

FLEMMING ROSE, THE DANISH CARTOON CONTROVERSY,  
AND THE NEW EUROPEAN FREEDOM OF SPEECH<sup>1</sup>

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*“As a former correspondent in the Soviet Union, I am sensitive about calls for censorship on the grounds of insult. This is a popular trick of totalitarian movements. Label any critique or call to debate as an insult and punish the offenders.”*<sup>2</sup>

*“[The cartoons were a]n act of inclusion. Equal treatment is the democratic way to overcome traditional barriers of blood and soil for newcomers. To me, that means treating immigrants just as I would any other Danes.”*<sup>3</sup>

## I. A BRAVE (YET INCLUSIVE) NEW WORLD OF FREEDOM OF SPEECH

Settled doctrine inspires feelings of comfort. In the late 1980s and the 1990s, the debate between Americans and Europeans over the boundaries between free speech and hate speech had this quality.<sup>4</sup> Americans had a set of stock arguments for speech—speech helps in the search for truth, democracy, and individual self-fulfillment.<sup>5</sup>

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2. Flemming Rose, *Why I Published Those Cartoons*, WASH. POST, Feb. 19, 2006, at B.01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/17/AR2006021702499.html>.

3. Flemming Rose, *Why I Published the Mohammed Cartoons*, SPIEGEL ONLINE, May 31 2006, <http://www.spiegel.de/international/spiegel/0,1518,418930,00.html>.

4. See SANDRA COLIVER, *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION, AND NON-DISCRIMINATION* (1992) (providing an overview of the debate); see also UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES (Louis Greenspan & Cyril Levitt eds., 1993) (providing a country by country survey).

5. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15-73

Restrictions on speech fall hardest on powerless groups,<sup>6</sup> and, more generally, tolerating speech helps generate tolerant citizens.<sup>7</sup> Europeans answered with their own concerns, mostly related to the unhappy course of the twentieth century. Hate speech threatened the political order of unstable democracies and, at worst, opened the door to a Nazi resurgence.<sup>8</sup> Despite disagreements, both positions shared a certain logic: if Europe's reluctance to tolerate hate speech reflected its own unstable past, then the passage of time should lead to a gradual weakening of European hate speech laws.<sup>9</sup>

Ironically, a major new European opponent of hate speech laws found his voice in a "crisis."<sup>10</sup> *Jyllands Posten* culture page editor's

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(1982) (discussing the traditional bases for freedom of expression and defenses of speech based on truth, democracy, the good life and individuality).

6. See Sandra Coliver, *Hate Speech Laws: Do They Work?*, in COLIVER, *supra* note 4, at 363, 368-69 (providing a generic version of the argument). One reason Americans are especially receptive to this argument is the role freedom of speech played in the Civil Rights movement. See also SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 115-20 (1994) (describing speech restrictions imposed by Southern opponents of the movement that were struck down by the Supreme Court in cases like *NAACP v. Alabama*, 357 U.S. 449 (1957), and *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964)).

7. See LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

8. See UNDER THE SHADOW OF WEIMAR, *supra* note 4, at 1-15. The concern about Nazi revival was strongest in Germany (which bans the Nazi party, the Nazi salute and the Swastika). See ROBERT A. KAHN, *HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY* 23-24 (2004). But similar concerns are also present in countries such as France which experienced Nazi rule. These concerns came to a head in the 1960s with the rise of neo-Nazi and other right-wing extremist groups. These same concerns also found expression in international treaties that either allowed or required member states to enact bans on hate speech. WALKER, *supra* note 6, at 87-90.

9. See *infra* notes 135-38 and accompanying text (describing this perspective is in accord with Bollinger, who suggests that tolerating speech has the positive side effect of making the citizenry more tolerant).

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

decision to call for Danish cartoonists to draw the Prophet Mohammed as they saw him triggered an international controversy.<sup>11</sup> Steadfastly defending his decision to run the cartoons, the editor, Flemming Rose relied on two main arguments. First, Rose saw the controversy from the vantage point of totalitarianism. He compared himself to *samizdat* authors who, faced with a totalitarian state, had a duty to speak out by publishing provocative work.<sup>12</sup> Second, Rose made the paradoxical case that the cartoons—by exposing Danish Muslims to the same insults experienced by regular Danes—integrated Muslims into Danish society.<sup>13</sup>

From both European and American perspectives, these arguments are novel. Traditionally, the threat of totalitarianism was a reason to censor. During the McCarthy era, courts balanced the individual right to speak against the danger posed by the communist peril.<sup>14</sup> Likewise, the German concept of militant democracy restricts speech as a means of preventing a Nazi return to power.<sup>15</sup> Rose, however, viewed the “totalitarian threat” as imposing a duty on the journalist to speak out.

While the United States, unlike Europe, does not generally punish hate speech,<sup>16</sup> American opponents of hate speech laws generally accept that insulting speech harms the victim; differing from their European counterparts only in arguing that this harm is not sufficient

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(2006).

11. The actual decision process behind the publication of the cartoons is still in doubt. Klausen hints that the paper’s editorial board made the decision and left it to Rose to formally invite the cartoonists to participate. KLAUSEN, *supra* note 10, at 14. Rose, however, often describes himself as the publisher of the cartoons and has been an energetic defender of the decision to publish. *Id.*

12. See *infra* Part III and accompanying text. “Samizdat” is defined as “a system in the Union of Soviet Socialist Republics and countries within its orbit by which government-suppressed literature was clandestinely printed and distributed.” Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/samizdat>.

13. See *infra* Part IV and accompanying text.

14. See HARRY KALVEN JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 198-211 (Jamie Kalven ed., 1988) (providing a thorough overview of the seditious libel debate in the United States during the 1940s and 50s).

15. See DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 37-38 (1998).

16. See generally WALKER, *supra* note 6.

to justify legal sanctions.<sup>17</sup> Rose, however, argues that insulting speech—in this case the cartoons—helps rather than harms its intended targets.

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

Moreover, Part III discusses the totalitarian theme in Rose's writings. While Rose's rhetoric of totalitarianism most likely grew out of his personal experiences in the Soviet Union, it resonates with two larger discourses—one that views radical Islam as totalitarian, the other that applies the totalitarian label to hate speech restrictions (especially the bans on Holocaust denial enacted by many European countries in the 1990s).<sup>18</sup> Yet Rose's anti-totalitarian rhetoric—especially when used to justify his decision to publish the cartoons (as opposed to simply defending his right to do so)—does not sit well with American free speech doctrine, which tends to counsel patience in the face of threats posed by speech.<sup>19</sup>

Further, Part IV turns to Rose's argument that insults can be inclusive. It traces this argument to the Danish cultural norm of *hygge*, a form of informal sociality characterized by joking and teasing.<sup>20</sup>

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17. For example, Ronald Dworkin, writing in opposition to Germany's laws banning Holocaust denial, concedes that denial "hurts" its victims but argues that free speech requires sacrifices that "really hurt." Ronald Dworkin, *The Unbearable Cost of Liberty*, 3 INDEX ON CENSORSHIP 43 (1995).

18. This discourse dates back at least to 1990, when opponents of the French ban on Holocaust denial contrasted the collapse of the iron curtain in Eastern Europe with the rise of totalitarian laws in Western Europe. See KAHN, *supra* note 8, at 105-108.

19. See *infra* Part III and accompanying text. By free speech doctrine, the author has in mind both the line of cases running from the dissent of Justice Holmes in *Abrams v. United States*, 250 U.S. 616 (1919) to *Brandenburg v. Ohio* 395 U.S. 444 (1969), that over time set out a broad defense of political speech in the United States as well as academic writing defending freedom of speech. See, e.g., KALVEN JR., *supra* note 14 (describing the American speech cases in a sympathetic light); BOLLINGER, THE TOLERANT SOCIETY, *supra* note 5 (describing different models of speech protection).

20. See STEVEN M. BORISH, THE LAND OF THE LIVING: THE DANISH FOLK HIGH SCHOOLS AND DENMARK'S NON-VIOLENT PATH TO MODERNIZATION 276 (1991) (providing a description of *hygge*).

Rose's argument—though paradoxical at first glance—fits somewhat better with American free speech doctrine. But it is undercut by Rose's own anti-immigrant rhetoric as well as the broadly anti-immigrant political culture in Denmark and Europe.

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

## II. THE STRANGE CAREER OF FLEMMING ROSE

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

Born in 1958, Flemming Rose describes himself as “raised on the ideals of the 1960s” and someone who, “adopting both the hippie pose and the political superiority complex” of his generation, believed that “the West was imperialistic and racist.”<sup>21</sup> This attitude changed in 1980-81 when Rose spent ten months at the Institute for Russian Literature in Moscow.<sup>22</sup> He lived in a small apartment, had no personal privacy, and his girlfriend (and later wife), an editor for TASS, was kept under government surveillance.<sup>23</sup> The experience was critical for Rose: “I learned more about the Soviet system and Marxist-Leninist ideology from living in that apartment than from all the Sovietology I read.”<sup>24</sup>

Returning from the Soviet Union, Rose became a “committed Cold Warrior” with an “impressive grasp of Russian dissident literature.”<sup>25</sup> He pursued a career as a journalist and, in 1990, Rose

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21. Rose, *supra* note 3.

22. *Id.*; see also Jacob Laskin, *The Controversialist*, DOUBLETHINK ONLINE, Dec. 9, 2008, <http://americasfuture.org/doublethink/2008/12/the-controversialist/>.

