

## **FREEDOM OF SPEECH: HALAL OR HARAM?**

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*The publication on September 30, 2005 of twelve satirical cartoons of the prophet Muhammad in the Danish newspaper Jyllands-Posten spurred a heated debate about the limits of free speech in general and about the balance between respecting religious beliefs and an uninhibited free press in particular. This essay discusses the Muhammad cartoons and examines the boundaries of free speech. It is argued that the intention behind the offensive cartoons seem to have been genuine communicative. Instead of being seen as an example of castigation, the cartoons should be seen as an attempt in a critical, satirical way to engage in a dialogue with Moslem community about Islamic fundamentalism and the current crisis of the Moslem world in most of the Middle East.*

Controversies about freedom of speech often occur along religious boundaries. The publication on September 30, 2005 of twelve satirical cartoons of the prophet Muhammad is no exception. This publication has spurred a heated debate about the limits of free speech in general and about the balance between respecting religious beliefs and an uninhibited free press in particular. In this essay I shall discuss the boundaries of free speech and try to decide whether the concrete case of the Muhammad cartoons should fall within the legal limits of free speech.

The keyword in this discussion is the concept of offence. I argue that causing offence, though less serious than actually harming someone, should in some cases be prohibited. However, the type of profound religious offence involved in the publication of the Muhammad drawings cannot justify public censorship because despite affecting a potential castigation of an already vulnerable minority, it is in this case, I argue, outweighed by the facts that the most offensive of the drawings also issued a both legitimate and important criticism, which those affected were allowed to respond to in the relevant media. Of course, as instances of satire, these drawings issue their criticism in a quite disrespectful way, but nonetheless still with a view to engage in a dialogue rather than simply – as has been argued - with the intention of disproving the democratic credentials of the Moslem community.

In Western liberal societies, people sometimes speak as if freedom of speech should be absolute and unqualified. A moment's reflection, however, would remind them that there are many areas of speech where expression is rightly restricted, of which libel or defamation are but a few. Thus, any sensible defense for the high value of free speech should allow for its occasional curtailment simply because the discussion concerning the limits of free speech takes place within the context of competing values. Of course, as liberals attaching enormous importance to individual freedom, we argue that the limitation on freedom of speech be minimal. In fact, as liberals we hold that freedom of speech is the norm, whereas its limitation

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stands in need of justification. But that there must be limitations is a given, the question is rather what the *legitimate* limitations on free speech are. In this discussion, I shall focus on the concept of offence, but before that I will shortly address one type of argument that is all too often encountered in ethical and legal debates, which is that of the slippery slope.

Some liberals might fear for example that any limitation of free speech is the beginning of a slippery slope towards tyranny and censorship, while others might say that if we do not heavily censure speech, no matter how reasonable the speech, it could incite to public disturbance, and with uninhibited free speech we shall soon end up in a Hobbesian state of nature, where life as we know it from *Leviathan* is 'solitary, poore, nasty, brutish, and short'. Thus, before painting too horrific consequences of our opponents' views, we should remind ourselves that there is always more than one slippery slope. Or to put the point in another way, you cannot get off the slippery slope altogether, the task is rather to decide where on the slope to stay. This reminder seems especially pertinent in the debate over the Muhammad drawings, where the one side claims that free speech is not a matter of degree, and the other side holds that any insult to Mohammad should be prohibited.<sup>2</sup>

