

FIVE THOUGHTS ABOUT THE REPEAL OF DENMARK'S
BLASPHEMY BAN

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ABSTRACT

In June 2017, Denmark repealed Article 140, its blasphemy ban. This came after a Danish prosecutor sought to charge a 42-year-old man under its blasphemy law for burning the Quran. The prosecution and repeal led to first shock and then rejoicing in the global community as another country abolished its blasphemy ban. The dominant narrative, however, is too simple. In this essay, I suggest five additional issues raised by the Danish blasphemy debate.

First, blasphemy ban opponents emphasized the impact of Denmark's ban on the majority Muslim world. Is this concern empirically accurate? Even if there is a connection, should Denmark have to repeal its own ban because of outside pressure? Second, those celebrating repeal have not asked why the previous arrangement – a rarely used blasphemy ban – unraveled in 2017, a question worth asking if one wants to plot out the future of the movement against blasphemy bans. Third, some American critics of the prosecution pointed to a double standard because in 1997 Denmark refused to prosecute a TV show that burned a Bible on air. Are Bible and Quran burning really the same thing? Fourth, the Danes largely rejected the anti-appeasement language of the

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Danish cartoon controversy, instead asking whether repeal would enhance or hinder the likelihood of terrorist attacks in Demark. What accounts for the change? Finally, repeal comes at the time many countries across Europe are using anti-terror laws to restrict speech (including, in one instance, Quran burning). Are Europeans, in abolishing blasphemy bans, simply trading one speech restriction for another?

I. ANOTHER BAN BITES THE DUST¹

In December 2015, a 42-year-old Danish man, John Salvesen,² burned a copy of the Quran, filmed himself, and posted the film to a Facebook page titled “Freedom Yes, Islam No.”³ In February 2017, a local Danish prosecutor charged him with violating Article 140, Denmark’s ban on blasphemy.⁴ This came after a decision not to prosecute the man under Denmark’s hate speech laws. News of the prosecution spread rapidly and led to renewed calls for Denmark to abolish its blasphemy law. A key argument in the campaign was that Denmark, by continuing to penalize blasphemy, gave aid and comfort to countries, largely in the Islamic world, that punish blasphemy with draconian penalties.⁵ In early June 2017, the Danish party abolished Article

¹ My apologies to Queen. The message of the song, that “we’re going to get you too” does parallel the momentum of the global campaign against blasphemy bans which is racking up repeals of Western blasphemy bans.

² While the accused was not identified by Danish authorities, this is now he described himself. Kimiko de Freytas-Tamura, *Danish Man Who Burned Quran is Prosecuted for Blasphemy*, NEW YORK TIMES, (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/world/europe/denmark-quran-burning.html>.

³ *Id.*

⁴ Up to its repeal, Article 140 read as follows: “Whoever, in public, mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community in this country, shall be liable to a fine or imprisonment for a term not exceeding 4 months.” Taken from Lars Grassmé Binderup & Eva Maria Lassen, *The Blasphemy Ban in Denmark*, in András Koltay and Jeroen Temperman eds., *BLASPHEMY AND FREEDOM OF EXPRESSION: COMPARATIVE, THEORETICAL AND HISTORICAL REFLECTIONS AFTER THE CHARLIE HEBDO MASSACRE*, (Cambridge University Press, 2017), pp. 431-56.

⁵ For example, the May 15, 2017 petition from authors and journalists around the world makes this point. See Repeal Denmark’s blasphemy ban – a

140 on a 75-27 party line vote, made possible by the decision of the center-right Venstre Party to support repeal.⁶ Great celebration followed, as Denmark joined a growing list of countries – including Norway, Iceland, Malta and the French province of Alsace-Moselle – that have removed their blasphemy laws since the 2015 *Charlie Hebdo* attacks.

On one level, this is not a complicated story. Blasphemy bans have no place in modern society; indeed, Denmark last used its ban in 1971. If the February prosecution raised doubts and puzzlement about why secular Denmark punishing blasphemy,⁷ the June removal of the ban itself sounded the all clear. As a modern secular state in which, according to Danish political scientist Per Mouritsen, “the very idea that religion is taken seriously is the antithesis of being a good citizen,”⁸ Denmark now takes the modern, liberal position on the issue. Abolitionists hope that, in the future, other European countries that still punish blasphemy will follow Denmark’s lead, in the process stripping Pakistan, Iran and Saudi Arabia of the talking point that “the West” punishes blasphemy too.⁹ In these developments, the true winner is freedom of speech – in Denmark, in Europe, and across the world.¹⁰

petition (“Repeal Petition”) (May 15, 2017), <https://www.opendemocracy.net/can-europe-make-it/authors-journalists-and-others-from-all-over-world/repeal-denmarks-blasphemy-ban>.

⁶ See “Denmark to repeal blasphemy law after government party changes stance,” *The Local*, June 1, 2017, <https://www.thelocal.dk/20170601/danish-likely-to-remove-blasphemy-paragraph-after-government-changes-stance>.

⁷ This was the view of Mark DeGirolami and Mark Movsesian both of whom commented on the prosecution in the weeks after the *New York Times* story. See Mark DeGirolami, *Danish Blasphemy Prosecution for Koran Burning*, COMMENTARY (Feb. 27, 2017), <https://lawandreligionforum.org/2017/02/27/danish-blasphemy-prosecution-for-koran-burning/> (reprinted in the St. John’s Law and Religion Forum); Mark Movsesian, *Blasphemy in Denmark*, First Things (blog), (Mar. 9, 2017), <https://www.firstthings.com/web-exclusives/2017/03/blasphemy-in-denmark>.

⁸ De Freytas-Tamura, *supra* note 4.

⁹ See Jacob Mchangama, *It’s time to end Denmark’s blasphemy ban*, WASHINGTON POST (April 24, 2017), https://www.washingtonpost.com/news/democracy-post/wp/2017/04/24/its-time-to-end-denmarks-blasphemy-ban/?utm_term=.63066b6c687a. In the article, Mchangama noted the worry of the U.N. Special Rapporteur on Freedom of Religion or Belief that “the Danish blasphemy ban might be abused by other states.” *Id.* This worry, was based on 2015 meeting in Saudi Arabia where, according to the Special Rapporteur, the Pakistani representative used the Danish blasphemy ban to argue that a global ban on ‘defamation of religions’ is emerging in customary international law.” *Id.*

¹⁰ See, e.g., the statement from the International Humanist and Ethical Union, “Blasphemy law in Denmark is no more!,” (June 2, 2017),

I wonder about this story. Let me be clear: I do not support the draconian anti-blasphemy laws in effect in Pakistan and many other majority-Muslim countries. The End Blasphemy Laws campaign is right to target such laws, especially given their broad language, harsh penalties and use against minority groups.¹¹ On the other hand, three aspects of the mainstream narrative make me uneasy. First, I question whether the continued existence of rarely used, relatively mild¹² European blasphemy bans encourage countries like Pakistan, Iran (or Russia, for that matter) to enact and enforce draconian bans in a way that targets minority groups. To me, this is something one must prove, rather than something taken as a first principle. Second, any campaign against blasphemy bans should come to grips with the support such bans (even draconian ones) receive in countries like Pakistan. One does not have to accept this support as legitimate (it could, for example, be a form of false consciousness); but one should not assume that removing blasphemy bans in Pakistan will necessarily stop violent extra-judicial enforcement of anti-blasphemy norms. Finally, any campaign against punishment of those who denigrate religious symbols should also speak to “blasphemy” bans against secular symbols (such as a national flag).¹³

Underneath these departures from the majority narrative are normative and pragmatic concerns. From a normative side, there is a virtue in getting the history, politics and sociology behind blasphemy and blasphemy bans right. In particular, this means developing nuanced arguments that transcend the culture war framework that debates on blasphemy bans generate – especially

<http://iheu.org/blasphemy-law-denmark-no/> (describing repeal as a victory for freedom expression and a vital change).

¹¹ For more, see Rob Kahn, *Rethinking Blasphemy and anti-Blasphemy Laws*, in András Koltay and Jeroen Temperman eds., *BLASPHEMY AND FREEDOM OF EXPRESSION: COMPARATIVE, THEORETICAL AND HISTORICAL REFLECTIONS AFTER THE CHARLIE HEBDO MASSACRE*, (2017), pp. 167-93 (calling for a “liberalism of fear” approach to blasphemy bans which compares their use, severity and vagueness to other speech restrictions).

