DEFAMING MUHAMMAD: DIGNITY, HARM, AND INCITEMENT TO RELIGIOUS HATRED

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> How to draw the line between protected expression and speech that can be suppressed because it is likely to cause discrimination is . . . a difficult and complex issue. The most obvious way to make this distinction would be to rely on the traditional difference between hate speech and ordinary expression, a difference that is incorporated into the positive law of many countries. . . . Measured by this standard, the Danish cartoons seem to me rather far from legally prohibited hate speech. They take a position on issues of obvious public moment, but they do not advocate discrimination or oppression or violence; they do not threaten; they do not use race epithets or names; they do not attack individuals; they do not perpetuate an obvious untruth; they do not portray Muslims as without human dignity. They may exacerbate stereotypes and exaggerations, but that is not the same as hate speech. That is simply the nature of most ideas.
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> — *Robert Post*[1]

I. INTRODUCTION

On September 30, 2005, the Danish newspaper *Jyllands-Posten* published twelve editorial cartoons depicting the Islamic prophet Muhammad leading to widespread and violent protests both in Denmark and across the Islamic world.[2] The controversy has generated a torrent of commentary seeking to define and defend competing conceptions of the normative implications of the affair. For some, the controversy has been emblematic of the incommensurable divide in democratic societies between the liberal value of free speech on the one hand and a religious taboo (the objection to blasphemy) on the other.[3] For others, the whole affair is better understood in terms of the socio-political context of Muslim minorities living in European nation-states and perceived differences between "Europe" or "the West" and "Islam"—each conceived as a distinct civilizational *nomos* "championing opposing values: democracy, secularism, liberty, and reason on the one side, and on the other the many opposites—tyranny, religion, authority, and violence."[4] Still for others, the publication of the cartoons is better seen as attributable to increasing Islamophobia and discrimination against Muslims in Europe and North America in the wake of September 11 and is "reminiscent of the anti-Semitic propaganda leveled at another minority in European history."[5]

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1. Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 CONSTELLATIONS 72, 84 (2007).

2. The cartoons portrayed the Prophet Muhammad as, *inter alia*, a bomb-throwing terrorist and suicide bomber. *See generally* JYTTE KLAUSEN, THE CARTOONS THAT SHOOK THE WORLD (2009).

3. Saba Mahmood, *Religious Reason and Secular Affect: An Incommensurable Divide?*, *in* IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH 64, 64 (Talal Asad et al. eds., 2009) (noting that a series of international events, particularly around Islam, is leading some scholars to posit "an incommensurable divide between strong religious beliefs and secular values" and that events such as 9/11, the ensuing War on Terror, and the rise of religious politics globally are "often seen as further evidence of this incommensurability").

4. Talal Asad, *Free Speech, Blasphemy and Secular Criticism*, *in* IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH 20, 21 (Talal Asad et al. eds., 2009).

5. *See* Mahmood, *supra* note 3, at 840; s*ee also* Tariq Modood, *Obstacles to Multicultural Integration*, 44 INT'L MIGRATION 51, 51–61 (2006); Maleiha Malik, *Muslims are Getting the Same Treatment*

Each of these narratives captures an aspect of what is at stake in the controversy. The focus of this Article is narrower. The question addressed is how liberal democratic states ought to respond to visible manifestations of hatred, especially speech that constitutes incitement to religious hatred. The Article's concern is thus a contested and overlapping normative gray area lying between extreme or hate speech on the one hand, and discrimination, hostility, or violence on the basis of religion on the other.

The notion that persons have a right to be free from incitement to religious hatred is recognized in the laws of most modern democracies[6] and international human rights conventions.[7] It encounters fierce resistance in American law, however, and in the jurisprudence interpreting the First Amendment to the U.S. Constitution in particular. Conventional constitutional wisdom is that the Free Speech and Free Exercise Clauses together forbid legal restriction of the kind of speech encapsulated by the Danish cartoons. This is for three general reasons. First, while the state has a legitimate interest in preventing discrimination against Muslims, this objective is distinct from the interest in prohibiting and preventing speech that Muslims find offensive. The difficulty with suppressing even hateful speech is that this requires a content-based restriction, which, at least since the publication of John Stuart Mill's classic argument in *On Liberty*, has been held to violate free speech as a liberal principle.[8] The only ground for limiting such speech is the line drawn in *Brandenburg v. Ohio* of speech which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[9]

Second, contrary to several decisions of the European Court of Human Rights and calls by Islamic states to prevent the "defamation of religions and prophets,"[10] persons do not have a right not to be insulted in their religious beliefs and offensive speech of this kind should not be understood as inhibiting the right freely to practice one's religion. This argument rests on a particular account of the right to freedom of religion and belief and a distinctive theory of toleration which holds that liberal democracy "does not require toleration in the

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as Jews Had a Century Ago, GUARDIAN, Feb. 2, 2007, *available at* http://www.guardian.co.uk/commentisfree/2007/feb/02/comment.religion1/print (noting parallels between characterizations of Muslims in Europe today and Jews in the 1930s: as "religious bigots, aliens, and a blight on European civilization").

6. *See infra* text accompanying note 24.

7. *See infra* text accompanying note 23.

8. For Greenawalt, the principle of "no content regulation" (i.e. that some messages should not be favored over others) has emerged as a "central doctrine of First Amendment law." KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 16 (1995).

9. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

10. On the basis that defamation of religions is inconsistent with the right to freedom of expression, the Organization of the Islamic Conference has called for "legally-binding" United Nations resolutions to "prevent defamation of religion and prophets" and to "render all acts whatsoever defaming Islam as 'offensive acts' and subject to punishment." On Eliminating Hatred and Prejudice Against Islam, Thirty-third Islamic Conference of Foreign Ministers, Res. No. 26/33-P (June 19–21, 2006). Fifty-seven member states of the OIC have had long standing concerns regarding the "defamation of religions." The U.N. Commission on Human Rights has passed resolutions annually since 1999 on Combating Defamation of Religions. *See* Combating Defamation of Religions, G.A. Res. 2005/3, U.N. Doc. E/CN.4/2005/L.10/Add.6 (Apr. 12, 2005).

sense that persons abandon their independent evaluation of the beliefs and ideas of others."[11]

Third, by limiting free speech in order to suppress blasphemy, the state "loses democratic legitimacy with respect to those who do not believe in the truths protected by a law of blasphemy."[12] Implicit in this argument is a particular conception of the liberal subject and a particular theory of democracy linking free speech to the flourishing of self-government.[13] At a deeper level, the argument rests on a theory of political legitimacy under which hate speech laws are seen to imperil the legitimacy of other legitimate laws against violence and discrimination.

Taking the Danish cartoons controversy as its point of departure, this Article interrogates the normative assumptions underlying these conceptions of free speech and freedom of religion and considers what such an inquiry reveals about both the contingency and particularity of First Amendment law. What is silenced or rendered mute when issues such as the Danish cartoons are analyzed in this way through the prism of liberal rights? Might international legal norms and dominant understandings of the world community complicate the self-assuredness of liberal assumptions and open up new spaces and divergent pathways for navigating difference and responding to the claims of Muslim communities? If First Amendment jurisprudence is committed to an account of secular liberalism that is no longer able to deny being more than one claim among others, how might we take philosophical stock of the confrontation between secular-liberal and Muslim-identitarian commitments to such values as the freedom from injury to religious feelings or sensibilities?

In addressing these questions, this Article intervenes in the extant literature by suggesting two distinct dialectical moves, each premised on the distinction between *internal* and *external* reasons in philosophical argument, which have the capacity to unsettle the static secular-religious binary and purportedly incommensurable divide between liberal and Islamic values discussed above. The argument proceeds as follows: What characterizes classical arguments for secular liberal principles advanced by thinkers as diverse as Mill, Locke, Kant and Rawls is the assumption that there are *external* reasons that all rational people should be bound by, simply in virtue of their rationality. The difficulty is that while rationality is a shared human faculty, there are no such uncontested external or *a priori* universal reasons. All reasons appeal, at some level of justification, to substantive value commitments and these may or may not be shared by persons of divergent religious and cultural backgrounds. As Akeel Bilgrami has suggested:

> [I]t won't do to say that those who are not convinced by secular liberal ideals are failing to be illuminated by some clear light of reason. It is a theoretical fallacy to declare the opponents of secular liberalism irrational by standards of rationality which all rational people accept. Finding them wrong requires finding them wrong by the light of some of *their own* values. This is what I . . . [have] called

11. Post, *supra* note 1, at 79–80.

12. *Id.* at 78.

13. *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (Harper & Bros. 1960) (1948).

> "internal" reasons by which one can show them to be wrong, by contrast with what . . . is simply unavailable: "external" reasons, which all rational people are supposed to accept, not because of any substantive values they hold but because these external reasons precisely make no appeal to other substantive values of theirs; they make appeal only to their capacities to think rationally.[14]

If correct, two important consequences follow. First, classical liberal arguments for free speech and freedom of religion are indeed efforts to provide external reasons, or even a *single* principled reason, which all rational people should accept. Such arguments must concede, however, that they rely on and indeed mask *internal* reasons which are in turn dependent on substantive value commitments. Failure to recognize the limits of rationality by dogmatically asserting external reasons in the face of their contestability—the optimistic cosmopolitan belief in the "reconcilability of all human values in a single, harmonious unity"—can lead only to the illusion, of which Isaiah Berlin once spoke, of the possibility of a final solution: the prospect that mankind can be made "just and happy and creative and harmonious forever," for which no price is too high to pay.[15]

The loss of external reasons, however, is a necessary but not sufficient condition. Unlike external reasons, internal reasons may not be present in all persons and thus in cases of disagreement over value commitments we may indeed face the dreaded specter of a relativist impasse, i.e. a situation where there are no internal reasons two persons can give to each other. A liberal may thus agree that free speech is ultimately justified by internal reasons and rests on substantive values, but assert that these are the *right* reasons and values all the same. It is only if she has an *internal conflict*, some other value which is in tension with her commitment to free speech, that the liberal will be reachable by someone advancing internal reasons that appeal to her liberal values in an effort to persuade her to change her mind on some disputed evaluative issue.[16]

This Article argues that this is the real importance of the Danish cartoons: not what they teach us about Islamic norms and values (although they may do this), but rather how they raise unsettling questions regarding core features of secular modernity and the place of religion in liberal democratic orders, especially in regard to the epistemology of legal categories pertaining to religious toleration and value pluralism.[17] In much the same way international human rights norms provide a critical mirror by which to illuminate certain cultural and historical assumptions *internal* to American constitutional law, and liberal theorizing more broadly, that continue to shape and define the contours of the

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14. Akeel Bilgrami, *Secularism and Relativism*, 31 BOUNDARY 2, Summer 2004, at 173, 175.

15. STEVEN LUKES, LIBERALS AND CANNIBALS: THE IMPLICATIONS OF DIVERSITY 90 (2003).

16. The principled impasse of relativism is thus conceivable only where "someone with whom one is disagreed over values is not merely never inconsistent . . . they would also have to be *wholly* without any tension or dissonance in their values and desires." Bilgrami, *supra* note 14, at 186. Bilgrami suggests that this would be an "extraordinary condition to find in any value-economy" and would require the two parties in a dispute over a value to be "monsters of coherence." *Id.*

17. *See infra* Part IV. *See generally* Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT'L L. 1, 21–25 (2008); Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT'L L.J. 249, 292–96 (2008).

Religion and Speech Clauses of the First Amendment. For such a discussion even to begin, however, the two notions of loss of external reasons and existing tension or conflict between internal reasons each must be acknowledged.

