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## Religious Satire, and Moral Restraint and the *Charlie Hebdo* Cartoons

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### ABSTRACT

In *Otto -Preminger*, the European Court of Human Rights (EctHR) upheld the decision of the Innsbruck Provincial Court in Austria ordering forfeiture of a film portraying Catholicism in a satirical form in a community where the vast majority of the population were Roman Catholics because the Austrian authorities had acted to ensure religious peace in the region as well as to prevent an unwarranted and offensive attack on their religion. The majority of the EctHR considered its function to be that of balancing the two conflicting rights of free expression and religious freedom. This article argues that it is in the minority dissenting judgment of the three judges, in which the right to both free expression and religious freedom stands best to be protected in the future. This is because free expression is not an untrammelled right but carries within its exercise an obligation of “moral restraint” on which the three minority judges based their dissenting opinions. A quarter of a century after that decision, and with cases such as the Charlie Hebdo Murders in France, it is timely to consider whether the minority opinions carry the seeds of wisdom for the future.

“If liberty means anything at all, it means the right to tell people what they do not want to hear.”

George Orwell

### I. INTRODUCTION

Some twenty-five years ago, the majority decision of the European Court of Human Rights (EctHR) in *Otto Preminger*<sup>1</sup> drew attention to how, “it is not possible to discern throughout Europe a uniform conception of the significance of religion in society.” So much so, that, “even within a single country such conceptions may vary.”<sup>2</sup> The decision confirmed that, “it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others.”<sup>3</sup> Since then, similar views have been expressed in other cases.<sup>4</sup>

Stign Smet has described the European position as one where “when speech insults religious feelings, a human rights conflict arises between freedom of expression and freedom of religion”<sup>5</sup> with the result that, “[c]ertain scholars have . . . criticised the Court’s interpretation of insult to religious feelings as a human right.”<sup>6</sup> Accordingly, there are two rights in conflict: religious freedom and freedom of expression.

If this is true, then since that case was decided, the conflict between religion and free expression has only come into sharper relief. The fault-line between the two was tragically exposed by the gruesome *Charlie Hebdo* murders of 2015. This event suggested that one cannot be an equal opportunity offender when the religion being insulted is marginalized and disenfranchised in the community. The adherents of such a religion may not be able to answer back. They may be hampered by limited access to the same tools of print and the media as the majority. This means the identity of the offended religious group is not irrelevant to free expression rights. Indeed, under the European Convention of Human Rights (ECHR), the societal values of tolerance, pluralism, broad-mindedness, social peace and non-discrimination must be taken into account in the practice of the stipulated human rights.<sup>7</sup> This article uses *Charlie Hebdo* as a framing device, and emphasizes “duty,” which it takes from the *Otto Preminger* dissenting opinion.<sup>8</sup> It describes relevant cases in a way that advances the argument, rather than simply being descriptive, and it raises secondary literature on the subject of restrictions on religiously offensive speech. It does not argue for a new blasphemy law to protect minority religions.

In *Otto -Preminger*<sup>9</sup> the Innsbruck Provincial Court in Austria ordered the seizure and forfeiture of a film portraying Catholicism in a satirical form, because it was to be shown in

Tyrol, where 87% of the population are Roman Catholics. The EctHR upheld the decision. It explained how,

[t]he issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views, on the one hand and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand.<sup>10</sup>

It held that “[t]he Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans,” which explained why, “the Austrian authorities acted to ensure religious peace in the region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.”<sup>11</sup> The EctHR viewed its task as that of balancing the two conflicting rights of free expression and religious freedom.<sup>12</sup> What I argue in this article is that it is in the minority dissenting judgment of the three judges that the right to free expression and religious freedom are best protected. I do not argue for a law of blasphemy to protect minority faiths. On the contrary, I argue that free expression is not an untrammelled right. It carries with it an obligation of “moral restraint.”<sup>13</sup> This is what the three minority judges in *Otto -Preminger* effectively emphasized.

This should surprise no one, because the right to freedom of expression under the ECHR is found in Article 10,<sup>14</sup> the first part of which expresses the right and the second part of which imposes limitations on the right. It is the only right for the ECHR to impose a corresponding obligation of duties and responsibilities.<sup>15</sup> Similarly, whereas Article 19 of the ICCPR also provides for the *absolute* right to hold opinions without interference,<sup>16</sup> so as to include “freedom to seek, receive and impart information and ideas of all kinds,” and in various forms including in writing and in art,<sup>17</sup> sub-paragraph (3) of that Article refers to the existence of special duties and

responsibilities based on “the rights . . . of others,” “national security,” “public order,” and “public health or morals.”<sup>18</sup> This is adopted in Article 10, which prescribes limitations on the grounds of “the prevention of disorder or crime” and “the protection or rights of others.”<sup>19</sup> Indeed, the national constitutions of a number of leading liberal democracies have been no less forthright. Article 5(2) of the German constitution permits limitations to the freedom of expression, arts and sciences when it is for the protection of a matter such as “the right to personal honour,”<sup>20</sup> and Article 19(1)(a) of the Indian Constitution only guarantees freedom of speech subject to such matters as “decency and morality.”<sup>21</sup> It is true that the First Amendment of the US Constitution forbids restrictions on free speech by the government, but the Supreme Court has recognized limitations in its jurisprudence.<sup>22</sup>

In *Otto-Preminger*, Judges Palm, Pekkanen, and Makarczyk recognized that “[t]he Convention does not, in terms, guarantee a right to protection of religious feelings” because “such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.”<sup>23</sup> Nevertheless, there must be moral restraint. They added that, “[t]he duty and the responsibility of a person seeking to avail himself of his freedom of expression should be to limit, as far as he can reasonably be expected to, the offence that his statement may cause to others.”<sup>24</sup> That is to say, “that it may be ‘legitimate’ for the purpose of Article 10 to protect the religious feelings of certain members of society against criticism and abuse.”<sup>25</sup> “[T]olerance works both ways and the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed.”<sup>26</sup> The question is what level of “violent and abusive” attack should be restrained. For the dissenting judges, this is when the attack “reaches so high a level of abuse,

and comes so close to a denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by society.”<sup>27</sup> This is how the principle of moral restraint works.

The minority view in *Otto-Preminger* that “tolerance works both ways” is commendable.<sup>28</sup> While liberal scholars like Letsas have argued that there was no right to not be offended and that no balancing of interests was necessary,<sup>29</sup> his view remains open to question. When Dr. Zakir Naik, “a Muslim speaker of international reputation”<sup>30</sup> was banned in 2010 from entering the UK by the British Home Minister Theresa May<sup>31</sup> because he had previously made statements in breach of the government’s “unacceptable behaviours policy,”<sup>32</sup> which risked Naik’s statements being used to justify violence,<sup>33</sup> a British appeal court upheld the ban.<sup>34</sup> Dr. Naik argued that his inability to enter the UK would result in the loss of substantial amounts in sponsorship money,<sup>35</sup> but the Court held that although, “[t]here has been no suggestion (and there is no evidence) that his presence in itself is likely to cause problems, such as disruption to public order,”<sup>36</sup> Nevertheless, “the Secretary of State could fairly take the view that the statements were either directly within the policy, or in any event potentially ‘divisive and . . . damaging to community relations,’ and inconsistent with Dr Naik’s asserted message of tolerance and bridge-building.”<sup>37</sup> The judgment was lauded in a leading liberal newspaper as one which showed that “absolute free expression is not desirable.”<sup>38</sup> If we really are a secular community, we must treat all religions equally. If difficulties arise, it is because, as Lorenzo Zucca has argued, that the current religious tensions within Europe are actually a symptom of the problems with a narrow conception of secularism. We need a robust form of secularism, one that treats other religions and groups with real respect.<sup>39</sup> One way to achieve that is to ensure the exercise of free expression is tempered with moral restraint.