¹² As noted above, the Danish ban is punishable by a fine or four months in jail.

¹³ In describing why Denmark’s blasphemy ban (and prosecution) seemed out of place, *New York Times* reporter Kimiko de Freytas-Tamura noted that flag burning is not a punishable crime in Denmark. Freytas-Tamura, *supra* note 3. This makes one wonder about the United States. While the Supreme Court held that flag burning is protected speech, *Texas v. Johnson*, 491 U.S. 387 (1989), the recent controversy over pro-athletes kneeling during the national anthem suggests that the United States is not as “modern” as we might think. See Sophie Tatum, *Trump: NFL owners should fire players who protest the national anthem*, CNN, (Sept. 23, 2017), <http://www.cnn.com/2017/09/22/politics/donald-trump-alabama-nfl/>.

when Islam is involved.¹⁴ At the same time, my concerns are also pragmatic. To be effective, the anti-blasphemy campaign should acknowledge the obstacles that lay in its path; otherwise, any progress it makes will unravel with the next crisis.¹⁵

This essay focuses on five aspects of the debate over Denmark's repeal of its blasphemy ban, several of which undermine the commonly accepted story. First, the claim that Denmark properly abolished Article 140 because of its impact on Pakistan raises an empirical puzzle (was there really an impact?) as well as normative implications about state sovereignty. Second, the sudden emergence of a prosecution and repeal – after a century of Denmark's carrying on quite well with a rarely used blasphemy ban – reflects legal difficulties in prosecuting Quran burning as hate speech. To change Ronald Dworkin's idiom slightly, "Hard cases unmake bad laws."¹⁶

Third, the failure of the Danes to prosecute those responsible for burning a Bible burning on live television in 1997¹⁷ led some commentators from the United States to accuse Denmark of discriminating against Christians.¹⁸ While one can always challenge double standards, burning a holy book of a minority group raises issues that "majoritarian" burning of holy books (such as the Bible in the United States or Denmark) does not.

Fourth, the discussion of appeasement in the Danish debate was quite strange. Instead of arguing, as Flemming Rose had during the Danish cartoon controversy, about the dangers of appeasement,¹⁹ the debate over Article 140 centered on whether repeal would lead to increased terrorism. More generally, the End Blasphemy Laws Now movement is quite invested in establishing a

¹⁴ For an example of context sensitive discussions of blasphemy bans, see András Koltay and Jeroen Temperman eds., *BLASPHEMY AND FREEDOM OF EXPRESSION: COMPARATIVE, THEORETICAL AND HISTORICAL REFLECTIONS AFTER THE CHARLIE HEBDO MASSACRE*, (2017); Neville Cox, *Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech*, 62 *AMERICAN JOURNAL OF COMPARATIVE LAW* 739 (2014).

¹⁵ The uneven history of blasphemy law reform in Pakistan bears this out. Reform efforts often lead to a populist backlash. See Kahn, *supra* note 12?, at 191 (describing how law reform has been met by protests).

¹⁶ Dworkin inverted this formula, examined the idea that hard cases make bad law. See Ronald Dworkin, *Hard Cases* 88 *HARV. L. REV.* 1057 (1975).

¹⁷ See Freytas-Tamura, *supra* note 3.

¹⁸ DeGirolami, *supra* note 8?; see also Movsesian, *supra* note 8?.

¹⁹ Flemming Rose, *Why I Published Those Cartoons*, *WASHINGTON POST* (Feb 19, 2006). See also Robert A. Kahn, "Flemming Rose, The Danish Cartoon Controversy, and the New European Freedom of Speech," 40 *CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL*, 253, 272-73 (2009).

nexus between blasphemy bans and terrorism. They do so, however, without presenting statistical evidence, or explaining how blasphemy bans encourage the commission of terrorist acts.

Finally, John Salvesen was not the only Quran burner facing charges in 2017. At the same time Denmark abolishing its blasphemy ban, a woman in Slovakia was facing criminal charges for urinating on a Quran and burning it; these charges, however, were brought under a newly passed anti-terror law.²⁰ The use of anti-terror laws to punish Quran burning, and other offensive speech acts, a somewhat depressing question: Has the anti-blasphemy law campaign struck a blow for freedom of expression; or have we merely replaced one form of speech restriction with another?

I. SUBMITTING TO PAKISTAN?

Let's start with what the Danish vote abolishing its blasphemy ban means for the world at large. To hear it from the End Blasphemy Laws Now movement, the vote should have been 102-0, not 75-27. Blasphemy bans like Denmark's are "medieval" and, worse still, harm people in countries like Pakistan with draconian bans. Sounds good; but is it true? Even if true, is it a reason to abolish Denmark's rarely used ban? I have some doubts.

For one thing, the argument about Pakistan using the Danish blasphemy ban to justify its own ban requires one to credit what an ambassador from Pakistan says. Since when, however, do blasphemy law foes pay attention to what diplomats from majority Muslim countries say? Consider the defamation of religions debate that dominated the first decade of the new century.²¹ For example,

²⁰ See Belinda Robinson, *Woman "filmed urinating on Koran before burning it" could face six years in jail*, EXPRESS, (Feb. 21, 2017), <http://www.express.co.uk/news/world/770087/Woman-filmed-urinating-on-Koran-before-burning-it-could-face-six-years-in-jail>. See also, Patrick Strickland, *Fighting Slovakia's far right online and on the streets*, AL-JAZEERA, (June 13, 2017), <http://www.aljazeera.com/indepth/features/2017/05/fighting-slovakia-online-streets-170529083248638.html>, places the burning and prosecution in the context of a fight against right-wing-extremism in Slovakia.

²¹ During this period, representatives of majority Muslim countries called for a global standard against "defamation of religions." While the Muslim countries focused on examples of Islamophobia, Western opponents of the law expressed concern that the proposal would stifle debate about religious ideas. See Robert A. Kahn, *A Margin of Appreciation for Muslims? Viewing the Defamation of Religions Debate Through Otto Preminger Institut v. Austria*, 5 CHARLESTON LAW REVIEW 401, 411-12 (2011); see also Lorenz Langer, *The Rise (and Fall) of Defamation of Religions*, 35 YALE JOURNAL OF INTERNATIONAL LAW 1 (2010); see also L. Bennett

did they credit the arguments the arguments Pakistani diplomats made supporting the “defamations of religions” concept?²² If the End Blasphemy Laws Now campaigners do not credit what Pakistan says generally, why should they credit Pakistani claims that a rarely used blasphemy ban in Denmark will create “customary international norm” favoring Pakistan’s much more severe blasphemy ban?²³ I wonder: Do the blasphemy ban opponents actually believe this? An abolitionist might respond: “Of course, it is not customary law now, but it might be one day.” This may be true. Yet by repeating the customary international law argument, and using it as a centerpiece of the campaign against Article 140, are human rights activists creating the future they fear? While Denmark no longer punishes blasphemy, Germany, Austria, Poland and Italy still do. Does this justify what Pakistan does when it comes to blasphemy?

A second problem concerns empirical evidence. Abolitionists point to Article 140, note that the internet exists, and conclude that what happens in Denmark no longer stays in Denmark but instead has an impact around the world, including in Pakistan.²⁴ There is some truth to this, especially as regards the prosecution of the Quran burner. Had this case gone to trial, it may have had a global impact (although how much is unclear). Yet it is hard to see how Denmark’s having a rarely used blasphemy law makes a difference. Moreover, shouldn’t the abolitionist movement carry the burden of showing that Denmark’s blasphemy law harms Pakistan before using this as a reason for demanding that Denmark abolish it?

The focus on Pakistan also raises normative concerns. The opposition to blasphemy laws such as Article 140 is quite varied. Some opponents reject blasphemy bans for principled reasons that

Graham, *Defamation of Religions: The End of Pluralism?* 23 EMORY INTERNATIONAL LAW REVIEW 69 (2009).

²² For instance, Graham notes that Pakistan was a supporter of the “defamation of religions” proposal but strenuously opposed this same idea. See Graham, *supra* note 22, at 69 (opposing defamation of religions concept despite Pakistani support for it).