Assuming this space for dialogue and contestation can be opened in the Self, the second dialectical move involves the question of how to understand and interpret the claims of the Other. The first point is to accede that Islamic (and other religious) arguments for the restriction of blasphemy (as yet undefined) rest on internal reasons and substantive value commitments. But given the unavailability of external reasons, this alone provides no reason to reject such arguments' claims to objectivity, toleration, or respect. What has been most striking about the Danish cartoons controversy has been how the deep sense of injury expressed by so many Muslims at seeing the Prophet Muhammad depicted as a terrorist has literally been incomprehensible within Euro-Atlantic modernity. Following the work of Saba Mahmood, this Article thus asks what constitutes religion and a proper religious subjectivity in the modern world and what practices may be necessary to make this kind of injury of religious pain not mute but intelligible within the discourse of liberal rights?[18]

Answering these questions requires us to appreciate the difference between particular modalities of belief and hermeneutics within distinct religious traditions. As observed by Wendy Brown, "[w]ithout an appreciation of this difference, the offence and injury that the cartoons caused for many remained unarticulated and unrecognized; the debates remained locked in an unreflexive and one-sided hermeneutic taken to be the only hermeneutic."[19] This Article's suggestive title "Defaming Muhammad" is thus a gesture to an elusive intermediate position reducible to neither defaming Islam *qua* religion nor Muslims *qua* persons. Such a reflexive hermeneutic becomes intelligible only once we appreciate particular Islamic conceptions of devotion and piety and of an intimate living relationship of veneration, emulation, and embodied habitation that many Muslims have with the Prophet.

But as before, this is a necessary, not sufficient condition. In order to seek to persuade Muslims in evaluative disputes to change their substantive value commitments, it is further necessary to advance internal reasons which appeal to Islamic values and norms and to pay close attention to how legal restrictions and competing conceptions of right seem from the *internal point of view* of Islam itself. As increasingly recognized by leading liberal[20] and international human rights[21]

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18. Mahmood, *supra* note 3, at 70–71. Mahmood notes that "the motivations for the international protests were notoriously heterogeneous, and [that] it is impossible to explain them through a single causal narrative." *Id.* at 70. Some scholars, for example, have argued that the Muslim reaction to the cartoons was more the result of an orchestrated campaign by political actors with vested interests and opportunism by Islamic extremists than any spontaneous emotional reaction. *See* KLAUSEN, *supra* note 2. This Article pursues only the narrower question of intelligibility of moral injury.

19. Wendy Brown, *Introduction*, *in* IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH 1, 17 (Talal Asad et al. eds., 2009).

20. *See*, *e.g.*, Jeremy Waldron, *Toleration and Reasonableness*, *in* THE CULTURE OF TOLERATION IN DIVERSE SOCIETIES: REASONABLE TOLERANCE 13, 14–15 (Catriona McKinnon & Dario Castiglione eds., 2003) (suggesting that there is no way to say that a "set of permissions is adequate for the practice of a religion except by paying attention to how that set of restrictions seems from the internal point of view of the religion" and that an "externally stated adequacy condition—which was quite at odds with internal conceptions—would be arbitrary and unmotivated"); JOHN RAWLS, THE LAW OF

theorists alike, this is the only viable path for rights discourse and the only way to open up new potential fusions of horizons and spaces for dialogue on "the irreducible and interrelated problems of equality *and* culture."[22]

The Article proceeds in three parts. After first setting out the notion of incitement to religious hatred in Part I, Part II considers the relationship between free speech, group libel, and human dignity and argues that the notion of dignity lying at the heart of group defamation laws destabilizes classical accounts of freedom of expression. Part III addresses the complex historical and normative relationship between free speech and freedom of religion in liberal democratic orders and considers the two critical questions of whether the Danish cartoons give rise to a genuine conflict of rights and how to understand the notion of harm. Part IV then discusses how the analysis in the previous two parts shapes competing liberal accounts of religious toleration. The Article concludes by reflecting on what a more robust account of reflexive toleration might look like premised on notions of *mutual justification* and *peaceful coexistence* between rival ways of life and recognition of the need to pay attention to how legal restrictions seem from the *internal point of view* of a religious tradition.

II. GROUP DEFAMATION AND HUMAN DIGNITY

A. Incitement to Religious Hatred

The notion of incitement to religious hatred is notoriously difficult to define. On the one hand, antidiscrimination law is premised on a right of persons to be treated equally in certain spheres of life. On the other hand, hate speech laws are directed towards speech that attacks a person or group on the basis of certain shared characteristics. There is clearly an overlap between these categories: e.g. certain types of hate speech (such as inflammatory political speech) may be said to amount to or constitute evidence of discrimination, while certain non-spoken discriminatory conduct or behavior (such as cross-burning) may be said to amount to hate speech. The leading international human rights treaty describes the idea as follows: "Any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law."[23] It is also codified in various forms of hate speech legislation in countries around the world, including most Western liberal democracies. As recently noted by Jeremy Waldron, this includes

> legislation of the sort you will find in England, Canada, France, Denmark, Germany, New Zealand, and in some of the states of Australia, prohibiting statements 'by which a group of people are threatened, insulted or degraded on

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PEOPLES 78 (1999) (arguing that the "alternative is a fatalistic cynicism which conceives the good of life solely in terms of power").

21. *See, e.g.*, ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION (1990) (arguing for acceptance of the concept and content of a human rights regime through internal cultural legitimation in an Islamic context).

22. James Tully, *The Illiberal Liberal: Brian Barry's Polemical Attack on Multiculturalism*, *in* MULTICULTURALISM RECONSIDERED: *CULTURE AND EQUALITY* AND ITS CRITICS 102, 104 (Paul Kelly ed., 2002).

23. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 20, U.N. Doc. A/6316 (Mar. 23, 1976) [hereinafter ICCPR].

> account of their race, color, national or ethnic origin,' or prohibiting attempts to incite racial or religious hatred.[24]

In the United States, hate speech legislation of this kind has traditionally been held to be unconstitutional.[25] The logic of free speech jurisprudence is that "debate on public issues should be uninhibited, robust and wide-open."[26] This idea makes little sense unless individuals can aggressively present their views to others—even to those for whom the views are unwelcome or upsetting. The First Amendment has thus been held to protect all religious polemic from legal sanction—even expression that aims "deliberately and provocatively to assault the religious sensibilities of the pious."[27] On this basis, the United States entered a reservation to the International Covenant on Civil and Political Rights ("ICCPR") stating that Article 20 "does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."[28]

This stance is generally defended[29] in terms of the weight that American constitutional law places on free speech—what the Supreme Court in *Palko v. Connecticut* referred to as "the matrix, the indispensable condition, of nearly every other form of [freedom]."[30] The notion that free speech and freedom of conscience are supreme constitutional values is further defended in terms of

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24. Jeremy Waldron, Holmes Lectures at Harvard Law School: Why Call Hate Speech Group Libel? (Oct. 5–7, 2009) (referring to Article 266b of the Danish Penal Code and an English statute on hate speech).

25. Interpretation of the Free Speech Clause of the First Amendment has historically been guided by "principles of facial neutrality that disfavor the government's use of express content-based classifications," and thus free speech doctrine "only protects expression *qua* expression, without regard for its social meaning to certain audiences or the identity of the speaker." Murad Hussain, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920, 946–47 (2008) (citing Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 293–94 (1991)). Hussain argues that this "'profound individualism' is shaped by 'a tendency [in American law] to view groups as mere collections of individuals, whose claims are no greater than those of their constituent members." *Id.* An example of a law held to be unconstitutional on First Amendment grounds is *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (overturning a cross-burning conviction under a municipal hate crimes ordinance and finding the law facially unconstitutional because prohibiting the use of fighting words only "on the basis of race, color, creed, religion or gender").

26. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

27. Post, *supra* note 1, at 73. Post refers to the judgment of the Supreme Court in *Cantwell v. Connecticut* as authority for this proposition. *Id.* He does note, however, that the First Amendment is exceptional in this respect and that in Europe "there is a long history of regulating blasphemy, and as a consequence the question of subjecting the cartoons to legal sanction is very much alive." *Id.*

28. U.S. RESERVATIONS, DECLARATIONS, AND UNDERSTANDINGS, INT'L COVENANT ON CIV. AND POL. RTS, 138 CONG. REC. S4781-01 (Apr. 2, 1992).

29. However, on September 25, 2009 the United States and Egypt tabled a draft General Assembly resolution on Freedom of Opinion and Expression that, while including no exception for "defamation of religions," provides in paragraph four that the Human Rights Council expresses its concern that "incidents of racial and religious intolerance, discrimination and related violence, as well as negative stereotyping of religions and racial groups continue to rise around the world, and condemns, in this context, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and urges States to take effective measures, consistent with their international human rights obligations, to address and combat such incidents." G.A. Res. Draft, U.N Doc. A/HRC/12/L.14 (Sept. 25, 2009).

30. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

deeply entrenched narratives of American exceptionalism and Enlightenment accounts of individual freedom, self-realization, and autonomy. The discussion that follows seeks to foreground an alternative notion of exceptionalism: one that views these narratives as outlier or relativist positions of the disreputable sort[31] that fail to take seriously both particular types of harm and the plurality of values at stake, especially in the case of Muslims living in Western democratic societies.

A prominent example of such a narrative is Robert Post's argument in relation to the Danish cartoons that short of speech being directed to inciting or producing imminent lawless action (the *Brandenburg* threshold[32]), the state does not have an interest in prohibiting speech that Muslims find offensive.[33] But why is incitement to *imminent violence* the correct standard as opposed to Article 20(2) of the ICCPR[34] or Section 1 of the Racial and Religious Hatred Act 2006 (United Kingdom),[35] which both prohibit speech intended to incite racial or religious hatred? Whose harm exactly is at issue here? Is it the harm caused by suppressing speech or the harm caused by the speech itself (or both) that should be our critical concern? Whose ox exactly is being gored?

The first point to note is that in Post's analysis the controversy is not portrayed as a conflict between fundamental rights. Rather, the conflict is portrayed as between a fundamental right on the one hand—free speech understood as a principle essential to modern freedom—and the charge of blasphemy on the other. Blasphemy is then portrayed as an archaic and coercive religious constraint which the United States (although not European nation-states) has managed to transcend, but which Islamic states and Muslims still cling to in their unwillingness or inability to grasp the supreme value of freedom. Post cites in this regard Harry Kalven's well-known statement that "*In America, there is no heresy, no blasphemy*"[36] and reiterates conventional constitutional wisdom which holds that speech in public discourse be vigorously protected, even speech which intentionally targets religious sensibilities and causes emotional pain, distress, and outrage.[37]

Thus for Post either (1) the free speech principle alone provides the means by which to resolve the controversy or (2) other rights such as to freedom of religion or human dignity are simply assumed either (a) to be compatible with free speech *a priori*, or (b) in cases of conflict, to be normatively inferior. This way of framing the problem is unhelpful to understanding those who complain about blasphemy and to finding peaceful and just means of resolving such conflicts. Following the logic of reasoning set out above, the first position must either concede its dependence on internal reasons and substantive value commitments or risk the charge of obduracy. The second position opens the possibility,

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31. Jeremy Waldron, *How to Argue for a Universal Claim*, 30 COLUM. HUM. RTS. L. REV. 305, 307–08 (1999) (distinguishing reputable from disreputable forms of cultural relativism).

32. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

33. Post, *supra* note 1, at 82.

34. ICCPR, *supra* note 23, art. 20(3).

35. Racial and Religious Hatred Act, 2006, c.1 (Eng.) [hereinafter RRHA].

36. HARRY KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 7 (Jamie Kalven ed., 1988).

37. Post, *supra* note 1, at 73.

however, of dialogue on tensions internal to liberal rights discourse between competing conceptions of fundamental rights and their normative interrelationship. Let us consider each of these possibilities in turn.