## II. THE CHARLIE HEBDO CARTOONS

This is a controversial proposition because for Douthat, “laws against blasphemy (usually described these days as ‘restrictions on hate speech’) are inherently illiberal” and “the kind of blasphemy that *Charlie Hebdo* engaged in had deadly consequences, and *that* kind of blasphemy is precisely the kind that needs to be defended, because it’s the kind that clearly serves a free society’s greater good” and this is so even if there is a “threat” of violence.<sup>40</sup> I do not agree with that proposition, and there are others who are also less convinced. In one US case, Justice Alito, a white Catholic male, dissented from the majority to remind everyone that, “[o]ur profound national commitment to free and open debate is not a license for . . . vicious verbal assault. . . . The Court now holds that the First Amendment protected respondents’ right to brutalize. . . . I cannot agree.”<sup>41</sup> Even within liberal society, there is disagreement on the precise weight to be attached to the values of free speech and freedom of religion when they clash violently. For Justice Alito, while the US First Amendment might permit the distribution of offensive leaflets, “[i]t does not follow that they may *intentionally* inflict severe emotional injury on private persons . . . by launching vicious verbal attacks that make no contribution to public debate.”<sup>42</sup> After all, the “harm in hate speech” is by now well recognized by legal philosophers,<sup>43</sup> and European case-law affirms the societal interest in preventing negative stereotyping of a group,<sup>44</sup> given the need to uphold equality.<sup>45</sup> For Jeremy Waldron hate speech undermines the public good and the dignity of those it targets, given that:

It is their social standing, the fundamentals of basic reputation that entitle them to be treated as equals in the ordinary operations of society. Their dignity is something they can rely on—in the best case implicitly and without fuss, as they live their lives, go about their business, and raise their families.<sup>46</sup>

For this reason, ever since the *Charlie Hebdo Cartoons* case, the causing of “religious offence” to a powerless, marginalized, and /or an otherwise vulnerable group in society has forced us to consider whether groups in society have a right to be free from *specific* forms of deliberately hurtful expression. The *Charlie Hebdo Cartoons* case compelled free speech protagonists to consider the intrinsic viability in society of “free speech which causes harm and produces no appreciable good in society,”<sup>47</sup> especially given that since 9/11 there has been a “stream of mockery toward Muslims.”<sup>48</sup>

The case arose when four cartoonists, and five other Charlie Hebdo employees, were among twelve people killed by the Kouachi brothers.<sup>49</sup> The Kouachi brotheres attacked the Paris offices of the magazine, *Charlie Hebdo*, on 6 January 2015, in order to “avenge the Prophet.”<sup>50</sup> In doing so, they killed twelve people, including four cartoonists, and five other Charlie Hebdo employees.<sup>51</sup> Although the Prophet Mohammed had generally been depicted by the magazine as a well-meaning man who despaired at the actions of his followers, it had also managed to poke fun at radical Islam, and it was this which had occasioned widespread offence to even ordinary followers of this faith. That some of the cartoons were patently offensive and bigoted cannot be doubted, as in the case of the African sex slaves of Boko Haram, who were shown in one grotesque caricature as welfare queens.<sup>52</sup> In another cartoon, the prophet Mohammed was shown in degrading imagery.<sup>53</sup> For Slavoj Zizek, it confirmed his belief that, “with a paradoxical brilliance, the more tolerant a society becomes the more homogenous it becomes.”<sup>54</sup>

In September 2020, the trial of fourteen suspects “opened in Paris.”<sup>55</sup> The proceedings lasted almost two months and were recorded live for “the historical record.”<sup>56</sup> Amid high security, the three days of the January 2015 shootings of seventeen people, were graphically relived, as 144 witnesses, fourteen expert witnesses and 200 interested parties, came forward to



give their harrowing accounts of that day.<sup>57</sup> But on top of this, (and some would say, to add salt to old wounds) Charlie Hebdo's "decision to republish the inflammatory cartoons that prompted the 2015 attacks on the opening day of court proceedings []reignited old debates."<sup>58</sup> Then it went so nightmarishly wrong again. As the trial progressed, a history teacher showed a caricature of the prophet Muhammad to his pupils; he was horrifyingly decapitated outside his secondary school in a Paris suburb in mid-October 2020.<sup>59</sup> If all this suggested a need for anti-blasphemy laws for minority faiths it is not surprising, but it is not the right answer. What is needed instead is a recognition of moral restraint in the exercise of free speech. This was advocated in the dissenting opinions of the *Otto-Preminger* case. If this thesis could be successfully adopted, then yesterday's dissent may yet still become today's orthodoxy. This is a controversial proposition—but it has been increasingly suggested.

In the *Charlie Hebdo Cartoons* case there was, as David Bromwich reminded us, something about the identity of the targeted group in the cartoonists ill-judged mimicry, as these "cartoons were published at a time when a few Muslims were known to be terrorists and many others were outsiders in European society, exposed to prejudice of a kind no longer suffered by Christians or Jews."<sup>60</sup> Muslims, accordingly, were seen as an existential threat. Attacks on their religion took place within this context, and the threat was actively constructed, as now appears to be happening with China.<sup>61</sup> When these attacks occur, the identity of the targeted group cannot be overlooked. This is relevant to the current situation in regard to China. In the wake of the Coronavirus pandemic, Peter Osborne wrote, "China is being presented as the new existential enemy, just as Islam was 20 years ago,"<sup>62</sup> He continued, "[I]t's just over a quarter of a century since the American political scientist Samuel Huntington wrote his famous essay on the Clash of Civilizations"<sup>63</sup> and "[i]t set the tone for a series of wars"<sup>64</sup> where, "Huntington forecast a new

struggle between what he viewed as irreconcilable enemies: Islam and the West.”<sup>65</sup> Importantly, “Huntington asserted that identity, rather than ideology, lay at the heart of contemporary politics.”<sup>66</sup> As Osborne put it, Huntington asked the question “What are you?”<sup>67</sup> and responded with the dramatic explanation of how, “from Bosnia to the Caucasus to the Sudan, the wrong answer to that question can mean a bullet in the head.”<sup>68</sup> For Osborne, this is how “Muslims have often been portrayed in Western media as lawless, radical ideologues and an existential threat to the world” which “has given rise to virulent Islamophobia in the West with the rise of far right political parties in Europe.”<sup>69</sup> Tariq Ali has gone further and even suggested that the “hostility to Muhammed and to Islam itself was a result of the instrumentalization of Christian and imperialist war aims from the eight century onwards.”<sup>70</sup> The result is that if there is the framing of religious fundamentalism as Islamic jihadism,<sup>71</sup> there is also the inevitable increase in anti-Muslim hate as evidenced by the *Christchurch* terrorist attack in New Zealand on a mosque in 2019 with dozens killed in cold blood,<sup>72</sup> as well as the rise of far-right forums as anti-Muslim hate has inevitably increased.<sup>73</sup> The value of tolerance is up for grabs and there has been a deep polarization and fragmentation of society everywhere we look.

It is against this background that it is possible to say that “the defence of *Charlie Hebdo* as an equal-opportunity offender was misjudged,” as David Bromwich goes on to explain.<sup>74</sup> Yet the liberal opinion was so out of touch from the facts on the ground, that the cartoons at the time were largely applauded. “Complacency was a recurrent flaw in the European and North American praise of the cartoons.”<sup>75</sup> Bromwich, however, was clear that this was a mistake because “[t]here is, after all, a difference between ridicule of the established and mockery of the unestablished.”<sup>76</sup> He referred to an emerging uncomfortable truth that, “[t]hough the difference can never rightly be reflected in laws, since laws must apply to everyone in the same way,

*Charlie Hebdo* might have served to bring the matter to consciousness.”<sup>77</sup> I would, therefore, argue that the public realm is not a free-for-all. It is not to be used and abused at one’s whims regardless of any countervailing considerations. It falls to be policed quite simply because courtesy and respect are matters of public interest. To require those in the public realm to take care in what they say, and how they say it, is not such a profanity at all. The profanity lies in leaving the public realm entirely unregulated in all circumstances and all of the time. It is possible to be against blasphemy laws and yet believe that there is no need to exercise one’s freedom of expression in a way that will cause unnecessary offence. One might have a legal right to call one’s neighbor a pig, but should we really be exercising it?

Take the cartoons in *Charlie Hebdo*. What do cartoonists of Christian heritage know about Muhammad? How do they know what he looked like? And, why do they care? In short, can we really be sure that the cartoonists were free from discriminatory intent in their exercise of freedom of expression? Shortly before he died in July 2021, at age eighty-six, Kurt Westergaard, a Danish cartoonist whose caricature of the Prophet Muhammad outraged many Muslims worldwide, is alleged to have remarked, “I would do it the same way (again) because I think that this cartoon crisis in a way is a catalyst which is intensifying the adaptation of Islam.”<sup>78</sup> I must make it absolutely clear that in proposing these questions I am not arguing for a special blasphemy law for a religion that is not Christian, especially given that historically, blasphemy laws have only applied to protecting the Christian majority, as was the case for many centuries in the United Kingdom.<sup>79</sup> What I am arguing is quite the contrary. I am asking whether the work of such cartoonists amounted to an incitement of religious hatred. One only has to look at the cartoon of a bomb in a bearded man’s turban before venturing to answer this question. This in turn forces us to question whether such cartoonists are deliberately picking on Muslims to teach

them a lesson. Let's not forget that there is a two-way street here. On one hand, Muslims should not overreact when they feel that someone has insulted their prophet, and of course, who can reasonably disagree with the proposition that violence in response to offensive expression is never justified? But on the other hand, those who wish to deliberately offend Muslims should stop and ask themselves why? How will society benefit from their legally protected right to engage in offensive free expression? Will they worsen the marginalized situation of the Muslim minority in their country?

