jyllands Posten* to run the cartoons should be applauded—and perhaps emulated—by all supporters of free speech.

Given the strong reaction to the cartoons in the Muslim world, this claim was harder to make. In fact, most mainstream papers in the United States and Great Britain refused to run the cartoons.<sup>86</sup> Meanwhile, as the controversy progressed, several European journalists and politicians apologized for either having run or supported the cartoons. For example, in Norway a small conservative Christian newspaper, *Magazinet*, ran the cartoons in October 2006.<sup>87</sup> The following month, the Norwegian Minister of

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<sup>85</sup> Denmark follows the European model in which refusal to prosecute can be appealed by the complainant and must be supported by a written decision. See Lagoutte, THE CARTOON CONTROVERSY IN CONTEXT, *supra* note \_\_\_ at 392-93. The only European prosecution based on the cartoons resulted in an acquittal. See Stefan Simmons, *Cartoons 1, Muhammad 0*, SPIEGEL ONLINE, Feb. 16 2007 (describing the prosecution of *Charlie Hebdo*, a satirical weekly magazine in France for running the turban cartoon). I hope to take up the *Charlie Hebdo* litigation in a future paper.

<sup>86</sup> For a brief overview of the situation in the United States where the only major papers to run the cartoons were the *Philadelphia Inquirer*, the *Rocky Mountain News*, and the *Austin American Statesman*, see Kahn, *The Danish Cartoon Controversy and the Rhetoric of Libertarian Regret*, *supra* note \_\_\_ at 153, 163-66. In Britain no major papers ran the cartoons. See Angela Phillips and David Lee, *The UK: A Very British Response*, in Risto Kunelius, Elisabeth Eide, Oliver Hahn & Roland Schroeder (eds.) *READING THE MOHAMMED CARTOONS CONTROVERSY: AN INTERNATIONAL ANALYSIS OF PRESS DISCOURSE ON FREE SPEECH AND POLITICAL SPIN* (2007) at 65.

<sup>87</sup> Solveig Stein, *Norway: "A Norway almost at war,"* in Risto Kunelius, Elisabeth Eide, Oliver Hahn & Roland Schroeder (eds.) *READING THE MOHAMMED CARTOONS CONTROVERSY: AN INTERNATIONAL ANALYSIS OF PRESS DISCOURSE ON FREE SPEECH AND POLITICAL SPIN* (2007) at 41.

Labor and Immigration arranged a meeting between the papers editor and local Muslim at which the editor apologized for offending the religious dignity of Muslims.<sup>88</sup>

The most dramatic event—while falling short of a formal apology—came from Danish Prime Minister Anders Fogh Rasmussen. Earlier Rasmussen had refused to meet with Muslim ambassadors to discuss the controversy—in large part because any meeting would, in his opinion, constitute interference with the press.<sup>89</sup> After the controversy turned violent in early 2006, Rasmussen changed his tune. In March 2006 he invited 76 Muslim ambassadors to a press conference at which, without directly apologizing, stressed Denmark’s commitment to religious tolerance and deplored the publication of the cartoons.<sup>90</sup>

The anti-totalitarian imperative argument Rose uses to overcome these obstacles has three logical steps. First, he must show that radical Islam indeed poses a “totalitarian” threat to West and that, from a constitutional perspective, the state can legitimately defend against it. Next, Rose must show that anti-totalitarian argument—traditionally used to censor speech—can also be used to protect speech. Finally, Rose must show that the need to defend speech against totalitarian self-censorship imposed a duty on him—and presumably others—to run the cartoons. We will look at each step in turn.

#### *A. Radical Muslims as the New Totalitarians*

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<sup>88</sup> *Id.* at 46.

<sup>89</sup> See *supra* notes \_\_\_\_\_ and accompanying text.

<sup>90</sup> Fogh opfordrer ambassadører til samarbejde DR [Danish Radio] Feb. 3, 2006 (available at <http://www.dr.dk/Nyheder/Politik/2006/02/03/121812.htm> accessed Aug. 13, 2009)

In comparing radical Islam to hard line communists, Rose is not alone.<sup>91</sup> In fact, many opponents of radical Islam make the same comparison, including Daniel Pipes—son of Richard Pipes, a historian most notable for his opposition to the Soviet Union.<sup>92</sup> Moreover, the equation of radical Islam and communism makes biographical sense for Rose given his life story. But the “totalitarian” metaphor also works because of its role in European and American constitutional debates as the paradigmatic threat a liberal society can and should act against.

This theme is most obvious in the Germany where the concept of militant democracy is written into the constitution,<sup>93</sup> finds expression in a number of specific prohibitions on speech, actions, and association,<sup>94</sup> and has been extended to groups beyond the Nazis and Communists—the two groups normally associated with totalitarianism. In particular, the totalitarian label has been used to justify restrictions on Jehovah’s Witnesses and Scientologists.<sup>95</sup> The same anti-totalitarian rhetoric was at play

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<sup>91</sup> The years since 9/11 have seen the rise of a cottage industry of books and articles with evocative titles, warning of radical Islam as the new threat facing the West. See, e.g., BRUCE BAWER, *WHILE EUROPE SLEPT: HOW RADICAL ISLAM IS DESTROYING THE WEST* (2007).

<sup>92</sup> Interestingly, Rose interviewed Pipes a few months before the controversy began. See *Interview: The Threat of Islamism*, available at <http://www.danielpipes.org> (translation of article that ran in the *Jyllands Posten* on Oct. 29, 2004). In his article, Rose specifically referred to Richard Pipes as “opposed to the [liberal?] spirit of the 1960s and 1970s.” *Id.*

<sup>93</sup> For example, Article 18 of the constitution states that those who abuse a number of freedoms—including freedom of expression and freedom of the press—by combating “the free democratic basic order” forfeit these rights. Cited in KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*, *supra* note \_\_\_ at 510. Meanwhile, Article 21(2) declares unconstitutional “[p]arties which... seek to impair or abolish the free democratic basic order[.]” *Id.* at 511.

<sup>94</sup> As noted *supra*, note \_\_\_ these include the ban on the swastika and the Nazi salute. See also Robert A. Kahn, *Informal Censorship of Holocaust Revisionism in the United States and Germany*, 9 *GEO. MASON U. CIV. RTS. L. J.* 125, 141-42 (describing the banning of the German Communist party and the 1972 decree against radicals in the German civil service).