B. Free Speech and Blasphemy

By framing the controversy in terms of a conflict between free speech and offense to the religious sensibilities of Muslims, the outcome of Post's analysis is predetermined. Freedom must prevail as against superstition, intolerance, and irrationality. There can be no place in a secular liberal society for blasphemy as a religious crime—the idea of "treason against God"[38]—or indeed any laws "protecting the respect properly due to God."[39] This argument rests on two assumptions: first, that the free speech principle is justified by external or universal reasons to which all rational persons should be bound simply in virtue of their rationality; second, that Islamic norms requiring the suppression of blasphemy are premised on internal or subjective reasons that some persons may share and others may not and which therefore cannot impose constraints on the rights of others.[40] It is the first of these assumptions that is our concern here; the second is considered in Part III below.

As Post rightly notes there are many distinct justifications for protection of free speech, arguably the most prominent of which is the argument from democratic self-governance.[41] Accordingly, "[i]f public policy is to be directed by an intelligently informed public opinion . . . [citizens] must be free to express and discuss their perspectives on the matters satirized in the *Jyllands-Posten* cartoons."[42] What is critical to appreciate is that, despite appealing to no substantive moral or political values in its premises, such classical liberal arguments regarding non-interference in the lives of citizens depend upon essentially-contested propositions regarding the nature of truth and progress. It is not possible here to explain in full how such abstract, externally-stated propositions rest on internal reasons and substantive value commitments. But for present purposes, Bilgrami's incisive critique of John Stuart Mill's meta-inductive argument for free speech illustrates the point.

For Bilgrami, Mill's argument in *On Liberty* has two premises: "(1) our own past opinions have been wrong, and (2) our present opinions may therefore also

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38. *See* LEONARD W. LEVY, TREASON AGAINST GOD: A HISTORY OF THE OFFENSE OF BLASPHEMY (1981).

39. Post, *supra* note 1, at 77.

40. It is important to note, as explained by Asad, that "blasphemy" strictly speaking is a category which defines an "outrageous 'religious' transgression in the Christian tradition." Asad, *supra* note 4, at 37. The theological term *tajdīf* is often translated in English to mean "blasphemy," but in Arabic it has the sense of "scoffing at God's bounty." *Id.* at 38. Like similar words such as *kufr* ("apostasy, blasphemy, infidelity"); *ridda* ("apostasy"); *fisq* ("moral depravity"); and *ilhād* ("heresy, apostasy"), these terms overlap but are not synonymous with the English term *blasphemy*. *Id.* They also do not apply to non-Muslims and thus were not used by Arabic speakers in response to the Danish cartoons. *Id.* Rather, the World Union of Muslim scholars used the word *isā'ah* which has a range of meanings including "insult, harm and offense" that apply in secular contexts. *Id.* In seeking to understand the nature, scope, and justifications of the constraints imposed by Islamic norms, it is critical to appreciate these distinctions. I am grateful to Saba Mahmood for discussion on this point.

41. Post, *supra* note 1, at 73. *See* discussion *infra* Part IV.

42. Post, *supra* note 1, at 77.

be wrong, despite our conviction in them. From these premises [Mill's argument] concludes (3) that we should tolerate dissent against our current opinions just in case they are wrong and the dissenting opinion is right."[43] The basic facts of past error and current epistemic fallibility are things that *any* rational person will accept and lead inexorably to the evaluative conclusion that all dissenting opinions should be tolerated because they might be true. But as Bilgrami acutely observes, the first premise (that our past opinions have been wrong) is stated from *the point of view of our present opinions*. How then can we "be diffident in holding our present opinions in the way that the second premise requires us to be"? We may well be diffident about our present opinions, but to that extent "the first premise is that much shakier than Mill presents it."[44]

What if we say instead that Mill's argument does not require us to be skeptical regarding *all* our current beliefs; that in fact we "make epistemological *progress*, and cumulatively build up on a fund of truths via rejecting past convictions in the course of the history of inquiry;" and thus we can at least have confidence "in our current judgments about our past beliefs being false."[45] Again, however, this maneuver is unable to rescue Mill's argument from its non-credible epistemology. The underlying difficulty is that the "pervasive diffidence which we are supposed to have in our opinions . . . *is due to a conception of truth which has it that we can never know when we have achieved the truth* for any belief."[46]

Mill's argument for free speech in this way requires us to accept that we should seek the Truth, but that we can never be confident we have attained what we epistemologically seek.[47] There is a deep tension between these two propositions, a tension to which the sheer fact of being rational provides no apparent solution without appealing to further substantive moral or political values such as the virtues of a society characterized by a diversity of opinion.[48] But having acknowledged this, we are now in the sphere of internal reasons which opens up space for dialogue on substantive values and justifications for tolerating different dissenting opinions.[49] As a conceptual matter, the argument for publishing the cartoons now stands on the same normative ground as the

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43. Bilgrami, *supra* note 14, at 177.

44. *Id*. at 178.

45. If there are beliefs whose truth epistemic progress via falsification allows confidence, then to that extent free speech need not be necessary—at least regarding them. But Mill will not permit any exceptions to free speech for some beliefs. He will not allow, for example, that our convictions (now held with confidence) that certain beliefs are false are immune from his conclusion about tolerance and free speech. *Id*. at 179.

46. *Id*. at 179–80.

47. The argument is not that we cannot attain the truth; only that we cannot ever *know* that we have attained it. One could then relinquish truth as a goal of inquiry and seek something less than the truth. But as Bilgrami notes, "[i]f truth, the property of beliefs we never are confident we have achieved, is no longer a goal of inquiry, if it is replaced by something weaker which we *can* be confident of having achieved when we have achieved it, then Mill loses his premises altogether." *Id*. at 181.

48. *Id*.

49. On the basis of value-based reasoning and international and comparative legal analysis, Waldron thus reaches the conclusion that the content-based restriction doctrine is a "blind-alley" and example of "path-dependency" in First Amendment jurisprudence. Jeremy Waldron, Holmes Lectures at Harvard Law School: Libel and Legitimacy (Oct. 5–7, 2009).

argument for suppressing their publication. A further set of arguments is needed for the inquiry to continue.

C. Group Libel and Human Dignity

Before turning to the complex issues of religious piety and sanctity and whether substantive values of this kind are properly protected by the right to freedom of religion and belief, we are yet to address the question raised above: Whose harm exactly is at issue here? Post is surely correct that suppressing provocative and polemical speech targeting the religious sensibilities of the pious may cause harm to speakers by limiting their liberty and restricting the diversity and vibrancy of opinions in society. Even if we concede this, however, what about the harm which such speech may cause to its targets? How does this harm factor into a liberal algebra of individual rights?

Here we can see the kind of tension internal to secular liberalism to which Bilgrami alludes. Individual liberty is not the only substantive value at stake. There is at least one other important justification for suppressing speech which may not rise to the level of inciting imminent violence but nonetheless seeks to stir up religious hatred: the notion of human dignity and the need to protect social groups from certain forms of group libel or defamation. As Waldron has argued, legal restrictions on hate speech

> are not restrictions on thinking; they are restrictions on more tangible forms of message. The issue is publication and the harm done to individuals and groups through the disfiguring of our social environment by visible, public and semi-permanent announcements to the effect that in the opinion of one group in the community, perhaps the majority, members of another group are not worthy of equal citizenship.[50]

Germany's penal code thus prohibits attacks on human dignity by insulting, maliciously maligning, or defaming part of the population.[51] A specific French provision prohibits defamation of groups.[52] The Canadian province of Manitoba has a defamation statute which proscribes the "publication of a libel against a race, religious creed, or sexual orientation."[53] British laws forbid the expression of racial or religious hatred.[54] And Australian federal legislation prohibits actions that insult, humiliate, or intimidate a group of people because of their race, color, or national or ethnic origin.[55]

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50. Waldron, *supra* note 24, at 5.

51. Strafgesetzbuch [StGB] Nov. 13, 1998, Bundesgesetzblatt [BGB1] 945, § 130(1)(2). *See also* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1153, 1181 (2004).

52. Loi nº 81-637 du 29 juillet 1881, art. 29 (prohibiting group and individual defamation).

53. Defamation Act, R.S.M., ch. D 20 (1987) (prohibiting "[t]he publication of a libel against a race, religious creed or sexual orientation, likely to expose persons belonging to the race, professing the religious creed, or having the sexual orientation to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people").

54. The Public Order Act, 1986, c. 64 § 18 (Eng.).

55. Racial Hatred Act, 1995 (Cth.). *See also* The Racial and Religious Tolerance Act, 2001, s 1 (VIC) (noting that vilifying conduct diminishes the "dignity, sense of self-worth and belonging to the community" of individuals and groups and is contradictory to the principle of democracy).

In the United States, the Supreme Court upheld the idea of group libel in 1952 in *Beauharnais v. Illinois*.[56] In addition, various states have historically enacted group libel statutes in their criminal codes proscribing the holding up to ridicule, hatred, or contempt any group or class of people because of their race, color, or religion.[57] Since the Supreme Court's 1964 decision in *New York Times v. Sullivan*[58] and ensuing cases, however, the status of *Beauharnais* and the whole notion of group libel as an exception to protected speech under the First Amendment has been in doubt.[59]

For Waldron, the key to understanding the notion of group defamation lies in the concept of the *dignity* of the persons affected—dignity "in the sense of their basic social standing, the basis of their recognition as social equals and as bearers of human rights and constitutional entitlements."[60] A well-ordered democratic state must be concerned with upholding and vindicating important aspects of the legal and social status of its citizens. Thus, laws regarding group libel are set up to "vindicate *public order*, not just by preempting violence, but by upholding against attack a shared, public sense of the basic elements of each person's status, dignity, and reputation as a citizen or member of society—particularly against attacks predicated upon the characteristics of some particular social group."[61] While laws against racial or religious defamation are framed in terms of group reputation, they are not ultimately concerned with groups *per se*, but rather with the basic social standing of individual members of groups. In this respect, the concern is ultimately individualistic: such laws "look instead to the basics of social standing and to the association that is made . . . between the denigration of that social standing and some characteristic associated more or less *ascriptively* with the group."[62]

Waldron agrees with Post that while *offense* and *dignity* are closely related and often entangled in complex ways when a racial or religious group is hatefully denigrated, they are not the same thing. He thus supports Post's claim that deeply offensive, distressing and even assaultive speech may justifiably be protected in a well-ordered democracy.[63] But this alone does not end the inquiry. It does not answer, for example, the question of whether visible manifestations of

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56. 343 U.S. 250, 251, 267 (1952) (upholding the constitutionality of a statute prohibiting the publication or exhibition of any writing or picture portraying the "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion").

57. *See* CONN. GEN. STAT. § 53-37 (2007); 720 ILL. COMP. STAT. ANN. 5/27-1 (1961); MASS. ANN. LAWS ch. 272, § 98c (2000); MONT. CODE ANN. § 45-8-212 (1984); NEV. REV. STAT. § 200.510 (1979). *See also* Kenneth Lasson, *In Defense of Group-Libel Laws, or Why the First Amendment Should Not Protect Nazis*, 2 HUM. RTS. ANN. 289, 298 (1985).

58. 376 U.S. 254 (1964).

59. *But cf.* Waldron, *supra* note 24, at 19 (arguing that "it is not at all clear why the reasoning in *New York Times v. Sullivan* should protect the defendant in the *Beauharnais* case").

60. *Id*. at 15.

61. *Id*. at 9 (emphasis added).

62. *Id*. at 14 (emphasis added). Thus, "[m]embers may belong ascriptively to a group by virtue of some shared characteristics: race, ethnicity, religion, gender, sexuality, and national origin." *Id*. at 14. In this respect, group defamation "sets out to make [group membership] a liability by denigrating group-defining characteristics or associating them with bigoted factual claims that are fundamentally defamatory. A prohibition on group defamation, then, is a way of blocking that enterprise." *Id*. at 16.