²³ *Id.* at 80-82 (describing the severity of Pakistan’s anti-blasphemy bans). See also Kahn, *supra* note 12 at 179-85.

²⁴ For instance, Jacob Mchangama warns that “a video or comment uploaded in Copenhagen is instantly available in Cairo and Karachi.” Mchangama, *supra* note 10. For a more nuanced view, see Joelle Fiss, *Anti-blasphemy offensives in the digital age: when hardliners take over*, Brookings Project on US Relations with the Islamic World, Analysis Paper, No. 25 (Sept. 2016) at 9. Fiss notes how “verbal expressions...once limited to the immediate vicinity are now broadcast at lightning speed” and concludes that “online or offline, high-profile allegations of blasphemy have affected foreign relations.” *Id.*

would apply to people of all religions -- freedom of speech is inviolate; God does not exist, so no offense is possible.²⁵ These arguments, whatever one thinks of them, do not explicitly target Islam or the Islamic world, even if the blasphemy bans they call for removing exist primarily in majority Muslim countries.

There is, however, another branch of the anti-blasphemy ban movement that focuses more directly on Muslims – often combining opposition to bans with a broader sense of unease about the presence of Muslims in Europe and the West more generally.²⁶ These groups argue against blasphemy bans, an international norm against defamation, Sharia arbitration and the burqa by arguing that these policies represent a form of “submission” by the West to Islamic norms.²⁷ Submission is not simply giving into a demand; it is not compromise, or even appeasement. The term, as used in this context, has a religious flavoring; by requiring “submission,”

²⁵ For example, Robert Post, in discussing the Danish Cartoon controversy, discussed restrictions of blasphemy from the perspective of a general normative position that democracies should not ban public discourse. Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 CONSTELLATIONS 72 (2007); see also Eric Heinze, HATE SPEECH AND DEMOCRATIC CITIZENSHIP (2016) (arguing that longstanding, stable prosperous democracies may not legitimately restrict speech based on its content).

²⁶ Consider the Gatestone Institute, a non-profit “international policy council and think tank” led by former Bush U.N. Ambassador John Bolton. The group, among other things, is committed to protecting freedom of speech. Gatestone Institute, “About Us” page, (visited Jan. 12, 2017), <https://www.gatestoneinstitute.org/about/>. The Institute has run articles on blasphemy bans, albeit with a somewhat exaggerated focus on other supposed instances of Muslim inspired speech restrictions. See also Soeren Kern, *Muslims Pressing for Blasphemy Laws in Europe*, Gatestone Institute, (Nov. 30, 2012), <https://www.gatestoneinstitute.org/3474/blasphemy-laws-europe> (describing issues involving nativity plays, promotion of dogs and proselytizing in an article supposedly about blasphemy). Other Gatestone articles, however, go much further. See also Guy Millière, “Muslim Invasion of Europe,” (Oct. 22, 2015), <https://www.gatestoneinstitute.org/6721/muslim-invasion-europe> (describing Islam as a culture of the “formerly colonized,” Muslims as “not wanting to assimilate” and drawing attention to “Muslim criminality in Europe”).

²⁷ For example, the leader of the xenophobic Alternative for Germany party, Alexander Gauland, commented on the decision to postpone a school Christmas party after a Muslim student complained about singing Christmas carols as: “An unbearable, involuntary submission to Islam.” Soeren Kern, *Europe: The Islamization of Christmas* (Dec. 24, 2017), <https://www.gatestoneinstitute.org/11598/christmas-islamization-europe> (quoting Gauland). The theme of submission also figures prominently in literature and film. See also Michel Houellebecq, *SUBMISSION: A NOVEL* (2017) (describing a fictional Islamist party’s electoral victory in France); see also Rachel Donadio, *Provocateur’s Death Haunts the Dutch*, NEW YORK TIMES (Oct. 30, 2014) (describing the killing of Theo van Gogh’s after the release of his film *Submission*).

Muslim countries (or Muslim residents in Europe and the United States) are imposing their religious beliefs on the liberal, tolerant, Christian West.

Yet the End Blasphemy Campaign, in demanding that Denmark alter its penal laws to avoid giving Pakistani diplomats arguing points, appears to be demanding a form of “submission” as well. Instead of Denmark determining whether Article 140 best suits its needs (as it did in 2015-16 when it was out of the limelight), Denmark faces demands from the international community to play its part in the global soap opera featuring Islam vs. the West over religious freedom. In other words, Denmark is not simply being asked to join an emerging international consensus around blasphemy bans; it is being called upon to create this consensus, for the benefit of Pakistan and other majority Muslim that still have not seen the light. To be sure, the causation is indirect – Denmark is acting as Pakistan’s mentor rather than its slave. But the sense remains that the developments in the Islamic world are dictating how a Western country should deal with a domestic political issue.

Is this a problem? There are good reasons to repeal blasphemy bans. So perhaps the Danes should thank the End Blasphemy Campaign (and, indirectly Pakistan) for doing it a favor and leading Denmark to do something they should have done years ago. Would we, however, feel as sanguine if the international pressure led to extending rather than removing a restriction on speech? What if a country without a blasphemy ban decided to enact one, not out of domestic political considerations, but because the international community told it to? To take an only slightly different example, many European countries adopted bans on Holocaust denial because of a 2008 Framework Decision inspired by Germany. Is this type of external pressure a problem, from either a free speech or state sovereignty perspective?²⁸

To be sure, there is a difference; Holocaust denial and blasphemy bans reduce speech. Repealing bans, therefore, is a good thing. Free speech, however, is not the only issue; there is also the question of Denmark’s right to govern itself according to its own norms. Here the role of the international anti-blasphemy ban campaign seems more problematic. It would be one thing if Denmark engaged in a string of blasphemy prosecutions were

²⁸ Uladzislau Belavusau has made similar argument about the introduction of hate speech norms (including norms against Holocaust denial) into East Central Europe – which became a borderland for the competition between European and US positions on freedom of speech. *See* Belavusau, FREEDOM OF SPEECH: IMPORTING EUROPEAN AND US CONSTITUTIONAL MODELS IN TRANSITIONAL DEMOCRACIES (2014).

constantly front-page news in Karachi. Are we as comfortable making the same argument about a rarely used law?

To conclude, while there are good reasons for Denmark, or any other country (inside or outside of Europe) to repeal its blasphemy bans, questions remain. Who decides this question – Danes or the global community? What types of arguments for repeal count? Arguments about the impact of Article 140 in Denmark (or at least claims that Article 140 harms another country in a tangible way)? Or is it sufficient to present vague claims from a global human rights community that actually calls for abolition on the basis of broader, philosophical grounds? From my perspective, the global campaign against blasphemy bans would do better if abolition came from an open debate within a given country,²⁹ rather from international pressure – especially for the relatively mild, rarely used bans used in Europe.³⁰

II. BLASPHEMY, HATE SPEECH AND REPEAL

So what about Denmark? If there were good internal reasons to remove the ban, perhaps the fact that the End Blasphemy Campaign also called for removal as well was harmless. After all, being told by a bully to brush one’s teeth does not make doing so a bad idea.. Here a few points are in order.

First, the situation between 1971 when the Danes last used Article 140 and 2017 seemed stable. Despite the Danish Cartoon controversy, which raised the question of blasphemy (at least as it related to depicting the Prophet Muhammad), a public poll of Danes commissioned in 2012 found that 66% supported the blasphemy

²⁹ Indeed, the International Humanist and Ethical Union proclaimed that repeal of Article 140 came through a “open public debate.” See IHEU Statement, *Blasphemy Law in Denmark is No More* (Jun. 2, 2017), <http://iheu.org/blasphemy-law-denmark-no/> (stating that “Denmark saw a real, open public debate of the ‘blasphemy’ law[.]”). While the IHEU statement demonstrates the normative appeal of open debates, was the debate over Article 140 truly open? Or was the debate shaped in critical ways by facts beyond Denmark’s control?