Furthermore, why do they think Muslims need to be taught a lesson? Oh, don't be so sensitive, is a constant jibe. Or, is it in fact the case that such cartoonists are equal opportunity satirists who spare no religion or creed when causing offence? Yet, even if the Charlie Hebdo cartoonists try to offend anyone and everyone, the question must still be asked in a free society: why? Is humor really that humorous when it is at the sole expense of a minority group that already feels alienated? I am not arguing here that the religious feelings of marginalized minorities should be legally protected, but that people have a moral duty to exercise self-restraint, i.e., not to exercise their legal right to mock the religious beliefs of those minorities. The right to offend is not an obligation to offend. And yet, what we have here is an interesting contrast. Non-Muslims may insult Muslims, but Muslims may not.

It is precisely in this context that Meital Pinto has written that, “[t]he arguments that followed the Charlie Hebdo tragedy consider an important factor that has rarely been considered before: the identity of the offended religious group and its relative social status in general society.”<sup>80</sup> She has argued for a recognition of the fact that “demeaning expressions that are directed towards vulnerable minorities, rather than towards privileged members of society, are unique in that they tend to cause intensive offences,” referring to arguments made both by

myself<sup>81</sup> and by Rhoda Howard-Hassmann.<sup>82</sup> Pinto accordingly maintains, “that the factor of vulnerable cultural identities should be taken into account,” and that this “will send an important message to society, according to which there is an important difference between expressions that offend vulnerable minorities and those that offend strong majorities.”<sup>83</sup> She argues that

[n]ewspaper editors, for instance, will be wise to think about implementing an official policy that acknowledges the vulnerability of minority groups, and encourages their employees to avoid or to moderate offensive expressions that target such groups. Courts will be wise to condemn such expressions and to limit them in extreme circumstances.<sup>84</sup>

She is not far from wrong, because in the aftermath of the Charlie Hebdo grisly murders, Professor Nigel Biggar, the regius Professor of Moral and Pastoral Theology at Oxford University, argued that, “Charlie Hebdo took offensiveness too far” because although it was clear that the, “French satirists didn't deserve to die . . . they flaunted their legal right to offend and neglected their moral duty not to.”<sup>85</sup> I have myself previously argued that, “[t]he purpose of satire is to expose the injustice, blindness and hypocrisy of the powerful.<sup>86</sup> It is not to justify puerile, vulgar, pillaging of soft targets.”<sup>87</sup> For me, “there is no justification for deliberately belittling a community that already feels marginalized and vulnerable.”<sup>88</sup> The reason is quite simply that, “[w]e do not expose the hubris of the powerful by attacking the marginalised.”<sup>89</sup> Were this to be so, then “content-based freedoms will triumph” in circumstances where “the result is to escalate blasphemous satire.”<sup>90</sup> This would turn free-speech rights on their head because “[s]urely, free speech is only tolerable so long as it is constitutive of a liberal discourse.”<sup>91</sup> For this reason, I have previously asked rather rhetorically, “[w]hat is liberal about the anti-Muslim Charlie Hebdo cartoons which have achieved so little good and brought so much grief?”<sup>92</sup> Thus, whereas “a magazine like Charlie Hebdo must have the *legal* right to publish

what it wants, that does not mean that its decision to publish gratuitously offensive material is to be applauded.”<sup>93</sup>

In fact, lest we forget, the right to freedom of expression is already qualified, and as I have previously pointed out elsewhere, “[t]he bounds of decency and respect already constrain the realm of public discourse” and we have long known that, “[l]anguage in a community of diverse interests matters.”<sup>94</sup> Unfortunately, we have reached a stage in western democracies where, “[p]arody, free speech, and secular atheism are all pretexts for the exercise of power over a minority community,”<sup>95</sup> which cannot upon closer examination be justified on grounds of the liberal right to freedom of expression. Others too have added their voice in a similar vein. The case against attacking a vulnerable religious group has been described by Peter Cumper<sup>96</sup> in his book. Cindy Holder has expressed the view that the publication of the Danish cartoons in a nation like Denmark, where Muslims are a small minority, was “not about rights [but rather] about power,”<sup>97</sup> and a former Church of England Bishop, Richard Harries, has acknowledged that, “[t]here is no justification for deliberately belittling any community that already feels marginalised and vulnerable, as does the Muslim community in France.”<sup>98</sup> This suggests that vulnerable minorities and marginalized groups should not be gratuitously subjected to unacceptable forms of offensive free speech. A minority need not lack agency. It need not even be subject to routine discrimination. Yet, gratuitously offensive speech may force a minority group into marginalization. And, if this happens, it will fail to enhance their participation in society’s democratic institutions.

This is why Talal Asad has criticized the liberal approach to freedom of religion rights protection.<sup>99</sup> In the case of the *Charlie Hebdo Murders*, “the offence and injury that the cartoons caused for many remained unarticulated and unrecognized” so that “the Christian secular

understanding of blasphemy cannot fathom the violence or moral injury that the cartoons cause to believing Muslims.”<sup>100</sup> The reason for this, he argues, is because of the existence of “secular Protestantism and, more precisely, different semiotics of iconography and representation especially pertinent to religious deities and prophets.”<sup>101</sup> The result is that “the debates remained locked in an unreflexive and one-sided hermeneutic taken to be the only hermeneutic.”<sup>102</sup> He also cautions against an over-use of “liberalism,” pointing out that “[l]iberalism isn’t located simply in classical texts,” and that, “it jostles with other traditions in the West” so that “[i]n its early stages, liberal politics was engaged in challenging hegemonic power.”<sup>103</sup> That is often not the case today where, “it is the ally of global power.”<sup>104</sup> It is of course true that “[a]s a discursive space, liberalism provides its advocates with a common political and moral language in which to identify problems and to dispute them,” and here “[s]uch ideas as individual autonomy, freedom of (economic, political, social) exchange, limitation of state power, rule of law, national self-determination, and religious toleration belong to that space.”<sup>105</sup> But liberalism is not as consistent and unified as its theorists would have us believe so that, “it is precisely the contradictions and ambiguities in the language of liberalism that make the public debates among self-styled liberals and with their ‘illiberal’ opponents possible.”<sup>106</sup> In short, this would suggest that liberalism too can work in thoroughly illiberal ways. We ignore that at our peril if what we want is a mutually tolerant society for all. Speech is not always a force for good.

### III. WHEN SPEECH IS OPPRESSIVE

It was Jurgen Habermas who suggested, “compelling reasons must be found for the definition of what can just about be tolerated and what cannot.”<sup>107</sup> He had, however, a caveat to this general

proposition. This was that “the principle of tolerance is to be above any suspicion of oppressive features.”<sup>108</sup> In this lies the clear recognition that speech is not always a force for good. It can be oppressive, crushing and tyrannical when one considers how it has a potential to cause harm. Free speech is “necessary for the development of the person,”<sup>109</sup> but this does not come at the expense of forfeiting tolerance of others. This has long been clear from the ECtHR decision in *Handyside v. UK*, which, while recognizing the value of ideas which “offend, shock or disturb the State or any sector of the population,” also took care to qualify this right on grounds of the “demands of . . . pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”<sup>110</sup> This suggests that ultimately the legality of free expression is determined by a continual process of negotiation, compromise and tolerance, which underlies the democratic forms of decision-making, where the relationship between freedom of expression, democracy and tolerance is not clear-cut. Accordingly, freedom of expression has to be interpreted reflexively and contextually.

This had long become clear by the time of the *Rushdie Affair* in 1989,<sup>111</sup> which was followed by the *Jyllands-Posten Danish Cartoons Affair* in 2005,<sup>112</sup> before culminating so tragically with *Charlie Hebdo* murders in 2015.<sup>113</sup> All three cases demonstrated the tension between untrammelled free speech and the protection of religious sensibilities. Accordingly, the reality is that “there is a surprising amount of disagreement about the content of freedom of expression although it is accepted as a human right unlike other (socio-economic) rights,” as Sandra Fredman points out.<sup>114</sup> Freedom of expression is in truth as much disputed as it is valued. We often forget this. At this stage, it is worth looking at the classic liberal justifications for freedom of expression, because none of them actually provide an open license for the use of



oppressive speech forms. We need to be reminded of this in the wake of the dreadful *Charlie Hebdo* affair.