63. *See infra* Part III.D.

hatred directed towards racial and religious groups (especially vulnerable minorities) should be suppressed on the grounds of vindicating a basic conception of public order premised on the equal dignity and status of persons.

Entirely internal to liberal argument, Waldron's notion of dignity as lying at the core of group defamation laws destabilizes Post's one-sided framing of the cartoons controversy. Waldron shows, persuasively in my view, why the free speech principle may need to be limited in certain circumstances, and why dignity and the rights and freedoms of others may provide a sufficient and necessary justification to do so. Whether the Danish cartoons meet this threshold may be doubted.[64] But the critical issue is how we understand and give meaning to notions of "dignity" and the "rights and freedoms of others," especially in this context the right to freedom of religion and belief. It is to these questions we can now turn.

III. FREEDOM OF RELIGION AND BELIEF

The discussion in Part II argues that it is a conceptual error to view the suppression of blasphemy and speech inciting religious hatred more generally *solely* in terms of the threat they may pose to the freedom of individual speakers. Blasphemy, for example, may also be viewed as violence done to deeply valued human relations and thus to the limits that define particular kinds of freedom. The difficulty, as Talal Asad has observed, is that

> [a]ngry Muslim responses to the publication of the Danish cartoons are seen by secularists as attempting to reintroduce a category that was once a means of oppression in Europe, while they see themselves critiquing, in the name of freedom, the power to suppress human freedom. For the worldly critic, there can be no acceptable taboos. When limits are critiqued, taboos disappear and freedom is expanded.[65]

The word freedom is doing a great deal of work here and needs carefully to be unpacked. The first puzzle concerns justified limits on the free speech principle. In First Amendment jurisprudence, limitations are well-accepted: laws and judicial decisions relating to fighting words, defamatory speech, obscenity, and indecency; laws relating to child pornography; and copyright and patent laws all impose restrictions on freedom of expression.[66] It is thus not the constraint *per se* that seems intolerable, but rather the reasons for, and terms in which, the constraint is articulated. What does this particular array of restrictions and configuration of free speech doctrine tell us about liberal conceptions of human freedom?

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64. For Waldron, exercise of the right to publish the cartoons by the editors of *Jyllands-Posten* was "fatuous, unnecessary and offensive" but the cartoons "make some sort of twisted contribution . . . and I believe they should be tolerated as such." Waldron, *supra* note 49, at 16; *cf.* Geert Wilders, Party for Freedom, Contribution to the Parliamentary Debate on Islamic Activism, http://www.geertwilders.nl/index2.php?option=com_content&do_pdf=1&id=1214 (comparing the Qur'an to Hitler's Mein Kampf and the film *Fitna* (meaning "strife" in Arabic), which juxtaposes Quranic verses with images of 9/11 and other terrorist attacks).

65. Asad, *supra* note 4, at 55.

66. *See, e.g.*, William van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 121–25 (1982) (noting that the category of "'the' freedom of speech" does not include perjury, obscenity, defamation, fighting words, commercial fraud, criminal solicitation, etc.).

In order to answer this question, we need to understand the rise of the liberal democratic state and secular modernity in the West and, in particular, how the conceptual separation between public and private functions in liberal theory. This is a formidable task, one well beyond the scope of this Article. For present purposes, let me offer just a few observations.

A. The Public/Private Divide

The defining ideas of the liberal state are neutrality and a putative public/private divide. Religion is seen as separated from the state and properly understood to be within the private sphere. This leaves a "neutral" public sphere that seeks to maintain its neutrality through rigorous commitment to a scheme of individual rights. The state may thus have no cultural or religious projects or indeed any collective goals of its own beyond the protection of the liberty and security of its citizens.

These distinctions are often traced historically to the eighteenth century Enlightenment. It was Immanuel Kant who in 1795 famously distinguished between the public and private uses of reason: the idea that reason must be "free" in its public use (*aude sapere* exercised in "broad daylight") and "submissive" in its private use (the subjection of reason to the particular ends in view).[67] But as Michel Foucault observed, this is "term for term, the opposite of what is ordinarily called freedom of conscience."[68] Two centuries later, we see the private sphere as a space of non-interference from state and religious authority while the public sphere is viewed as a space where rationalism itself imposes limits and constraints on freedom of thought, conscience, and speech—what Foucault refers to as Kant's "contract of rational despotism with free reason: the public and free use of autonomous reason will be the best guarantee of obedience, on condition, however, that the *political principle that must be obeyed itself be in conformity with universal reason*."[69]

Here we see perhaps the defining effort in modernity to use external reasons to justify liberal notions of autonomy (the "public and free use of autonomous reason"), neutrality (the "political principle"), and right ("universal reason") so as to bind all rational people simply in virtue of their rationality. The difficulty is that each of these notions inexorably rest, and depend for their coherence, upon distinctive and contingent internal reasons and substantive values. The liberal-autonomous subject remains in part a religious subject, but only in the private sphere where religion is tacitly assumed or (re)defined in Protestant terms to take the form of private "belief or conscience." As noted above, the neutrality of the state then simultaneously mediates and circumscribes this private sphere though a scheme of individual rights and the right to freedom of religion and belief in particular. And the notion of secular or universal right is encompassed in the categorical rationalism of the liberal algebra itself: "Act

67. Immanuel Kant, *An Answer to the Question: What is Enlightenment?*, *in* WHAT IS ENLIGHTENMENT? EIGHTEENTH-CENTURY ANSWERS AND TWENTIETH-CENTURY QUESTIONS (James Schmidt ed., 1996).

68. Michel Foucault, *What is Enlightenment?*, *in* THE FOUCAULT READER 32 (Paul Rabinow ed., 1984).

69. *Id.* (emphasis added).

externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law."[70]

Each of these propositions involve fraught and contested claims that in effect define Enlightenment as the discovery of an exit, a "way out," a "process that releases us from the status of 'immaturity'" (i.e. from a state where religious authority takes the place of our conscience) by a "modification of the preexisting relation linking will, authority, and the use of reason."[71] The consequences of these complex moves for secular liberalism are well-described by Saba Mahmood:

> [C]ontrary to the ideological self-understanding of secularism (as the doctrinal separation of religion and state), secularism has historically entailed the regulation and re-formation of religious beliefs, doctrines, and practices to yield a *particular normative conception of religion* (that is largely Protestant Christian in its contours). Historically speaking, the secular state has not simply cordoned off religion from its regulatory ambitions but sought to remake it through the agency of the law. This remaking is shot through with tensions and paradoxes that cannot simply be attributed to the intransigency of religionists (Muslims or Christians).[72]

Mahmood notes that under the Religion Clauses of the First Amendment, courts constantly need to distinguish and decide which manifestations of religious belief to recognize and accommodate when conflicts arise with "neutral laws of general application."[73]

A further consequence for liberal theory is the so-called "mind-action" distinction which forms a core premise in liberal rights discourse. This applies as much to claims of free speech as to freedom of religion. Freedom of thought and conscience are each considered to be *absolutely* protected from interference by the law, i.e. non-derogable and not subject to limitation.[74] The right to *manifest* one's

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70. Waldron, *supra* note 20, at 14–15.

71. The idea that metaphysics was a "premise derived from another source" led to Kant's statement that "he needed to set thinking aside in order to make room for faith." Pope Benedict XVI, Address at University of Resenburg, Faith, Reason and the University: Memories and Reflections (Sept. 12, 2006). The result was that he "anchored faith exclusively in practical reason, denying it access to reality as a whole." *Id.*

72. Mahmood, *supra* note 3, at 87. In this respect, the process of democratic self-government and space of public debate can be seen not simply as a space of expression and rational deliberation but of *formation* in which "both coercive, regulatory, and rhetorical power is necessary in order to produce the *right kind of citizen subject* who can inhabit the norms of a liberal democratic polity. Contra Post, the public sphere is not simply a domain of unhindered communication, but also a disciplinary space that inhibits certain kinds of speech while enabling others, equipping people to hear specific types of arguments while remaining deaf to others." Saba Mahmood, *Comments by Saba Mahmood on the Una's Lecture: Religion and Freedom of Speech*, http://townsendcenter.berkeley.edu/pubs/post_mahmood.pdf (emphasis added).

73. *See*, *e.g.*, WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2007) (analyzing the unsuccessful struggle of Catholic, Protestant, and Jewish families to preserve the practice of placing religious artifacts such as crosses and stars of David on the graves of a city-owned burial ground).

74. ICCPR, *supra* note 23, art. 20. Article 18(2) of the ICCPR provides that no person "shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice." *Id.* art. 18(2). The state, for example, is absolutely prohibited from proscribing membership of certain religions under law; from coercing individuals to reveal their religion without consent; or

thought or conscience in the form of speech or other action is, however, subject to reasonable limitation by the state on certain specified grounds. There is a rich jurisprudence at the domestic and international levels dealing with the fragile and unstable divide between thought and conscience on the one hand, and action related to belief on the other.[75]

We have seen above how hate speech laws, which impose limits on the "public and free use of autonomous reason," are thus justified on the dual premises that (1) they leave the *forum internum* of thought and conscience undisturbed, and (2) impose restrictions on speech only to the extent necessary to protect the autonomy and dignity of others from visible manifestations of hatred. Interestingly, Islamic law makes a similar distinction to justify the suppression of blasphemy. It is a central tenet of Islam that there may be no coercion in matters of religion.[76] In Islamic law, Muslims remain free to believe whatever they wish in matters of religious or other belief.[77] Laws proscribing blasphemy limit only the extent to which those beliefs can be publically acted upon in relation to the rights and freedoms of other Muslims. There is a different normative understanding, however, of the public sphere and of how religion and religious belonging to a particular way of life (as distinct from *religious belief per se*) define the limits and contours of political toleration.

On this understanding, blasphemy is not concerned so much with the challenge of a new truth as "something that seeks to disrupt a living relationship."[78] In this respect, Sharia does restrict the individual right to behave as one wishes in public, but any notion of separation between "public" and "private" spheres is differently understood than in the idealized liberal state. Morality is not regarded solely as a private matter. In addition to what liberal theory accepts as "time, manner, and place" restrictions in the public sphere, religious morality and piety are accepted as imposing norms of appropriate speech and behavior on the individual while, conversely, the "breaching of 'private' domains is disallowed in Islamic law."[79] In this sense, "the limits of

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from using threats, physical force, or penal sanctions to compel individuals to adhere or recant to certain religious beliefs. *See* BAHIYYIH G. TAHZIB, FREEDOM OF RELIGION OR BELIEF—ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION 26 (1996).

75. For discussion of cases involving the belief-action distinction in the jurisprudence of the European Court of Human Rights see Peter Danchin & Lisa Forman, *The Evolving Jurisprudence of The European Court of Human Rights and the Protection of Religious Minorities*, *in* PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 192 (Peter G. Danchin & Elizabeth A. Cole eds., 2002); s*ee also* CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 74–79 (2001) (discussing the difficulties of the internal/external dichotomy in European Court of Human Rights case law).

76. The Holy Qur'an 2:256 ("There is no compulsion in religion"); *Id*. 18:29 ("let him who wills have faith, and him who wills reject it").

77. Asad, *supra* note 4, at 39–40 (citing MUHAMMAD SALIM AL-'AWWA, *AL-HAQ FI AL-TA'BĪR* (THE RIGHT TO FREE SPEECH) 23 (1998) (arguing that in the sharia "[f]reedom of belief means the right of every human being to embrace whatever ideas and doctrines he wishes, even if they conflict with those of the group in which he lives or to which he belongs, or conflicts with what the majority of its members regard as true")).