³⁰ Consider in this regard the case of Stephen Fry an Irish humanist under investigation for violating Ireland’s blasphemy laws for asking how an “all-loving” God can be responsible for evil, such as “bone cancer in children.” See Andrew Copson, *Stephen Fry being investigated for blasphemy is just the beginning*, THE INDEPENDENT (May 8, 2017), <http://www.independent.co.uk/voices/stephen-fry-blasphemy-ireland-getting-worse-around-the-world-a7723631.html>. The investigation has spurred new attacks on Ireland’s blasphemy laws. *Id.* This strikes me as a reasonable result because the opposition is coming from the abuse of Ireland’s law, not how it relates to a global clash of cultures narrative.

ban.³¹ Interestingly, this percentage is higher than the percentage of Norwegian *Muslims* who in 2017 called for a return of that country's ban).³² Indeed, before matters came to a head earlier this year, the Danish debate over Article 140 turned on competing arguments based on the futility of change. Abolitionists argued that prosecuting a few Quran burners did not make society a better place; supporters of Article 140 made the same argument with the roles reversed – society is not improved by making Quran (and Bible) burning legal.

The status quo – a rarely used blasphemy ban – persisted because it satisfied both sides. On the one hand, it signaled that society would not give, as Danish Social Democrat spokesperson for religion Karen Klint put it, “a free pass to say anything we want.”³³ At the same time, nobody was actually prosecuted and Denmark stayed out of the headlines. Article 140 was an especially effective status quo measure because it required provincial attorney general's consent, which made the law difficult to use and helped explain how the Danish cartoon controversy could come and go without blasphemy charges against Flemming Rose and the *Jyllands Posten*.³⁴

The February 2017 prosecution made the status quo impossible to maintain. Danes had to choose between having a blasphemy law and punishing concrete instances of blasphemy. The prosecution, in turn, was not – to take up a second point – a reflection of a lust for prosecution in a secular society, as some American commentators put it.³⁵ Instead, the prosecution of John

³¹ See Dani Fife, *Denmark Applies Blasphemy Law for the First Time in 46 Years*, Center for Security Policy (Apr. 6, 2017), <https://www.centerforsecuritypolicy.org/2017/04/06/denmark-applies-blasphemy-law-for-the-first-time-in-46-years/>.

³² See Judith Bergman, *The West Submits to Blasphemy Laws, Forward to the Middle Ages!*, Gatestone Institute, (Mar. 3, 2017), <https://www.gatestoneinstitute.org/10000/blasphemy-laws> (citing a poll indicating that 41% of Norwegian Muslims would like to see a return of Norway's blasphemy ban).

³³ See Repeal Petition, *supra* note 6.

³⁴ Indeed, in his statement refusing to bring charges, the regional prosecutor spent much more time discussing Section 266b which covers hate speech than Section 140. *Decision on Possible Criminal Proceedings in the case of Jyllands-Posten's article "the face of Muhammad,"* Director of Public Prosecutions (Mar. 15, 2006).

³⁵ DeGirolami, *supra* note 12; see also Movsesian, *supra* note 12.

Salvesen fell in a gap between blasphemy and hate speech law, a circumstance that made blasphemy charges very tempting.³⁶

Here we should briefly distinguish blasphemy bans and hate speech laws. A ban on blasphemy focuses on an object, an idea, or an institution – this is one reason why blasphemy bans are rightly unpopular. By contrast, a hate speech ban (even one punishing incitement based on religion) concerns individuals or groups. While the United States has no hate speech laws, most of the rest of the world does.³⁷ These laws, explicitly mentioned in international legal documents, form part of a global consensus about speech regulation – rightly or wrongly.

Given these differences, bans on incitement to religious hatred represent an advance on blasphemy bans because they require that the speaker attack believers rather than beliefs.³⁸ Such laws also reflect the lived experience of some groups – Jews and Muslims – who experience hatred that looks religious at first glance but actually turns on ethnic or cultural characteristics.³⁹ If a country enacts a ban on inciting religious hatred, there is no reason for a blasphemy ban. This was the basis of the 2011 compromise in the defamation of religions debate and it covers most situations.⁴⁰

One of the reasons, however, the incitement standard works as a compromise is the tendency of speakers to engage in commentary that triggers a wide variety of legal provisions. The case of Geert Wilders, the Dutch right-wing politician, is instructive. The Amsterdam Appeals Court in 2009 authorized charges against Wilders for a series of statements he made about Islam and Muslims.⁴¹ Some of the statements – Islam is a fascist religion – might be hard to justify under an incitement standard.⁴²

³⁶ I am not necessarily suggesting that this is why the prosecutor brought blasphemy charges. I have not found information about this. Rather it is speculation, but speculation with some logic to it.

³⁷ See Robert A. Kahn, *Why Do Europeans Ban Hate Speech? A Debate between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545 (2013).

³⁸ See Robert A. Kahn, *Offensive Symbols and Hate Speech Law, Where to Draw the Line? An American Perspective*, in A. Koltay ed. MEDIA FREEDOM AND REGULATION IN THE NEW MEDIA WORLD (2014) (describing the limitations of blanket bans).

³⁹ See Kahn, *A Margin of Appreciation for Muslims*, *supra* note 22, at 450 (describing some forms of anti-Muslim speech as cultural racism).

⁴⁰ See Kahn, *supra* note 12, at 167.

⁴¹ For an overview of the Wilders case, see Robert A. Kahn, *The Acquittal of Geert Wilders and Dutch Political Culture*, U. of St. Thomas Legal Studies Research Paper, No. 11-31 (posted Nov. 8, 2011), <https://ssrn.com/abstract=1956192> at 2-5.

⁴² *Id.* at 4.

Yet Wilders also made statements that were more classically hate speech – such as calls to close the borders to Muslims, or for citizens to confront Muslims in the streets. While the Trial Court ultimately acquitted Wilders, in its 2011 ruling the Court acknowledged that some of the charges posed close issues.⁴³

John Salvesen's case was different. While the name of the Facebook group "Freedom Yes, Islam No" takes a negative view of Islam, it is not hate speech. Nor did Salvesen make any statements about Muslims gaining unfair special privileges, or calling for harm against Muslims. Hate speech charges would be hard to bring under these circumstances. At the same time, however, this is not Quran burning for aesthetic purposes; in other words, Salvesen is not Andres Serrano whose 1987 artwork "Piss Christ" was not intended as an attack on Christians but as an act of devotion from a lifelong Catholic.⁴⁴ (The burning of the Bible on Danish public TV in 1997, which was investigated but not charged, under Article 140 may well be a similar example).

We have an inkling about Salvesen's intent from his decision to post a film of the burning on an anti-Islamic Facebook page. This by itself may not be that convincing. But Salvesen's lawyer made statements that, while not part of the criminal act, say something more specific about Salvesen's motives and suggest why the case was so tempting to prosecute. According to the *New York Times*, the lawyer, Rasmus Paludan, described the burning as an act of self-defense: "The Quran contains passages on how Mohammed's followers must kill the infidel, i.e. the Danes.... Therefore, it's an act of self-defense to burn a book that in such a way incites war and violence."⁴⁵

Inciting war and violence is a type of speech that even the United States lets the government punish. *Brandenburg v. Ohio*,⁴⁶ for example, speaks of incitement to imminent lawless violence; likewise, a series of cases culminating in *Virginia v. Black* justify

⁴³ *Id.* at 15-16 (noting that some of Wilders's comments went right to the edge of permissibility).

⁴⁴ See Andres Serrano, *Protecting Freedom of Expression from Piss Christ to Charlie Hebdo*, Creative Time Reports (Jan 30, 2015), <http://creativetimereports.org/2015/01/30/free-speech-piss-christ-charlie-hebdo-andres-serrano>. One can, to be sure, question this valuation. But even if one does, this still is not a situation where a member of a religious majority is attacking a member of a minority group.

⁴⁵ De Freytas-Tamura, *supra* note 4.