Now, let us first get a clear picture of the situation in the Muhammad debate. In September 2005, in a so-called manifestation of freedom of expression, the Danish newspaper Jyllands-Posten (JP) asked a group of cartoonist to draw the prophet as they perceived him to be, which would – as they were clearly aware of – entail violating a well-established Islamic tradition against depicting the holy prophet. The openly acclaimed reason for this request was the following: The author of a children's book about the life of Muhammad had apparently been unable to find anybody who by name would illustrate his book. Thus, in the wake of Michel Houellebecq's trial and the murder of Theo van Gogh, JP wanted to test whether an atmosphere of self-censorship had emerged in the Danish debate preventing discussion and criticism of Islam. They received twelve cartoons. Some of the cartoons - undoubtedly the more funny ones - mocked JP and their cultural editor, Mr. Flemming Rose, for initiating the publication. Others were of a more neutral nature. Two of them, however, have ignited a fire of insult throughout the Moslem world. One of them portrays Muhammad with a bomb in his turban, whereas the other has St. Peter refuse Muhammad at the gate to heaven with the words: 'Sorry, we're fresh out of virgins'. Unsurprisingly, many Moslems – both inside and outside Denmark – felt deeply offended by the cartoons, and the question is – in this essay at least, whether these cartoons should fall within the *legal* scope of free speech? But before I try to tackle that question, I shall briefly discuss the tradition of religious satire in Western and Moslem societies.

Nowadays, in Western Europe, satire or ridicule is generally seen as an impotent way of undermining religion. Unlike the perception of for example the medieval monks in Umberto Eco's *The name of the Rose* (1980), satire is no longer believed to threaten religious faith or political stability. Rather, we have experienced a gradual shift in general orientation from a passionate concern with whether and how far religion should tolerate criticism, to a more

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<sup>2</sup> For a powerful argument against the use of slippery slopes see David Enoch: 'Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope', *Oxford Journal of Legal Studies*, 2001, 21, pages 629-647

moderate concern with how far skepticism should tolerate religion. However, it is worth bearing in mind that the Western tradition of criticizing religion has indeed evolved over a longer period of time in Jewish and Christian contexts than in Islam. The slow development of religious criticism in Western Europe has proved much easier to absorb than the sudden transformation Islam has experienced in the modern period.

This is of course not to say, however, that the Western tradition of satire has not been hard fought. In 1664, Molière's uncompromising attack upon religious hypocrisy in *Tartuffe* stirred the rage of the church and was consequently banned by Louis XIV. However, the opposition to revealed religion gradually increased through such eighteenth century figures as Voltaire and Rousseau before Nietzsche in *Der Antichrist* (1895) unabashedly attacked Christianity as a masochistically disguised urge for power.

The rather sudden exposure of Islam to modernity appears all the more damaging in the light of the comprehensiveness of the Islamic religion with its inclination to exclude distinctions between society and state and between church and government. These facts might thus give the beginning of an explanation as to why the modern debates over the limits of free speech has recently so often centered on the clash between Western secularism and Islam.

Salman Rushdie's book *The Satanic Verses* (1988) was one of the first cases to bring this clash into the open. However, though there are many similarities between the case of Rushdie and the later cases of Houellebecq, Theo van Gogh and the Danish cartoons, it is of course an understatement to say that the political situation has changed between 1988 and now. Following notably terrorist attacks on New York and Washington DC on September 11, 2001, and the war in Afghanistan and Iraq, we are living in a situation of increased sensibilities, in which the preconditions for genuine communication and discussion are often absent. And the publication of the Danish cartoons should of course also be evaluated on the background of this new situation. But the question still remains whether the cartoons should fall within the *legal* scope of free speech?

Well, on a liberal theory of the criminal law, a first question might be to ask whether anybody has been *harmed* by the publication of the cartoons.<sup>3</sup> Many Moslems have claimed to have been harmed. However, following Joel Feinberg's influential interpretation of the liberal harm principle in *Harm to Others* (1984), it seems implausible to say that anybody has been harmed. According to Feinberg, harm – in the sense relevant for the criminal law – consists in the *wrongful setback of interests*. By interests he importantly understands those basic welfare interests in physical and psychological health that constitute the preconditions for the pursuit