78. Asad thus notes that the "passionate reaction to 'blasphemers' is typically directed not at the latter's disbelief but at their alleged violence." Asad, *supra* note 4, at 27.

79. Asad, *supra* note 4, at 17. As Asad acutely observes, the extent of legal regulation and intervention into "domestic space" has expanded exponentially in the liberal welfare state as the

freedom are differently articulated in relation to spaces that may roughly be described as 'private' and 'public,' and different kinds of discourse are socially available to distance what is repugnant, whether transcendent or worldly."[80] We will never understand blasphemy if all we see in it is a *threat* to freedom as opposed to a competing *conception* of freedom developed according to a different understanding of the interrelationship between individual freedom and social order.

B. Public Order

If the static external/internal dichotomy between free speech and blasphemy is relinquished, how then should we understand laws which impose restrictions on certain types of speech or incitement involving religion or belief whether in European or Islamic states or elsewhere? Whether limits are imposed on blasphemy, incitement to religious hatred, group libel, or defamation of religion (each overlapping and raising complex and variegated questions of their own), can such laws be viewed in certain contexts as seeking to vindicate public order by upholding against attack a shared sense of the basic elements of status, dignity, and reputation of members of a society?

In order to address this question, let us consider briefly recent debates and reform efforts in the United Kingdom. Following the 9/11 terrorist attacks, the British Government introduced the Anti-Terrorism, Crime and Security Bill which sought *inter alia* to amend the Public Order Act 1986 to extend its provisions on incitement to racial hatred to include incitement to religious hatred.[81] The effort failed in the House of Lords, but in 2005 the Government reintroduced the Bill and Parliament finally enacted the Racial and Religious Hatred Act 2006 which creates a new offense of stirring up hatred against persons on religious grounds.[82] Two years later, on May 8, 2008, the Criminal Justice and Immigration Act 2008 abolished the common law offences of blasphemy and blasphemous libel in England and Wales.[83]

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boundaries of the citizen's right to privacy, "on which her moral and civic freedom rests," have been significantly redrawn by "public" law to authorize ever more bureaucratic action in (formerly) "private" domains. *Id*. at 36–37.

80. *Id*. at 37.

81. *See* Anti-Terrorism, Crime and Security Bill, 2001, H.C. Bill [49] (Eng.). For discussion, see Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to September 11?*, 65 MODERN L.R. 724 (2002).

82. Religious hatred is defined in section 29A as "hatred against a group of persons defined by reference to religious belief or lack of religious belief." RRHA, *supra* note 35, c.1, § 29A. The offense is defined in Section 29B in terms of a "person who uses threatening words or behavior, or displays any written material which is threatening . . . if he intends thereby to stir up religious hatred." *Id.* § 29B. For present purposes, it is important to note that section 29J of the Act expressly excludes "discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs and practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practicing their religion or belief system." *Id.* § 29J. See *infra* Part III.D for discussion of the distinction between group libel and offense.

83. Criminal Justice and Immigration Act, 2008, c. 4, § 79 (Eng.).

Prior to their abolition, these offences extended only to the Church of England and in certain respects to Christianity as a whole.[84] The offenses had consistently been upheld against challenge not only in the English courts, but also in the European Court and Commission of Human Rights as being both non-discriminatory and compatible with the right to free speech under the European Convention on Human Rights ("ECHR").[85] But in recognition of increasing Islamophobia and hostility towards Muslims and in light of longstanding calls by reform bodies to abolish or amend the law relating to religious offenses, they became subject to review by a House of Lords Select Committee during the 2003 debate over whether to introduce a new offence of incitement to religious hatred which would have the effect of extending the law's protection to Britain's Islamic and other religious communities.[86] Interestingly, after an exhaustive debate the Committee was unable to make any specific recommendations failing to recommend either abolition of existing blasphemy laws or the creation of a new offense of incitement to religious hatred.

As Ian Hunter notes, the underlying problem was the apparent incompatibility between the language of the ECHR and the terms in which European political and legal orders have historically dealt with the problems of sectarian conflict and religious freedom.

> As the inheritors of these settlements, liberal political and legal orders are not involved in the game of balancing potentially conflicting rights, but in the quite different task of adjusting degrees of freedom (whether of speech or religion) in light of an assessment of the likely threats to personal and state security arising.[87]

The Committee thus acknowledged that its judgments must be informed by the need to ensure continued stability, tranquility, and mutual tolerance between major religious groups and secular segments of society, and equality of

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84. In *R. v. Lemon* [1979] 1 All E.R. 898, 921–22, Lord Scarman criticized blasphemous libel at common law on the grounds that it did not extend to "protect the religious beliefs and feelings of non-Christians" (which was necessary in an "increasingly plural society such as that of modern Britain") but rather belonged to a "group of criminal offences designed to safeguard the internal tranquility of the kingdom." The rationale for the limited scope of the offences is related to the historical relationship between the state and nation (which is dominantly Protestant) in Britain.

85. *See* Gay News Ltd. v. U.K., 5 Eur. H.R. Rep. 123 (1983) (upholding the prosecution of a British magazine for publishing a poem found to be blasphemous to Christians because the "main purpose" of the English common law offense of blasphemous libel is "to protect the rights of citizens not to be offended in their religious feelings"); Choudhury v. U.K., 12 H.R.L.J. 172 (1991) (declaring an application contending that English law was prejudicial against Islam inadmissible because there was no positive obligation on states under the Convention to protect all religious sensibilities); Wingrove v. U.K., 24 Eur. H.R. Rep. 1 (1996) (upholding the British government's refusal to permit circulation of a film found to be offensive to Christian sensibilities because the government had the legitimate aim to "protect[] the rights of others"); Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H. R. 56 (ser. A) (1994) (upholding the Austrian government's seizure of a film on the basis that it constituted an attack on the Christian religion and Roman Catholicism in particular and concurring that the government "acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.").

86. *See* HOUSE OF LORDS, RELIGIOUS OFFENCES IN ENGLAND AND WALES - FIRST REPORT, 2003.

87. Ian Hunter, *Religious Offenses and Liberal Politics: From the Religious Settlements to Multi-Cultural Society* (unpublished manuscript at 15, on file with author).

protection from intolerance on the basis of belief or no belief.[88] But not only was there no apparent way of reconciling this conception of toleration with the liberal algebra of rights, this approach also appeared to contradict the traditional conception of England as a "state whose church is part of its constitution" where "religious belief continues to be a significant component or even determinant of social values" and thus a state that should "have the role of embodying the religious identities of its constituent communities."[89] Caught between the three positions of needing to (1) maintain religious peace, (2) respect universal human rights, and (3) protect the religious freedom and cultural identity of the nation, the Committee was paralyzed in a remarkable situation where "the actual organization of the liberal political and juridical order remain[ed] out of reach of a central mode of modern moral reflection."[90]

The point of this analysis is to suggest that, in contrast to the claims of classical liberal theory, laws imposing limitations on blasphemy or incitement to religious hatred may not *necessarily* be inconsistent with either conceptions of human rights in international law or the public law of modern liberal democratic orders. The more interesting question is why blasphemy laws have progressively lost their basis in sacrilege and assumed instead the form of public order offences in the secular *nomos* of modern Europe, and why conversely these laws have assumed neither of these forms in the United States. If the analysis above is correct, then the answer lies in the history of competing conceptions of the public/private divide,[91] the role of religion in general and Christianity in particular in imagining and realizing that divide,[92] and how these legal and

88. SELECT COMMITTEE ON RELIGIOUS OFFENCES IN ENGLAND AND WALES, REPORT, 2002–3, H.L. 95–I, at 7.

89. Hunter, *supra* note 87, at 17.

90. *Id*. at 16.

91. There is an important historical difference between the United States and United Kingdom on the question of establishment of religion. In the United States, the eighteenth century Enlightenment notion of non-establishment is entrenched as an express constitutional norm, whereas in the United Kingdom the Church of England remains established within an older tradition of common law constitutionalism.

92. Hans Kohn first made the distinction between *territorial-civic* and *ethnocultural* nationalism, the former conceived as a political movement to limit governmental power and secure civic rights that developed during the Enlightenment, the latter conceived as based on an older conception of the nation as the product of objective facts pertaining to social life. HANS KOHN, NATIONALISM: ITS MEANING AND HISTORY 29–30 (1955). The United States and United Kingdom can be viewed again as competing examples of the relationship between liberalism and nationalism, the former conceived in an immigrant conception as an "association of citizens" committed to the abstract ideals of liberty, equality, and republicanism and not based on any single nationality, the latter conceived as a traditional "nation-state" where a single national or *collective* identity (shaped in part by a dominant religion) defines the public sphere. *See* Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, *supra* note 17, at 30–33. Given these different historical trajectories, it is unsurprising that in the United States while the "logic of blasphemous libel required courts to find ways of seeing the churches or Christianity in general as indispensible supports of government . . . . [b]y the middle of the nineteenth century, American courts found themselves unable to do this, and they struck down prosecutions for blasphemy not on free speech but on anti-establishment grounds. Since Christianity could no longer be seen as part of the organized apparatus of social control, then vulnerable or not, it would just have to fend for itself in the unruly marketplace of sacred and profane ideas." Waldron, *supra* note 24, at 20.

political philosophies have generated competing conceptions of pluralism and toleration in the liberal state.[93]

C. Conflicts of Rights

While blasphemy laws may be understood in this way as protecting dignity and public order, they may also be defended in terms of protecting the right to freedom of religion and belief itself. On this approach, the difficulty we confront is not a supposed conflict between a right (free speech) and an oppressive conception of the good (blasphemy), but rather a genuine conflict of fundamental rights and thus *internal* to the question of right itself.

The critical point here is that freedom of thought, conscience, and expression, justified on Enlightenment-rationalist and secular-modernist grounds, is the dominant value in liberal theory. There are two major difficulties with this approach. First, as a normative matter, why exactly should free speech take precedence over respect for religions and the right to freedom of religion and belief? Nothing in the ICCPR supports the view that Article 19 is hierarchically superior to Article 18. Conversely, Article 20(2) in fact requires states to prohibit by law advocacy of religious hatred rising to the level of incitement to discrimination, hostility, or violence.[94]

Second, freedom of religion is compatible with this view only to the extent it encompasses an inviolable private or inner realm of "belief" or "conscience"—the so-called *forum internum* discussed previously—separate from manifestations of that belief.[95] On this view, you may believe in any prophet or religion you wish, provided you don't manifest your beliefs in such a way as to restrict the rights of others to believe (or not to believe) or express (or not to express) themselves as they choose. The difficulty with this argument is that it relies on a prior assumption which equates religion with *belief* or *conscience*. As Michael Sandel has argued, this conception connects the case for religious liberty and state neutrality with a liberal conception of the person whereby the right is conceived as prior to the good and the self as prior to its ends, i.e. the argument seeks its justification in the realm of external reasons:

> It holds that government should be neutral toward religion in order to respect persons as free and independent selves, capable of choosing their religious convictions for themselves. The respect this neutrality commands is not, strictly speaking, respect for religion, but respect for the self whose religion it is, or

93. *See, e.g.*, MICHAEL WALZER, WHAT IT MEANS TO BE AN AMERICAN 27–30 (1992) (noting the distinction between "New World" and "Old World" pluralism, the former premised on the nondiscrimination principle in the context of a dominantly immigrant society, the latter premised on situated cultural and religious majority and minority groups territorially concentrated in historic territories).