<sup>95</sup> See Robert A. Kahn, *The Headscarf as Threat: A Comparison of German and U.S. Legal Discourses*, 40 *VANDERBILT JOURNAL OF TRANSNATIONAL LAW* 417, 422 n. 29 (2007).

in 2003 when the German Federal Constitutional Court held that individual German states had the power to ban headscarf use by civil servants.<sup>96</sup>

The same theme was also a part of mid-twentieth century American justifications of speech restrictions. In *Dennis v. United States*,<sup>97</sup> the Supreme Court upheld convictions of eleven communist leaders charged with violating the Smith Act, which made it illegal to advocate the violent overthrow of the United States. In reaching this decision, the Court held that speech restrictions were permissible so long as “the gravity of the evil, discounted by its probability” was sufficiently high.<sup>98</sup> Nor was the concern solely limited to Communists—in a series of articles written in the 1940s sociologist David Riesman advocated using group libel laws as a “weapon” in the struggle of democracy against international fascism.<sup>99</sup> The Supreme Court appeared to validate these concerns when, in 1952, it upheld a group libel statute in *Beauharnais v. Illinois*.<sup>100</sup>

While both the “gravity of the evil” test and *Beauharnais* have fallen by the wayside,<sup>101</sup> the argument that a democracy can restrict speech to defend itself is powerful. And the German headscarf case shows a willingness to view radical Islam as a threat as to the free democratic order. However, the language Rose uses to describe the totalitarian claim is problematic. At times, for example, in his September 30, 2005 statement accompanying the initial publication of the cartoons, Rose carefully

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<sup>96</sup> The majority—over a sharp dissent—held that the German civil service could not, of its own accord, ban a school teacher, Fereshta Ludin, for wearing a headscarf. See Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Sept. 24, 2003, 108 Entscheidungen des Bundesverfassungsgerichts 282. The dissent in particular placed a great emphasis on the role of the headscarf as a symbol of totalitarian Islam. *Id.* at 333 (dissenting). For more, see KAHN, THE HEADSCARF AS THREAT, *supra* note \_\_\_\_ at 426-29.

<sup>97</sup> 341 U.S. 494 (1951).

<sup>98</sup> *Id.* at \_\_\_\_.

<sup>99</sup> For an overview, see WALKER, HATE SPEECH, *supra* note \_\_\_\_ at 79-81.

<sup>100</sup> 343 U.S. 250 (1952).

<sup>101</sup> For a discussion, see KALVEN, A WORTHY TRADITION, *supra* note \_\_\_\_ at 211-26 (describing the demise of the “gravity of the evil test”); WALKER, HATE SPEECH, *supra* note \_\_\_\_ at 101-26 (describing the gradual undermining of *Beauharnais*)

distinguished between radical Islam and Muslims more generally.<sup>102</sup> At other moments, however, Rose appeared to view the threat as involving in Muslims as a whole.<sup>103</sup> But in the militant democracy discourse, the origin of the totalitarian threat is almost always political; rarely, if ever, is it based on race or ethnicity. In fact, such claims go against the anti-Nazi ethos which is a central part of the anti-totalitarian argument.<sup>104</sup>

### *B. Anti-Totalitarianism as a Reason for Protecting Speech*

Assuming Rose restricts his claim to radical Islam (and can show that radical Islam is in fact a totalitarian threat), Rose would then face a new hurdle. In the examples just discussed, the totalitarian threat is used to restrict speech. Can the totalitarian threat also be a reason to allow speech? To put it another way, when Rose argues that “he is sensitive about calls for censorship on the grounds of insult” because “this is a popular trick of totalitarian movements”<sup>105</sup> is he adding something new to the Euro-American debate over speech?

At first glance, one might think Rose would have an easy time finding examples to buttress his case. After all, one of the key features of totalitarian movements and states is censorship; something clearly recognized Rose who cited Karl Popper’s *The Open Society and Its Enemies* in his *Washington Post* piece.<sup>106</sup> From a legal perspective, however, the task is considerably harder. The very existence of the twentieth century free speech discourse presupposes a constitutional democracy that, constrained by the rule of

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<sup>102</sup> See Rose, *The Face of Muhammad*, supra note \_\_\_\_.

<sup>103</sup> See Rose, *Why I Published the Muhammad Cartoons*, SPIEGEL ONLINE, May 31, 2006.

<sup>104</sup> As we shall see in Part IV, the anti-immigrant strain in Rose’s rhetoric also poses problems for his inclusiveness argument.

<sup>105</sup> Rose, *Why I Published Those Cartoons*, WASHINGTON POST, Feb. 19, 2006.

<sup>106</sup> *Id.*

law, abides by restrictions on its physical ability to restrict speech.<sup>107</sup> However, a constitutional democracy is by definition not totalitarian, which makes it hard to ground a justification for protecting speech based on a totalitarian threat from such a state.

However, there is one place where anti-totalitarian speech justifications have flourished—in debates over laws banning Holocaust denial. The most notable instance of this occurred in France in 1990 when a Communist member of the National Assembly, Jean Claude Gayssot, proposed a bill containing a number of measures targeting the extreme right, including a ban on Holocaust denial.<sup>108</sup> When the bill went up for debate, opposition members made repeated reference to failings of French Communist Party, communism in general, and categorized the Gayssot law as a Stalinist attempt to enforce an official truth.<sup>109</sup>

The anti-totalitarian discourse made sense because of specific circumstances. The minority Socialist government of France depended on the staunchly Stalinist French Communist Party for parliamentary support. This gave the opposition’s claims that the Gayssot law was totalitarian some resonance.<sup>110</sup> Rose, however, has a much broader goal—he wants to use an anti-totalitarian argument against *all* insult laws. To make this argument, Rose needs to assert that the states that enact such laws are either already totalitarian, or by enacting such laws, become totalitarian. This is a difficult argument to

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<sup>107</sup> To be sure, it is possible to discuss and defend speech in other times and places. See HENRY OSBORN TAYLOR, *FREEDOM OF THE MIND IN HISTORY* (1923). Voltaire, for instance, lived in absolutist France. But, I would argue, the presence of a constitutional state that decides cases according to reasoned arguments greatly deepened the public debate about when the state should restrict speech.

<sup>108</sup> For an overview, see KAHN, *DENYING THE HOLOCAUST*, *supra* note \_\_\_ at 103-08.