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<sup>3</sup> However, it might be argued that by taking a liberal starting point, I have already undermined the Moslem case for criminalizing such types of religious offense from the start. Let me try and explain why. A liberal law emphasises individuals, that is, the wrong which is done by say blasphemy is the wrong of offending individuals. In the eyes of Moslem believers, however, the wrong which is done by blasphemy is a wrong against God. Where blasphemy is tolerated, the result is therefore not simply that individual believers are distressed, but rather that God is mocked. Hence, if we begin with the belief that the individual is most important, we will find it rational to conclude that blasphemous acts are damaging to the extent that they damage individuals, where by contrast if we begin with the belief that God is most important, we will find it rational to conclude that blasphemy is wrong because it scorns God. As a liberal, I do of course take the former to be more rational than the latter, but this I shall simply assume.

of our more ultimate goals and objectives in life. In the case of the Muhammad cartoons, it would seem exaggerated to claim that anybody's *basic welfare interests* have been violated and consequently that anybody has been harmed in the relevant sense.

This is not, however, to say that speech merely in its character as offensive could not wrongfully violate a basic welfare interests and thus constitute harm. If for example somebody is constantly verbally bullied in school this might amount to harm. However, the character of the cartoons is different in this respect because they were not directed at one person. They do not seem to be directed at Moslems as such, but rather at Islamic fundamentalism. But that is a point for later. Now, the important thing to establish is that the publication does not constitute harm in a sense relevant to the criminal law. However, its mere *offensiveness* might still warrant censorship. Thus, we should therefore have a closer look at the crucial concept of offence.

In *Offense to Others* (1988), Joel Feinberg introduces the so-called offence principle, which states that: "*It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end*".<sup>4</sup> Under the concept of offence, Feinberg subsumes a group of 'universally disliked mental states' the prevention of which might also be desirable. The concept of offence thus covers a variety of annoying or offensive disturbances, which Feinberg divides into six general categories: 1) *Affronts to the senses*, 2) *Disgust and revulsion*, 3) *Shock to moral, religious, or patriotic sensibilities*, 4) *Shame, embarrassment (including vicarious embarrassment), and anxiety*, 5) *Annoyance, boredom, frustration*, 6) *Fear, resentment, humiliation, anger*.<sup>5</sup> Though these states of course differ in their origin and effect, their subsumption under the general heading of offence is justified by their sharing certain important characteristics:

"They are at the very least unpleasant to the one who suffers them, [...], they are complex states whose unpleasantness is in part a function of the tension between conflicting elements. [...] they are nuisances, making it difficult for one to enjoy one's work or leisure in a locality which one cannot reasonably be expected to leave in the circumstances".<sup>6</sup>

In addition to the abovementioned different offended states, Feinberg identifies a further normative sense of the concept of offence according to which offences in the context of the offence principle only refers to such states when caused by the *wrongful* conduct of others.

Now, though it is of course clear that these disturbances and annoyances affect us to a much smaller degree than say physical assaults or being robbed, we are nonetheless faced with the question of whether and by what means the state should protect us from these disliked occurrences. Furthermore, some offences such as importantly religious satire have historically been punished in a quite draconian way and though we nowadays often find the legitimacy of that punishment more than questionable, this very fact points to a basic legislative question

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<sup>4</sup> Feinberg: *Offense to Others*, page 1

<sup>5</sup> Feinberg: *Offense to Others*, page 10-13

<sup>6</sup> Feinberg: *Offense to Others*, page 21-22

concerning the legitimacy of an offence principle to which the liberal must formulate an answer.

Feinberg, however, denies a general interest in the avoidance of offences. This move appears at first somewhat surprisingly since it seems irrefutable that people have a very real interest in avoiding say shock to their religious sensibilities. But the argument becomes more plausible once we understand the difference between harm and offence. The differentiation between harm and offence must be understood in the light of Feinberg's very elaborated concept of a network of interests: The *basic welfare interests* only covers our basic interests in sustaining a minimum of physical and mental welfare and their violation amounts to harm, but it would indeed be an exaggeration to claim that the avoidance of for example something physically nauseating or a religious shock is vital to sustaining our basic welfare; the *ulterior interests* on the other hand seek to realize certain more complex long term life plans and goals and the momentous instances of nuisances seem in this context without any weight.