23. *Id.*

24. *Id.* (quoting Rose).

25. *Id.*

returned to the U.S.S.R. to cover the Chechen war as a journalist for *Berlingske Tidende*,<sup>26</sup> a center-right Danish newspaper. While Rose initially sympathized with the Chechens, especially during the first war in 1990, a second assignment in 1996 changed his view. Interviewing a Danish advisor to the Chechens named Ibn Wahab, Rose was, according to Laskin, “first confronted with radical Islam.”<sup>27</sup> Rose concluded that radical Islam was “a totalitarian ideology” which was “very aggressive and framing itself in the same us-vs.-them dichotomy as Nazism and Stalinism.”<sup>28</sup>

To some extent, Rose’s transition mirrored that of his native land. Until the cartoon controversy erupted, Denmark was best known as a progressive Scandinavian society noted most for its homogeneity.<sup>29</sup> The country’s small Muslim population, while a target for right-wing extremists, was not itself seen as a threat.<sup>30</sup> As the 1990s progressed, however, the number of Muslims in Denmark grew. Attitudes became so hostile that in 2001 a Danish academic could report that the new groups, including Muslims, “challenged the historical homogeneity of Danish society” leading to fears that “in the not-too-distant future Danes will be reduced to a minority ‘in their own country.’”<sup>31</sup>

In response to these pressures, in 2001 Danes voted in a right-wing coalition led by Anders Fogh Rasmussen, whose Liberal (*Venstre*) Party depended on the anti-immigrant Danish People’s Party for support.<sup>32</sup> The election, which broke over seventy years of center

26. *Id.*

27. *Id.* (quoting Rose)

28. *Id.*

29. KNUD J.V. JESPERSEN, A HISTORY OF DENMARK 6-7 (2004) (discussing the common view of Denmark as a small, homogeneous country). The Danes’ reputation as a brave and tolerant people is also based in part on the rescue of Denmark’s 8000 strong Jewish population from the Nazi Holocaust during World War II. See ANDREW BUCKSER, AFTER THE RESCUE: JEWISH IDENTITY AND COMMUNITY IN CONTEMPORARY DENMARK 171-87 (2003) (providing an intriguing account of how the rescue shaped Danish national identity).

30. See BORISH, *supra* note 20, at 320-25.

31. Jørgen Bæk Simonsen, *Globalization in Reverse and the Challenge of Integration: Muslims in Denmark*, in MUSLIMS IN THE WEST: FROM SOJOURNERS TO CITIZENS 121, 126 (Yvonne Yazbeck Haddad ed., 2002).

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

left coalitions in Danish politics,<sup>33</sup> resulted in the passage of harsh new immigration laws including a new citizen test and an oath requiring potential citizens to swear allegiance to liberal ideals.<sup>34</sup> The government's culture minister, Brian Mikkelsen, called for opening a "new front of the cultural battle" against "immigrants from Muslim countries [who] refuse to accept Danish culture and European norms."<sup>35</sup>

Against this backdrop, Rose was hired in 2004 as the culture page editor of the *Jyllands Posten*, the largest circulation paper in Denmark and a firm supporter of the governing Liberal Party.<sup>36</sup> Despite this support, however, the paper has not consistently pursued an anti-immigrant line. In fact, in early 2005 it ran a series of articles portraying immigrants in a positive light.<sup>37</sup> It is unclear, however, whether Rose played any role in the decision to run these articles.

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

Rose ran the cartoons in the September 30, 2005 edition of the *Jyllands Posten*. In an article accompanying the cartoons, Rose referred to growing "self-censorship" and listed a series of incidents, most notably the case of a children's book illustrator who would draw Mohammed only on the condition of anonymity.<sup>38</sup> He noted "'people

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33. From 1924 to 2001 the Social Democrats were the largest party in parliament, yet they never obtained a clear majority. JESPERSEN, *supra* note 29, at 165.

34. See Robert A. Kahn, *The Danish Cartoon Controversy and the Exclusivist Turn in European Civic Nationalism*, 8 *STUD. ETHNICITY & NATIONALISM* 524, 528-30 (2008).

35. See Bonde, *supra* note 10, at 36 (providing a reprint of Mikkelsen's comments made in 2005).

36. Jytte Klausen, *Rotten Judgment in the State of Denmark*, SPIEGEL ONLINE, Feb. 8, 2006, <http://www.spiegel.de/international/0,1518,399653,00.html>.

37. Pernille Ammitzbøll & Lorenzo Vidino, *After the Danish Cartoon Controversy*, *MIDDLE EAST Q.*, Winter 2007, at 3-11 (describing how in May 2005 the *Jyllands Posten* won a European-wide award for "its positive coverage of successful cases of Muslim immigration in Denmark").

38. See KLAUSEN, *supra* note 10, at 14-21. Although Rose did not mention it in his article, he may have also been motivated by the November 2004 murder of Dutch filmmaker Theo van Gogh by a Muslim extremist in response for the film *Submission*, a statement against domestic violence, in which bodies of thinly veiled naked women are superimposed over passages from the Quran. The shooting



[living] in totalitarian societies are imprisoned for telling jokes or for satirizing dictators.”<sup>39</sup> Rose also added, “in a secular democracy,” one ““must be ready to put up with insults, mockery, and ridicule.””<sup>40</sup>

It is worth briefly mentioning the cartoons themselves and why Muslims might feel offended by them. The cartoons ran the gamut from inside jokes among Danish elites to explicit attacks on Muslims.<sup>41</sup> For examples of the first category, one cartoon depicted a man, presumably Mohammed, unable to pick Pia Kjaersgaard, head of the anti-immigrant Danish People’s Party, out of a police line-up; and yet another cartoon featured Mohammed as a seventh-grade boy who wrote on the blackboard in Arabic “Jyllands Posten’s journalists are a bunch of reactionary provocateurs.”<sup>42</sup> On the other hand, one cartoon arguably portrayed Muslims as misogynistic.<sup>43</sup> Finally, one that would later become infamous featured Mohammed with a bomb in his turban.<sup>44</sup>

Potential Muslim objections to the cartoons fell into two categories. First, some Muslims observe a general prohibition against depicting the Prophet Mohammed.<sup>45</sup> Muslim concerns about physical depictions of the prophets have, in earlier instances, led to removal of sculptures of Mohammed from American buildings.<sup>46</sup> A second set of

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triggered a vigorous anti-Muslim response in the Netherlands. See IAN BURUMA, *MURDER IN AMSTERDAM* (2006).

39. KLAUSEN, *supra* note 10, at 6.

40. *Id.* See also DANISH PENAL CODE § 140 (1933) (defining “blasphemy” as “mockery and insult.”)

41. Except where otherwise indicated, the description of the cartoons is taken from The Director of Public Prosecutions, Decision on Possible Criminal Proceedings in the Case of Jyllands-Posten’s Article “The Face of Muhammad,” Mar. 15, 2006, at 2-3, [http://www.risgadvokaten.dk/media/bilag/afgorelse\\_engelsk.pdf](http://www.risgadvokaten.dk/media/bilag/afgorelse_engelsk.pdf) [hereinafter DPP Decision].

42. *Id.* The “reactionary provocateur” language is from Klausen, *supra* note 36.

43. DPP Decision, *supra* note 41, at 3. The cartoon featured a bearded man with a sword flanked by two women wearing black gowns that covered everything except their eyes. *Id.*

44. *Id.* The turban cartoon is generally held as an example of a cartoon that gratuitously offends Muslims.

45. See Saloom, *supra* note 10, at 23-27 (describing strong prohibition against physical depiction in Sunni Islam).

46. Kahn, *supra* note 10, at 177.

concerns related to content. In particular, many Muslims objected to the image of Mohammed with a bomb in his turban, which was seen as suggesting either that Islam was a violent religion or that all Muslims were terrorists.<sup>47</sup>

The cartoon controversy was slow to develop. At first, tensions were confined to Denmark, as Danish Muslims complained both about the cartoons and other racist incidents.<sup>48</sup> In early October a group of eleven ambassadors from Muslim countries sought to meet with Prime Minister Rasmussen to combat “the ongoing smear campaign in Danish public circles and media against Islam and Muslims.”<sup>49</sup> Prime Minister Rasmussen refused the meeting, arguing that it was up to the courts to resolve any issues involving hate speech and that otherwise he had no power to intervene.<sup>50</sup>

Over the next months the controversy became internationalized.<sup>51</sup> In late 2005 a group of Danish imams visited the Middle East with a dossier that included the twelve cartoons as well as other, more offensive cartoons.<sup>52</sup> There soon followed a boycott on Danish goods by several Muslim countries including: major Danish trading partners such as Saudi Arabia and Iran; the publication of the cartoons by papers in other European papers (first Norway, then other countries); and finally, in February 2006, violent demonstrations against the

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47. See Saloom, *supra* note 10, at 34-35.

48. Bonde, *supra* note 10, at 40-41.

49. *Id.*

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

51. See Risto Kunelius & Elisabeth Eide, *The Mohammed Cartoons, Journalism, Free Speech and Globalization*, in *READING THE MOHAMMED CARTOONS CONTROVERSY: AN INTERNATIONAL ANALYSIS OF PRESS DISCOURSE ON FREE SPEECH AND POLITICAL SPIN* 10 (Risto Kunelius, Elisabeth Eide, Oliver Hahn & Roland Schroeder eds., 2007) (providing an overview of how the controversy escalated); see also Saloom, *supra* note 10, at 6-12.