⁴⁶ 395 U.S. 444 (1969).

banning “true threats.”⁴⁷ That is not to say that a video of a Quran burning satisfies this test – in the United States, or elsewhere. But Salvesen’s act, read in light of his lawyer’s “explanation”, looks like an attempt to breach the peace by triggering a war that, presumably, the Danes will win. This war, moreover, will be with Muslims who – if one takes the self-defense rationale seriously – will be jolted by the video into taking actions that will justify a warlike response by the Danes. To the extent the video is intended to trigger Muslims, as opposed to critiquing Islam, the speech moves closer to incitement to religious violence which is punishable under traditional hate speech law. Still, because Salvesen did not say this in the video, hate speech charges under Article 266b probably were not justified.⁴⁸

Taken as a whole, however, the Salvesen case was well calculated to undercut the Danish truce over its blasphemy ban by presenting a case that – to some at least -- a) was worth prosecuting but b) could only be prosecuted under Article 140. In this regard, Quran burning appears to be a distant relative of cross-burning in the United States, where Supreme Court justices have debated when a cross is burned with an “intent to intimidate” and when it is simply expressive activity.⁴⁹ Justice Clarence Thomas, writing in dissent, argued that given the history of the Ku Klux Klan, in the United States cross burning is always intimidating.⁵⁰ Supporters of the Danish blasphemy ban might well try to make a similar argument, namely that Quran burning, given its context, is intrinsically anti-Muslim (as opposed to simply a critique of Islam).

In making this argument, Danish Muslims can draw on evidence from Danish politics and society – evidence that goes well beyond Flemming Rose’s call for cartoonists to draw Muhammad as they see him. For instance, they can refer to xenophobic comments of the Danish People’s Party over the past fifteen years.⁵¹ Added to

⁴⁷ 538 U.S. 343 (2003); see also Robert A. Kahn, *Cross-Burning, Holocaust Denial and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163, 177-81 (2005-2006).

⁴⁸ Binderup & Lassen, *supra* note 5, at 434, quote Article 266b as follows: “(1) Whoever publicly or with the intention of wider dissemination makes a statement or other communication by which a group of people are threatened, humiliated or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or imprisonment for a term not exceeding two years; (2) When handing down punishment, it is to be considered as an aggravating circumstance if the statement has the form of propaganda.”

⁴⁹ Kahn, *supra* note 48, at 177.

⁵⁰ Virginia, 538 U.S. at 388 (Thomas, J., dissenting).

⁵¹ See Robert A. Kahn, *The Danish Cartoon Controversy and the Rhetoric of Libertarian Regret*, 16 U. OF MIAMI INT’L AND COMP. L. REV. 151, 170-71 (2009).

this was the 2005 call for a “culture war” against Muslims by Danish Culture Minister Brian Mikkelsen.⁵² More recently DPP party representatives called for immigrants to celebrate Christmas and Easter to be considered authentically Danish, for bans on Muslim prayer rooms and, in one town, for a requirement that school cafeterias serve pork.⁵³ Ritual slaughter bans and rules about circumcision point in the same direction.⁵⁴ Against this background, Quran burning could indeed have an anti-Muslim cast (as opposed to merely being anti-Islamic).

At the same time, this argument faces some obstacles. For one thing, Justice Thomas dissented in *Virginia v. Black*. The dominant position on the US Supreme Court requires proof that a cross was burned with intent to intimidate, something established on a case-by-case basis.⁵⁵ As noted above, the Salvesen case is pretty weak in this regard. Moreover, in drawing his tight connection between cross-burning and targeting African Americans, Justice Thomas could point to two centuries of slavery, a century of segregation and almost 150 years of Klan activity.⁵⁶ This is a deeper history than the history of Muslim migrants in Denmark, no matter how oppressive this recent Danish history is. Finally, while cross burning has no other purpose beyond racial intimidation (although Justice O'Connor, in her opinion, mentioned a cross burning at a wedding of a Nazi supporter and a member of the Ku Klux Klan),⁵⁷ someone might burn a Quran as a way to oppose Islam.

Compare these obstacles to a potential prosecution under Article 140. To make a case, the prosecution need not show a particular act of Quran burning was racist; it suffices to show that a Quran was burned in a way that disturbed the peace. One can see why prosecuting Salvesen was tempting, even as it broke up a societal truce over the status of Denmark's anti-blaspemy law.

⁵² *Id.* at 171. Notably, Mikkelsen made his remarks before the Flemming Rose published the Danish Cartoons.

⁵³ Rasmus Brygger, *Something is Unspoken in the State of Denmark*, NEW YORK TIMES, (Mar. 12, 2017).

⁵⁴ See R. J. Delahunty, *Does Animal Welfare Trump Religious Liberty? The Danish Ban on Kosher and Halal Butchering*, 16 SAN DIEGO INT'L L. JOURNAL 341 (2015).

⁵⁵ See Kahn, *supra* note 48, at 177.

⁵⁶ *Id.* at 179; see also Robert A. Kahn, *Did the Burning Cross Speak? Virginia v. Black and the Debate Between Justices O'Connor and Thomas over the History of Cross Burning*, in Austin Sarat ed. 39 STUDIES IN LAW, POLITICS, AND SOCIETY 75, 79-83 (2006) (describing Thomas's historical argument).

⁵⁷ Kahn, *supra* note 57, at 77. Justice O'Connor also gave the example of a cross burned to express support in the 1960 elections for Richard M. Nixon, who had the decency – unlike other politicians -- to reject the Klan's offer of support. *Id.*

III. BIBLES, QURANS AND CULTURE WARS IN THE UNITED STATES

The prosecution triggered a debate in Denmark about what to do about the law. One of the aspects of this debate focused on the 1997 burning of a Bible on Danish TV. This raised a question, especially in the United States. Why the double standard? If one can burn a Bible, why can't one burn a Quran? At the same time, these critics marveled at the existence of a blasphemy ban in Denmark – supposedly a modern, secular country.

For example, St. Johns Law Professor Marc DeGirolami, an expert in law and religion, expressed shock in a *Commentary* article that “blasphemy laws remain on Danish books” despite the fact that “the country is, by all accounts, very secular.”⁵⁸ Claiming that when the Bible was burned in 1997, “nobody batted an eye,” DeGirolami suggested that “what Denmark really needs is to refine its blasphemy laws – to give more detailed guidance about which religious texts may be defiled with impunity and which must be left alone.”⁵⁹ Later, after noting Per Mouritsen’s comment about taking religion seriously being the antithesis of good citizenship, DeGirolami jokes that Denmark might “adopt laws authorizing the state-enforced (but nondiscriminatory, of course) burning of all holy books” on a special day he called “Conflagration Sunday.”⁶⁰

While there is an element of humor in his post, DeGirolami seems oddly bothered by the differential treatment of Christianity and Islam. He neglects to point out that the 1997 Bible burning led to an investigation. Nor does he mention that the *Jyllands Posten*, which ran 12 cartoons poking fun at the Prophet Muhammad, refused to run cartoons making fun of Christian religious figures.⁶¹ Indeed, DeGirolami seems unable to decide what upsets him more – that Denmark has blasphemy bans or that it treats the Bible and Quran differently.

To take another example, Hofstra University Professor Mark Movsesian in a post on the *First Things* blog describes the February 2017 prosecution as a “truly singular occurrence.”⁶² In doing so, he

⁵⁸ DeGirolami, *supra* note 8.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ The paper rejected the cartoons to avoid creating an outcry. See Gwladys Fouché, *Danish Paper Rejected Jesus Cartoons*, GUARDIAN (Feb. 6, 2006), <https://www.theguardian.com/media/2006/feb/06/pressandpublishing.politics>.

⁶² Movsesian, *supra* note 8.

overlooks a series of recent European blasphemy cases over the past decades, including *Otto Preminger Institut v. Austria*, in which the European Court of Human Rights ratified a blasphemy prosecution of the film, "The Holy Family."⁶³ Be that as it may.

Turning to the 1997 Bible burning, Movsesian speculates that "Danish authorities prosecute insults against Islam but not insults against Christianity," because "as a minority religion in Denmark, Muslims have more to fear from public mockery of their religion than Christians do." So far, so good. But after pointing out that he doesn't "approve [of] Quran burning" and describing his experience of feeling "deeply affronted, as a Christian, by the various public mockeries of my own religion that occur every day," Movsesian raises something he finds very puzzling. Why is "this particular anti-religious expression" (Quran burning) "out of so many others" targeted "in a secular, progressive, enlightened society like twenty-first-century Denmark[?]"

Movsesian is sympathetic to the argument that Muslims face special burdens as adherents to a minority religion but ultimately finds this argument "very puzzling." Once again, there is a tension between opposing Denmark's prosecution of blasphemy and a strong principled opposition to treating Bible and Quran burning as equivalent acts.