<sup>109</sup> One can get a feel for the argument by looking at the comments made by backbenchers while the bill was being read in parliament. Opponents made reference to the Nazi-Soviet non-aggression pact, the Katyn massacre, and the demolition of an immigrant hostel by the Communist mayor of a small French city in 1980. *Id.* at 105.

<sup>110</sup> Another, less pleasant resonance, came from the fact that many members of the group targeted by the law—Holocaust deniers—were committed to a world view that equated Jews with Bolsheviks, which made it easier to oppose the law on “anti-totalitarian” grounds. See LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993) at \_\_\_\_.

because “insult laws” are widespread across Europe.<sup>111</sup> Not only that, if Rose is right and European states are already—due to a misguided political correctness—well on the path to totalitarianism, then what precisely is the threat posed by radical Islam? The barn door has already been closed.<sup>112</sup>

*C. The Duty to Speak Out Against Totalitarian Self-Censorship*

Still, the debate over the Gayssot law at least allows Rose to claim that—in at least some times and places—anti-totalitarian rhetoric can be used to defend speech claims. But the Holocaust denial example involves an argument about state censorship; Rose wants to do more—he wants to use the “totalitarian threat” to justify his decision to run the cartoons. To do this, he must show that given the current political climate he had a duty to commission and run the cartoons, just as fellow journalists in February 2006 (and later) had a duty to publish them. It is this argument where Rose departs the furthest from the way Americans talked about speech in the twentieth century.

One of the key differences related to the use of the themes of bravery, courage—and on the other side—cowardice. For Rose and his supporters the hero was someone who takes action against the totalitarian threat—by publishing the cartoons, or by refusing to apologize for running them. For example, Lars Hedegaard, president of the Danish Free Press Society, compared pressure on Rose to apologize to “appeasement”

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<sup>111</sup> Most European states penalize some form of insult—does this make all of Europe totalitarian?

<sup>112</sup> One interesting case to think about here is *West Virginia Board of Education v. Barnette*, 391 U.S. 624 (1943) where the Supreme Court held that the First Amendment protected the right of Jehovah’s Witnesses to opt out of a state mandated flag salute. Writing in the middle of World War II, Justice Jackson criticized to regimes that use “coercive uniformity” to enforce “racial or territorial security,” noting that such efforts always failed—including “the fast fading efforts of our totalitarian enemies.” *Id.* at 640-41. So here anti-totalitarian rhetoric does serve the cause of individual rights. But *Barnette* is slightly different because, unlike the case of the Danish cartoons or Holocaust denial, the totalitarian entity (here Nazi Germany) is not behind the acts of censorship at issue.

before World War II.<sup>113</sup> Likewise, papers that refused to run the cartoons were caving in to fear.<sup>114</sup> As a *Jyllands Posten* columnist put it, the “natural way to show solidarity” with the support the paper’s “refusal to follow...a restriction on freedom of speech” was to “print the cartoons.”<sup>115</sup> Rose, for his part, reinforced the point by repeated assurances to interviewers that he was not afraid.<sup>116</sup>

While there is a tradition of viewing speakers as heroes (or martyrs), mainstream American free speech doctrine, as it has evolved in the twentieth century does not. Instead, the tradition tends to follow the lead of Justice Holmes who, dissenting in *Abrams v. United States*, referred to the publishers of Bolshevik pamphlets as “poor and puny anonymities”—hardly the language of heroes.<sup>117</sup> Later, Holmes questioned how “a silly leaflet” handed out “by an unknown man” could “present any immediate danger.”<sup>118</sup>

Instead, the heroes of the American speech drama are the citizens themselves, who refuse to give in to speculative fears. One sees this in the dissent of Justice Brandeis in *Whitney v. California* who notes “[t]hose who won our independence were not cowards”<sup>119</sup> in part because they understood that “no danger flowing from speech can be deemed clear and present” unless the evil is “so imminent” that there is no “opportunity for full discussion.”<sup>120</sup> Holmes makes a similar point when he refers to the United States

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<sup>113</sup> Lindsay Berrigan, Denmark: Mohammed cartoon publisher awarded, EDITORS WEBLOG, Mar. 21, 2007 (available at <http://www.editorsweblog.org> last accessed Aug. 14, 2009).

<sup>114</sup> This was especially evident in Britain, where no papers carried the cartoons. See Angela Phillips and David Lee, *The UK: A Very British Response*, *supra* note \_\_\_ at 74-75

<sup>115</sup> Peter Hervik and Clarissa Berg, *Denmark: A political struggle in Danish journalism*, *supra* note \_\_\_ at 26.

<sup>116</sup> See Nir Migal *Muhammad cartoons editor: There’s a problem with Muslims in Europe*, *supra* note \_\_\_.

<sup>117</sup> 250 U.S. 616, 629 (1919).

<sup>118</sup> *Id.* at 628.

<sup>119</sup> 274 U.S. 357 (1927)

<sup>120</sup> *Id.* at 377 (Brandeis, J., dissenting).

constitution as an “experiment” which, like the rest of life, is based on “imperfect knowledge.”<sup>121</sup>

Rose, however, appears unwilling to view Danish (or European) political arrangements in the same terms. These, instead, are under siege by radical Islam. In this regard, Rose is closer to the language of Justice Jackson, who dissenting in *Terminello v. Chicago*<sup>122</sup>—interestingly a case involving hate speech—rejected the idea that the constitution is a “suicide pact.”<sup>123</sup> What both Rose and Jackson lack is patience: either the metaphysical trust of Holmes that things will work out, or the call of Brandeis to summon up courage by reference to a heroic past.

Rose might respond that reliance of Holmes and Brandeis on more discussion supports his right to run the cartoons. This may be true. But Rose’s call for others to either approve of his decision to run the cartoons or run the cartoons themselves depends on the “imminent” danger posed by radical Islam. But Holmes and Brandeis teach their readers to discount precisely such dangers. Ironically, arguments about long range political threats are more often made by supporters of the hate speech laws Rose rejects.

One can appreciate the difficulty Rose’s position in an op-ed piece he wrote in the *Copenhagen Post* decrying the decision of British authorities to deny a visa to Dutch politician Geert Wilders.<sup>124</sup> The British authorities excluded Wilders because of a history of xenophobic comments about Muslims, culminating in his 2008 film *Fitna*.<sup>125</sup> In justifying this decision, British foreign minister David Miliband fell back on the analogy

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<sup>121</sup> *Abrams*, 250 U.S. at 630.

<sup>122</sup> 337 U.S. 1 (1949).