52. Ammitzbøll & Vidino, *supra* note 37.

cartoons in the Arab/Muslim world, which culminated in the burning of Danish embassies in Syria and Gaza.<sup>53</sup>

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

These events brought Rose and the *Jyllands Posten* back to center stage. As editor of the paper that triggered the controversy, Rose became an overnight celebrity. These were heady times for Rose. Interviewed on the CNN Situation Room, Rose explained how, despite threats to kill those who offended the Prophet, he “was not scared.”<sup>54</sup> Rose also refused to apologize for “the [act of] publication itself” even though he would “apologize for the feelings it has caused.”<sup>55</sup>

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

If you make a religious cartoon, we do that with Jesus Christ, with the royal family, with public politicians . . . that does not mean you thereby denigrate their religion, you humiliate, you make fun of them. In fact, by that, you are part of Denmark. You are treated like everybody else in our society. You are not strangers and outsiders.<sup>56</sup>

Later in the interview Rose described the cartoons as part of “Danish customs, traditions of satire and humor.”<sup>57</sup>

Eventually, the pressure seemed to get to Rose. Three days after

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53. See Kunelius & Eide, *supra* note 51, at 10. Interestingly, in October 2006, the cartoons ran in an Egyptian paper without incident. *Id.* Jytte Klausen ties the escalation of the controversy to developments in Middle Eastern politics—in particular the desire of the Egyptian government to show the West that democratization would lead to violent Islamist protests. See *A Conversation with Jytte Klausen about European Islam*, BRANDEIS NOW, Mar. 10, 2009. See also KLAUSEN, *supra* note 10.

54. The Situation Room, CNN.com, Feb. 7, 2006, (Transcript of Interview with Jyllands-Posten Editor Flemming Rose) available at <http://edition.cnn.com/TRANSCRIPTS/0602/07/sitroom.o3html> [hereinafter CNN Transcript].

55. *Id.*

56. *Id.*

57. *Id.*

appearing on CNN, however, Rose said the newspaper would consider running the cartoons that came out of Iran's proposed contest for cartoons depicting the Holocaust.<sup>58</sup> In response, Carsten Juste, editor-in-chief of the paper, asked Rose to take vacation time. He explained that Rose had recently been working under "inhumanly hard pressure."<sup>59</sup> Rose for once admitted error and stated he was now "100% behind the newspaper's line."<sup>60</sup>

Despite his forced vacation, Rose continued to defend his position that he was right to publish the cartoons. In a mid-February op-ed piece in the *Washington Post*, Rose lectured an American audience about self-censorship and the danger of giving into "totalitarian" impulses—which Rose called "*the*" lesson of the Cold War.<sup>61</sup> In a novel twist, Rose justified calling for and running the cartoons as a way of covering "the legitimate news story" of self-censorship in Denmark.<sup>62</sup> Rose also referred to the Danish "tradition of satire when dealing with the royal family and other public figures" and talked at length about how the cartoons opened the debate up in Denmark by encouraging Muslims to speak out.<sup>63</sup>

Writing for a European audience a few months later, Rose stressed the same themes but with a slightly harsher tone.<sup>64</sup> He described his personal journey from "hippie" to "Cold Warrior" but, in a much more systematic way, drew a direct comparison between his old and new enemies: "Europe's left is deceiving itself about immigration, integration and Islamic radicalism today, the same way we young hippies deceived ourselves about Marxism and communism 30 years ago."<sup>65</sup> He then chided Denmark's Muslim minority for their high birth rates, high crime rates, and cult of victimology.<sup>66</sup> Next he turned his focus to Europeans who, he claimed, need to take "a leaf—

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58. *Cartoon Row Editor Sent on Leave*, BBC NEWS, Feb. 10, 2006, available at <http://newsvote.bbc.co.uk>.

59. *Id.*

60. *Id.*

61. Rose, *supra* note 2.

62. *Id.*

63. *Id.*

64. Rose, *supra* note 3.

65. *Id.*

66. *See id.*

or a whole book—from the American experience” of absorbing newcomers.<sup>67</sup>

#### D. Free Speech Celebrity

As the controversy started to subside, Rose settled into his new role as defender of free speech. In 2007 Rose received the first ever Sappho prize from the Danish Free Press Society.<sup>68</sup> The uncovering of a bomb plot directed at Kurt Westergaard, who drew the turban cartoon,<sup>69</sup> led to a new round of interview requests and speaking engagements in early 2008. Later that same year, Rose traveled to the United States and spoke at a number of forums, including university campuses.<sup>70</sup> The following year, Rose traveled to Israel where—despite his unwillingness to run cartoons about the Holocaust—he called for a lifting of laws banning the publication of *Mein Kampf*.<sup>71</sup>

In these appearances, Rose began to broaden his concerns beyond the cartoons. He now expressed opposition to all laws punishing insults—a category that went beyond genocide denial bans to also encompass the hate speech laws that most European countries have adopted.<sup>72</sup> In making these arguments, Rose warned of the “insult

67. *Id.*

68. Gwladys Fouché, *Danish Cartoons Editor Wins Award*, *GUARDIAN*, Mar. 20, 2007.

69. The plot was uncovered in February 2008. *Police Foil Plot to Kill Muhammad Cartoonist*, *MSNBC.COM*, Feb. 12, 2008. Interestingly, while Westergaard spoke of fear, anger and resentment, Rose asserted that the atmosphere in Denmark was “pretty calm” and that he did not fear for his life. “*I Don’t Fear for My Life*”, *SPIEGEL ONLINE*, Feb. 12, 2008 (interview with Jyllands-Posten Editor).

70. Rose spoke at Stanford University in May 2008 and at Duke the following October. *See Cartoon Editor Disillusioned With U.S. Press*, *N.Y. SUN*, May 9, 2008; *see also* The Committee for Free Speech, *Mr. Flemming Rose, Publisher of Danish Muhammad Cartoons, to Speak at Duke University* (flyer), Oct. 30, 2008. Rose was also interviewed by Radio Free Europe/Radio Liberty in March 2008. *See Interview: Editor Behind Cartoon Controversy Discusses Islam, Free Speech* (*RADIO FREE EUROPE/RADIO LIBERTY* radio broadcast Mar. 29, 2008).

71. Nir Magal, *Muhammad Cartoons Editor: There’s a Problem with Muslims in Europe*, Apr. 22, 2009, available at <http://www.ynetnews.com/articles/0,7340,L-3704712,00.html>.

72. Sometimes, Rose’s reach was even broader. In his 2008 *Spiegel* interview, Rose called on “people in favor of free speech . . . to unite in order to get rid of all kinds of laws around the world that limit the right to free speech,” a category that included “blasphemy laws, laws protecting dictators, [and] laws being used to

fundamentalist” who insists that people “have a right not to be offended.”<sup>73</sup> These people, Rose argued (tongue in cheek?), should be given “insensitivity training.”<sup>74</sup> Rose also criticized those who made the argument: “If you respect my taboo, I’ll respect yours.”<sup>75</sup> This, according to Rose, “was the rule of the game during the Cold War until people like Vaclav Havel, Lech Walesa [and] Andrei Sakharov” replaced it with the idea that rights belong to “human beings” not “cultures, religions or political systems.”<sup>76</sup> In opposing hate speech and genocide denial laws, Rose has company. For example, Timothy Garton Ash has become a vocal critic of genocide denial laws, arguing that in light of the cartoon controversy, Europeans cannot afford to be seen as censors.<sup>77</sup>

Rose also took his American hosts to task for not running the cartoons.<sup>78</sup> For example, speaking at Stanford University in May 2008, he said: “It reads on the top of the New York Times, ‘All the News That’s Fit to Print,’ but it’s very hard to argue that [the cartoon controversy] was not news on February 1, 2006.”<sup>79</sup> While he won some converts—such as, Debra Saunders of the *San Francisco Chronicle*<sup>80</sup>—he and his supporters often struggled with American

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silence people who are critical.” *“I Don’t Fear for My Life”*, *supra* note 69.

73. Islam in Europe, *Israel: Flemming Rose on Free Speech*, Apr. 26, 2009, <http://islamineurope.blogspot.com/2009/04/israel-flemming-rose-on-free-speech.html>. Rose spoke at a panel discussion held at Hebrew University.

74. *Id.*

75. See Flemming Rose, *Free Speech and Radical Islam*, WALL ST. J., Feb. 15, 2008.

76. *Id.*

77. See Timothy Garton Ash, *This is the Moment for Europe to Dismantle Taboos, Not Erect Them*, GUARDIAN, Oct. 19, 2006, at P31.

78. For instance, Rose told his audience at Stanford University that he was “disappointed” that American papers did not run the cartoons. *Cartoon Editor Disillusioned With U.S. Press*, *supra* note 70.