First, there is the “marketplace of ideas” argument.<sup>115</sup> This was first famously cemented by John Stuart Mill. He used words which are clearly to do with truth-finding when he said that given that, “we are not necessarily aware of the errors of our own views, censorship could therefore deprive us of possible truths,”<sup>116</sup> which is located in the ‘marketplace of ideas.’<sup>117</sup> Second, there is the right to free expression based on the autonomy of the individual, which Thomas Scanlon articulated in terms that, “if a strong idea of free speech is rejected, then the state is able to decide on the falsity of views and this, in turn, enables the state to deprive the individual of her right to make rational independent judgments.”<sup>118</sup> This presupposes that the individual is able to reject the falsity of state-imposed idea, emphasizing the autonomy of the speaker and audience,<sup>119</sup> but does not justify using oppressive speech to cause intrusive harm to other individuals in society. Indeed, Eric Heinze has more recently limited deontological protection of free speech to longstanding, stable prosperous democracies, arguing that only such states can offer resources to minorities impacted by hate speech by being able to respond to such speech.<sup>120</sup> Third, and finally, there is the argument of deliberative democracy,<sup>121</sup> where freedom of expression is considered to be an integral part of the deliberative process, but where although free speech encourages rational debate,<sup>122</sup> it does not provide a basis for highly abusive criticism.

In short, it is possible to say that there are some harms which justify the State imposing limitations. While we want to ensure the State does not limit expression and speech, there is a *moral individual duty* on the individual to refrain from hateful and highly abusive speech which causes religious offence to fellow citizens. This has been recognized in *Otto-Preminger*.<sup>123</sup> It is the basis of the principle of moral restraint when as liberals we choose to exercise free speech.

#### IV. PERSUADING LIBERAL SCHOLARS TO RECOGNIZE RELIGIOUS OFFENCE

Liberal scholars as a whole, however, have not been of the view that freedom of speech should be restricted if it causes religious offence to marginalized religious minorities.<sup>124</sup> This is so even in the face of archetypal cases today of the gratuitous targeting of Muslims. Edward Luce recently gave two reasons for why Muslims are considered to be fair game, although he himself is not by any means suggesting that this is a justification. In his words, “[t]he first is politics. Opinion polls across the west—and beyond—show Muslims as the least trusted minority.”<sup>125</sup> One reason is that “[t]hey are thought to integrate less well and be more supportive of terrorism,” but that it is also the case that “[p]eople believe the Muslim reproduction rate is higher than other groups,” although, one would have thought, that in itself is no reason to resent them more than other minorities.<sup>126</sup> And yet, “[a]lmost a quarter of the world’s population—roughly 1.8bn people—are Muslim.”<sup>127</sup> However, there is also a second reason that Luce points out. This

is how badly most of the Muslim world treats its minorities. Whether it is Coptic Christians in Egypt, Shias in Saudi Arabia, or Sunnis in Iran, Muslim-majority countries are among the worst places in which to be in a minority. Do not even think of being Jewish in an Arab country. Combine these two stereotypes and you have a world that is largely callous about the fate of Muslims where they are a minority.<sup>128</sup>

And yet, as he points out, the “[Muslim’s] plight tests whether liberal democracy means what it claims to mean.”<sup>129</sup> Edward Luce is critical in his assertion that “[b]y playing down much larger-scale violations against Muslims,” both the US President Donald Trump and the UK Prime Minister Boris Johnson, who “claim to champion oppressed Christians,” now, “jeopardise what remains of the west’s human rights credibility.”<sup>130</sup>

It is against this background that there is perceived to be widespread discrimination against Muslims especially where they are minorities.<sup>131</sup> The rights of women in Islamic culture,

be it within Muslim countries or outside it in the West, are also considered by liberals to be unprotected.<sup>132</sup> I have previously referred to how Muslim women's headscarves are uncritically viewed as a symbol of oppression and as anti-feminist.<sup>133</sup> Susan Mancini has observed that "[t]he veil—or particular types of it—has been judged as difficult to reconcile with gender equality, with women's equal value, with their autonomy, dignity, and freedom."<sup>134</sup> By the time the *Charlie Hebdo* murders took place in 2015, liberal belief was united in assuming that Islam was at odds with modernity and rational critique, which was at the heart of the liberal value of freedom of expression. It is unfair to single out Islam in this way, because the taking of religious exception to offensive caricatures of faith is not confined to it. Satirical, racist, and insulting depictions to which religious exception has been taken by other faiths have included *Tintin* in Congo, as well as pejorative portrayals of black, Irish, and Jewish people.<sup>135</sup> What was different about the *Charlie Hebdo* murders was the way that it drew attention to the identity of the offended minority group together with its relative status in society. Up until then, there had been little real critical engagement with this aspect of satirical speech.

Unfortunately for the Muslims, anti-discrimination laws did not historically provide them with the protection that they needed as a minority group.<sup>136</sup> Nor were Muslims covered by the UK's blasphemy laws (at a time when they were still enforced in the UK).<sup>137</sup> This is why, "[t]he pressure to extend the proscription of hate speech to cover members of religious communities has largely come from Muslims," as Eric Barendt reminds us, "whose faith was not protected by the common law of blasphemy, or usually by the racial hatred offence."<sup>138</sup> Nevertheless, Barendt reasons that there remains an essential difference between races and religions and that, "[t]he most important difference between a racial and a religious group is that membership of the former is never voluntary."<sup>139</sup> This implies that racial identities are immutable whereas religious

ones are not, as these are of choice, but this surely overlooks the existence of *inter-sectional* discrimination in the lives of minorities. Yet, religious identities may be just as “immutable” as racial identities. While Barendt acknowledges that racial identity may also be contestable and that for some people religion is more important than their race or ethnicity,<sup>140</sup> he nevertheless does not accept that there is a need to protect religious identity in the face of the right to freedom of expression.<sup>141</sup> In short, for him

[t]here may be good arguments in some particular circumstances for hate speech laws—the utilitarian argument that the dissemination of such speech will produce disorder—but it is difficult to make a persuasive case for them on the basis of the nebulous concept of racial or religious identity, however important that might be to some individuals.<sup>142</sup>

For this reason, any “[l]imits on freedom of expression should not be upheld as necessary to prevent offence to religious groups, for this is often a thin disguise for the imposition of restriction on the open discussion of religious truths and beliefs.”<sup>143</sup> In the same way, Judge András Sajó cautions against treating religious discrimination as if it were race discrimination because, “if criticism of religion is re-categorized as racism, it could lead to the situation where religious terrorism cannot be criticised.”<sup>144</sup> This is all the more reason; however, why there should not be a blasphemy law which insulates religion from justifiable criticism, but it’s not a reason for not exercising moral restraint in the way advocated by the minority judges in *Otto-Preminger*.

In fact, largely because religion touches upon so many aspects of human life, it should not be immune from critique and criticism. Indeed, James Nickel has described religion “as a specific application area of more general basic liberties such as freedoms of thought, expression, association, assembly, movement, privacy, political participation, and economic activity.”<sup>145</sup> In this sense, religion is a special kind of human liberty. Others have been content with giving religion a more nuanced and attenuated protection. Ronald Dworkin considers there to be a right

to “ethical independence,”<sup>146</sup> a category which could include religion,<sup>147</sup> and Andrew Koppelman does not doubt that religion is a distinct human good.<sup>148</sup> Religious practices revolve around the expression of rituals, particular clothes, sentiments, a sacred sense, shared with individuals and communities. Religion may therefore even qualify as a specific form of expression. If it became oppressive, it could be criticized as a form of illiberal expression because then it would be nothing short of an antithesis of *free* expression. A *religiously motivated* hurt could not be shielded from legitimate criticism.

Accordingly, religious freedom and freedom of expression can both be instrumentalized with the aim of harming each other. Freedom of religion can only work, therefore, if there is also freedom *from* discrimination for a religious group. Only then can that group’s members live safe and dignified lives. This makes it possible, in the words of Heiner Bielefeldt, the UN Special Rapporteur on Religion or Belief, for freedom of religion to operate in a way where the right in question, “does not protect religious traditions *per se*, but instead empowers *human beings* to find their various ways within, without or beyond those traditions.”<sup>149</sup> This is consistent with Ian Leigh’s view that, “[r]eligions do not have rights because ideas do not have rights” but that “groups of religious believers on the other hand do have rights.”<sup>150</sup> Put in this way, the choice is not between choosing liberal values (absolute expression) over anti-liberal values (limitations), but a choice of balancing different interests, which is why Christian Rostbøll points out that the Danish cartoon controversy reveals how an appeal to universal values can sometimes be exclusionary.<sup>151</sup> Free expression as a universal value may well be open to question, it all depends on what is said, how it is said, and about whom.