<sup>123</sup> *Id.* at 37 (Jackson, J., dissenting).

<sup>124</sup> Rose, *A False Analogy*, THE COPENHAGEN POST, Feb. 24, 2009.

<sup>125</sup> *Id.* At other times, Rose has tried to distance himself from Wilders, who has called for a ban on the Quran. See Nir Migal *Muhammad cartoons editor: There’s a problem with Muslims in Europe*, *supra* note \_\_\_\_.

of Justice Holmes that there is no right to yell “fire” in a crowded theater, which Miliband equated with stirring up racial and religious hatred.<sup>126</sup>

In defending Wilders, Rose made arguments that, from the perspective of American free speech discourse, were quite conventional. For instance, he noted that the conduct Schenck was convicted of—distributing anti-war leaflets—“is now completely legal.” He also point out—somewhat vaguely—that Justice Holmes “later used an opposing argument to defend freedom of speech.”<sup>127</sup> He made the point that when there is a fire, one is actually allowed to yell.<sup>128</sup> Finally, Rose repeated the argument of Alan Dershowitz that the proper analogy is not shouting fire in a crowd theater, but distributing leaflets outside the theater, warning it was unsafe.<sup>129</sup>

This is all well and good—and probably sufficient for his immediate purpose of criticizing the exclusion of Wilders. Rose, however, went a step further: “If the theater is on fire, or if there is smoke, then you have an obligation to draw everyone’s attention to it.”<sup>130</sup> While this may true of smoky theaters, it is not an accurate description of American free speech doctrine, which protects but does not require speech. In his *Abrams* dissent, Justice Holmes wrote that “the best test of truth [of an idea] is the power of the thought to get itself accepted in the competition of the market[.]”<sup>131</sup> This is a process that takes time. So the market place of ideas rhetoric, just like Justice Brandeis’s *Whitney* dissent, undercuts the urgency Rose needs to justify his decision to run the cartoons.

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<sup>126</sup> *Id.* Justice Holmes initially introduced the analogy in *Schenck v United States*, 249 U.S. 47, 52 (1919).

<sup>127</sup> *Id.* One imagines Rose is hinting at the shift in Justice Holmes’s position between *Schenck* and *Abrams v. United States*, 250 U.S. 616 (1919) where Holmes, writing in dissent opposed the conviction of distributors of Bolshevik leaflets.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Abrams*, 250 U.S. at 630-31.

Nor does the situation improve for Rose when one looks at second-order rationales for speech. In his book the *Tolerant Society*, Lee Bollinger lays out a series of models that explain why liberal societies tolerate extremist speech. Two of Bollinger’s models are of interest here—the “fortress model” and what he calls “general tolerance theory.”<sup>132</sup> While the fortress model’s name fits nicely with Rose’s concerns about fighting the forces of totalitarian self-censorship,<sup>133</sup> the model itself rests on a different premise—to protect good speech one must also protect a large amount of less good speech. By doing so, the courts set up a culture in which the suppression of speech is “unthinkable.”<sup>134</sup> However, condemning censorship is not enough for Rose who needs a theory that will justify publishing provocative speech.<sup>135</sup>

Bollinger’s preferred solution—the general tolerance model—at first glance offers Rose more comfort. In essence, Bollinger argues that societies should tolerate offensive speech because the practice of doing so helps citizens exercise self-restraint when dealing with opposing views.<sup>136</sup> This has some overlap with Rose’s idea, discussed in Part IV, that offensive speech can have a positive impact on the society at large as well as the target group. But Bollinger’s argument is largely about self-restraint—the state refuses to give into the temptation to censor, and the citizenry restrains its impulse to censor. To that extent, Bollinger follows in the footsteps of Holmes and Brandeis—both of whom counsel against immediate action.

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<sup>132</sup> Bollinger also includes a third category—the classical model—which encompasses the traditional arguments for speech based on search for truth, promotion of democracy and individual self-fulfillment. See Bollinger, *THE TOLERANT SOCIETY*, at 43-75.

<sup>133</sup> Thus, Bollinger talks about “strategic” reasons for protecting speech and speaks of creating “a fortress of legal doctrine under which choices over speech regulation are sharply constrained. *Id.* at 77.

<sup>134</sup> *Id.* at 100.

<sup>135</sup> What is more, Bollinger himself is quite critical of the model—especially the way it introduces “an unattractive elitist outlook” into speech protection. *Id.* at 101.

<sup>136</sup> *Id.* at 243

But Rose *has* acted. By publishing the Mohammed cartoons he helped trigger an international controversy. While he can argue—quite plausibly—that the unfolding of events, which culminated in an embargo, embassy burnings, and deaths was not his responsibility,<sup>137</sup> Rose did not exhibit the patience counseled by Brandeis, Holmes and Bollinger. It could well turn out that Rose is on the verge of creating a new paradigm of speech justification, one that requires—or at least applauds—those who speak out against totalitarian censors. But this will be a departure from the traditional American reasons for protecting speech.<sup>138</sup>

#### IV. The Danish Cartoons—Insult or An Act of Inclusion?

Rose, however, has another reason for publishing the cartoons. He argues they served a beneficial purpose by helping Muslim migrants feel at ease in their new Danish homeland. The inclusiveness argument has the advantage of shifting the debate from the duties of the journalist/speaker to the content and impact of the speech itself. The problem then becomes the typical American civil libertarian who, following Ronald

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<sup>137</sup> Rose defends his position that he could not have known the cartoons would lead to violent controversy by reference to a discussion with Bernard Lewis, noted author of several books on the Muslim world. According to Rose, Lewis told him that the prohibition against depicting or insulting the prophet only applied to Muslims. See *Naser Khader and Flemming Rose: Reflections on the Danish Cartoon Controversy*, MIDDLE EAST QUARTERLY, Fall 2007.

<sup>138</sup> Let me briefly pause to take up one possible objection to my argument. It could be that Rose, as a journalist, has a deeper concern about self-censorship than traditional American free speech theory, which is focused on the perspective of the judge. One might then want to compare Rose's publication of the cartoons to what might seem like comparable instances from recent American history: (a) in the 1970s comedian George Carlin used swear words in a deliberate attempt to expand the permissible grounds of freedom of speech and (b) in the early 1990s a number of college newspapers ran ads denying the Holocaust on freedom of speech grounds. See KAHN, HOLOCAUST DENIAL AND THE LAW, *supra* note \_\_\_\_ at 121-35 (describing the debate on college campuses). However, Carlin's words did not target a specific group, while the papers running the denial ads did not do so out of a fear of totalitarianism or with the idea that the ads would help integrate Holocaust survivors into American life.