79. *Id.*

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

audiences, who defended his right to publish, but not his judgment.<sup>81</sup>

Meanwhile, for Rose, his supporters, and surprisingly even some Danish critics, the cartoons themselves became a symbol of resistance to totalitarian censorship.<sup>82</sup> For instance, when the bomb plot against cartoonist Kurt Westergaard was revealed, several Danish papers ran the cartoons as a show of support.<sup>83</sup> For his part, Rose has taken up the cause of defending cartoonists who depict Mohammed. For instance, in his 2008 *Spiegel* interview defending Westergaard, Rose also discussed a Swedish artist accused of depicting Mohammed as a dog.<sup>84</sup>

### *E. Hero or Huckster?*

The issue here is not Rose's sincerity—his role in the cartoon controversy flows out of his past experiences in the Soviet Union and deeply held concerns about Islam. What is more, the controversy clearly changed his life and given Rose a mission—to repeal all “insult” laws in the name of free speech.<sup>85</sup> But are his ideas coherent?

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

82. This echoes the broader European trend in January and February 2006, when papers across Europe ran the cartoons in part as an act of “solidarity” with the Danes. KLAUSEN, *supra* note 10, at 51.

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

84. “*I Don't Fear for my Life*,” *supra* note 69.

85. This remains the case, even if, as some critics argue, Rose ran the cartoons for other, less idealistic reasons. See Klausen, *supra* note 36 (arguing that the cartoons “started out as a gag, the kind you do when the news is slow”). Klausen also said that she had no interest in her book being used as a “demonstration for or against the cartoons.” *Yale Rejects Prophet Cartoons Reprint*, ISLAM ONLINE, Aug. 13, 2009.

Do they mark out a cognizable theory of free speech, or are they merely a cobbled together *post-hoc* justification for his decision to run the cartoons?<sup>86</sup>

The next two parts attempt to answer these questions with a detailed look at Rose's two main reasons for running the cartoons—standing up to totalitarianism and initiating Muslims into the Danish tradition of satire. Are these concerns viable? How do they compare to traditional American rationales for defending speech?

### III. THE ANTI-TOTALITARIAN IMPERATIVE

From an American perspective, what is most striking about Rose's totalitarian argument is its urgency. Rose calls on his readers to act now, before it is too late. Rose's call to action reflects the difficult nature of his task. He was not simply arguing that the *Jyllands Posten* had a legal right to publish the cartoons. This was not really in dispute, although the Danish prosecutor's office did investigate the possibility of bringing formal charges against the paper.<sup>87</sup> Rose was also arguing that the decision of the *Jyllands Posten* to run the cartoons should be applauded—and perhaps emulated—by all supporters of free speech.

Given the strong reaction to the cartoons in the Muslim world, this claim was harder to make. In fact, most mainstream papers in the United States and Great Britain refused to run the cartoons.<sup>88</sup>

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86. The impression that Rose shoots from the hip is fostered by his blunt, informal language. For example, in his *Spiegel* article defending the cartoons, Rose found time to call the song "Imagine" by John Lennon "stupid." Rose, *supra* note 19. When asked whether he had any regrets about running the cartoons, Rose often responds by comparing himself to a rape victim. See CNN Transcript, *supra* note 54 (claiming that the question is "like asking a rape victim if she regrets wearing a short skirt at the discotheque").

87. Denmark follows the European model in which refusal to prosecute can be appealed by the complainant and must be supported by a written decision. See Lagoutte, *supra* note 50, at 392-93. The only European prosecution based on the cartoons resulted in an acquittal. See Stefan Simmons, *Cartoons 1, Muhammad 0*, SPIEGEL ONLINE, Feb. 16 2007 (describing the prosecution of *Charlie Hebdo*, a satirical weekly magazine in France, for running the turban cartoon). The author hopes to take up the *Charlie Hebdo* litigation in a future paper.

88. In the United States, the only major papers to run the cartoons were the *Philadelphia Inquirer*, the *Rocky Mountain News*, and the *Austin American Statesman*. See Kahn, *supra* note 10, at 153, 163-66. In Britain, no major papers ran



Meanwhile, as the controversy progressed, several European journalists and politicians apologized for either having run or supported the cartoons. For example, in Norway, a small conservative Christian newspaper, *Magazinet*, ran the cartoons in October 2006.<sup>89</sup> The following month, the Norwegian Minister of Labor and Immigration arranged a meeting between the paper's editor and a local Muslim at which the editor apologized for offending the religious dignity of Muslims.<sup>90</sup>

The most dramatic event—falling short of a formal apology—came from Danish Prime Minister Anders Fogh Rasmussen. Earlier Rasmussen had refused to meet with Muslim ambassadors to discuss the controversy—in large part because any meeting would, in his opinion, constitute interference with the press.<sup>91</sup> After the controversy turned violent in early 2006, Rasmussen changed his tune. He invited seventy-six Muslim ambassadors to a press conference at which, without directly apologizing, he stressed Denmark's commitment to religious tolerance and deplored the publication of the cartoons.<sup>92</sup>

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

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the cartoons. See Angela Phillips & David Lee, *The UK: A Very British Response*, in *READING THE MOHAMMED CARTOONS CONTROVERSY: AN INTERNATIONAL ANALYSIS OF PRESS DISCOURSE ON FREE SPEECH AND POLITICAL SPIN* 65 (Risto Kunelius, Elisabeth Eide, Oliver Hahn & Roland Schroeder eds. 2007).

89. Solveig Stein, *Norway: “A Norway Almost at War,”* in *READING THE MOHAMMED CARTOONS CONTROVERSY: AN INTERNATIONAL ANALYSIS OF PRESS DISCOURSE ON FREE SPEECH AND POLITICAL SPIN* 41 (Risto Kunelius, Elisabeth Eide, Oliver Hahn & Roland Schroeder eds. 2007).

90. *Id.* at 46.

91. See *supra* note 50 and accompanying text.

92. Fogh opfordrer ambassadører til samarbejde DR [Danish Radio], *POLITIK*, Feb. 3, 2006, available at <http://www.dr.dk/Nyheder/Politik/2006/02/03/121812.htm>.

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

In comparing radical Islam to hard line communists, Rose is not alone.<sup>93</sup> In fact, many opponents of radical Islam make the same comparison, including Daniel Pipes—son of Richard Pipes, a historian most notable for his opposition to the Soviet Union.<sup>94</sup> Moreover, the equation of radical Islam and communism makes biographical sense for Rose given his life story. But the “totalitarian” metaphor also works because of its role in European and American constitutional debates as the paradigmatic threat a liberal society can and should act against.

This theme is most obvious in Germany where the concept of militant democracy is written into the constitution,<sup>95</sup> finds expression in a number of specific prohibitions on speech, actions, and association,<sup>96</sup> and has been extended to groups beyond the Nazis and Communists—the two groups normally associated with totalitarianism. In particular, the totalitarian label has been used to justify restrictions on Jehovah’s Witnesses and Scientologists.<sup>97</sup> The

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

94. Interestingly, Rose interviewed Pipes a few months before the controversy began. See Interview by Daniel Pipe with Flemming Rose, *The Threat of Islamism*, available at <http://www.danielpipes.org/3362/flemming-rose-interview-the-threat-of-Islamism> (translation of an article that ran in the *Jyllands Posten* on Oct. 29, 2004). In his article, Rose specifically referred to Richard Pipes as “opposed to the [liberal?] spirit of the 1960s and 1970s.” *Id.*

95. For example, Article 18 of the German Constitution states that those who abuse a number of freedoms—including freedom of expression and freedom of the press—by combating “the free democratic basic order” forfeit these rights. KOMMERS, *supra* note 15, at 510. Meanwhile, Article 21(2) declares unconstitutional “[p]arties which . . . seek to impair or abolish the free democratic basic order.” *Id.* at 511.

96. See *supra* note 6 and accompanying text (noting that Germany bans the swastika and the Nazi salute). See also Robert A. Kahn, *Informal Censorship of Holocaust Revisionism in the United States and Germany*, 9 GEO. MASON U. CIV. RTS. L.J. 125, 141-42 & n.85 (1998) (describing the banning of the German Communist party and the 1972 Decree Against Radicals).

97. See Robert A. Kahn, *The Headscarf as Threat: A Comparison of German and U.S. Legal Discourses*, 40 VAND. J. TRANSNAT’L L. 417, 422 n.29 (2007).

same anti-totalitarian rhetoric was at play in 2003 when the German Federal Constitutional Court held that individual German states had the power to ban headscarf use by civil servants.<sup>98</sup>

The same theme was also a part of mid-twentieth century American justifications of speech restrictions. In *Dennis v. United States*,<sup>99</sup> the Supreme Court upheld convictions of eleven communist leaders charged with violating the Smith Act, which made it illegal to advocate the violent overthrow of the United States. In reaching this decision, the Court held that speech restrictions were permissible so long as “the gravity of the evil, discounted by its improbability” was sufficiently high.<sup>100</sup> Nor was the concern solely limited to Communists—in a series of articles written in the 1940s sociologist David Riesman advocated using group libel laws as a “weapon” in the struggle of democracy against international fascism.<sup>101</sup> The Supreme Court appeared to validate these concerns when, in 1952, it upheld a group libel statute in *Beauharnais v. Illinois*.<sup>102</sup>

While both the “gravity of the evil” test and *Beauharnais* have fallen by the wayside,<sup>103</sup> the argument that a democracy can restrict speech to defend itself is powerful. And the German headscarf case shows a willingness to view radical Islam as a threat as to the free democratic order. However, the language Rose uses to describe the totalitarian claim is problematic. For example, at times during his September 30, 2005 statement accompanying the initial publication of the cartoons, Rose carefully distinguished between radical Islam and Muslims more generally.<sup>104</sup> At other moments, however, Rose

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98. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Sept. 24, 2003, 108 Entscheidungen des Bundesverfassungsgerichts 282 (F.R.G.) (translated by the author). The majority—over a sharp dissent—held that the German civil service could not, of its own accord, ban a school teacher, Fereshta Ludin, for wearing a headscarf. *Id.* The dissent in particular placed a great emphasis on the role of the headscarf as a symbol of totalitarian Islam. *Id.* at 333 (dissenting). For more information, see Kahn, *supra* note 97, at 426-29.