Now, there are of course some extreme forms of nuisances, which affect the person concerned to a degree amounting to harm. Constant humiliations at one's workplace might for example result in a severe depression. However, although the harm is caused by offensive behavior, it is nonetheless still the occurrence of a *harm* that merits the actions criminal and not the offence as such.

As should be clear by now, Feinberg finds offences to be a lesser evil than harms. This, he says, is an "evident, but unprovable truth".<sup>7</sup> In the light of the aforementioned differentiation of interests, however, we should be able substantiate this allegedly unprovable truth: if the protection of interests constitute the indispensable element in fulfilling a human beings' goals in life and furthermore that the justification for the criminalization of the violation of interests is based on the fact that these very violations are the most serious infringement of the individual's personal sphere, we must on the other hand conclude that since causing offences are as we have seen conceptually separate from violating interests, they pose a less serious infringement of the personal sphere.

Until now it has been shown that the concept of offence can be separated from the concept of harm and that causing offence is less serious than causing harm. Therewith, however, is of course nothing said as to whether offences should be criminalized at all. The moral legitimacy of state coercion against causing offence is not to be found in any grave consequences following the offence, but rather in the intuitive intensity with which we react towards offences. Feinberg starts out by airing a certain amount of skepticism concerning the criminalization of offences: "It may well be that the criminal law need not concern itself at all with defining crimes of offensiveness, even though offensiveness is the sort of evil it could in principle be used legitimately to combat".<sup>8</sup> Hence, only if other modes of regulation such as injunctions fail, should offensive behavior be punished and even in those cases only by the most moderate forms of punishment. The function of the offence principle is thus both to legitimate and limit

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<sup>7</sup> Feinberg: *Offense to Others*, page 3

<sup>8</sup> Feinberg: *Offense to Others*, page 4

punishment of offences: the state should possibly punish certain offences but in those cases only by using the most moderate means. This limiting function becomes clearer as Feinberg introduces the mediating maxims that govern the application of the offence principle.

The normative limitation of offences is determined by balancing the seriousness of the offence with the reasonableness of the offending conduct. Feinberg presents us with following schema for mediating the offence principle:

The seriousness of an offence is determined by the following standards: 1) The magnitude of the offence including its intensity, duration and extent, 2) the avoidability of the offence, 3) *volenti non fit iniuria*, that is, the volenti maxim: 'to one who has consented, no wrong is done', and 4) the discounting of abnormal susceptibilities. Having assessed the seriousness of the offence it must be balanced against the reasonableness of the offending conduct, which is determined by the following standards: 1) The personal importance of the offending conduct, 2) the social value of the offence, 3) the value of free expression, 4) the availability of alternatives, 5) the motivation behind the conduct and finally 6) the nature of the locality.<sup>9</sup>

The balancing scheme therefore emphasizes compromises as the indispensable requisite for peaceful co-existence between members of complex modern societies.

Now, so far our discussion of the offence principle has despite the disparity of types of offences assumed a general feature to be present in all cases of offence: the feeling of offence is produced directly at the sight of the offensive behavior. However, besides these general cases of offence, there are special cases to which the mediating maxims are not directly applicable. Unlike normal offensive nuisances, there are types of *profound* offences that continue to be offensive whether witnessed or not. Thus, the volenti maxim does not apply to profound offences. The question of criminalization of profound offences is accordingly subject to a separate treatment.

Offences that exclusively affect our senses are obviously dependent upon the immediate perceptual experience of the offended party. But with affronts to our moral senses it is of course otherwise. The feeling of offence is in these cases affected by the *mere knowledge* of the offensive behavior. Feinberg characterizes this type of offence as *profound offence*. The difference between offensive nuisances, merely, and profound offences is that while profound offences offend because they are believed to be wrong, offensive nuisances are believed to be wrong simply because they offend.