Dworkin, will see hate speech (or to use a less loaded term, “insulting speech”) as harmful—even while opposing against hate speech laws. Instead, harmful speech is seen as the “cost” of liberty.

While the cost of liberty argument protects Rose’s right to publish the cartoons, it has not led American papers to run the cartoons or agree with Rose’s actions. Instead, the tendency has been to take the offensiveness of the cartoons as given—often while questioning Rose’s judgment.<sup>139</sup> This response led *Jyllands Posten* publisher Joergen Ejboel to complain that Americans had reversed Voltaire’s famous dictum. While Ejboel quoted Voltaire as saying “I strongly disagree with what you say, but I’m willing to die for your right to say it,” the current press says: “I accept your right to say whatever you want, but I really think you shouldn’t say it.”<sup>140</sup>

Behind concerns about the cartoon’s potential to offend is the broadly held view that insulting speech is offensive. As critical race theorist Mari Matsuda puts it, speech that targets a group based on ethnic, racial, or religious characteristics is particularly offensive because it separates the target from the general society.<sup>141</sup> Rose, however, may have a plausible answer—if he can show that insulting speech (or least the cartoons) is a source of inclusion.

Rose’s inclusiveness argument might look like an opportunistic, if unpersuasive, response to Matsuda. But his argument has roots in Danish culture, especially the Danish

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<sup>139</sup> See, e.g., *Poynter Podcast: Covering the Cartoon Controversy*, POYNTER ONLINE, Feb. 13, 2006 (available at [www.poynter.org](http://www.poynter.org)). Interestingly, some of this reluctance comes from skepticism about the likely impact of the cartoons on Muslims. For instance, Keith Woods, Dean of the Poynter faculty, worried that “the world around, who are not Muslim, don’t really understand the issue of depicting Muhammad at its core[.]” *Id.*

<sup>140</sup> Ejboel, *At the Center of the Storm*, *supra* note \_\_\_ at 19.

<sup>141</sup> Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* 17, 25 (Matsuda *et al.* eds. 1993). According to Matsuda, this is because hate speech “hits right at the emotional place where we feel the most pain”—“being hated, despised, and alone[.]” *Id.*

idea of informal sociality (*hygge*). The next section explores the idea that the cartoons are an expression of *hygge*. The following section puts Rose’s claim that the cartoons are inclusive to the test by in a broader context of anti-immigrant sentiment in Denmark and Europe more generally.

#### A. *The Cartoons and the Danish Tradition of Informal Sociality*

In defending the cartoons Rose often speaks of a “tradition” of satire in Denmark. This raises a number of questions: Does such a tradition exist? If so, what are its purposes? (i.e. does it actually promote inclusiveness?) Finally, do Rose’s actions—especially the publication of the cartoons—fall within this tradition?

##### 1. The Danish Norm of Informal Sociality (*Hygge*) and Teasing

On the first point, the evidence does suggest that Denmark has a cultural tradition of *hygge* or social informality. According to anthropologist Steven Borish, *hygge* is present in one form or another in all Scandinavian societies—something often explained as “an adaptation to the long dark nights of the Scandinavian winter.”<sup>142</sup> As practiced in Denmark, *hygge* rests on two elements: (i) “the complete and positive participation of all present in the [social] encounter;” and (ii) a “sustained back and forth dance of involvement” that encourages positive participation.<sup>143</sup> One can find evidence of *hygge* in the tendency of Danes to engage in friendly interactions in public places and, more generally, in the Danish focus on having “fun.”<sup>144</sup>

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<sup>142</sup> BORISH, LAND OF THE LIVING, supra note \_\_\_ at 276.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 278-80. Borish quotes Danish folklorist Iørn Piø who wrote: “Every time there has been the slightest occasion for it, people celebrate.” *Id.* at 280.

Sustaining *hygge* requires “quick repartee,” an ability to tell jokes, and an expertise at “teasing” which Borish calls a Danish “national pastime[.]”<sup>145</sup> According to Borish, teasing is an effective way of assuring that no one remains “indefinitely in a mood or posture communicating separateness or isolation” because “by the very act of responding to it the individual cannot help effectively becoming part of the interaction.”<sup>146</sup>

One can see examples of *hygge* in the public debate by Danes over the cartoons. For instance, Danish born political scientist Jytte Klausen in her 2006 *Spiegel* article called the cartoons a “school boy prank” yet admitted that one of the cartoons “elicited a laugh or two” in her family.<sup>147</sup> *Jyllands Posten* publisher Ejboel—who belongs to a group dedicated to better relations between Denmark and the Middle East—explained to an American audience that when he meets Islamic girls on his travels he replies: “Hey, girls, in Denmark we have a lot of women who go topless.”<sup>148</sup> At the same event, Ejboel was questioned by an audience member who, asking about whether he would publish the cartoons again, concluded by saying: “Didn’t you expect some sort of incendiary reactions? Or were you just somehow oblivious?” Ejboel replied: “Just call me stupid.”<sup>149</sup>

While teasing—especially when self deprecating—can be disarming, there is a harsher side to the practice. Consider the following example. Responding to the same questioner mentioned in the previous paragraph, Ejboel gave a hypothetical: “I mean if I look at you straight and say that you look like a stupid woman, I mean you have two

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<sup>145</sup> *Id.* at 276

<sup>146</sup> *Id.*

<sup>147</sup> See Klausen, *Rotten Judgment in the State of Denmark*, *supra* note \_\_\_\_. The cartoon her family, most of whom belonged to Ramussen’s Liberal Party, depicted Mohammed standing above a cloud turning away suicide bombers with the comment “Stop, stop, we have run out of virgins.” *Id.*

<sup>148</sup> Ejboel, *At the Center of the Storm*, *supra* note \_\_\_\_ at 26

<sup>149</sup> *Id.* at 25. When the questioner responded that she would ignore him, Ejboel responded that this proved his point that “in our life...we simply ignore things.” *Id.*

choices, you can either give me a smash in the nose or you can leave the room. Or you can sue me. So which would you prefer?”<sup>150</sup> When the questioner said that she would choose to ignore him, Ejboel responded: “Exactly...in most of our life, you know, we simply ignore things.”<sup>151</sup>

Consistent with the tradition of *hygge*, Ejboel used teasing to draw his questioner into a “back and forth dance of involvement.” However, the element of light-hearted fun is missing, in part because Ejboel, instead of calling himself “stupid,” now uses the word to describe the questioner. The exchange also raises doubts about Ejboel’s commitment to inclusion since he suggests that the questioner—who, based on a reading of the transcript, had been hounding him for several minutes about the wisdom of running the cartoons—could leave the room. Finally, Ejboel’s choice of words—he chose to call the questioner a “stupid woman”—suggests (at least according to critical race theory) his intent to silence his questioner by drawing attention to a personal characteristic.