99. *Dennis v. United States*, 341 U.S. 494 (1951).

100. *Id.* at 510.

101. See generally WALKER, *supra* note 6, at 79-81.

102. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

103. See KALVEN JR., *supra* note 14, at 211-26 (describing the demise of the “gravity of the evil test”), and WALKER, *supra* note 6, at 101-26 (describing the gradual undermining of *Beauharnais*).

104. See DPP Decision, *supra* note 41, at 2 (citing extensively from Flemming

appeared to view the threat as involving Muslims as a whole.<sup>105</sup> But in the militant democracy discourse, the origin of the totalitarian threat is almost always political; rarely, if ever, is it based on race or ethnicity. In fact, such claims go against the anti-Nazi ethos which is a central part of the anti-totalitarian argument.<sup>106</sup>

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

Assuming Rose restricts his claim to radical Islam (and can show that radical Islam is in fact a totalitarian threat), Rose would then face a new hurdle. In the examples just discussed, the totalitarian threat is used to restrict speech. Can the totalitarian threat also be a reason to allow speech? To put it another way, when Rose argues that he is “sensitive about calls for censorship on the grounds of insult” because “[t]his is a popular trick of totalitarian movements,”<sup>107</sup> is he adding something new to the Euro-American debate over speech?

At first glance, one might think Rose would have an easy time finding examples to buttress his case. After all, one of the key features of totalitarian movements and states is censorship: something clearly recognized by Rose, who cited Karl Popper’s *The Open Society and Its Enemies* in his *Washington Post* piece.<sup>108</sup> From a legal perspective, however, the task is considerably harder. The very existence of the twentieth century free speech discourse presupposes a constitutional democracy that, constrained by the rule of law, abides by restrictions on its physical ability to restrict speech.<sup>109</sup> However, a constitutional

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Rose, *The Face of Muhammad*, JYLLANDS POSTEN, Sept. 30, 2005, at 3.

105. See Rose, *supra* note 3.

106. The anti-immigrant strain in Rose’s rhetoric also poses problems for his inclusiveness argument. See discussion *infra* Part IV.

107. See Rose, *supra* note 2.

108. *Id.*

109. To be sure, it is possible to discuss and defend speech in other times and places. See HENRY OSBORN TAYLOR, *FREEDOM OF THE MIND IN HISTORY* (1923). Voltaire, for instance, campaigned against the excesses of absolutist France. See Adam Gopnik, *Voltaire’s Garden: The Philosopher as a Campaigner for Human Rights*, NEW YORKER, Mar. 7, 2005, [http://www.newyorker.com/archive/2005/03/07/050307crbo\\_books](http://www.newyorker.com/archive/2005/03/07/050307crbo_books). But, the author would argue, the presence of a constitutional state that decides cases according to reasoned arguments greatly deepened the public debate about when the state should restrict speech.

democracy is by definition not totalitarian, which makes it hard to ground a justification for protecting speech based on a totalitarian threat from such a state.

However, there is one place where anti-totalitarian speech justifications have flourished—in debates over laws banning Holocaust denial. Most notably, in France in 1990, a Communist member of the National Assembly, Jean Claude Gayssot, proposed a bill containing a number of measures targeting the extreme right, including a ban on Holocaust denial.<sup>110</sup> When the bill came up for debate, opposition members made repeated reference to failings of the French Communist Party, communism in general, and categorized the Gayssot law as a Stalinist attempt to enforce an official truth.<sup>111</sup>

The anti-totalitarian discourse made sense because of specific circumstances. The minority Socialist government of France depended on the staunchly Stalinist French Communist Party for parliamentary support. This gave resonance to the opposition's claims that the Gayssot law was totalitarian.<sup>112</sup> Rose, however, has a much broader goal—he wants to use an anti-totalitarian argument against *all* insult laws. To make this argument, Rose should assert that states enacting such laws are either already totalitarian or become totalitarian by enacting such laws. This is a difficult argument to make because “insult laws” are widespread across Europe.<sup>113</sup> In addition, if Rose is right and European states are already—due to a misguided political correctness—well on the path to totalitarianism, then what precisely is the threat posed by radical Islam? The barn door has already been closed.<sup>114</sup>

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110. See KAHN, *supra* note 8, at 103-108.

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

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

113. Most European states penalize some form of insult—does this make all of Europe totalitarian?

114. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

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

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

One of the key differences is related to the use of themes of bravery, courage—and conversely—cowardice. For Rose and his supporters the hero was someone who took action against the totalitarian threat—by publishing the cartoons, or by refusing to apologize for running them. For example, Lars Hedegaard, president of the Danish Free Press Society, compared pressure on Rose to apologize to “appeasement” before World War II.<sup>115</sup> Likewise, papers that refused to run the cartoons were depicted as cowards.<sup>116</sup> As a *Jyllands Posten* columnist put it, the “natural way to show solidarity” with the paper’s “refusal to follow . . . a restriction on freedom of speech” was to “print the cartoons.”<sup>117</sup> Rose, for his part, reinforced

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There, the Supreme Court held that the First Amendment protected the right of Jehovah’s Witnesses to opt out of a state mandated flag salute. *Id.* at 639, 642. Writing in the middle of World War II, Justice Jackson criticized regimes that use “coercive uniformity” to enforce “racial or territorial security,” noting that such efforts always failed—including “the fast fading efforts of our totalitarian enemies.” *Id.* at 640-41. So, here, anti-totalitarian rhetoric does serve the cause of individual rights. But *Barnette* is slightly different because, unlike the case of the Danish cartoons or Holocaust denial, the totalitarian entity (here Nazi Germany) is not behind the acts of censorship at issue.

115. Lindsay Berrigan, Denmark: Mohammed Cartoon Publisher Awarded, EDITORS WEBLOG, Mar. 21, 2007, available at <http://www.editorsweblog.org> (last visited Aug. 14, 2009).

116. This was especially evident in Britain, where no papers carried the cartoons. See Phillips & Lee, *supra* note 88, at 74-75.

117. Peter Hervik & Clarissa Berg, *Denmark: A Political Struggle in Danish Journalism*, in READING THE MOHAMMED CARTOONS CONTROVERSY: AN INTERNATIONAL ANALYSIS OF PRESS DISCOURSE ON FREE SPEECH AND POLITICAL

the point by repeated assurances to interviewers that he was not afraid.<sup>118</sup>

While there is a tradition of viewing speakers as heroes (or martyrs), mainstream American free speech doctrine, as it has evolved in the twentieth century, does not. Instead, the tradition tends to follow the lead of Justice Holmes who, dissenting in *Abrams v. United States*, referred to the publishers of Bolshevik pamphlets as “poor and puny anonymities”—hardly the language of heroes.<sup>119</sup> Later, Holmes questioned how “a silly leaflet” handed out “by an unknown man” could “present any immediate danger.”<sup>120</sup>

Instead, the heroes of the American speech drama are the citizens themselves, who refuse to give in to speculative fears. This is evident in Justice Brandeis’ dissent in *Whitney v. California*, where he notes “[t]hose who won our independence were not cowards,”<sup>121</sup> in part because they understood that “no danger flowing from speech can be deemed clear and present” unless the evil is “so imminent” that there is no “opportunity for full discussion.”<sup>122</sup> Justice Holmes makes a similar point when he refers to the United States Constitution as an “experiment” which, like the rest of life, is based on “imperfect knowledge.”<sup>123</sup>

Rose, however, appears unwilling to view Danish (or European) political arrangements in the same terms. These, instead, are under siege by radical Islam. In this regard, Rose’s view is closer to Justice Jackson’s view, where Justice Jackson, in his dissenting opinion in *Terminello v. Chicago*<sup>124</sup>—interestingly a case involving hate speech—rejected the idea that the Constitution is a “suicide pact.”<sup>125</sup> What both Rose and Justice Jackson lack is patience: either the metaphysical trust of Justice Holmes that things will work out, or

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SPIN 26 (Risto Kunelius, Elisabeth Eide, Oliver Hahn & Roland Schroeder eds. 2007).

118. See Magal, *supra* note 71.

119. *Abrams v. United States*, 250 U.S. 616, 629 (1919)

120. *Id.* at 628.

121. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting).

122. *Id.*

123. *Abrams*, 250 U.S. at 630.

124. *Terminello v. Chicago*, 337 U.S. 1 (1949).

125. *Id.* at 37 (Jackson, J., dissenting).

Justice Brandeis' call to summon up courage by reference to a heroic past.