94. ICCPR, *supra* note 23, art. 20(2).

95. The point is not that free exercise of religion is not protected, but that the scope of limitations on the manifestation of religious beliefs will depend on the theory of religious toleration employed. Note, for example, the uncertainty following the Supreme Court's decision in *Employment Division v. Smith* regarding the scope of religious toleration in cases involving the enforcement of formally neutral, general laws that burden the free exercise of religion. 494 U.S. 872 (1990); *see, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993). The critical question is the extent to which the state recognizes a limited sphere of *collective* autonomy.

> respect for the dignity that consists in the capacity to choose one's religion freely. Religious beliefs are "worthy of respect", not in virtue of what they are beliefs *in*, but rather in virtue of being "the product of free and voluntary choice", in virtue of being beliefs of a self unencumbered by convictions antecedent to choice.[96]

The equation of religion with conscience is the end result of the attempt to resolve a deep and enduring puzzle in Enlightenment philosophical thought. How was the state to be neutral between religion and non-religion while at the same time accord religion special protection? As noted by Andrew Koppelman, "'[c]onscience' promises a way out of this dilemma by describing the basis of free exercise [of religion] in a way that specifies only the internal psychology of the person exempted, without endorsing any claims about religious truth."[97] The power of the argument is that *prima facie* it avoids appealing to any particular substantive moral or political values in its premises. But here we meet two critical objections.

First, why should persons from widely divergent religious and cultural traditions accept the proposition that only conscience and not religion *per se* is the proper object of liberal toleration? Outside of Euro-Atlantic modernity, where religion and state have entirely different historical configurations, and where religious identities define differences between majority and minority groups and entire ways of life, this simply does not work.[98] Non-Western religious traditions such as Islam, for example, do not make the distinction between the domains of the secular and the sacred or, as in the case of Hinduism, hierarchically subsume the secular under the sacred.[99] Even for Madison and Jefferson in the eighteenth century it was precisely because religious duties were to be exercised according to conscience, and because belief was not governed by the will, that religious liberty was held to be an inalienable right.[100] Second, even if this objection is accepted, why should only *religious* exercises of conscience be singled out for special protection?

Similar to the difficulties with Mill's argument for free speech discussed in Part II,[101] this argument requires us to accept that the right to freedom of religion should be understood (1) in terms of interiorized conscience, and (2) in terms of

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96. Michael Sandel, *Religious Liberty: Freedom of Choice or Freedom of Conscience*, *in* SECULARISM AND ITS CRITICS 33, 84 (Rajeev Bhargava ed., 1998).

97. Andrew Koppelman, *No Respect: Brian Leiter on Religion* (Northwestern Public Law Research Paper No. 10-07, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1544484.

98. As Sandel suggests, this is especially the case for those who "regard themselves as claimed by religious communities they have not chosen" with the result that "[n]ot all religious beliefs can be redescribed without loss as 'the product of free and voluntary choice by the faithful.'" Sandel, *supra* note 96, at 85; *see also* Bhiku Parekh, *Superior People: The Narrowness of Liberalism from Mill to Rawls*, TIMES LITERARY SUPPLEMENT, Feb. 25, 1994, at 11–13 (suggesting that classical liberalism linked "diversity to individuality and choice, and valued the former only in so far as it was grounded in the individualist conception of man" with the result that it "ruled out several forms of diversity . . . [such as] traditional and customary ways of life, as well as those centered on community").

99. T.N. MADAN, MODERN MYTHS, LOCKED MINDS: SECULARISM AND FUNDAMENTALISM IN INDIA 15 (1997).

100. See ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE (2010), for a recent discussion of the distinction between "autonomy" and "conscience."

101. *See supra* note 45 and accompanying text.

conscience viewed as "freely chosen."[102] The first proposition is utopian in identifying "conscience" as a universal norm or value that all rational people should accept and be bound by; the second proposition is apologist for a certain Protestant conception of religion. Not only is the first proposition in tension with the second, but each also relies on reasons internal to a particular historically- and culturally-situated normative tradition. If the right to freedom of religion is conceived not solely as protecting autonomy in the form of privatized conscience but as encompassing the ascriptive, communal, public, and ethically sensitive aspects of religions such as Islam, and if the notion of religious duty is viewed in this broader conception as a constitutive end essential to the good and personal identity, then the existing contours and shape of the liberal argument collapse and the need arises to engage with a genuine conflict of interests *internal* to the right itself.

Why, for example, should liberal assumptions not now be reversed as many representatives of Islamic states have urged and the right peacefully to manifest one's religion be regarded as a dominant normative value? On this view, freedom of thought and opinion remains absolutely protected, but *manifestations* of that opinion are now open to limitation to the extent that they incite discrimination, hostility, or violence toward religious groups. The fraught task of calibrating the respective rights and interests now resumes, for instance, in undertaking to draw the line between speech that is "gratuitously offensive" and speech that, though offensive, contributes to "any form of public debate capable of furthering progress in human affairs."[103] But while the heremeneutic difficulties remain, the method and mode of reasoning has shifted. It is now respect for the intrinsic value and moral importance of religious belief and practice that provides the unspoken background and tacit starting point for the ensuing rights discourse.

Different states in different parts of the world, each with their own unique histories and constitutional settlements, continue to struggle with these questions and reach different forms of accommodation of the rights claims at issue. The critical point, however, is that once the concept of religion is viewed in pluralist, as opposed to one-sided Enlightenment-rationalist or Protestant terms, and once the collective interests that the right to freedom of religion protects are explicitly brought back into the analysis, notions such as "discrimination" and "harm" lose the self-assuredness they assume in liberal rights discourse and become once again essentially contested concepts within divergent religious and cultural nomian spheres. Such conceptions of value pluralism and the conflicts that inevitably arise between fundamental rights have profound implications for any mapping of individual toleration whether in domestic or international law.[104]

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102. *See infra* text accompanying note 129 for discussion of Locke's conception of the free and unfree conscience.

103. This distinction is drawn by the Court in *Otto-Preminger-Institut v. Austria*. 295 Eur. Ct. H. R. 49 (ser. A) (1994). Post notes that the distinction between the style and substance of speech is what underlies British law on blasphemous libel, which permits anything to be said so long as the "decencies of controversy are observed." Post, *supra* note 1, at 80.

104. *See infra* Part IV.

D. Offense and Harm

Let us turn to a final objection regarding freedom of religion in this context: that contrary to the opinion of the European Court of Human Rights in *Otto-Preminger-Institut v. Austria,* persons do not have a right not to be insulted in their religious beliefs because offense of this kind does not inhibit the right to practice a religion.[105] In response to the Court's assertion that a "spirit of tolerance" must be a feature of a democratic society, Post has argued that "democracy does not require toleration in the sense that persons abandon their *independent evaluation of the beliefs and ideas of others*."[106]

Recall again the distinction between defamation and offense discussed in Part II.[107] The type of speech at issue in this context is not defamation based on denigration of some shared ascriptive characteristics of a group (which would be covered by group libel), but rather speech which provocatively aims to cause *offense*, even when "the offense goes to the heart of what . . . [is regarded] as the identity of their group."[108] Waldron is thus careful to argue that the specific concern about group libel does not include protection of Islam itself or its founders:

> The group of all Muslims in society, the group of all followers of Islam, is a group of people committed to the one God, to his Prophet, Mohammed, and to the holy writings of the Koran. They—the individual Muslims—are entitled to protection against defamation, including defamation *as Muslims*. But that doesn't mean that the Prophet is to be protected against defamation or the creedal beliefs of the group. The civic dignity of the members of a group stands separately from the status of their beliefs, however offensive an attack upon the Prophet or even upon the Koran may seem.[109]

As a matter of international law, there is no express provision in human rights instruments such as the ICCPR or ECHR stating that individuals or groups have a right to be "free from injury to religious feelings."[110] Rather, these words have been used in ECHR jurisprudence as the European Court of Human Rights has stated that, while religious believers cannot expect to be exempt from all criticism and must tolerate the denial by others of their beliefs, the state does have a responsibility under Article 9 to ensure the peaceful enjoyment of believers' rights. Thus in *Wingrove*, the actions of the British government were found to be "intended to suppress behavior likely to cause justified indignation

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105. Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H. R. 47 (ser. A) (1994) (stating that "in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them").

106. Post, *supra* note 1, at 79–80 (emphasis added).

107. *See supra* note 63 and accompanying text.

108. Waldron, *supra* note 24, at 17; RRHA, *supra* note 35, § 29J (excluding "discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents").

109. Waldron, *supra* note 24, at 17.

110. ICCPR article 19(3) qualifies the right to freedom of expression by providing that the exercise of this right "carries with it special duties and responsibilities . . . [and] may therefore be subject to certain restrictions . . . provided by law and . . . necessary . . . [f]or respect of the rights or reputations of others." ICCPR, *supra* note 23, art. 19(3).

amongst believing Christians" and as a consequence "intended to protect the right of citizens not to be insulted in their religious feelings."[111]

The European Court's notion of injury to religious feelings appears *prima facie* to run afoul of the distinction between defamation and offense. It is a sacred cow of the liberal tradition that causing outrage, moral distress, or offense to others does not qualify as harm for the purposes of Mill's Harm Principle—the principle which holds that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[112] The reasons in favor of this proposition are well-known, the leading amongst which are the indispensability of ethical confrontation to the progress of new and better ideas in society and the cultivation of a certain open-mindedness in persons.[113]

On this basis, provocatively assailing certain *ideas*, *traditions*, or *symbols* even (or *especially*)[114] with the intent of causing offense to a group of persons ought to be distinguished from defaming or denigrating the group as such—the civic dignity of the members of a group stands separately from the status of their beliefs no matter how offensive the attack. The defamation/offense distinction thus explains the strong reaction in the West against proposals by Islamic states to prevent the defamation of religion and prophets. As argued by the philosopher Peter Singer, "[w]hile attempts to stir up hatred against adherents of a religion, or to incite violence against them, may legitimately be suppressed, criticism of religion as such should not be."[115]

There are two observations to make here. First, it is important to note again how the belief-action distinction is critical to the logic of this argument. The *forum internum* or *internal* sphere of personal thought, conscience, or belief of speaker and listener alike is absolutely protected from interference by the law, i.e. is nonderogable and not subject to limitation by the state. The critique of *ideas*, *symbols* or *traditions*—each located on the "value" side of the fact/value distinction—is within the sovereignty of this realm and thus inviolable. While critique does involve *action* or *manifestation of belief* in the form of speech or other

111. Wingrove v. U.K., 24 Eur. H.R. Rep. 1, 53 (1996); *see also* EVANS, *supra* note 71.

112. JOHN STUART MILL, ON LIBERTY 13 (Gateway 1955) (1859).

113. JEREMY WALDRON, *Mill and The Value of Moral Distress*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 120–23 (1993).

114. One philosophical argument made in support of the Danish cartoons was that, despite the offense they caused, "it was *even a good thing that pious Muslims felt injured*, because being hurt by criticism might provoke people to re-examine their beliefs–something vital both for democratic debate and ethical decision-making." Asad, *supra* note 4, at 19. In this respect, "criticism of (questionable) religious beliefs is presented as an *obligation of free speech*, an act carried out in the *knowledge and power of truth*." *Id.* (emphasis added).

115. Peter Singer, *To Defame Religion is a Human Right*, GUARDIAN, Apr. 15, 2009, *available at* http://www.guardian.co.uk/commentisfree/belief/2009/apr/15/religion-islam-atheism-defamation; *see also* International Religious Liberty Association, Statement of Concern about Proposals Regarding Defamation of Religions (Sept. 3 2009), http://irla.org/index.php?id=368 (recognizing that when speech constitutes incitement to violence or discrimination it may be limited according to existing international human rights law, but expressing concern that prohibiting the "defamation of religions" will not solve the underlying problem of crimes motivated by religious hatred but will instead increase religious intolerance and infringe the equally fundamental human rights of freedom of expression and religion, which allow for the critique of religious beliefs and practices).

expression and is thus potentially subject to reasonable limitation in the *forum externum*, it is not seen to interfere with the *forum internum* of listeners who, while potentially offended, insulted, and even threatened by the speech, remain free to believe in the tenets of their faith or religious tradition.