## 2. The Danish Norm of Egalitarian Uniformity (*folkelighed*)

The harsher form of *hygge* demonstrated in the exchange also reflects the way the Danish practice informal sociality reinforces a deeply held norm of democratic egalitarian uniformity (*folkelighed*), which goes back at least to the nineteenth century folk school movement led by N.F.S. Grundtvig.<sup>152</sup> The egalitarian concept, which combined elements of “popularity, folksiness, simplicity, [and] unassuming warmth and

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See Jespersen, A HISTORY OF DENMARK, *supra* note \_\_\_\_ at 107-13. Grundtvig coined the term *folkelighed*, which roughly translates to “equality of the people.” *Id.* at 108. The idea of *folkelighed*, in turn, built on an earlier Danish tradition of consensus and negotiation that stretched back to the sixteenth century. *Id.* at 110.

ease” helps explain the preference for a party politics characterized by multi-party coalitions and a student movement in the 1960s that preferred words to violence.<sup>153</sup>

But Danish egalitarianism also could be restrictive. Writing in the 1930s Askel Sandemose, a Danish novelist living in Denmark came up with Jante’s Law—a list of ten rules enacted by a hypothetical Danish community.<sup>154</sup> These rules, which include the directives “You shall not believe that you are somebody” and “You shall not believe that you can teach us anything,” convey the message “Don’t be different.”<sup>155</sup> The emphasis on uniformity harms Denmark by keeping “talented people `in their place”<sup>156</sup> and discouraging ambition in the educational system.<sup>157</sup> The harsh uniformity, meanwhile, is enforced by the Danish fondness for teasing. Describing Danish schools, Borish notes a tendency toward “humiliation and ridicule for those who dare to stand out[.]”<sup>158</sup>

### 3. Sociality, Inclusion and the Positive Benefits of Speech

With this in mind, let us turn to Rose’s inclusiveness argument in the *Washington Post*. Consistent with the norm of *folkelighed*, Rose suggested that the cartoons were a way of “treating Muslims in Denmark as equals,” not “strangers.”<sup>159</sup> When he asserted that the cartoons led to “a constructive debate in Denmark, and Europe about freedom of

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<sup>153</sup> *Id.* at 108-09.

<sup>154</sup> BORISH, *THE LAND OF THE LIVING*, *supra* note \_\_\_ at 316. According to Borish, the novel—*En Flygtning Krydsrer Sit Spor* (The fugitive crosses the track)—remained popular. In the 1980s, when he did his field work for his book, many Danes brought up the novel, and most of those who did could cite large parts of it verbatim. *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> JESPERSEN, *A HISTORY OF DENMARK*, *supra* note \_\_\_ at 112. For instance, a Minister of Education in the 1970s made the following statement which, if extreme, nevertheless is rooted in what Jespersen calls “the Grundtvigian principal of equality.” “Unless everybody can learn it, nobody should be taught it.” *Id.*

<sup>158</sup> *Id.* Borish connects this to the “prevailing midrange of achievement” in Danish schools. *Id.*

<sup>159</sup> Rose, *Why I Published Those Cartoons*, WASHINGTON POST, Feb. 19, 2006.

expression, freedom of religion and respect for immigrants and people's beliefs"<sup>160</sup> and told his readers that the *Jyllands Posten* ran three pages of interviews from moderate Muslims, Rose spoke in the language of *hygge*—by running the cartoons he drew Danish Muslims into a positive social interaction.

Moreover, Rose's defense of the cartoons as generating productive debate has some resonance in the mainstream American speech discourse—even if few Americans likely accept his characterization of the cartoons as “inclusive.” For example, in *New York Times v. Sullivan*,<sup>161</sup> Justice Brennan wrote of the “profound national commitment” in the United States to “the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>162</sup> There may be some overlap to the extent Rose can show that concerns about self-censorship constitute “a public issue.”

On the other hand, there are difficulties with Rose's inclusiveness argument. First, while Rose's *Washington Post* article referred to Muslims as “part of our society,”<sup>163</sup> his comments about “high immigrant crime rates” and “the coming demographic surge” in *Spiegel* raise doubts about his commitment to inclusiveness.<sup>164</sup> Second, when Rose uses inclusiveness as a reason for other American newspapers to run the cartoons, he models the harsher, more coercive side of *hygge* which seeks to enforce participation in social activities. In effect, Rose and his supporters want the rest of the world to act as Danes by

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<sup>160</sup> *Id.*

<sup>161</sup> 376 U.S. 254 (1964)

<sup>162</sup> *Id.* at 270.

<sup>163</sup> *Id.*

<sup>164</sup> Rose, *Why I Ran the Muhammad Cartoons*, SPIEGEL ONLINE, May 31, 2006.

taking an active role in the controversy. The very need to make this request, however, suggests that *hygge* (and teasing) are not universal norms.

Third, Rose, who has become an all purpose critic of insult laws, has not said enough about when insults are inclusive. For instance, while Rose after some wavering refused to run depictions of the Holocaust in the *Jyllands Posten*, he has not explained why cartoons of Mohammed are different.<sup>165</sup> Instead, he argues that the cartoons—at least in Denmark—are no longer controversial.<sup>166</sup> To make this argument, Rose pointed out that following the death threat to Westergaard seventeen Danish papers ran the cartoons.<sup>167</sup> But does the action of the Danish papers really show this? Weren't they, in fact, responding to a crisis? Doesn't this show—at least among some of Denmark's Muslim community—the cartoons were still quite “controversial?”