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

One can appreciate the difficulty of Rose's position in an op-ed piece he wrote in the *Copenhagen Post* decrying the decision of British authorities to deny a visa to Dutch politician Geert Wilders.<sup>126</sup> The British authorities excluded Wilders because of his history of xenophobic comments about Muslims, culminating in his 2008 film *Fitna*.<sup>127</sup> In justifying this decision, British Foreign Minister David Miliband fell back on Justice Holmes' analogy that there is no right to yell "fire" in a crowded theater, which Miliband equated with stirring up racial and religious hatred.<sup>128</sup>

In defending Wilders, Rose made arguments that, from the perspective of American free speech discourse, were quite conventional. For instance, he noted that the conduct Schenck was convicted of—distributing anti-war leaflets—"is now completely legal."<sup>129</sup> He also pointed out—somewhat vaguely—that Justice Holmes "later used an opposing argument to defend freedom of speech."<sup>130</sup> He made the point that when there is a fire, one is actually

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126. Flemming Rose, Op-Ed, *A False Analogy*, COPENHAGEN POST, Feb. 24, 2009.

127. *Id.* At other times, Rose has tried to distance himself from Wilders, who has called for a ban on the Quran. See Magal, *supra* note 71.

128. Rose, *supra* note 126; see also *Schenck v. United States*, 249 U.S. 47, 52 (1919) (where Justice Holmes initially introduced the analogy mentioned in Rose, *supra* note 126).

129. Rose, *supra* note 126.

130. *Id.* One imagines Rose is hinting at the shift in Justice Holmes's position between *Schenck* and *Abrams*, where Holmes, writing in dissent, opposed the conviction of distributors of Bolshevik leaflets.



allowed to yell.<sup>131</sup> Finally, Rose repeated the argument of Alan Dershowitz that the proper analogy is not shouting fire in a crowded theater, but distributing leaflets outside the theater, warning it was unsafe.<sup>132</sup>

This is all well and good—and probably sufficient for his immediate purpose of criticizing the exclusion of Wilders. Rose, however, went a step further: “If there is a fire, or if there is smoke, then you have an obligation to draw everyone’s attention to it.”<sup>133</sup> While this may be true of smoky theaters, it is not an accurate description of American free speech doctrine, which protects but does not require speech. In his *Abrams* dissent, Justice Holmes wrote “the best test of truth [of an idea] is the power of the thought to get itself accepted in the competition of the market.”<sup>134</sup> This is a process that takes time. So the marketplace of ideas rhetoric, just like Justice Brandeis’s *Whitney* dissent, undercuts the urgency Rose needs to justify his decision to run the cartoons.

Nor does the situation improve for Rose when one looks at second-order rationales for speech. In his book the *Tolerant Society*, Lee Bollinger lays out a series of models that explain why liberal societies tolerate extremist speech: two of Bollinger’s models are of interest here—the “fortress model” and what he calls “general tolerance theory.”<sup>135</sup> While the fortress model’s name fits nicely with Rose’s concerns about fighting the forces of totalitarian self-censorship,<sup>136</sup> the model itself rests on a different premise—to protect good speech one must also protect a large amount of less good speech. By doing so, the courts set up a culture in which the suppression of speech is “unthinkable.”<sup>137</sup> However, condemning censorship is not

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131. Rose, *supra* note 126.

132. *Id.*

133. *Id.*

134. *Abrams v. United States*, 250 U.S. 616, 630-31 (1919)

135. Bollinger also includes a third category—the classical model—which encompasses the traditional arguments for speech based on the search for truth, promotion of democracy and individual self-fulfillment. See Bollinger, *supra* note 7, at 43-75.

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

137. *Id.* at 100.

enough for Rose, who needs a theory that will justify publishing provocative speech.<sup>138</sup>

Bollinger's preferred solution—the general tolerance model—at first glance offers Rose more comfort. In essence, Bollinger argues that societies should tolerate offensive speech because the practice of doing so helps citizens exercise self-restraint when dealing with opposing views.<sup>139</sup> This has some overlap with Rose's idea, discussed in Part IV, that offensive speech can have a positive impact on the society at large as well as the target group. But Bollinger's argument is largely about self-restraint—the state refuses to give into the temptation to censor, and the citizenry restrains its impulse to censor. To that extent, Bollinger follows in the footsteps of Justice Holmes and Brandeis—both of whom counsel against immediate action.

But Rose *has* acted. By publishing the Mohammed cartoons he helped trigger an international controversy. While he can argue—quite plausibly—that the unfolding of events, which culminated in an embargo, embassy burnings, and deaths, was not his responsibility,<sup>140</sup> Rose did not exhibit the patience counseled by Brandeis, Holmes and Bollinger. It could well turn out that Rose is on the verge of creating a new paradigm of speech justification, one that requires—or at least applauds—those who speak out against totalitarian censors. But this will be a departure from the traditional American reasons for protecting speech.<sup>141</sup>

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

139. *Id.* at 243

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

141. The author would like to briefly pause to take up one possible objection to this argument. It could be that Rose, as a journalist, has a deeper concern about self-censorship than traditional American free speech theory, which is focused on the perspective of the judge. One might then want to compare Rose's publication of the cartoons to what might seem like comparable instances from recent American history: (a) in the 1970s, comedian George Carlin used swear words in a deliberate attempt to expand the permissible grounds of freedom of speech and (b) in the early

## IV. THE DANISH CARTOONS—INSULT OR AN ACT OF INCLUSION?

Rose, however, has another reason for publishing the cartoons. He argues they served a beneficial purpose by helping Muslim immigrants feel at ease in their new Danish homeland. The inclusiveness argument has the advantage of shifting the debate from the duties of the journalist/speaker to the content and impact of the speech itself. The problem then becomes one of the typical American civil libertarian who, following Ronald Dworkin, will see hate speech (or to use a less loaded term, “insulting speech”) as harmful—even while opposing hate speech laws. Instead, harmful speech is seen as the “cost” of liberty.

While the cost of liberty argument protects Rose’s right to publish the cartoons, it has not led American papers to run the cartoons or agree with Rose’s actions. Instead, the tendency has been to take the offensiveness of the cartoons as given—often while questioning Rose’s judgment.<sup>142</sup> This response led *Jyllands Posten* publisher Joergen Ejboel to complain that Americans had reversed Voltaire’s famous dictum. While Ejboel quoted Voltaire as saying “I strongly disagree with what you say, but I’m willing to die for your right to say it,” the current press says: “I accept your right to say whatever you want, but I really think you shouldn’t say it.”<sup>143</sup>

Behind concerns about the cartoon’s potential to offend is the broadly held view that insulting speech is offensive. As critical race theorist Mari Matsuda puts it, speech that targets a group based on ethnic, racial, or religious characteristics is particularly offensive because it separates the target from the general society.<sup>144</sup> Rose,

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1990s, a number of college newspapers ran ads denying the Holocaust on freedom of speech grounds. See KAHN, *supra* note 8, at 121-35 (describing the debate on college campuses). However, Carlin’s words did not target a specific group, while the papers running the denial ads did not do so out of a fear of totalitarianism or with the idea that the ads would help integrate Holocaust survivors into American life.

142. See, e.g., *Poynter Podcast: Covering the Caricature Controversy*, POYNTER ONLINE, Feb. 13, 2006, available at [http://www.poynter.org/content/content\\_view.asp?id=96410](http://www.poynter.org/content/content_view.asp?id=96410). Interestingly, some of this reluctance comes from skepticism about the likely impact of the cartoons on Muslims. For instance, Keith Woods, Dean of the Poynter faculty, worried that “the world around, who are not Muslim, don’t really understand the issue of depicting Muhammad at its core.” *Id.*

143. Ejboel, *supra* note 81, at 19.

144. Mari Matsuda, *Public Response to Racist Speech: Considering the*

however, may have a plausible answer—if he can show that insulting speech (or least the cartoons) is a source of inclusion.

Rose's inclusiveness argument might look like an opportunistic, if unpersuasive, response to Matsuda. But his argument has roots in Danish culture, especially the Danish idea of informal sociality (*hygge*). The next section explores the idea that the cartoons are an expression of *hygge*. The following section puts Rose's claim that the cartoons are inclusive to the test in a broader context of anti-immigrant sentiment in Denmark and Europe more generally.

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

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

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

On the first point regarding the existence of such a tradition, the evidence does suggest that Denmark has a cultural tradition of *hygge* or social informality. According to anthropologist Steven Borish, *hygge* is present in one form or another in all Scandinavian societies—something often explained as "an adaptation to the long dark nights of the Scandinavian winter."<sup>145</sup> As practiced in Denmark, *hygge* rests on two elements: (i) "the complete and positive participation of all present in the [social] encounter[;]" and (ii) a "sustained back and forth dance of involvement" that encourages positive participation.<sup>146</sup> One can find evidence of *hygge* in the tendency of Danes to engage in friendly interactions in public places and, more generally, in the Danish focus on having "fun."<sup>147</sup>

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*Victim's Story*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT 17, 25 (Matsuda et al. eds., 1993). According to Matsuda, this is because hate speech "hits right at the emotional place where we feel the most pain[:] . . . being hated, despised, and alone." *Id.*

145. BORISH, *supra* note 20, at 276.

146. *Id.*

147. *Id.* at 278-80. Borish quotes Danish folklorist Iørn Piø, who wrote: "Every time there is the slightest occasion for it, people celebrate." *Id.* at 280.