The reactions affected by profound offences are as already mentioned caused by the moral sensibilities. The aggrieving aspect of these offences is the open and aggressive pursuit of morally disapproved standards. However, from a liberal point of view, the very fact that the moral and political beliefs of the offender is involved should count as a serious argument against state coercion because the realization of the core liberal values of religious and political

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<sup>9</sup> Feinberg: *Offense to Others*, page 35 and 44

freedom and of freedom of speech is the foundation of the liberty limiting principles. In the conflict between fulfilling one's concept of the good life and thereby affecting impairments of other people beyond the harm principle, there is always a presumption in favor of the latter.

This presumption is justified in virtue of the fact that profound offences do not normally cause personal grievance; they are not directed at the offended person but rather at her beliefs. "The offence-causing action, [however], must be more than wrong; it must be a *wrong* to the offended party, in short a violation of her rights".<sup>10</sup> The adherents of the criminalization of profound offences must therefore employ illiberal morals to protect the affected offended persons. Thus, profound offences can basically not be criminalized on the basis of liberal principles.

An exemption from this general rule is some forms of provocations in which the offender deliberately seeks out the offended party and merely seeks to offend. In these cases it seems appropriate to characterize the offended party as a *victim*. Furthermore, in its character of being merely offensive, this type of behaviour is without any social value and therefore legitimately punished under the mediating maxims governing the offence principle.

Thus equipped with a deeper understanding of the nature of offence and especially profound offence, we can try to evaluate whether the concrete case of the Muhammad cartoons should fall with the legal limits of free speech. However, before evaluating the actual case, let us first for example imagine that the two most offensive cartoons were not just published in a newspaper but hung on giant billboards in all major cities in Denmark. Should that be allowed? And let us furthermore imagine that some of these billboards not 'only' portrayed Muhammad as a suicide bomber, but also as a pedophile and as a pig. I would say that both examples should be prohibited. The reason being that large billboards make the Moslem community a captive audience to pictures they are deeply offended by. They are not free to avoid being offended. Thus, I do believe some things should be prohibited merely on the grounds of its offensiveness. Of course, my two imaginary examples might invite the thought: 'the cartoons were published in a private newspaper, which even had a warning on the front-page, why could we not reply to the offended Moslems: if you want to avoid being offended, just do not buy the newspaper?' Liberals often use the same line of argument against prohibiting pornography: 'If you know pornography offends you, just do not buy pornographic magazines or videos'. However, this reply misunderstands the nature of the offence involved in the Muhammad cartoons (as it might also misunderstand the nature of pornography, but that is another story). The Moslem community finds the satirical cartoons of Muhammad profoundly offensive, that is, it is the mere fact that the cartoons have been published *and* that its violation is legal that the majority of the Moslem community finds offensive. Thus, to argue that Moslems could easily avoid being offended simply by averting their gaze away from the newspaper fails to appreciate the special type of offence involved in this case.

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<sup>10</sup> Feinberg: *Offense to Others*, page 68

Now, the crucial question is whether the mere knowledge of the publication of the Muhammad cartoons constitutes a good reason for the prohibition of that offence? A modern secular answer, of course, would be that susceptibility to offence at the mere knowledge of that offence taking place can only very rarely if ever warrant legal interference. And, as already mentioned, the liberal should add that the offence-causing action must be more than a wrong, it must be a wrong to the offended party, i.e., it must be a violation of her rights or in other words, the crime must have a victim. But who is the victim in this case? Well, as the drawings only vilify *Muhammad*, he can seemingly be said to be the only victim of the crime. Of course, Moslems might claim that their grievance is indeed personal in this case, that the offence is unmistakably directed at them, and that they therefore each individually are the victims of the offensive behavior. If this is a correct interpretation, we have at least a reason for prohibiting the cartoons, but in order for it to be a *good* reason, we should first balance among other things the social utility and reasonableness of the offence with the reasonableness of the offence felt by the victims.