There is in fact a long line of cases stretching back almost half-a-century where the EctHR has upheld restrictions on freedom of expression on the grounds that this was a negative

liberty.<sup>152</sup> *Handyside v. UK* involved a book which discussed sex, porn, and abortion, but being aimed at children, it also challenged prevailing sexual attitudes at the time.<sup>153</sup> When the ban on the book was upheld by the UK domestic courts, the ECtHR, explained that, “the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many of the children and adolescents who would read it.”<sup>154</sup> In the same way, in *Wingrove v. UK*, the British Board of Film Classification’s refusal to grant a certificate for the applicant’s video was held to have been justified on grounds that it caused outrage to believers in the story of Christ.<sup>155</sup> The short film, *Visions of Ecstasy*, deriving from the life and writings of St. Teresa of Avila, depicted the wounded body of the crucified Christ as a participant in the erotic desire of St. Teresa. The Court had little doubt that “[t]he aim of the interference was to protect against the treatment of a religious subject *in such a manner as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story.*”<sup>156</sup>

All these cases have served, however, to protect the religious feelings of the majority population, as indeed did *Otto-Preminger Institute v. Austria* where a film’s portrayal of the Virgin Mary and Jesus in a pornographic manner,<sup>157</sup> saw the Strasbourg Court agree with the Innsbruck provincial court, that it had insulted Christianity and the other Abrahamic religions,<sup>158</sup> who were the *religious majority* in the Tyrol. So clearly religious majorities find it easier to use the law to prevent publication of materials which cause religious offence compared to a minority faith. What is needed is not a blasphemy law for minority faiths. Contemporary opinion in the common law world is against laws of blasphemy,<sup>159</sup> and freedom of expression is highly valued.<sup>160</sup> What is needed is moral restraint, and this is how the minority vote in *Otto-Preminger Institute*, in the words of Zeynep Yanasmayan,<sup>161</sup> successfully “sketched out a decisively liberal

understanding of freedom of religion or belief” by imposing a “duty and . . . responsibility” on a person exercising freedom of expression.<sup>162</sup>

Without there being a duty and responsibility on those exercising freedom of expression, there is a risk that majority religious sentiments will more often than not be privileged over the rights of minorities. A good example is *Mouvement Raëlien Suisse v. Switzerland* where Swiss authorities successfully banned a Raëlien advert that had a picture of ‘aliens’ with a text that read “finally science has replaced religion.”<sup>163</sup> It advocated the idea of “geniocracy,” a system where power should be entrusted only to those with the highest intellect<sup>164</sup> and even promoted the idea of cloning.<sup>165</sup> The Swiss government argued that, given that the Raëlien Movement’s ideas were capable of giving religious offence, the promotion of geniocracy was a legitimate basis for banning the poster.<sup>166</sup> The ECtHR agreed and rejected the claim that Article 10 was violated, holding that the availability of public spaces (such as billboards) was restricted and that there were alternative means to promote ideas of the Raëlien Movement.<sup>167</sup>

If majority views can be privileged in this way, then there is clearly a risk in Western society of anti-Islam prejudice being openly flaunted as well. Public authorities and the Courts in the West are aware of this risk and are known to have taken stern action to stem this. A useful case is that of *Norwood v. DPP*, where the appellant displayed a poster that read “Islam out of Britain” and “Protect the British people,”<sup>168</sup> with a photograph of one of the twin towers of the World Trade Centre in flames on 11 September 2001. Nicholas John Griffin, who was then Chairman of the British National Party (BNP), was convicted for displaying this poster on grounds that it was “threatening, abusive or insulting” under section 5(1)(b) of the Public Order Act of 1986. When he tried to argue that the poster was specifically against Islamic extremism, and not offensive to Muslims in general,<sup>169</sup> the UK court disagreed on grounds that, “it could not,

on any reasonable basis be dismissed as merely an intemperate criticism or protest against the tenets of the Muslim religion, as distinct from an unpleasant and insulting attack on its followers generally.”<sup>170</sup> The ECtHR endorsed this view, pointing out that:

the words and images on the poster amounted to *a public expression of attack on all Muslims in the United Kingdom*. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.<sup>171</sup>

*Norwood*, and the Christian cases of *Wingrove*, *Otto-Preminger*, and of *Mouvement Raëlien*, were all cases where the courts considered that ‘moral restraint’ was called for in the exercise of freedom of expression. So far so good. But better was to come. This should give minority faiths like Islam some grounds for optimism in the future.

The case of *ES v. Austria*<sup>172</sup> in 2018 concerned an Austrian national who had been giving seminars on “Basic Information on Islam.” In these seminars, she referred to the Prophet Muhammed as a pedophile.<sup>173</sup> Her reason for this was that he had married *Aisha* when he was fifty-six years old, and she was six years old.<sup>174</sup> The marriage had been consummated three years later when she was nine, but when the Prophet Muhammed was fifty-nine years of age.<sup>175</sup> The details of this highly contentious seminar were notified to the national authorities by an undercover journalist who had been in attendance.<sup>176</sup> The Austrian authorities brought criminal charges against her.<sup>177</sup> She was convicted of “disparaging religious doctrines.”<sup>178</sup> On the one hand, applying the majority decision in *Otto-Preminger*, the ECtHR held that “[t]hose who choose to exercise the freedom to manifest their religion . . . irrespective of whether they do so as members of a religious majority or a minority, . . . cannot expect to be exempt from criticism” and so “[t]hey must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.”<sup>179</sup> But, on the other hand, the ECtHR



also declared that, “the exercise of the freedom of expression carries with it duties and responsibilities” because of “the general requirement to ensure the peaceful enjoyment of the rights guaranteed” so that there is “a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.”<sup>180</sup>

This clearly implies a duty of moral restraint on those who exercise freedom of expression. Indeed, the EctHR was clear that “expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention.”<sup>181</sup> Religious freedom and free expression involve the “weighing up the conflicting interests of the exercise of two fundamental freedoms.”<sup>182</sup> and here “the subject matter . . . is of a particularly sensitive nature.”<sup>183</sup> This is especially true since the seminar in question was a public seminar and the seminar holder, “could not assume that there would only be like-minded people in the room who would share her very critical views of Islam.”<sup>184</sup> Clearly the “statements had been capable of arousing justified indignation,” and “they had not been made in an objective manner.”<sup>185</sup> Given that the seminar holder “must have been aware that her statements were partly based on untrue facts and liable to arouse (justified) indignation in others,” this meant that the Convention States had “positive obligations under Article 9 of the Convention,” to take steps of “ensuring an atmosphere of mutual tolerance.”<sup>186</sup> Importantly, the domestic courts had been justified in regarding, “the impugned statements as value judgments,” and had “found that the applicant had subjectively labelled Muhammad with a general sexual preference for paedophilia,” but in doing so the speaker, “failed to neutrally inform her audience of the historical background, which consequently had not allowed for a serious debate on that issue.”<sup>187</sup> Accordingly, this was a case where, “the impugned statements” were no more than, “value judgments” and had been made, without “sufficient factual basis.”<sup>188</sup>

They had gone “beyond the permissible limits of an objective debate” and were “an abusive attack on the Prophet of Islam, which was capable of stirring up prejudice and putting religious peace at risk,” so that in the end it was clear that, “the facts at issue contained elements of incitement to religious intolerance.”<sup>189</sup> Reading this judgment, one may well ask why the same cannot be said about the *Charlie Hebdo Cartoons*. After all, the words of the EctHR used in *ES* are equally applicable there, namely that:

the Government pointed out that critical statements *regarded by believers as extremely insulting and provocative*, as well as general *vehement attacks on a religious or ethnic group*, were incompatible with the values of tolerance, social peace and non-discrimination which underlie the Convention and therefore were not protected by the right to freedom of expression.<sup>190</sup>

The regional court below was correct, in the judgment of the EctHR in *ES*, “that child marriages were not the same as paedophilia, and were not only a phenomenon of Islam but also used to be widespread among the European ruling dynasties” and this is why the speakers conviction here was justified “in order to protect religious peace in Austria,”<sup>191</sup> In this way, the EctHR endorsed the principal of criminal sanctions which “gives strong signals to all parts of society and to all societies that *an effective democracy cannot bear behaviours and acts which undermine its core values: pluralism, tolerance, respect for human rights and non-discrimination*” (emphases added).<sup>192</sup> This judgment has been criticized by Professor Marko Milanovic as being, “essentially meaningless and incapable of being applied in any non-arbitrary way, leading us not to a slippery slope of a further erosion of free speech, but to a cliff.”<sup>193</sup> He argues that, “the judgment will likely do nothing to promote religious tolerance in Europe, but will only help to further the narrative of Islamophobic closet neo-Nazis.”<sup>194</sup> However, far from the judgment being essentially meaningless and not promoting religious tolerance in Europe, it is arguable that it does exactly that. This is because what *ES* did in 2018 was to make it abundantly

clear that a “high [] level of abuse,” can amount “to a denial of the freedom of religion of others,” so that speech can, “forfeit for itself the right to be tolerated by society.”<sup>195</sup> Another critic of *ES*, Dr. Emmanouil Bougiakiotis, has argued that “there are no convincing grounds for distinguishing between religious and other beliefs” because “[t]he text of the Convention does not make such distinctions and if the crucial criterion is subjective feelings, surely some people must be very sensitive about non-religious beliefs as well.”<sup>196</sup> Many may reasonably disagree with the statement that religious beliefs are no different from other beliefs and with his assertion that “the emphasis on the subjective criterion of justified indignation relativizes the level of freedom of expression protection” because, as we have said above, religion is a special kind of liberty that touches upon myriad aspects of human life.<sup>197</sup> To say that the subjective criterion, “makes it dependable on whether someone’s feelings will be hurt and whether a judge finds the indignation justified”<sup>198</sup> is no different than saying that what is said, how it is said, and about whom it is said, are matters which courts have always had to adjudicate upon.