Sustaining *hygge* requires “quick repartee,” an ability to tell jokes, and an expertise at “teasing,” which Borish calls a Danish “national pastime.”<sup>148</sup> According to Borish, teasing is an effective way of assuring that no one remains “indefinitely in a mood or posture communicating separateness or isolation” because “by the very act of responding to it the individual cannot help effectively becoming part of the interaction.”<sup>149</sup>

One can see examples of *hygge* in the public debate by Danes over the cartoons. For instance, Danish born political scientist Jytte Klausen, in her 2006 *Spiegel* article, recognized that the Economist called the cartoons a “schoolboy prank” yet admitted that one of the cartoons “elicited a laugh or two” in her family.<sup>150</sup> *Jyllands Posten* publisher Ejboel—who belongs to a group dedicated to better relations between Denmark and the Middle East—explained to an American audience that when he meets Islamic girls on his travels he replies: “Hey girls, in Denmark we have a lot of women who go topless.”<sup>151</sup> At the same event, Ejboel was questioned by an audience member who, asking about whether he would publish the cartoons again, concluded by saying: “Didn’t you expect some sort of incendiary reactions? Or were you like somehow oblivious?” Ejboel replied: “Just call me stupid.”<sup>152</sup>

While teasing—especially when self-deprecating—can be disarming, there is a harsher side to the practice. Consider the following example. Responding to the same questioner mentioned in the previous paragraph, Ejboel gave a hypothetical: “I mean if I look at you straight and say that you look like a stupid woman, I mean you have two choices, you can either give me a smash in the nose or you can leave the room. Or you can sue me. So which would you prefer?”<sup>153</sup> When the questioner said that she would choose to ignore him, Ejboel responded: “Exactly . . . in most of the time in our life,

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148. *Id.* at 276.

149. *Id.*

150. See Klausen, *supra* note 36. The cartoon her family, most of whom belonged to Ramussen’s Liberal Party, laughed at depicted Mohammed standing above a cloud turning away suicide bombers with the comment “Stop, stop, we have run out of virgins.” *Id.*

151. Ejboel, *supra* note 81, at 26.

152. *Id.* at 25.

153. *Id.* at 26.

you know, we simply ignore things.”<sup>154</sup>

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

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

The harsher form of *hygge* demonstrated in the exchange also reflects the way the Danish practice informal sociality and reinforces a deeply held norm of democratic egalitarian uniformity (*folkelighed*), which goes back at least to the nineteenth century folk school movement led by N.F.S. Grundtvig.<sup>155</sup> The egalitarian concept, which combined elements of “popularity, . . . folksiness, simplicity, [and] unassuming warmth and ease[.]” helps explain the preference for party politics characterized by multi-party coalitions and a student movement in the 1960s that preferred words to violence.<sup>156</sup>

But Danish egalitarianism also could be restrictive. Writing in the 1930s, Askel Sandemose, a Danish novelist living in Denmark, came up with Jante’s Law—a list of ten rules enacted by a hypothetical Danish community.<sup>157</sup> These rules, which include the directives “You

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154. *Id.*

155. See JESPERSEN, *supra* note 29, at 107-13. Grundtvig coined the term *folkelighed*, which roughly translates to “equality of the people.” *Id.* at 108. The idea of *folkelighed*, in turn, built on an earlier Danish tradition of consensus and negotiation that stretched back to the sixteenth century. *Id.* at 110.

156. *Id.* at 108-09.

157. BORISH, *supra* note 20, at 316. According to Borish, the novel—*En Flygtning Krydsder Sit Spor* (The fugitive crosses the track)—remained popular. In the 1980s, when he did his fieldwork for his book, many Danes brought up the novel, and most of those who did could cite large parts of it verbatim. *Id.*

shall not believe that you *are* somebody” and “You shall not believe that you can teach *us* anything,” convey the message: “Don’t be different.”<sup>158</sup> The emphasis on uniformity harms Denmark by keeping “talented people ‘in their place’”<sup>159</sup> and discouraging ambition in the educational system.<sup>160</sup> The harsh uniformity, meanwhile, is enforced by the Danish fondness for teasing. Describing Danish schools, Borish notes a tendency toward “humiliation and ridicule for those who dare to stand out . . . .”<sup>161</sup>

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

Now considering Rose’s inclusiveness argument in the *Washington Post*, Rose suggested the cartoons were a way of “treating Muslims in Denmark as equals,” not “strangers,” consistent with the norm of *folkelighed*.<sup>162</sup> When he asserted that the cartoons led to “a constructive debate in Denmark and Europe about freedom of expression, freedom of religion and respect for immigrants and people’s beliefs,”<sup>163</sup> and told his readers that the *Jyllands Posten* ran three pages of interviews from moderate Muslims, Rose spoke in the language of *hygge*. By running the cartoons he arguably drew Danish Muslims into a positive social interaction.

Moreover, Rose’s defense of the cartoons as generating productive debate has some resonance in the mainstream American speech discourse—even if few Americans likely accept his characterization of the cartoons as “inclusive.” For example, in *New York Times v. Sullivan*,<sup>164</sup> Justice Brennan wrote of the “profound national commitment” in the United States to “the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes

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158. *Id.*

159. *Id.*

160. JESPERSEN, *supra* note 29, at 112. For instance, a Minister of Education in the 1970s made the following statement which, if extreme, nevertheless is rooted in what Jespersen calls “the Grundtvigian principal of equality”: “Unless everybody can learn it, nobody should be taught it.” *Id.*

161. BORISH, *supra* note 20, at 318. Borish connects this to the “prevailing midrange of achievement” in Danish schools. *Id.*

162. Rose, *supra* note 2.

163. *Id.*

164. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

unpleasantly sharp attacks on government and public officials.”<sup>165</sup> There may be some overlap to the extent Rose can show that concerns about self-censorship constitute a public issue.

On the other hand, there are difficulties with Rose’s inclusiveness argument. First, while Rose’s *Washington Post* article referred to Muslims as “part of our society,”<sup>166</sup> his comments about “high immigrant crime rates” and “the coming demographic surge” in *Spiegel* raise doubts about his commitment to inclusiveness.<sup>167</sup>

Second, when Rose uses inclusiveness as a reason for other American newspapers to run the cartoons, he models the harsher, more coercive side of *hygge* which seeks to enforce participation in social activities. In effect, Rose and his supporters want the rest of the world to act as Danes by taking an active role in the controversy. The very need to make this request, however, suggests that *hygge* and teasing are not universal norms.

Third, Rose, who has become an all-purpose critic of insult laws, has not said enough about when insults are inclusive. For instance, while Rose, after some wavering, refused to run depictions of the Holocaust in the *Jyllands Posten*, he did not explain why cartoons of Mohammed are different.<sup>168</sup> Instead, he argued the cartoons—at least in Denmark—are no longer controversial.<sup>169</sup> To make this argument, Rose pointed out that following the death threat to Westergaard, seventeen Danish papers ran the cartoons.<sup>170</sup> But does the action of the Danish papers really show this? Were they not, in fact, responding to a crisis? Does this not show, at least among some of Denmark’s Muslim community, that the cartoons were still quite “controversial?”

To some extent, the argument that the cartoons are “inclusive”

165. *Id.* at 270.

166. Rose, *supra* note 2.

167. Rose, *supra* note 3.

168. He does respond to this point indirectly by arguing against the taboo traders’ promise to respect each others’ taboos. See Elliot Jager, *An Islamist ‘New World Order,’* JERUSALEM POST, Apr. 22, 2009. The result of taboo trading is “an intolerable decrease in freedom.” *Id.*

169. See *Editor Behind Cartoon Controversy Discusses Islam*, *supra* note 70. Klausen, defending her decision, vetoed by Yale University Press, made the same point. Cohen, *supra* note 83.

170. *Editor Behind Cartoon Controversy Discusses Islam*, *supra* note 70.



turns on what one means by “inclusion.” In all his writings on the cartoons, Rose has accepted the premise that Danish Muslims are in Denmark to stay. In his willingness to accept Muslims as citizens, he is far ahead of former German Chancellor Helmut Schmidt (who is on record as wishing the “guest workers” would return home).<sup>171</sup> But Muslims can only take part in Danish society on Danish terms, for example, by accepting that (by 2008 at least) the cartoons were no longer “controversial.” This perspective denies Danish Muslims a role in setting Danish values.<sup>172</sup>

This element of exclusion complicates Rose’s effort to convince Americans that the cartoons were not insulting. Consider, for instance, Debra Saunders’s initial response to the cartoons: they reminded her of insults devout Christians endure on a daily basis; she only changed her tune because of fears about self-censorship.<sup>173</sup> Frank Smyth of the Committee to Protect Journalists had similar doubts. Arguing against republication, he compared the cartoons to the then-recent controversy in which Don Imus used gender and racial stereotypes to insult the Rutgers women’s basketball team, and to literature offensive to Jews, including anti-Semitic caricatures.<sup>174</sup> Finally, John Donatich, the director of Yale University Press, defending his rejection of author Jytte Klausen’s request to include the cartoons in her book on the subject, spoke of the book’s potential to trigger violence across the globe.<sup>175</sup>

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

Even if Rose’s argument about the inclusiveness of the cartoons has roots in Danish culture, for his argument to be persuasive he must

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171. See Kahn, *supra* note 97, at 432. Schmidt, chancellor from 1974-82, belonged to the center-left Social Democratic Party.

172. See Kahn, *supra* note 34, at 534.

173. Saunders, *supra* note 80.

174. Ejboel, *supra* note 81, at 28. He added that “when media outlets really push the envelope on press freedom, they don’t necessarily expand freedom in a sustained way.” *Id.* at 29.