To some extent, the argument that the cartoons are “inclusive” turns on what one means by “inclusion.” In all his writings on the cartoons, Rose has accepted the premise that Danish Muslims are in Denmark to stay. In his willingness to accept Muslims as citizens, he is far ahead of former German Chancellor Helmut Schmidt (who is on record as wishing the “guest workers” would return home).<sup>168</sup> But Muslims can only take part in the Danish society on Danish terms—for example, by accepting that (by 2008 at least)

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<sup>165</sup> He does respond to this point indirectly by arguing against the taboo traders promise to respect each others taboos. See Eliot Jager, *An Islamist 'new world order'*, JERUSALEM POST, Apr. 22, 2009. The result of taboo trading is “an intolerable decrease in freedom.” *Id.*

<sup>166</sup> See *Editor Behind Cartoon Controversy Discusses Islam, Free Speech*, RADIO FREE EUROPE / RADIO LIBERTY, Mar. 29, 2008. Klausen, defending her decision—vetoed by Yale University Press—made the same point. Patricia Cohen, *Yale Press Bans Images of Muhammad in New Book*, *supra* note \_\_\_\_.

<sup>167</sup> *Editor Behind Cartoon Controversy Discusses Islam, Free Speech*, *supra* note \_\_\_\_.

<sup>168</sup> See Kahn, *The Headscarf as Threat*, *supra* note \_\_\_\_ at ???. Schmidt, chancellor from 1974-82, belonged to the center-left Social Democratic Party.

the cartoons were no longer “controversial.” This perspective denies Danish Muslims a role in setting Danish values.<sup>169</sup>

This element of exclusion complicates Rose’s effort to convince Americans that the cartoons were not insulting. Consider, for instance, Debra Saunders’s initial response to the cartoons—they reminded her of insults devout Christians endure on a daily basis—she only changed her tune because of fears about self-censorship.<sup>170</sup> Frank Smyth of the Committee to Protect Journalists had similar doubts. Arguing against republication, he compared the cartoons to the then recent controversy in which Don Imus used gender and racial stereotypes to insult the Rutgers women’s basketball team as well as literature offensive to Jews, including anti-Semitic caricatures.<sup>171</sup> Finally, John Donatich, the director of Yale University Press, defending his rejection of author Jytte Klausen’s request to include the cartoons in her book on the subject, spoke of the book’s potential to trigger violence across the globe.<sup>172</sup>

### *B. The Cartoons and Rose and Anti-Immigrant Sentiment*

Even if Rose’s argument about the inclusiveness of the cartoons has roots in Danish culture, for his argument to be persuasive, he must show that Denmark (and Europe) are, in fact, open to Muslims. Here two questions emerge as central. First, do anti-immigrant developments in Denmark and Europe make Rose’s promise of inclusion ring false? Second, how do the cartoons, and the view of Muslims that underlies them,

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<sup>169</sup> See Kahn, *The Danish Cartoon Controversy and the Exclusivist Turn*, *supra* note \_\_\_ at ???.

<sup>170</sup> Saunders, *Stand Up to Intimidation*, *supra* note \_\_\_.

<sup>171</sup> Ejboel, *At the Center of the Storm*, *supra* note \_\_\_ at 29. He added that “when media outlets really push the envelope on press freedom, they don’t necessarily expand freedom in a sustained way.” *Id.* at 30.

<sup>172</sup> Cohen, *Yale Press Bans Images of Muhammad in New Book*, *supra* note \_\_\_. Because Donatich based his assessment on a series of confidential expert reports that he has not released to Klausen or anyone else, it is impossible to rule out reasons behind Yale’s actions—such as fear that publishing the cartoons would harm the reputation or financial interests of the press.

compare to rhetoric and the tactics of admittedly xenophobic politicians and movements across Europe?

The answer to the first question undercuts Rose's position. At the very moment Rose welcomed Muslims to partake in the "Danish tradition of satire," the government's Minister of Culture was calling for a culture war. Worse still, members of the far-right Danish People's Party—which was providing parliamentary support for the Liberals—were comparing Muslims to cancer cells.<sup>173</sup> In this respect, it is worth noting that the initial complaints from Danish Muslims raised the cartoons as merely one in series of racist incidents targeting Muslims.<sup>174</sup>

On the other hand, there is some positive news. One result of the controversy has been the rise of Naser Khader, a Muslim immigrant from Syrian who is also a member of parliament.<sup>175</sup> Khader, who opposes Muslim religious conservatives and favors assimilation, told an interviewer that "Muslims are no more discriminated in Denmark than they are elsewhere in Europe" and that Danes generally "accept Muslims if you declare you are loyal to this society, this country."<sup>176</sup> Meanwhile, there are plans to build the first state financed mosque in Denmark. So there may be some sense in which Rose's offer of inclusion has some truth to it.<sup>177</sup> But this must be balanced against the harsh anti-immigrant rhetoric of the Danish People's Party.

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<sup>173</sup> For more, see Kahn, *The Danish Cartoon Controversy and the Exclusivist Turn*, *supra* note \_\_\_ at ???.

<sup>174</sup> See Bonde, *How 12 Cartoons of the Prophet Mohammed were Brought to Trigger an International Conflict* *supra* note \_\_\_ at 41. Nor have recent events helped matters. In August 2009 Danish police stormed a Copenhagen church that had been housing Iraqi refugees. See Matthew Saltmarsh and Cat Contiguglia, *Raid in Denmark to Dislodge Iraqi Refugees Leads to Protests and Hunger Strike*, *NEW YORK TIMES*, Aug. 15, 2007 at A7.

<sup>175</sup> See Naser Khader and Flemming Rose, *Reflections on the Danish Cartoon Controversy*, *supra* note \_\_\_.

<sup>176</sup> *Id.*

<sup>177</sup> There is a complication. While Muslims may obtain acceptance as citizens, the acceptance as full-fledged Danes may be harder to come by. See BUCKSER, *AFTER THE RESCUE*, *supra* note \_\_\_ at 171 (describing the situation of Jews in Denmark, Buckser commented that "Danish culture tends to reject

Rose does better when his views are put into comparative context. Here it is instructive to compare Denmark to the Netherlands where, in recent years there have been a series of controversies involving Muslims, including the release of Theo Van Gogh and Ayaan Hirsi Ali's film *Submission*, the subsequent murder of Van Gogh,<sup>178</sup> and the rise of Geert Wilders, a Dutch member of parliament who, in a 2007 speech in parliament, denied the existence of "moderate Islam," compared the Quran to *Mein Kampf*, and has called an end to the "Islamic incursion" into Europe.<sup>179</sup> The following year Wilders released the film *Fitna* which, like Van Gogh's earlier film *Submission*, feature graphic images of violence overlaid with verses from the Quran and an extended discussion of Muslim influence in the Netherlands.<sup>180</sup>

When set against this background, Rose's cartoons appear tame. This may be why Kurt Westergaard objected to the inclusion in the film of the turban cartoon he drew.<sup>181</sup> While Westergaard based his objections solely on copyright issues, the Danish Union of Journalists who threatened to file a lawsuit on his behalf, objected "to the use of the cartoon as political propaganda"<sup>182</sup>—an objection that, to be sure, overlooks the political impact of the cartoons in Denmark. But it also shows the political distance between Rose

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difference on a more general level, valuing nation homogeneity and stigmatizing individuals who stick out"). For instance, Buckser relates the story of a Jewish woman with dark curly hair returning from abroad. She encountered a "very pleasant customs inspector" who "complimenting her on her Danish" asked "how long [she] had lived in the country." The woman replied "thirty-seven years!" *Id.* at 181.