## V. CONCLUSIONS

In conclusion, we can say that when it comes to questions of free speech and religious freedom, there is much to be said for the proposition that “it is not liberal principles or moral universalism *per se* that are to be blamed for the marginalization of Muslims,” as Rostbøll explains, “but rather the specific manner in which they were invoked by dominant defenders of the cartoons.”<sup>199</sup> Views critical of religionists are in themselves permissible because religion should not be insulated from legitimate criticism. One only has to look at the example of Pakistan, where blasphemy laws prohibit all criticism of the Islamic faith on pain of death, to realize

forbidding criticism of religion is not in itself a desirable liberal objective.<sup>200</sup> But that very example also makes it clear how there is a world of difference between a majority faith being criticized (to which alone Pakistan's blasphemy laws apply) and minority faith being vilified (which was the example of the *Charlie Hebdo* cartoons). Accordingly, the tension between freedom of expression and religious belief is not an *a priori* clash of two competing rights. It is a tension of choices between particular forms of speech with respect to particular situational religious groups at particular points in time in our society. In this regard, the dissenting opinions of Judges Palm, Pekkanen, and Makarczyk in *Otto -Preminger* have much to commend it. This is that since an international instrument like the ECHR "does not, in terms, guarantee a right to protection of religious feelings"<sup>201</sup> for this reason "[t]he duty and the responsibility of a person seeking to avail himself of his freedom of expression should be to limit, as far as he can reasonably be expected to, the offence that his statement may cause to others."<sup>202</sup>

## Endnotes

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<sup>1</sup> *Otto-Preminger-Institut v. Austria*, No. 13470/87, Chamber Judgment [1994] ECtHR 26 (20 Sept. 1994).

<sup>2</sup> *Id.* ¶ 50.

<sup>3</sup> *Id.*

<sup>4</sup> *Wingrove v. The United Kingdom*, 1996-V Eur. Ct. H.R. ¶ 58 (1996); *Í.A. v. Turkey*, 2005-VIII Eur. Ct. H.R. ¶ 25 (2005); *Giniewski v. France*, 2006-I Eur. Ct. H.R. ¶ 44 (2006); *Aydin Tatlav v. Turkey*, No. 50692/99 Eur. Ct. H.R. ¶ 24 (2006).

<sup>5</sup> STIJN SMET, *RESOLVING CONFLICTS BETWEEN HUMAN RIGHTS: THE JUDGE'S DILEMMA* 56 (2016).

<sup>6</sup> *Id.* Stijn Smet refers to George Letsas, *Is There a Right not to be Offended in One's Religious Beliefs?*, in *LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS* 239 (Lorenzo Zucca & Camil Ungureanu eds., 2012), as well as to Stavros Tsakyrakis, *Proportionality? An Assault on Human Rights?*, 7 *INT'L J. CONST. L.* 468, 481 (2009).

<sup>7</sup> *Otto-Preminger-Institut*, *supra* note 1 ¶ 49.

<sup>8</sup> *Id.* dissent ¶ 7.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* ¶ 55.

<sup>11</sup> *Id.* ¶ 56.

<sup>12</sup> *Id.* ¶¶ 47, 49.

<sup>13</sup> **Add cite**

<sup>14</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, Eur.T.S. No. 5, 213 U.N.T.S. 221. Article 10—Freedom of Expression reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without

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interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>15</sup> *Otto-Preminger-Institut*, *supra* note 1, ¶ 49.

<sup>16</sup> International Covenant on Civil and Political Rights art. 19(1), Dec. 16, 1966, 999 U.N.T.S. 171; U.N. GAOR, 21st Sess., 3rd comm. 49, 52, U.N. Doc. A/6316: G.A. Res. 2200 (XXI) [hereinafter ICCPR].

<sup>17</sup> *Id.* art. 19(2).

<sup>18</sup> *Id.* art. 19(3).

<sup>19</sup> Add cite

<sup>20</sup> Grundgesetz für die Bundesrepublik Deutschland [Constitution] May 8, 1949, art. 5(2) (Germany).

<sup>21</sup> Bhāratīya Saṃvidhāna [Constitution] Nov. 26, 1949, art. 19(2) (India).

<sup>22</sup> See cases such as *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Snyder v. Phelps* 131 S. Ct. 1207 (2011).

<sup>23</sup> *Otto-Preminger-Institut*, *supra* note 1 at dissent ¶ 6.

<sup>24</sup> *Id.* dissent ¶ 7.

<sup>25</sup> *Id.* dissent ¶ 6.

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

<sup>27</sup> *Id.* dissent ¶ 7. Indeed, the dissenting judges acknowledged the idea of “progress” to which free speech contributes in human society so that, “it should not be open to the authorities of the State to decide whether a particular statement is capable of ‘contributing to any form of public debate capable of furthering progress in human affairs’” and that “such a decision cannot but be

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tainted by the authorities' idea of 'progress.'" (*Id.* dissent ¶ 3), thus leaving the individual to determine how progress should be achieved.

<sup>28</sup> *Id.* dissent ¶ 6.

<sup>29</sup> George Letsas, *Is There a Right not to be Offended in One's Religious Belief*, in, *LAW, STATE AND RELIGION IN THE NEW EUROPE* 239 (Lorenzo Zucca & Camil Ungureanu eds., 2012).

<sup>30</sup> Lord Justice Carnwarth in *Naik, R (on the application of) v. Secretary of State for the Home Department* [2011] EWCA Civ 1546, ¶ 8.

<sup>31</sup> *Id.* ¶ 11.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* ¶¶ 5-7.

<sup>34</sup> *Id.* ¶¶ 74, 77.

<sup>35</sup> *Id.* ¶ 7.

<sup>36</sup> *Id.* ¶ 66.

<sup>37</sup> *Id.* ¶ 70.

<sup>38</sup> Rosalind English, *Zakir Naik's Case Shows Absolute Free Expression is not Desirable*, *THE GUARDIAN* (3 Jan. 2012), <https://www.theguardian.com/law/2012/jan/03/human-rights-freedom-of-speech>.

<sup>39</sup> Lorenzo Zucca, *A Secular Manifesto for Europe*, 10 *THE L. & ETHICS OF HUM. RTS.* 157 (2016).

<sup>40</sup> Ross Douthat, *The Blasphemy We Need*, *N.Y. TIMES* (7 Jan. 2015), <https://douthat.blogs.nytimes.com/2015/01/07/the-blasphemy-we-need/>.

<sup>41</sup> *See Snyder v. Phelps*, 131 S. Ct. 1207, 1222-23 (2011) (Alito, J., dissenting)

<sup>42</sup> *Id.*

<sup>43</sup> JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2014).

<sup>44</sup> *See R v. Keegstra* [1990] 3 S.C.R. 697 (Can.).

<sup>45</sup> SANDRA FREDMAN, *COMPARATIVE HUMAN RIGHTS L.* 339-43 (2018).

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<sup>46</sup> WALDRON, *supra* note 43, at 5.

<sup>47</sup> Satvinder S. Juss, *Burqa-Bashing and the Charlie Hebdo Cartoons*, 26 KING'S L. J. 27 (2015).

<sup>48</sup> *Id.* at 39.

<sup>49</sup> Add cite

<sup>50</sup> Add cite

<sup>51</sup> Add cite

<sup>52</sup> Add cite

<sup>53</sup> *Id.* at 37.

<sup>54</sup> For Zizek “[t]he global order is sustained less by explicit censorship than by restriction of scope” so that, “it is not what is proscribed but what is not acknowledged that matters and that immigration is a brilliant example.” See Derek Turner, *Slavoj Zizek—The Left’s Visionary of Violence*, Q. REV. (24 Feb. 2013), where Henry Hopwood-Phillips examines one of today’s most lionized Leftists at <http://www.quarterly-review.org/?p=1329>.

<sup>55</sup> Kim Wilsher, *Charlie Hebdo Attack: Suspected Accomplices go on Trial in Paris*, THE GUARDIAN (2 Sept. 2020), <https://www.theguardian.com/world/2020/sep/02/charlie-hebdo-attack-suspected-accomplices-go-on-trial-in-paris>.