175. Cohen, *Yale Press Bans Images of Muhammad in New Book*, *supra* note 81. Donatich based his assessment on a series of confidential expert reports that he has not released, not to Klausen or anyone else. *Id.* It is therefore impossible to discern possible reasons behind Yale’s actions—such as fear that publishing the cartoons would harm the reputation or financial interests of the press.

show that Denmark and all of Europe are in fact open to Muslims. Here two questions emerge as central. First, do anti-immigrant developments in Denmark and Europe make Rose's promise of inclusion ring false? Second, how do the cartoons and the view of Muslims that underlies them compare to rhetoric and the tactics of admittedly xenophobic politicians and movements across Europe?

The answer to the first question undercuts Rose's position. At the very moment Rose welcomed Muslims to partake in the "Danish tradition of satire," the government's Minister of Culture was calling for a culture war. Worse still, members of the far-right Danish People's Party were providing parliamentary support for the Liberals.<sup>176</sup> In this respect, it is worth noting that the initial complaints from Danish Muslims raised the cartoons as merely one in a series of racist incidents targeting Muslims.<sup>177</sup>

On the other hand, there is some positive news. One result of the controversy has been the rise of Naser Khader, a Muslim immigrant from Syria who is also a member of parliament.<sup>178</sup> Khader, who opposes Muslim religious conservatives and favors assimilation, told an interviewer that "Muslims are no more discriminated against in Denmark than they are elsewhere in Europe" and that Danes generally "accept Muslims if you declare that you are loyal to this society, to democracy."<sup>179</sup> Meanwhile, Muslims won approval from the Copenhagen city council to build a mosque, which would be the first purpose built mosque in the country.<sup>180</sup> So there may be some sense in which Rose's offer of inclusion has some truth to it.<sup>181</sup> Yet, this must

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176. For more on the DPP, see KLAUSEN, *supra* note 10, at 151-55.

177. See Bonde, *supra* note 10, at 41. Nor have recent events helped matters. In August 2009, Danish police stormed a Copenhagen church that had been housing Iraqi refugees. See Matthew Saltmarsh & Catherine Contiguglia, *Raid in Denmark to Dislodge Iraqi Refugees Leads to Protests and Hunger Strike*, N.Y. TIMES, Aug. 15, 2009, at A7.

178. See Interview by Daniel Pipes with Naser Khader & Flemming Rose, *supra* note 138.

179. *Id.*

180. *Muslim Council Given Go-Ahead to Run City Mosque*, COPENHAGEN POST, Jun. 25, 2009, available at <http://www.cphpost.dk/culture/culture/122-culture/46067-muslim-council-given-go-ahead-to-run-city-mosque.html>.

181. There is a complication. While Muslims may obtain acceptance as citizens, the acceptance as full-fledged Danes may be harder to come by. See

be balanced against the harsh anti-immigrant rhetoric of the Danish People's Party.

Rose does better when his views are put into comparative context. Here it is instructive to compare Denmark to the Netherlands where, in recent years, there has been a series of controversies involving Muslims. These controversies include the release of Theo Van Gogh and Ayaan Hirsi Ali's film *Submission*, the subsequent murder of Van Gogh,<sup>182</sup> and the rise of Geert Wilders, a Dutch member of parliament who denied the existence of "moderate Islam," compared the Quran to *Mein Kampf*, and called an end to the "Islamic incursion" into Europe during a 2007 speech in parliament.<sup>183</sup> The following year, Wilders released the film *Fitna* which, like Van Gogh's earlier film *Submission*, feature graphic images of violence overlaid with verses from the Quran and an extended discussion of Muslim influence in the Netherlands.<sup>184</sup>

When set against this background, Rose's cartoons appear tame. This may be why Kurt Westergaard objected to the inclusion in the film of the turban cartoon he drew.<sup>185</sup> While Westergaard based his objections solely on copyright issues, the Danish Union of Journalists who threatened to file a lawsuit on his behalf objected "to the use of the cartoon as political propaganda"<sup>186</sup>—an objection that, to be sure,

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BUCKSER, *supra* note 29, at 171 (describing the situation of Jews in Denmark, Buckser commented that "Danish culture tends to reject difference on a more general level, valuing nation homogeneity and stigmatizing individuals who stick out"). For instance, Buckser relates the story of a Jewish woman with dark curly hair returning from abroad. She encountered a "very pleasant customs inspector" who "complimenting her on her Danish" asked "how long [she] had lived in the country." The woman replied "thirty-seven years!" *Id.* at 181.

182. See generally BURUMA, *supra* note 38 (discussing the circumstances surrounding Van Gogh's death).

183. *Mr Wilders's Contribution to the Parliamentary Debate on Islamic Activism*, GROEP WILDERS, Sep. 6, 2007.

184. See Timothy Garton Ash, *Intimidation and Censorship are No Answer to this Inflammatory Film*, GUARDIAN, Apr. 10, 2008 (providing a brief description of the film). Garton Ash, while calling the film "deliberately provocative" and "anti-Islam," nevertheless opposes censorship because, while "inflammatory," it does not, in his opinion, "across [sic] the line to incitement." *Id.*

185. Matthew Moore, Bruno Waterfield & Joan Clements, *Danish Cartoonist to Sue Dutch MP Over Anti-Islamic Film*, DAILY TELEGRAPH, Mar. 28, 2008.

186. *Id.*

overlooks the political impact of the cartoons in Denmark. But it also shows the political distance between Rose—who, whatever his actual reason for running the cartoons has largely stayed true to his theme of inclusiveness—and Wilders.<sup>187</sup>

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

Yet, in the end, this may do Rose little good. While other participants in the "clash of cultures" were more xenophobic, it was his decision to run the cartoons that ignited a global scandal. While Rose can quite plausibly deny responsibility for the violence, three years after the debate, he has yet to come up with a compelling account of why he chose to run them.<sup>188</sup> Perhaps, given the surprising turn of events and his role at the center of a global controversy, Rose himself no longer knows why he acted. While this may be true, it still leaves Rose poorly positioned to act as an apostle of inclusion.

#### V. CONCLUSION: LOOKING TOWARDS THE FUTURE

Rose may, however, have more of a future as an advocate for free speech—although here the evidence is also mixed. While most

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187. In future work, the author wants to trace the harshness of the Dutch debate over Islam to a political culture that is far different from what one finds in Denmark. This is important because, superficially, the two countries look similar. For example, the Danish emphasis on egalitarian uniformity and the Dutch polder model of compromise and negotiation both place an emphasis on consensus government. See BURUMA, *supra* note 38, at 48-51. But the basis of compromise is very different. For the Danes, it is based on homogeneity and uniformity (people agree because they are the same). For the Netherlands, which has since its inception experienced religious diversity, compromise rests on a series of agreements by leaders of diverse groups to accept one another, without true tolerance. The author suggests the Dutch model is prone to tension. In fact, the idea of consociational democracy Dutch political scientist Arend Lijphart drew from his own country is most often associated with Lebanon—hardly a political success story.

188. Rose is currently writing a book on the cartoons, so this may change.

participants in the Euro-American debate over hate speech defend Rose's right to publish the cartoons, he has had less success—at least in the United States—gaining support for his decision to publish. Rose's claim that totalitarian forces of self-censorship forced him to run the cartoons runs into a problem: the mainstream speech discourse, at least in the United States, counsels patience, not action. Notably, this, of course, assumes Rose can show that radical Islam is, in fact, a totalitarian movement.

Rose's second claim—that the cartoons are inclusive—is quite interesting. Deeply rooted in Danish culture, this claim has a good deal of resonance given the national habits of informal sociality and good-natured teasing. The question is whether this argument applies beyond Denmark. Here there are reasons for doubt. Despite the American tradition of open and robust debate, there is reluctance by the media to inflame tensions gratuitously.<sup>189</sup> Moreover, the current, strong, anti-immigrant political context in Denmark and Europe makes it harder to take Rose's offer of inclusion at face value. And while Rose is a far cry from extremist xenophobes like Geert Wilders, as culture page editor of the *Jyllands Posten* Rose will be forever associated with the cartoons.

This does not mean Rose's thought will not evolve. Rose developed the totalitarian and inclusion themes by February 2006 at the latest (a time when he was at the center of the storm). More recently, Rose's positions have become more sophisticated. In a move that, for him, was oddly American, Rose defended Geert Wilders while also distancing himself from him. Rose's call for the repeal of all insult laws (and perhaps all speech restrictions save those based on libel, invasion of privacy and incitement) is certainly radical. Moreover, many of Rose's positions have been echoed by Timothy Garton Ash,<sup>190</sup> who—by virtue of having *not* run the cartoons—is in a

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189. Yale University Press Director John Donatich made this point to justify the removal of the cartoons from Jytte Klausen's book—because “[t]he cartoons are freely available on the Internet and can be accurately described in words, Mr. Donatich said . . . reprinting them could be interpreted easily as gratuitous.” Cohen, *supra* note 83.

190. Here, for instance, is Garton Ash, rallying supporters of free speech: “In the first decade of the 21st century the spaces of free expression, even in old established liberal democracies, have been eroded, are being eroded and if we don't summon ourselves to the fight, will continue to be eroded.” Ejboel, *supra* note 81, at

far better position to make Rose's argument. So, it may turn out that Rose has a future as a European free speech prophet. But will he—because of past indiscretions—like Moses fall short of entering the Promised Land?

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17 (quoting Garton Ash).