One response is to note another tension, one involving Denmark as a whole. It is commonplace to refer to Denmark as a secular society. On one level, this is true. Approximately 3% of Danes go to church each week;⁶⁴ less than a third of Danes believe in God.⁶⁵ At the same time, however, 79% of Danes belong to the national church⁶⁶ and, as we have seen, members of the Danish People's Party are eager to have Muslims attend Christmas and Easter services as a way to better integrate them into Danish

⁶³ For more, see Kahn, *supra* note 22 (describing *Otto-Preminger-Institut v Austria*, 295-A Eur. Ct. H.R. (ser. A)(1994); see also, e.g., *Wingrove v. United Kingdom*, Application 17149/90, decided Nov. 25, 1996 (finding no freedom of expression violation under Article 10 for film board's refusal, based on blasphemy concerns, to certify film about supposed erotic visions of Teresa of Avila).

⁶⁴ Robert Manchin, *Religion in Europe: Trust Not in Filling the Pews*, GALLUP NEWS (Sept. 14, 2004), <http://news.gallup.com/poll/13117/religion-europe-trust-filling-pews.aspx>. This is the lowest percentage mentioned in the article.

⁶⁵ A recent poll pegged the number at 28%. See Stephen Karmazyn and Pauli Burgaud, *Finding God in Denmark*, Jutland Station (blog) (Mar. 16, 2014), <http://www.jutlandstation.dk/finding-god-in-denmark/>.

⁶⁶*Id.*

society.⁶⁷ This type of integration would be meaningless, if Denmark was not – on some level – a Christian society. One can debate what it means to be Christian; the Danish variety is, to be sure, more cultural than religious.⁶⁸

Yet if a society is culturally Christian, one might want to look at political acts – like the burning of religious books – through a cultural rather than a religious lens. In a country that is majority culturally Christian, a decision by someone raised in the faith to burn a Bible may be religiously offensive (precisely the type of offense supporters of the End Blasphemy Laws movement insist we should tolerate) but it is not culturally intimidating. The same statement targeting a minority religion will have a different, more threatening feel. Now this view can be taken too far. Members of minority cultures are not the only ones who can suffer from acts of hate speech; an Imam in a Copenhagen mosque burning a Bible could be threatening, especially if Christians were a minority in the neighborhood around the mosque. But, generally, burnings of religious books are more likely to strike fear in the hearts of religious minorities than in the hearts of religious majorities.⁶⁹

With this in mind, consider the response of Denmark’s 7,000-member Jewish community to the calls to remove the blasphemy ban. While the 1943 rescue of Denmark’s Jews is well known, the overall history of Jews in Denmark is a bit more ambiguous.⁷⁰ This has especially been true over the past several years, in which ritual

⁶⁷ For a brief overview, see “Immigrants must Celebrate Christmas to be Danish”: DPP, *The Local* (Feb. 7, 2017), <https://www.thelocal.dk/20170217/immigrants-must-celebrate-christmas-to-be-danish-dpp>. Martin Henriksen, the Danish People’s Party’s immigration spokesperson, spoke about immigrants participating in “our cultural package,” which includes celebrating religious holidays and visiting churches; this will enable immigrants “to see how it’s done.” *Id.*

⁶⁸ To continue from the previous footnote, the “it” referred to by the immigration minister seems more cultural than religious.

⁶⁹ Because a religious minority is by definition outnumbered, its members are often vulnerable to persecution. For example, consider what happened to Jehovah’s Witnesses in the United States after the Supreme Court, in the first flag salute case, *Minersville v. Gobitis*, 310 U.S. 586 (1940), held that the Witnesses did not have a First Amendment right to refuse to salute the flag. See Garrett Epps, America’s New Lesson in Tolerance, *The Atlantic* (Sept. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/09/americas-new-lesson-in-tolerance/498404/> (describing persecution of the Witnesses in wake of the ruling). In part because of this persecution, the Supreme Court reversed course in, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁷⁰ See A. BUCKSER, *AFTER THE RESCUE: JEWISH IDENTITY AND COMMUNITY IN CONTEMPORARY DENMARK* (Palgrave 2003) (describing the experience of Danish Jews after the end of the Second World War).

slaughter and male circumcision have been at issue.⁷¹ While there are humanitarian defenses of these laws, the commentary sometimes has an anti-Semitic tinge.⁷² Not surprisingly, the Jewish community would up supporting the retention of Article 140. In particular, community leaders expressed “fear that the tendencies which have become particularly apparent over the past couple of years would be further cemented. The result would be a lesser protection and tolerance towards religious minorities.”⁷³

Nor was the Danish Jewish community alone in opposing abolition of the ban. The Danish Muslim community opposed the ban on similar grounds and the Danish chapter of PEN, a human rights group, opposed immediate removal of the blasphemy ban preferring instead to conduct a campaign of public education to prepare the Danish public for the removal of the ban without unleashing a torrent of aggression at religious minorities.⁷⁴ According to Danish PEN: “If today there is indeed reason to be scared, we must urgently create an understanding for an abolition of the ban on blasphemy tomorrow.”⁷⁵

Let me be clear. There is a strong argument that Article 140 is a poor way to protect religious minorities. Indeed, a compelling argument against speech bans of any type is that they will harm the disadvantaged groups they were intended to protect.⁷⁶ This seems especially true with a law, like Article 140, which targets ideas. Therefore, it may well be that Article 266b – along with Danish anti-discrimination law – already do an adequate job protecting the interests of Danish Jews or Muslims. Or more pessimistically: Even if religious minorities in Denmark are facing tough time, retaining Article 140 will not prevent Danish schools in Aarhus or Copenhagen from insisting that Muslim school children eat pork sandwiches.

Whatever the merits of these arguments, the vulnerability of Danish Muslims and Jews to oppression by a native Danish

⁷¹ For more, see Delahunty, *supra* note 55 (concluding that the ritual slaughter bans “does little or nothing to promote animal welfare and in fact is probably a reflection of Danish society’s discomfort with the country’s growing Muslim population”).

⁷² See Cnaan Liphshiz, *Bris Breeds Danish Anti-Semitism*, JEWISH TELEGRAPHIC AGENCY (Aug. 23, 2012), <https://www.ijn.com/bris-breeds-danish-anti-semitism/>.

⁷³ Binderup & Lassen, *supra* note 5, p. 449.

⁷⁴ *Id.* at 447.

⁷⁵ *Id.*

⁷⁶ See, e.g., Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L. J. 484, 554-55 (1990).

populace that is overwhelmingly culturally Christian is indisputable. The End Blasphemy Laws campaign recognizes that religious minorities (including Christians) face discrimination in Pakistan. Why is it so difficult for American legal scholars, who specialize in religion, to recognize that even a liberal, post-Christian society can discriminate against Jews, Muslims and other religious minorities?⁷⁷

IV. REPEAL, TERRORISM AND THE UNLIKELY RETURN OF APPEASEMENT

Another odd aspect of the Danish debate over repealing Article 140 was how both sides handled the themes of terror and appeasement. Flemming Rose deployed the theme of appeasement repeatedly in defending his decision to run cartoons depicting the Prophet Muhammad.⁷⁸ Describing what he called “[t]he lesson from the Cold War,” he warned his American readers: “If you give in to totalitarian impulses once, new demands follow. The West prevailed in the Cold War because we stood by our fundamental values and did not appease totalitarian tyrants.”⁷⁹ It would have, or so it seemed, been relatively easy to cast the Salvesen prosecution and Article 140 as an example of the importance of not giving into the demands of Muslim terrorists. Yet, the terror theme was not often used this way in the debate over repeal.

Let me give some context. As late as 2013 a solid percentage of the Danish public favored retaining that country’s blasphemy laws.⁸⁰ A criminal law commission, however, was appointed to look

⁷⁷ For a discussion of the how American Christianity has defined itself against outgroups such as the Jews, see Stephen Feldman ed. *PLEASE DON’T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* (1997). Let me be clear. I am not suggesting that a Christian (or any other member of a religious group) is bound by the current understanding of church-state separation in the United States. To me as a Jew there is nothing inherently anti-Semitic about being wished a Merry Christmas. On the other hand, the lack of sympathetic understanding about the perspective of minority faiths does not fit well with a commitment to restoring religion to the public square.