<sup>56</sup> *Id.* ¶ 2.

<sup>57</sup> *Id.* ¶¶ 2, 3.

<sup>58</sup> Anthony Cuthbertson, *Charlie Hebdo Defiantly Tests Limits of Free Speech as Terror Trial Begins*, THE INDEPENDENT, (2 Sept. 2020), <https://www.independent.co.uk/independentpremium/world/charlie-hebdo-trial-free-speech-terrorism-mohammed-cartoon-a9701486.html>.

<sup>59</sup> Kim Willsher, *Teacher Decapitated in Paris Named as Samuel Paty, 47*, THE GUARDIAN, (17 Oct. 2020), <https://www.theguardian.com/world/2020/oct/17/teacher-decapitated-in-paris-named-as-samuel-paty-47>.

<sup>60</sup> David Bromwich, *What are we Allowed to say?*, 38 LONDON REV. BOOKS 3 (22 Sept. 2016), <http://www.lrb.co.uk/v38/n18/david-bromwich/what-are-we-allowed-to-say>.

<sup>61</sup> Peter Osborne, *Will China Replace Islam as the West’s New Enemy?*, MIDDLE EAST EYE (28 Apr. 2020).



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<sup>62</sup> *Id.* ¶ 9.

<sup>63</sup> *Id.* ¶ 1.

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

<sup>65</sup> *Id.* ¶ 3.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* ¶ 6.

<sup>70</sup> Tariq Ali, *Winged Words*, 43 LONDON REV. BOOKS 11, 11 (2021), as he explains in this excellent review of Maxine Rodinson's now forgotten "Life of Mohammed."

<sup>71</sup> See Kimberly A. Powell, *Framing Islam: An Analysis of U.S. Media Coverage of Terrorism Since 9/11*, 62 COMM. STUD. 90, 92-93 (2011). Powell discusses the way in which Islam has been framed and reported in the Western media, often reinforcing an orientalist narrative.

<sup>72</sup> *Christchurch Shootings: How the Attacks Unfolded*, BBC NEWS (18 Mar. 2019), <https://www.bbc.co.uk/news/world-asia-47582183>.

<sup>73</sup> See Mark Townend, *Rise in UK Use of Far-Right Online Forums as Anti-Muslim Hate Increases*, THE GUARDIAN (16 Mar 2019), <https://www.theguardian.com/world/2019/mar/16/rise-far-right-online-forums-anti-muslim-hate-wave>.

<sup>74</sup> Bromwich, *supra* note 60.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See Kurt Westergaard, *Danish Cartoonist Behind Muhammad Cartoon, Dies at 86* (19 July 2021), <https://www.bbc.co.uk/news/world-europe-57883392>.

<sup>79</sup> Ian Hunter, *English Blasphemy*, 4 HUMAN.: INT'L J. HUM. RTS, HUMAN., & DEV. 403, 414, 417 (2013).

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<sup>80</sup> Meital Pinto, *The Symbolic Effect of Regulating Offences to Cultural Identity Following the Charlie Hebdo Attack*, THE CRITIQUE ¶ 5 (7 Jan. 2016), <http://www.thecritique.com/articles/the-symbolic-effect-of-regulating-offences-to-cultural-identity-following-the-charlie-hebdo-attack/>.

<sup>81</sup> Juss, *supra* note 47, at 36-38, 41.

<sup>82</sup> Rhoda E. Howard-Hassmann, *The Charlie Hebdo Murders and Freedom of Speech*, 2 INDON. J. INT'L & COMP. L. 467, 471 (2015).

<sup>83</sup> Juss, *supra* note 47, at 7.

<sup>84</sup> *Id.* at 6-7.

<sup>85</sup> Nigel Biggar, *Charlie Hebdo Took Offensiveness too far?*, THE TIMES (9 Jan. 2016).

<sup>86</sup> So, they worked. Or did they really? Can “content-based freedoms” really be defended that easily? Following these terrible events, the surviving Charlie Hebdo journalists, had on the following week’s cover, no choice but to depict an image of Mohamed (although this time altogether more benign in the form of a weeping prophet). But more importantly, how are our freedoms honored by the Paris March that followed. As Mark Steel wrote: “[t]o start with, we should congratulate the Prime Minister of Israel and ambassador for Saudi Arabia, for honouring satire in its time of need, by turning up to a march for free speech and against violence and murder.” Mark Steel, *What a Perfect Tribute to Satire the Paris March Turned out to be*, INDEPENDENT (15 Jan. 2015), <http://www.independent.co.uk/voices/comment/what-a-perfect-tribute-to-satire-the-paris-march-turned-out-to-be-9981352.html?origin=internalSearch>.

<sup>87</sup> Add cite

<sup>88</sup> Add cite

<sup>89</sup> Add cite

<sup>90</sup> Others like the Pope have “denounced ‘provocateurs’ who mocked religion . . . and said that they could expect a punch [when] he criticized the satirical magazine Charlie Hebdo for insulting Islam and said that he understood why Muslims reacted with violent rage.” See Charles Bremner & Tom Kington, *Mock Islam and Expect a Punch, says Pope*, THE TIMES (16 Jan. 2015).

<sup>91</sup> Add cite

<sup>92</sup> Juss, *supra* note 47, at 42.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

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<sup>95</sup> *Id.* at 43.

<sup>96</sup> Peter Cumper, *Blasphemy, Freedom of Expression and the Protection of Religious Sensibilities in Twenty-First-Century Europe*, in PART III: ON WESTERN LEGAL DISCOURSE AGAINST BLASPHEMY LAW PUBLISHED IN BLASPHEMY AND FREEDOM OF EXPRESSION: COMPARATIVE, THEORETICAL AND HISTORICAL REFLECTIONS AFTER THE CHARLIE HEBDO MASSACRE 137, 160 (Jeroen Temperman & Andras Koltay eds., 2017).

<sup>97</sup> Cindy Holder, *Debating the Danish Cartoons: Civil Rights Or Political Power?*, 55 UNIV. BRUNSWICK L. J. 179, 183 (2006).

<sup>98</sup> Michael Harries, *Paris Attacks: Jonathan Swift had a Point About Religion. Did Charlie Hebdo?*, THE INDEPENDENT ON SUNDAY (18 Jan. 2015).

<sup>99</sup> SABA MAHMOOD, TALAL ASAD, WENDY BROWN, & JUDITH BUTLER, IS CRITIQUE SECULAR: BLASPHEMY, INJURY AND FREE SPEECH? (2009).

<sup>100</sup> *Id.* at 16-17.

<sup>101</sup> *Id.* at 16.

<sup>102</sup> *Id.* at 17.

<sup>103</sup> *Id.* at 25.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

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

<sup>107</sup> Jürgen Habermas, *Religion in the Public Sphere*, 14 EUR. J. PHIL. 1, 4 (2006).

<sup>108</sup> *Id.*

<sup>109</sup> HRC, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, U.N. Doc. CCPR/C/GC/34 (12 Sept. 2011), ¶ 1; ICCPR, *supra* note 16, art. 19.

<sup>110</sup> *Case of Handyside v. the United Kingdom*, A24 Eur. Ct. H.R. ¶ 49 (1976).

<sup>111</sup> See the provocative account of the reactions to the Rushdie affair by Melanie Phillips who argues that those who called for Rushdie's death should have been for incitement to murder. Melanie Phillips, *After the Rushdie Affair, Islam in Britain Became Fused with an Agenda of*

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*Murder*, THE GUARDIAN (28 May 2006),  
<https://www.theguardian.com/commentisfree/2006/may/28/religion.islam>.

<sup>112</sup> The decision to publish the cartoons that offended many Muslims was made by the cultural editor of Jyllands-Posten, Flemming Rose, however, Rose allegedly had to back-track on his apparent willingness to publish Iranian cartoons on the holocaust. Fleming Rose, *Cartoon row Editor Sent on Leave*, BBC NEWS (10 Feb. 2006),  
<http://news.bbc.co.uk/1/hi/world/europe/4700124.stm>.

<sup>113</sup> *Charlie Hebdo Attack: Three Days of Terror*, BBC News (14 Jan. 2015),  
<https://www.bbc.co.uk/news/world-europe-30708237>

<sup>114</sup> FREDMAN, *supra* note 45, at 305.

<sup>115</sup> See Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J. L. & HUMANITIES 35 (2010).

<sup>116</sup> *Id.*

<sup>117</sup> See JOHN STUART MILL, ON LIBERTY (1859) (1974).

<sup>118</sup> Thomas Scanlon, Thomas Scanlon, *A Theory of Freedom of Expression 2* PHIL. & PUB. AFF. 204, 218 (1972).

<sup>119</sup> Sarah Sorial, *Free Speech, Autonomy, and the Marketplace of Ideas*, 44 J. VALUE INQ. 167, 168 (2010).