<sup>178</sup> For a discussion see BURUMA, MURDER IN AMSTERDAM, *supra* note \_\_\_\_.

<sup>179</sup> See *Mr Wilders's contribution to the parliamentary debate on Islamic activism*, GROEP WILDERS, Sep. 6, 2007.

<sup>180</sup> For a brief description of the film, see Timothy Garton Ash, *Intimidation and Censorship are no answer to this inflammatory film*, THE GUARDIAN, Apr. 10, 2008. Garton Ash, while calling the film "deliberately provocative" and "anti-Islam," nevertheless opposes censorship because, while "inflammatory" it does not, in his opinion, "cross the line to incitement." *Id.*

<sup>181</sup> Matthew Moore, Bruno Waterfield, and Joan Clements, *Danish Cartoonist to Sue Dutch MP over anti-Islamic Film*, DAILY TELEGRAPH, Mar. 28, 2008.

<sup>182</sup> *Id.*

who, whatever his actual reason for running the cartoons has largely stayed true to his theme of inclusiveness, and Wilders.<sup>183</sup>

Based on this brief survey a few conclusions are clear. First, to the extent Danish Muslims take the cartoons as an offer of inclusion, it is unclear whether Danish society will welcome them with open arms. If the rhetoric of the Danish People's Party gives some pause, there are also positive developments. Second, when placed in a comparative context the cartoons—and Rose's arguments for them about them—are nowhere near the far right xenophobic end of the political spectrum.

Yet, in the end, this may do Rose little good. While other participants in the “clash of cultures” were more xenophobic, it was his decision to run the cartoons that ignited a global scandal. While Rose can quite plausibly deny responsibility for the violence, three years after the debate, he has yet to come up with a compelling account of why he chose to run them.<sup>184</sup> Perhaps, given the surprising turn of events, and his role at the center of a global controversy, Rose himself no longer knows why he acted. While this may be true, it still leaves Rose poorly positioned to act as an apostle of inclusion.

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<sup>183</sup> In future work, I want to trace the harshness of the Dutch debate over Islam to a political culture that is far different what one finds in Denmark. This is important because, superficially the two countries look similar. For example, the Danish emphasis on egalitarian uniformity and the Dutch polder model of compromise and negotiation both place an emphasis on consensus government. See BURUMA, MURDER IN AMSTERDAM, *supra* note \_\_\_ at 48-51. But the basis of compromise is very different. For the Danes, it is based on homogeneity and uniformity (people agree because they are the same), while for the Netherlands, which has since its inception, experienced religious diversity, it rests on a series of agreements by leaders of diverse groups to accept one another, without true toleration. I want to suggest that the Dutch model is prone to tension. (In fact, the idea of consociational democracy Dutch political scientist Arend Lijphart drew from his own country is most often associated with Lebanon—hardly a political success story).

<sup>184</sup> Rose is currently writing a book on the cartoons, so this may change.

## V. Conclusion: Looking Towards the Future

On the other hand, Rose may have more of a future as an advocate for free speech—although here the evidence is also mixed. While most participants in the Euro-American debate over hate speech defend Rose’s right to publish the cartoons, he has had less success—at least in the United States—gaining support for his decision to publish. Rose’s claim that totalitarian forces of self-censorship forced him to run the cartoons runs into a problem—the mainstream speech discourse, at least in the United States, counsels patience, not action. (This, of course, assumes Rose can show that radical Islam is, in fact, a totalitarian movement).

Rose’s second claim—that the cartoons are inclusive—is quite interesting. Deeply rooted in Danish culture, it has good deal of resonance there given the national habits of informal sociality and good natured teasing. The question is whether this argument applies beyond Denmark. Here there are reasons for doubt. Despite the American tradition of open and robust debate, there is reluctance by the media to inflame tensions gratuitously.<sup>185</sup> Moreover, the current strongly anti-immigrant political context in Denmark and Europe makes it harder to take Rose’s offer of inclusion at face value. And while Rose is a far cry from extremist xenophobes like Geert Wilders, as culture page editor of the *Jyllands Posten*, Rose will be forever associated with the cartoons.

This does not mean Rose’s thought will not evolve. Rose developed the totalitarian and inclusion themes by February 2006 at the latest (a time when he was at

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<sup>185</sup> Yale University Press director Donatich made this point to justify the removal of the cartoons from Jytte Klausen’s book—because “[t]he cartoons are freely available on the Internet and can be accurately described in words, Mr. Donatich said....reprinting them could be interpreted easily as gratuitous.” Cohen, *Yale Press Bans Images of Muhammad in New Book*, *supra* note \_\_\_\_ .

the center of the storm). More recently, Rose's positions have become more sophisticated. In a move that for him was oddly American, Rose defended Geert Wilders, but also distanced himself from him. Rose's call for the repeal of all insult laws (and perhaps all speech restrictions save those based on libel, invasion of privacy and incitement) is certainly radical. Moreover, many of Rose's positions have been echoed by Timothy Garton Ash,<sup>186</sup> who—by virtue of having *not* run the cartoons—is in a far better position to make Rose's argument. So, it may turn out that Rose has a future as a European free speech prophet. But will he—because of past indiscretions—like Moses fall short of entering the Promised Land?

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<sup>186</sup> Here, for instance, is Garton Ash, rallying supporters of free speech: “In the first decade of the 21st century the spaces of free expression, even in old established liberal democracies, have been eroded, are being eroded and if we don't summon ourselves to the fight, will continue to be eroded.” Ejlboel, *At the Center of the Storm*, *supra* note \_\_\_\_ at 17 (quoting Garton Ash).