⁷⁸ This was most notable in his Washington Post article defending his decision to run the cartoons. See Flemming Rose, *Why I Published Those Cartoons*, WASH. POST (Feb. 19, 2006), at B.01, <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/17/AR2006021702499.html>. For more, see Robert A. Kahn, *Flemming Rose, the Danish Cartoon Controversy, and the New European Freedom of Speech*, 40 CAL. W. INT’L L. J. 253, 272-79 (2010).

⁷⁹ Rose, *supra* note 79.

⁸⁰ See (The authors name should be here if possible), *supra* note 32.

into the question of repeal.⁸¹ Then, just before the commission issued its report, the *Charlie Hebdo* offices were attacked and, a month later, a talk of a Swedish cartoonist was broken up by gunfire.⁸² There was a sense that early 2015, therefore, might not be the best time for Denmark to remove its blasphemy ban.⁸³ Indeed, Binderup and Lassen, reporting on the state of affairs in late 2016 concluded: “It seems that Denmark is caught up in the genuine dilemma that there is on the one hand a widespread and political agreement that Article 140 in principle must be given up, but also a sense that the timing of an abolition now would be bad and will probably, and sadly, remain so for a while.”⁸⁴

In the weeks leading up to repeal, the Danish security agency PET warned that repeal would increase the risk of terror attacks.⁸⁵ While some supporters of repeal rejected the “security argument” as insufficiently protective of speech,⁸⁶ others questioned whether, as a practical matter, the repeal of Article 140 would make a difference given the lack of a reaction after the other countries repealed their blasphemy bans “without serious consequences.”⁸⁷ Danish human rights expert Jacob Mchangama made a similar argument more abstractly: “trying to appease extremists” was “misguided” because “extremists, after all, do not care about the rule of law.”⁸⁸ In the end, Denmark abolished Article 140 because the

⁸¹ Binderup & Lassen, *supra* note 5, at 432.

⁸² Chris Johnston and agencies, *One dead and three injured in Copenhagen terrorist attack*, *The Guardian* (Feb. 14, 2015), <https://www.theguardian.com/world/2015/feb/14/copenhagen-blasphemy-lars-vilks-prophet-muhammad-krudttonden-cafe> (describing attack on Lars Vilks at a Copenhagen café).

⁸³ Binderup and Lassen view “the main explanation” for the retention of the law as “the fear of violent reactions to religious insult, including terrorism.” Binderup & Lassen, *supra* note 5, at 432.

⁸⁴ Binderup & Lassen, *supra* note 5, p. 455.

⁸⁵ *Denmark to repeal blasphemy law after government party changes stance*, *The Local* (Jun. 1, 2017), <https://www.thelocal.dk/20170601/danish-likely-to-remove-blasphemy-paragraph-after-government-changes-stance>.

⁸⁶ *Id.* (describing argument of a Danish People’s Party spokesperson that when “something happens in the world” leaders should “stand together” to protect freedom of speech.)

⁸⁷ *Id.* For some parties, the “consequences” issue was an empirical question. For example, the ruling Venstre Party initially said it would only reach a decision on repeal after investigating the experiences of Norway and the Netherlands – two countries that recently repealed their blasphemy bans. *Blasphemy law abolished in Denmark!* End Blasphemy Laws. Org. (Jun. 2, 2017), <https://end-blasphemy-laws.org/2017/06/blasphemy-law-abolished-denmark/>.

⁸⁸ Mchangama, *supra* note 10. To be fair, Mchangama also rejected appeasement as “illegitimate.” But his need to supplement his principled point with a more pragmatic argument speaks volumes about the nature of the Danish

center-right Venstre Party, which had always been divided on repeal, joined with the Green Party and the Danish People's Party to oppose the ban.⁸⁹ So, while appeasement was present, at least it did not triumph.

The part of the reason for this, however, relates to a second argument about blasphemy and terror, one raised by the global End Blasphemy Laws Campaign. On this view, removing Article 140 would reduce terrorism because blasphemy bans are themselves a major cause of terrorism.⁹⁰ For example, in a series of tweets celebrating repeal, the End Blasphemy Laws Campaign rejected the argument that abolishing Article 140 would promote terror as “deeply confused” and a “dangerous path.”⁹¹ It took this position because extremists also oppose other things, such as “sexual equality, LGBT rights, freedom [and] democracy,” and outlawing these things merely because terrorists do not like them “will only lend [the terrorists] false legitimacy.”⁹² The series of tweets concluded with a call to arms: “End blasphemy laws! Resist terror!”⁹³

This line of argument is interesting for several reasons. For one thing, the main argument that blasphemy bans cause terror parallels one explanation for why Britain introduced blasphemy bans to India in the nineteenth century – a concern that Hindus and Muslims were “too passive.”⁹⁴ If blasphemy bans exist, people are more likely to use them. In addition, blasphemy bans act as a signal that the society believes blasphemers should be punished extra judicially. All of this seems plausible. In the regard, it is not difficult to find evidence that the same countries that have and use anti-blasphemy laws – Pakistan, Saudi Arabia and Iran – also have crowds that engage in extra-judicial killings of suspected blasphemers, their lawyers and indeed anyone who takes any steps to weaken the scope and power of such laws.⁹⁵

debate. It would be hard to imagine Flemming Rose saying in 2005 when he ran the images of Muhammad: “By the way, the cartoons would not harm Denmark in any way.”

⁸⁹ Denmark to repeal blasphemy law, *supra* note 86.

⁹⁰ See, e.g., *Blasphemy law abolished in Denmark!*, *supra* note 87.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See Kahn, *Rethinking Blasphemy and anti-Blasphemy Laws*, *supra* note 12, at 189-91 (describing possible motivations behind the colonial era blasphemy ban in India).

⁹⁵ *Id.* at 185 (describing extra judicial killings). See also Amjad Mahmood Khan, *How anti-Blasphemy Laws Engender Terrorism*, 56 HARV. INT'L. L. J. ONLINE 1 (2015)(describing blasphemy motivated violence in Pakistan, Indonesia and

Yet this line of argument has problems. First, it conflates riots and extra judicial killings in countries with draconian anti-blasphemy laws with terror attacks directed at European countries. There is no logic that necessarily connects these events. In this regard, the *Charlie Hebdo* attack may be the exception that proves the rule – i.e., the rare instance in which a blasphemy based motive is realized in a terror attack. While Denmark by repealing Article 140 might ease tensions in Pakistan, it is unclear how this will make a terror attack less likely in Denmark. There are strong reasons to repeal Article 140; avoiding terror attacks originating in Pakistan is not likely one of them.⁹⁶

Second, the argument has some weaknesses even as it applies to Pakistan and other majority Muslim countries. Let's assume that tomorrow Pakistan repeals its blasphemy bans, or – to make this more realistic – rolls them back to the weaker laws in place before Zia-ul-Haq took over.⁹⁷ What would happen the next day? Would Pakistan suddenly morph into a more tolerant, free society? Or would crowds start to form demanding a return of the laws and punishment for the government that repealed them?⁹⁸

Nigeria); Fiss, *supra* note 25, at 10 (describing extra judicial killings of bloggers in Bangladesh).

⁹⁶ Part of the difficulty with the blasphemy-bans-cause-terror argument is that its proponents tend to juxtapose the existence of blasphemy bans with evidence of terror groups (such as Boko Haram) without explaining how the laws create terror groups or make acts of terror more likely – especially terror acts with a global reach. For example, Khan describes “the meteoric rise of Boko Harm” as “the most explosive outgrowth of Nigeria’s blasphemy law.” Khan, *supra* note 96, at 12. He then goes on to describe the crimes of Boko Haram, and the government’s use of censorship to punish critics of its anti-Boko Haram policy, *id.* at 13, without relating this directly to how the blasphemy bans (as opposed to other factors, including other forms of censorship) enabled the group’s rise to power.

⁹⁷ In the 1980s Pakistani dictator Zia- ul-Haq greatly expanded the scope and severity of Pakistan’s blasphemy bans. For a detailed discussion of Pakistan’s blasphemy laws, see Osama Siddique and Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. L. J. 303, 312-22 (2222) (describing Islamization of Pakistan, including blasphemy bans, under the Zia regime).