<sup>120</sup> ERIC HEINZE, HATE SPEECH AND DEMOCRATIC CITIZENSHIP (2016).

<sup>121</sup> See Scanlon, *supra* note 118, at 204.

<sup>122</sup> *Id.*

<sup>123</sup> *Otto-Preminger-Institut, supra* note 1.

<sup>124</sup> Add cite

<sup>125</sup> Edward Luce, *The World's Indifference to Muslim Woes*, FINANCIAL TIMES (2 Jan, 2020).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* ¶ 3.

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<sup>129</sup> *Id.* ¶ 2

<sup>130</sup> *Id.* ¶ 1.

<sup>131</sup> Sam Cherribi, *Politicians Perceptions of the “Muslim Problem”: The Dutch Example in European Context*, in *DEMOCRACY AND THE NEW RELIGIOUS PLURALISM* 113 (Thomas Banchoff ed., 2007).

<sup>132</sup> Add cite

<sup>133</sup> Satvinder Juss, *Burqa-Bashing and the Charlie Hebdo Cartoons*, 26 *KING’S LAW J.* 27 (2016).

<sup>134</sup> Susanna Mancini, *Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism*, 10 *INT’L J. CONST. L.* 411, 412 (2012).

<sup>135</sup> *See* David Keane, *Cartoon Violence and Freedom of Expression*, 30 *HUM. RTS. Q.* 845 (2008).

<sup>136</sup> *See* *Mandla v. Dowell Lee*, [1983] 1 All ER 1062 (HL) (on the criteria of what constituted “race” for the purposes of the Race Relations Act 1976); *See also* *Commission for Racial Equality v. Precision Manufacturing Services Ltd.* (10 Oct.1991), No. 4106/91 (Sheffield Industrial Tribunal).

<sup>137</sup> *See* *R v. Chief Metropolitan Magistrate, ex parte Choudhury* [1991] 1 QB 429 (the Satanic Verses case which held that Muslims could not receive legal protection under the Blasphemy laws. Blasphemy laws were repealed by the Criminal Justice and Immigration Act 2008); *See also* First Report Blasphemy, *Select Committee on Religious Offences in England and Wales* 2003-06-10 UK, Parliament Publications and Records.

<sup>138</sup> Eric Barendt, *Religious Hatred Laws: Protecting Groups or Belief?*, 17 *RES PUBLICA* 41, 45 (2011).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 41, 47.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 53.

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<sup>144</sup> András Sajó, *Countervailing Duties as Applied to Danish Cheese and Danish Cartoons*, in CENSORIAL SENSITIVITIES: FREE SPEECH AND RELIGION IN A FUNDAMENTALIST WORLD 288 (András Sajó ed., 2007).

<sup>145</sup> James W. Nickel, *Who Needs Freedom of Religion*, 76 U. COLO. L. REV. 941 (2005).

<sup>146</sup> RONALD DWORKIN, RELIGION WITHOUT GOD (2013).

<sup>147</sup> *Id.*

<sup>148</sup> Andrew Koppelman, *Is It Fair to Give Religion Special Treatment*, 3 U. ILL. L. REV. 571 (2006).

<sup>149</sup> HEINER BIELEFELDT, NAZILA GHANEA & MICHAEL WIENER, FREEDOM OF RELIGION OR BELIEF: AN INTERNATIONAL LAW COMMENTARY 32 (2016).

<sup>150</sup> Ian Leigh, *Damned if They Do, Damned if They Don't: The European Court of Human Rights and the Protection of Religion from Attack*, 17 RES PUBLICA 55, 68 (2011).

<sup>151</sup> Christian F. Rostbøll, *The Use and Abuse of "Universal Values," in the Danish Cartoon Controversy*, 2 EUR. POL. SCI. REV. 401 (2010).

<sup>152</sup> See ISAAH BERLIN, *Two Concepts of Liberty*, in ISAAH BERLIN, FOUR ESSAYS ON LIBERTY (1969) (1958).

<sup>153</sup> *Handyside*, *supra* note 110.

<sup>154</sup> *Id.* ¶ 52.

<sup>155</sup> Case of Wingrove v. The United Kingdom, App. No. 17419/90, 1996-V Eur. Ct. H.R. (1996).

<sup>156</sup> *Id.* ¶ 48 (emphasis added).

<sup>157</sup> *Otto-Preminger*, *supra* note 1, ¶¶ 21-22.

<sup>158</sup> *Id.* ¶ 22.

<sup>159</sup> J.W. Montgomery, *Can Blasphemy Law Be Justified?*, 145 LAW & JUST. CHRISTIAN L. REV. 6 (2000), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/ljusclr145&div=6&id=&page=>.

<sup>160</sup> See CHARLES TAYLOR, A SECULAR AGE (2007).

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<sup>161</sup> Heiner Bielefeldt, *Freedom of Religion or Belief: Anachronistic in Europe?*, in BELIEF, LAW AND POLITICS WHAT FUTURE FOR A SECULAR EUROPE? 55, 58 (Marie-Claire Foblets, Zeynep Yanasmayan, & Katayoun Alidadi eds., 2014).

<sup>162</sup> *Otto-Preminger-Institut*, *supra* note 1, dissent ¶ 7.

<sup>163</sup> *Mouvement Raëlien Suisse v. Switzerland*, 2012 Eur. Ct. H.R. at 4.

<sup>164</sup> *Id.* ¶ 12.

<sup>165</sup> *Id.* ¶ 21.

<sup>166</sup> *Id.* ¶ 41.

<sup>167</sup> *Id.* at 14, ¶¶ 70-76.

<sup>168</sup> *Norwood v. DPP* [2003] EWHC (Admin) 1564, ¶ 6 (Eng. & Wales).

<sup>169</sup> *Id.* ¶ 10.

<sup>170</sup> *Id.* ¶ 33.

<sup>171</sup> *Norwood v. United Kingdom*, 2004-XI Eur. Ct. H.R. at 4 (emphasis added) .

<sup>172</sup> *E.S. v. Austria*, App. No. 38450/12 (Oct. 25, 2018), <http://hudoc.echr.coe.int/eng?i=001-187188>.

<sup>173</sup> *Id.* ¶ 13.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* ¶ 14.

<sup>176</sup> *Id.* ¶ 74.

<sup>177</sup> *Id.* ¶ 10.

<sup>178</sup> *Id.* ¶ 12.

<sup>179</sup> *Id.* ¶ 42.

<sup>180</sup> *Id.* ¶ 43.

<sup>181</sup> *Id.*

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<sup>182</sup> *Id.* ¶ 46; *Otto-Preminger-Institut*, *supra* note 1, ¶ 55.

<sup>183</sup> *E.S. v. Austria*, *supra* note 172, ¶ 50.

<sup>184</sup> *Id.* ¶ 51.

<sup>185</sup> *Id.* ¶ 52.

<sup>186</sup> *Id.* ¶ 53.

<sup>187</sup> *Id.* ¶ 54.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* ¶ 57.

<sup>190</sup> *Id.* ¶ 37 (emphasis added).

<sup>191</sup> *Id.* ¶ 15.

<sup>192</sup> *Id.* ¶ 28 (emphasis added).

<sup>193</sup> Marko Milanovic, *Legitimizing Blasphemy Laws Through the Backdoor: The European Court’s Judgment in E.S. v. Austria*, EUR. J. INT’L L. (9 Oct. 2018).

<sup>194</sup> *Id.*

<sup>195</sup> *Otto-Preminger-Institut*, *supra* note 1, ¶ 6. Indeed, the dissenting judges acknowledged the idea of “progress” to which free speech contributes in human society so that, “it should not be open to the authorities of the State to decide whether a particular statement is capable of ‘contributing to any form of public debate capable of furthering progress in human affairs,’” and that “such a decision cannot but be tainted by the authorities’ idea of ‘progress,’” (*id.* ¶ 3) thus leaving the individual to determine how progress should be achieved.

<sup>196</sup> Emmanouil Bougiakiotis, *E.S. v. Austria: Blasphemy Laws and the Double Standards of the European Court of Human Rights*, U.K. CONSTITUTIONAL L. ASSOC. 3 (22 Nov. 2018), <https://ukconstitutionallaw.org/2018/11/22/emmanouil-bougiakiotis-e-s-v-austria-blasphemy-laws-and-the-double-standards-of-the-european-court-of-human-rights/>.

<sup>197</sup> *Id.* at 4.

<sup>198</sup> *Id.*

<sup>199</sup> Rostbøll, *supra* note 151 at 403.



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<sup>200</sup> See Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINNESOTA J. INT’L L. 303 (2008).

<sup>201</sup> *Otto-Preminger-Institut*, *supra* note 1, ¶ 5.

<sup>202</sup> *Id.* dissent ¶ 7.