But before finally evaluating the concrete case, I should like to introduce a distinction from Habermas between communicative and strategic actions: If the participants in a communicative situation adopt the attitude that they will attempt to achieve success without the rational agreement of those persons whose actions they seek to influence, then they are engaged in a *strategic* action. If they are oriented at reaching understanding, however they are engaged in a *communicative* action. I would suggest that pure communicative speech should always enjoy legal protection, at least as a *prima facie* principle, whereas pure strategic action should be unprotected though not always regulated or criminalized. Of course, it must be admitted, speech is rarely, if ever, pure communicative or pure strategic, but rather a mixture of both. However, speech will in many cases be predominantly communicative or predominantly strategic, so it does seem possible to distinguish the one from the other.

Now in order to illustrate this distinction, let us imagine that JP had published twelve purely insulting cartoons of Muhammad portraying him for example as the devil all done with the hidden agenda of inciting a riot in the Moslem world. This would be an example of offensive behavior which exclusively seeks to manipulate the recipients into a specific response. It would in a *Habermasian* term be an example of a purely strategic action, which there would consequently be good reason for prohibiting. However, JP's actual publication of the Muhammad cartoons was manifestly not a case of pure insult. Both of the most offensive cartoons issue an important criticism of the way some Islamic fundamentalists use the words of Muhammad to justify their suicide bombings. This form of criticism is not just allowed; it is indeed morally required. The manner in which the criticism has been posed is admittedly less than elegant, but the essential point is that the cartoons *do* have an important message to communicate.

However, it might still be objected that though criticizing Islamic terrorism is legitimate, that does not justify the use of satire. The same point could have been made in a less offensive way. I would readily concede that point, but argue that whereas there might be a case for censoring purely religious satire, especially in those cases where the satire only serves to mock

and ridicule, this was an instance of political satire that every group in society must be able to tolerate. The fact that the satire in this case also involved the mocking of a religious figure was to some extent unavoidable, exactly because of the fusion of religion and politics that dominate nearly all Moslem countries.

Furthermore, rather than seeing the cartoons as castigating and excluding a minority, they could be seen as integrating the Moslem community into the tradition of satire that flourishes in Denmark and which distinguishes the way Danes treat each other. Thus, rather than being excluding, the cartoons could be seen as including Moslems by treating them as equals. It might be objected that this form of argument presupposes a situation of equality that simply does not exist as of yet. Moslems are as a less empowered minority not in a position of equality. However, offended Moslems have indeed been given the opportunity to respond to the cartoons in the relevant media. The fact that Denmark experienced virtually no public demonstrations following the publication also seems to confirm that the Moslem community is actually heard and more empowered than many critics think. Only the powerless seek to the streets and demonstrate. Is one being heard on all channels and stations, demonstrations become more or less superfluous.

Lastly, it could be objected that JP should have foreseen the harm affected by the cartoons and refrained from publishing them on those grounds. However, though JP of course could foresee some disturbances, the extent of the disturbances could certainly not have been imagined by the newspaper. The demonstrations and attack on Danish embassies and representations seem to a high degree to have been politically rather than religiously motivated, which the long time period between the publication and the demonstrations only seem to confirm. And, importantly, even if the violent demonstrations could have been foreseen, we must still ask this form of violent response was appropriate? This answer to this question must surely be that mere offense does not justify harmful demonstrations that involve and incite to murder.

In conclusion, though the cartoons as a communicative act have been unsuccessful, as many Moslems believe the offensive cartoons suggested that all Moslems are potential suicide bombers, there is no reason to doubt neither the cartoonist nor JP that this was not their intention. The intention behind the offensive cartoons does seem to have been genuine communicative. Instead of being seen as an example of castigation, the cartoons should be seen as an attempt in a critical, satirical way to engage in a dialogue with Moslem community about Islamic fundamentalism and the current crisis of the Moslem world in most of the Middle East.