On this conception, we see familiar liberal assumptions at work again: speech is understood in terms of *autonomy* and religion in terms of *belief*. In the modern liberal state, religion is thus imagined as having two dimensions: in so far as it involves actual manifestations of belief and actions in the world, it is subject to regulation and control by the public (political and legal) spheres; in so far as it involves matters of conscience, it is imagined as occupying—in a state of inviolable freedom—the private sphere of personal belief, sentiment, and identity.[116] However this distinction is understood and calibrated in practice, the law both constructs and reflects the idea of a legal subject possessing an inviolable inner realm of ideas or beliefs separate from one's actions and "being in the world."

Second, if we change or adjust the conventional understandings of speech and religion underlying this conception, the implications for Mill's harm principle become significantly more complex as the problematic nature of the notions of harm and moral injury at work are made visible. Mahmood, for example, asks us to consider what constitutes religion and a proper religious subjectivity in the modern world? What ethical, communicative, and political practices may be necessary to make the kind of injury of religious pain caused by the Danish cartoons not mute but intelligible within the liberal calculus of rights?[117]

For Mahmood, the "modern concept of religion—as a set of propositions in a set of beliefs to which the individual gives assent—owes its emergence to the rise of Protestant Christianity and its subsequent globalization."[118] The distinctions between subject and object, and substance and meaning, are distinguishing features of modernity. Religious symbols and icons are one thing; sacred figures, with all the devotional respect they might evoke, another. Signs and symbols are only arbitrarily linked to the abstractions that human beings have come to revere and regard as sacred.[119] Muslims offended by the cartoons have thus collapsed the necessary distinction between the subject (the divine status attributed to Muhammad) with the object (pictorial depictions of Muhammad). Their agitation is a "product of a fundamental confusion about the materiality of a particular semiotic form that is only arbitrarily, not necessarily, linked to the abstract character of their religious beliefs."[120] The critical point for Mahmood is that, to the extent religion is

116. *See, e.g.*, TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 205 (1993) ("the constitution of the modern state required the forcible redefinition of religion as belief, and of religious belief, sentiment, and identity as personal matters that belong to the newly emerging space of private (as opposed to public) life").

117. Mahmood, *supra* note 3.

118. *Id.* at 72.

119. Religious signs, such as the cross, are thus not "embodiments of the divine but only stand in for the divine through an act of human encoding and interpretation." *Id.* at 73.

120. *Id.*

> primarily about belief in a set of propositions to which one lends one's assent, it is fundamentally a matter of choice. Once the truth of such a conception of religion, and concomitant subjectivity, is conceded then it follows that wrong-headed natives and Muslims can perhaps be persuaded to follow a different reading practice, one in which images, icons and signs do not have any spiritual consequences in and of themselves but are only ascribed such status through a set of human conventions . . . . It is this same vision that seems to inform the well meaning pleas circulating in Europe today for Muslims to stop taking images such as the Danish cartoons so seriously, to realize that the image (of Muhammad) can produce no real injury given its true locus is in the interiority of the individual believer and *not* the fickle world of material symbols and signs. The hope that a correct reading practice can yield compliant subjects crucially depends, in other words, upon a prior agreement about what religion *should* be in the modern world.[121]

The moral injury experienced by Muslims from publication of the Danish cartoons is intelligible only once one appreciates the relationship of intimacy that Muslims have with the Prophet. To see this, however, requires adopting an *internal* perspective on how Muhammad is regarded as a kind of moral exemplar, as a "human figure in Islamic doctrine who does not share in divine essence . . . [and in this respect] is more an object of veneration than worship."[122] Again, as Mahmood so elegantly explains:

> [W]ithin traditions of Muslim piety, a devout Muslim's relationship to Muhammad is predicated not so much on a communicative or representational model but an assimilative one wherein one aims to digest Muhammad's personage into oneself as it were. Muhammad, in this understanding, is not simply a proper noun referring to a particular historical figure, but the mark of a relation of similitude. In this economy of signification, he is a figure of immanence in his constant exemplariness, and is therefore not a referential sign that stands apart from an essence that it denotes.[123]

There is in this sense a "modality of attachment"—a sense of "embodied habitation and intimate proximity"—that lies at the heart of the relationship between devout Muslims and the Islamic Prophet.[124] This has a profound effect on how Islam as a religion is *lived* and *practiced*, and how certain embodied practices and virtues shape the meaning and mode of acquisition of devotion and piety.[125] Once this embodied and affective nature of the relationship between Muslims and the Prophet is made visible, the notion of moral injury caused by denigratory or purposively offensive speech no longer falls as neatly into an imagined *forum internum* of private belief or conscience. Rather it suggests a

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121. *Id.* at 73–74.

122. *Id.* at 75–76.

123. *Id.* at 76.

124. *See id.*

125. As Mahmood explains, this includes descriptions of the Prophet's behavior and "his persona and habits understood as exemplars for the constitution of one's own ethical and affective equipment . . . . Such an inhabitation of the model . . . is the result of a labor of love in which one is bound to the authorial figure through a sense of intimacy and desire. It is not due to the compulsion of 'the law' that one emulates the Prophet's conduct . . . but because of the ethical capacities one has developed." *Id.* at 78.

sense of violation—and violence—that strikes at a Muslim's very *being*, a sense of wounding against an entire *habitus* or structure of affect.

It is not immediately obvious how to fit this notion of harm into either of the concepts discussed in this Article of human dignity and freedom of religion. Does moral injury of this kind, for example, fall within Waldron's notion of dignity in the sense of basic status and social standing? It seems to me such a case is arguable once being Muslim is understood to encompass the kind of intimate and affective relationship with Muhammad I have described, and once the cartoons are viewed not as defaming a religion in the sense of abstract set of beliefs but rather as defaming or rising to the level of stirring up hatred against a group of persons as *Muslims*.

On the other hand, this kind of affective relationship has more of an intimate and personal, as opposed to strictly public, dimension. To the extent that dignitarian concerns are related to questions of public order and a well-ordered society, perhaps this form of moral injury is of a different kind? Interestingly, Mahmood suggests that the "sense of moral injury that emanates from such a relationship between the ethical subject and the figure of exemplarity is quite distinct from the one that blasphemy encodes."[126] To the extent then that blasphemy is viewed as a public order offence, the fit within extant legal categories is not obvious.

In the case of freedom of religion, once this right is interpreted in ECHR terms as encompassing the collective, public, and sensitive aspects of religious communities and traditions,[127] then we do face a genuine conflict with the right to free speech. These sorts of conflicts are simply irresolvable in the Kantian and Rawlsian traditions. As the House of Lords Select Committee discovered in its 2003 review of English blasphemy laws, there is simply no principled way to resolve conflicts not only between, but also *internal*, to rights themselves other than by seeking a form of reconciliation between the particular conceptions of the good of different groups in the historical context of particular political communities.[128]

To do so, however, risks undermining the rationale for rights in the first place, i.e. the idea that fundamental rights are independent of the good and thus not subject to the potentially unjust demands of public order. Liberal theory can resolve such conflicts only by tacitly positing a hierarchy of values or a single trumping "covering value" (such as autonomy), or by drawing certain "domain restrictions" between spheres of incommensurable values (e.g. between a public "secular" and private "religious" sphere) and by then developing theories of toleration based on open-textured principles such as "reasonableness." The shift in these justifications from external to internal reasons is again apparent.

126. *Id.*

127. *See, e.g.,* I.A. v. Turkey, Eur. Ct. H.R. no. 42571/98 (2005) (upholding a conviction for the offense of blasphemy for "an abusive attack on the Prophet of Islam" on the basis that "believers may legitimately feel themselves to be the object of unwarranted and offensive attacks").

128. *See* Danchin, *supra* note 17, at 311–13.

IV. RELIGIOUS TOLERATION

A. Liberal and Reflexive Toleration

In this final Part, I seek to illustrate the implications of the two dialectical moves considered in the Article for liberal theories of toleration. Consider John Locke's famous exclusion of atheists and Catholics (and, in the same vein, Muslims) from his theory of religious toleration. For Locke, the right to freedom of conscience was justified by "the Protestant argument that conscience was directly bound to obey and follow God and not men; a theory of the free and at the same time unfree conscience (as the 'work of God', as Luther had said)."[129] On this basis, there could be no justified claim to the freedom *not* to believe in God,[130] nor to believe in a faith that was politically subversive and thus not an *authentic* religious belief.[131] The problem with both atheism and Catholicism was that the doctrines which flowed from them were suspect because they proceeded from wholly *subjective* and flawed premises. In contrast, while Locke's Magistrate was Christian, this did not affect his ability *objectively* to interpret either the Commonwealth's civil laws or the universal natural law.

For Locke, Right Reason or Christian theology, or both, provided the necessary justification for his exclusionary positions. Today, however, we see distinctly Protestant assumptions at work in each of the arguments above, the former relying on a particular substantive account of "free conscience," the latter advancing a philosophical argument based on external reasons that any rational person ought to accept simply in virtue of their rationality. In this respect, Locke's arguments appear as subjective and vulnerable to precisely the same sorts of criticisms as those he leveled against Roman Catholicism and atheism.[132]

While modern liberal theorists such as John Rawls have sought to advance secular free-standing theories of public reason and autonomous moral personality independent of comprehensive religious views,[133] God remained an

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129. Rainer Forst, *Toleration and Democracy* (unpublished manuscript at 8, on file with author).

130. Forst refers to this as "Locke's fear," i.e. the concern that without a particular religious basis there can be no binding morality and thus no functioning state. Rainer Forst, *Pierre Bayle's Reflexive Theory of Toleration*, *in* TOLERATION AND ITS LIMITS 92 (Jeremy Waldron & Melissa Williams eds., 2008). Thus, in *A Letter Concerning Toleration*, Locke states: "those are not to be tolerated who deny the Being of a God. Promises, Covenants, and Oaths, which are the Bonds of Humane Society, can have no hold upon an Atheist. The taking away of God, tho but even in thought, dissolves all." JOHN LOCKE, A LETTER CONCERNING TOLERATION 51 (James Tully ed., Hackett Publishing 1985) (1689).

131. Locke appears to advance three grounds for the exclusion of Catholics: (1) because certain Roman Catholic doctrines bestow legal privileges on Catholics over and above the civil rights of other citizens; (2) because such doctrines (as opposed to Catholics themselves or Catholicism as a faith) are a "secret Evil" posing a threat on account of the secretive nature of Roman Catholic political practice; and (3) because it is not possible in some cases to disaggregate Catholism as a faith from Catholic doctrines because they are "absolutely destructive of the society wherein they live" and are premised on Vaticanism and loyalty to a foreign power. *See* Peter G. Danchin, *The Emergence and Structure of Religious Freedom in International Law Reconsidered*, 23 J.L. & RELIGION 455 (2008).

132. *See*, *e.g.*, Micah Schwartzman, *The Relevance of Locke's Religious Arguments for Toleration*, 33 POL. THEORY 678, 680 (2005) (noting that Locke's theory is either *incomplete* because it relies on religious premises that many people today reasonably reject or *inadequate* because it relies on nonreligious premises regarding belief that fail to provide a valid justification for toleration and ultimately rest on religious grounds).

133. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (1993).

indispensable transcendent premise in Locke's late-seventeenth-century thinking about natural rights.[134] Like the liberal thinkers that would follow him, Locke required a non-sectarian but nevertheless deontological argument that could define rights and indicate their normative significance.[135] While necessary, the combination of the premises of free individuals and a neutral order based on the consent of those same individuals was on its own insufficient to provide a coherent justification of individual liberty. Locke thus advanced a theological conception of natural law not related to any particular religion but ascertainable through ordinary human reason. While the existence of such a universal natural law was rationally discoverable, to later theorists Locke's natural law positions appear both utopian in the form of Judeo-Christian prejudice and apologist in justifying restrictions on non-Protestant religious traditions.[136]

Let us compare Locke's liberal argument with the reflexive account of religious toleration advanced by the Huguenot philosopher Pierre Bayle.[137] For Bayle, the primary duty of reason is the *mutual justification* of any use of religious or political force, and thus of *toleration* while at the same time having good reasons to regard one's own faith or beliefs as true. The critical point here was that human reason must recognize its own boundaries and finitude and accept the unavoidability of pluralism and reasonable disagreement. On this view, the respect owed to others is not on account of a particular *ethical* conception of the good (e.g. that personal autonomy is a precondition for the good life) but rather on "a *moral* notion of the person as a reasonable being with . . . a *right to justification*."[138] This right is "based on the recursive general principle that every norm that is to legitimize the use of force (or, more broadly speaking, a morally relevant interference with other's actions) claims to be reciprocally and generally valid and therefore needs to be justifiable by reciprocally and generally non-rejectable reasons."[139] Bayle's critical insight into the finitude of reason as evidenced by Locke's unreflexive and one-sided theory of toleration is another illustration of the shift from external to internal reasons. This shift in perspective opens the way for the normative ground for this view: the demanding moral-political virtue to respect the autonomy of others as reason-giving and reason-receiving subjects.

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134. *See generally* JEREMY WALDRON, GOD, LOCKE AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT (2002).

135. Waldron has argued that for Locke it was an open question the extent to which non-Christian or non-monotheistic faiths may provide a basis (through some form of Rawlsian overlapping consensus) for a theory of natural rights and human equality. Certainly, while Locke's main concern was with theism *per se* (i.e. belief in God), his work drew virtually exclusively on Judeo-Christian sources. *Id.*

136. This is not to say that Locke did not turn his "universalist critique against European customs, and conjectures" as well. The point is not that "Locke reflexively invest[ed] the practices of his own culture with an aura of moral universalism" or that he was "complicit in a deliberate attempt to dehumanize the peoples and practices that the colonists faced in the new world." *Id.* at 168. Rather, the point is that Locke's natural law and the doctrines he derived from it no longer appear to us three centuries later as either especially natural, objective, or universal.

137. *See* Forst, *supra* note 130, at 78.

138. Forst, *supra* note 129, at 14.

139. *Id.*

B. Two Faces of Religious Toleration

Locke's and Bayle's theories represent two rival philosophies and histories of liberal toleration—the former a universal moral ideal seeking rational consensus on principles of right and justice that stand apart from conflicts over the good, the latter an ethical *modus vivendi* seeking peaceful coexistence between rival ways of life as opposed to a comprehensive moral theory governing all ways of life.[140] As a political ideal, reflexive toleration is thus a *contingent* good limited by the form of ethical reasoning which gives it its force by drawing upon the conflicting values and internal reasons for action of the individuals and groups that it seeks to bind.

In interpreting what the right to religious liberty means today in religiously and culturally diverse societies, it is helpful to distinguish between the "permission" and "respect" models of toleration. The permission model is a relation between an authority (or in a democracy, a majority) and a dissenting, different minority or various minorities. On this view, toleration means that "the authority (or majority) gives qualified permission to the members of the minority to live according to their beliefs on the condition that the minority accepts the dominant position of the authority (or majority)."[141] By contrast, the respect model is a moral view which regards all individuals, whether members of majority or minority ethical groups, none of which is favored, as having *equal* legal and political status as guaranteed by a common framework of rights and liberties.[142]

Each model can in fact adopt either of the rival philosophies of toleration. The permission model of toleration (as has shaped most European nation-states) may evolve reflexively towards a co-existence conception that seeks, not a vertical relationship where a majority stands over minorities in a position of legal authority but, a horizontal relationship with groups standing in a relationship of coexistence relative to each other, at the same time subjects and objects of toleration. A respect model of toleration, however, may reflexively adopt a principle of substantive equality that acknowledges that formal equality is intolerant towards those religious communities whose beliefs and practices require a degree of public presence and collective identity that is both different

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140. *See* JOHN GRAY, TWO FACES OF LIBERALISM (2000).

141. As Forst notes, as long as "the expression of their difference is limited . . . and as long as the groups do not claim *equal public and political status*, they can be tolerated on both pragmatic and principled grounds. Rainer Forst, *Toleration, Justice and Reason*, *in* THE CULTURE OF TOLERATION IN DIVERSE SOCIETIES: REASONABLE TOLERANCE 73 (Catriona McKinnon & Dario Castiglione eds., 2003) (emphasis added). The origins of the permission conception can be traced to the 1598 Edict of Nantes in late sixteenth century France and to the later Toleration Act of 1689 in England. Both of these regimes of toleration involved complex matrices of freedom and domination and of inclusion and exclusion as the majority granted to minorities the liberty, but not the equal right, to practice their religion and participate in public life. *See* Rainer Forst, *To Tolerate Means to Insult*, in RECOGNITION AND POWER 215, 215–16 (Bert Van Den Brink & David Owens eds., 2007).

142. The history of the respect conception is traced by Forst to the struggle of Protestant provinces in the north of the Netherlands against Spanish rule and the enforcement of Catholicism in the sixteenth century, and to the later English Civil War and Protestant arguments for conscience being bound to obey and follow God and not men. *See* Forst, *To Tolerate Means to Insult*, *supra* note 141, at 223.

from the majority cultural form and unable to accommodate the public/private distinction.[143]

A respect model of toleration may conversely adopt a formal notion of liberal equality in which, although all citizens have equal rights, cultural and religious differences are confined to the "private" sphere on the basis of a public/private distinction. This model is reflected in the *laicité* of French republicanism and in the Rawlsian priority of the right (equal basic liberties) over the good. In contrast, a permission model may continue to exist within the framework of a modern liberal democracy. As in the case of speech inciting religious hatred in the United Kingdom, a majority may continue to rely on a permission conception notwithstanding the need to justify it under a scheme of basic equal liberties of all citizens.

What is decisive then is not the model of toleration that exists in a state, but rather the philosophy and mode of reasoning that underpins and justifies its normative application and development. The argument advanced in this Article suggests that Bayle's reflexive philosophy as applied to the respect model of toleration is superior to the alternatives. The difficulty, however, is how to apply this conception in practice. Is it the claims of the editors of *Jyllands-Posten* or those of offended Muslims, for example, that are more reciprocally or generally valid? The criteria of reciprocity and generality arguably function in much the same way, and face the same disabling indeterminacies, as the concepts of neutrality and general applicability in liberal theory. The outcome in practice therefore is likely to be a gradual shift towards the permission model, albeit in its liberal democratic form. Nevertheless, as Forst concludes, reflexive toleration is the

> attitude of those who are willing to engage in such arguments, who accept the criteria of reciprocity and generality, and who accept in a given case that their arguments do not suffice to be the basis of general law. Still, given . . . justified doubts, it is important to add another reason for toleration connected to this: the toleration of those who see that a debate remains in a standstill and that therefore no side can show its claims and reasons to be superior. In such a case, toleration means to accept that other grounds for the regulation of a conflict have to be found, by way of compromise.[144]

C. Democratic Theory and Political Legitimacy

There is one final objection levied against the enactment of hate speech or group libel laws that needs to be addressed. Robert Post[145] and Ronald Dworkin[146] have argued that, beyond the link between free expression and the flourishing of democratic self-government, free speech is *the price we pay for political legitimacy*. "'The majority has no right to impose its will on someone who

143. *See*, *e.g.*, ANNA ELISABETTA GALEOTTI, TOLERATION AS RECOGNITION 126 (2002) (suggesting that the idea of liberal neutrality should not be abandoned but rather reinterpreted so that public recognition of minoritarian differences is itself regarded as form of neutrality and impartiality).

144. Forst, *To Tolerate Means to Insult*, *supra* note 141, at n.32.

145. *See* Robert Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991).

146. *See* Ronald Dworkin, *Foreword*, *in* EXTREME SPEECH AND DEMOCRACY v–ix (Ivan Hare & James Weinstein eds., 2009).

is forbidden to raise a voice in protest . . . before the decision is taken.' If we want *legitimate* laws against violence or discrimination, we must let their opponents speak. And *then* we can legitimize those laws by voting."[147] On this basis, no matter how extreme or vicious the speech of opponents of anti-discrimination laws may be, that speech must be allowed in order to legitimate other laws that prohibit violence or discrimination.

Accepting the fact that hate speech laws do impose restrictions on speech on account of its content,[148] there clearly are differences of degree in the ways such speech may insult, humiliate, or intimidate groups of people. Most hate speech laws are carefully crafted to allow the propositional content of views to be expressed in such a way that they become subject to suppression only when expressed in vicious or vituperative terms intended to stir up hatred through attacking the basic social standing and elementary dignity of vulnerable groups.[149] While these are always difficult, and at times elusive, lines to draw and involve the balancing of divergent values and making of contested value judgments, both Post's and Dworkin's objections on the grounds of democratic theory and political legitimacy are answerable. As we have seen, the vast majority of advanced democracies have enacted such laws without visibly diminishing the legitimacy of their various anti-discrimination laws.

V. CONCLUSION

Serious consideration of how the American legal system should engage with Islamic norms and the claims of Muslim communities has only just begun. The public sphere of a liberal democracy such as the United States cannot accommodate all Islamic claims and sensibilities. The specific question addressed in this Article has been whether Muslim communities should be guaranteed protection from incitement to religious hatred as a matter of human dignity, or freedom of religion, or both. The scope and terms of engagement and the mode of deliberation under which the encounter between liberal theory and Islamic norms occurs will be determinative of how this question is ultimately addressed.

We have seen that liberal rights and the K each guarantee freedom of religion and freedom of thought. But they do so in different ways and for different reasons. The Lockean notion of religious *belief* as the simultaneously free and unfree will is quite distinct from the Islamic notion of religious *belonging* understood as a particular way of life where the individual does not own herself. Blasphemy, in this sense, is less concerned with belief or disbelief as with violently disrupting a living relationship. Viewing the Danish cartoon controversy solely through the lens of liberal theory masks the contingency and particularity of the normative assumptions upon which this theory rests and avoids an engagement with the internal point of view of a distinct normative

147. Waldron, *supra* note 49, at 4 (restating Dworkin's account of political legitimacy).

148. Waldron notes that other countries do not subscribe to the doctrine that an exception to free speech may not be based on the *content* of what is said or published and describes First Amendment jurisprudence as having "gone down a blind alley" in this area and being an example of "path-dependency." *Id.* at 19. Hate speech and group libel laws thus directly confront two of the main justifications for the content-based restriction doctrine, i.e. the market place of ideas and suspicion of majoritarian government rationales. *Id.* at 2–3.

149. *Id.* at 9–10.

system with its own hierarchies, disputes over interpretation, and standards of rational justification. On this approach, there is no dialogue, no search for possible forms of coexistence, reconciliation or overlapping consensus; there is only a dialogue of the deaf and a one-sided assertion of right.

By contrast, we need to consider what it may mean for a Muslim community to practice and maintain its religion in the conditions of contemporary European or North American society. What obstacles might such communities face? The degree to which rights to dignity and religious freedom may enable the practice of Islam as a religion and way of life free from visible manifestations of hate and incitement to religious hatred are essentially-contested but increasingly important questions. If all we see in the normative claims of Muslims are threats to freedom, however, the debate will remain at its current impasse.