⁹⁸ I am not an expert on Pakistan or a fan of its blasphemy bans. That said, the persistence of the Zia laws suggests that there is some popular support for the bans, even if it rests on a populism stoked by Islamist parties. For a recent example – albeit on a slightly different issue – illustrating the scope of the challenge blasphemy ban opponents face, see Niloufer Siddiqui, *What’s Behind the Islamist Protests in Pakistan?* WASH. POST (Dec. 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/08/whats-behind-the-islamist-protests-in-pakistan/?utm_term=.8368f80c62a2 (describing three weeks of protest brought about by a proposal to change the language

Which one of these would happen is an empirical question (although recent Pakistani history is not encouraging). The argument that blasphemy bans increase terror and religious violence in countries like Pakistan may have merit, but it requires hard statistical evidence, or at least educated guesses about how this cause and effect relationship actually works in practice.

The question about how Pakistani blasphemy ban supporters would react to repeal (or moderation) of Pakistan's draconian blasphemy ban is worth asking seriously for at least two reasons. First, a campaign against blasphemy bans should show an interest in why, despite decades of opposition, such bans persist. This, in turn, requires theorizing about who supports blasphemy bans and why. Here, for instance, one might distinguish between *opportunistic* and *sincere* supporters of blasphemy bans. To the extent the key actors in a given society are opportunistic, then perhaps a change in Pakistan's blasphemy bans (for example) will encourage society to express their desire for power and attention in a different, less violent way. If, however, supporters are sincere, this outcome is less likely.⁹⁹

A second, more important, reason relates to human dignity. As we all recognize, the internet and social media place us in an increasingly interconnected world – one in which events in Pakistan influence Denmark, and vice versa.¹⁰⁰ In this world, it is too easy to view people on different sides of political, social, religious, moral or national divides as the enemy. This point is well known and oft repeated. Indeed, it is a tenet that many campaigners against blasphemy share.¹⁰¹ However, if they really want to take the point seriously, they need to apply it to the mobs in Karachi or Islamabad who protest when a blasphemy suspect is released or a law weakened. We have written volumes about the Germans who in the

concerning the Prophet Muhammad as part of the oath of office to benefit the Ahmadi religious minority).

⁹⁹ I am not suggesting the opportunistic vs. sincere dichotomy works in practice, only that it is an example of how we should think pragmatically and creatively about the prospects and impact of removing blasphemy bans in countries that have them – as opposed to assuming that repeal is something the international community can impose on Pakistan (or Denmark) with no internal opposition.

¹⁰⁰ Mchangama, *supra* note 10.

¹⁰¹ For instance, the International Humanist Ethical Union, in its post celebrating repeal, faulted blasphemy bans for making it harder for “people to live side by side” and “marginaliz[ing] minorities.” International Humanist and Ethical Union, *supra* note 11.

1920s, 30s, and 40s, supported Hitler;¹⁰² why don't the angry mobs in Pakistan deserve the same attention? Are there strategies that will discourage them from protesting – strategies that are more direct than encouraging European countries from repealing their blasphemy bans?¹⁰³

V. BLASPHEMY BANS BY ANOTHER NAME? THE RISE OF ANTI-TERROR LAWS

Terror entered the debate over blasphemy bans in 2017 in a second, more troubling way. Just as the world was turning its attention to the spectacle of secular Denmark potentially punishing a Quran burner for blasphemy, a few hundred miles away another Quran burner was facing six years in prison.¹⁰⁴ The woman, Sheila Szmerekova's, burned a Quran after peeing on it – while a Slovak flag was in background. During the video she said, "I will hunt you all step by step. No matter if it is a woman, a child or a man. I will bump off anybody who gets in my way."¹⁰⁵ Szmerekova was charged with hate speech as well as creating materials that promote extremism.¹⁰⁶ Her rationale for burning the Quran is unclear; she had been sexually assaulted as a teenager and had extremist comments on her social media profile.¹⁰⁷ The rationale for the prosecution is also somewhat unclear; while Szmerekova comments could constitute hate speech, the extremism charges have an eerily post-liberal feel to them, in large part because of a global move toward punishing acts of terror – including speech acts.

¹⁰² See, e.g., T.W. Adorno et al. *THE AUTHORITARIAN PERSONALITY: STUDIES IN PREJUDICE* (Harper & Row 1950); see also Christopher Browning, *ORDINARY MEN: POLICE RESERVE BATTALION 101 AND THE FINAL SOLUTION* (Harper 1992).

¹⁰³ To be fair, there is a fair amount of literature describing religious populism and its connection to extremism – for example Martin Marty's Fundamentalism Project. See, e.g., Martin E. Marty and R. Scott Appleby eds. *FUNDAMENTALISM OBSERVED* (1991). Unfortunately, the End Blasphemy Laws movement does not really engage with this type of literature; instead, the focus tends to be on documentation of specific abuses committed in the name of Islamic fundamentalism. This makes it harder to develop practical, effective strategies to create change in countries like Pakistan.

¹⁰⁴ See Robinson, *supra* note 21. See also, Strickland, *supra* note 21, placing the burning and prosecution in the context of a fight against right-wing-extremism in Slovakia.

¹⁰⁵ Richard Hartley-Parkinson, *Woman who urinated on Koran and set it on fire faces six years in prison*, Metro, (Feb. 21, 2017), <http://metro.co.uk/2017/02/21/woman-who-urinated-on-koran-and-set-it-on-fire-facing-six-years-in-prison-6462451/>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

This broader trend is worth discussing. As we have seen, a number of European countries – the Netherlands, Norway and now Denmark – have discarded their blasphemy bans. And while many states across Europe ban hate speech – and Holocaust denial – resistance to other forms of memory bans has been stiffening, especially across Western Europe as organizations such as *Liberté pour l'Histoire*¹⁰⁸ and the MELA (Memory Laws in Comparative and European Perspective)¹⁰⁹ have taken a critical perspective on memory bans. The general trend is toward liberalization – at least in Western Europe.¹¹⁰ At least this is my perspective after having spent two decades trying to explain (and justify) European positions on hate speech, blasphemy and genocide denial bans to scholars from the United States.

The emergence of laws against terrorism and extremism, however, represent quite a different trend. Even before the *Charlie Hebdo* attacks France passed a strong anti-terror law with draconian laws for expressions of support for terrorist acts.¹¹¹ After the attacks, the French enacted a series of more severe restrictions, continuing to the present day.¹¹² There have been prosecutions

¹⁰⁸ *Liberté* was formed in 2005 by leading French historians after the passage of a law requiring praise for French colonialism and a civil prosecution of a French historian for denying the slave trade. The group has been somewhat successful in blunting the growth of memory bans in France. Nikolai Koposov, MEMORY LAWS, MEMORY WARS: THE POLITICS OF THE PAST IN EUROPE AND RUSSIA, at 98-116 (2017). For a critical analysis of *Liberté*'s views from a US perspective, see Robert A. Kahn, *Does it Matter How One Opposes Hate Speech Bans? A Critical Commentary on Liberté pour l'Histoire's Opposition to French Memory Laws*, 15 WASH. U. GLOBAL STUD. L. REV. 55 (2016).

¹⁰⁹ MELA was founded in 2016 by a group of European scholars. While MELA hopes to come up with a list of "best practices" for the enactment of memory laws (both punitive and non-punitive), its mission statement also contains a recognition that punitive memory bans restrict freedom of speech. See MELA, About Us, (visited, Jan. 13, 2018), <http://www.melaproject.org/about>. In the interests of full disclosure, I am affiliated with MELA as an external scholar.

¹¹⁰ In Eastern Europe and Russia, things are somewhat different as memory bans have been used as an instrument of power politics by states to promote internal and external goals. See Koposov, MEMORY LAWS, MEMORY WARS, *supra* note 109, at 127-299.

¹¹¹ Freedom House, Report on France 2016, <https://freedomhouse.org/report/freedom-press/2016/france>, (describing November 2014 law which moves the penalty for glorifying terrorism from the press law to the penal code, punishes it with prison sentences of up to 5 years – or 7 years if committed online – and allows the administrative blocking of websites that glorify terrorism).

¹¹² In early 2015, the government enacted additional laws that allowed increased government surveillance and in November of that year, after the ISIS attack in Paris, enacted temporary legislation that allowed the government to block

under these laws, with defendants facing lengthy prison sentences for relatively innocuous statements.¹¹³ Nor are the problems limited to France.¹¹⁴ This trend deserves serious examination, more than I can give here. Nevertheless, at a minimum, it suggests that the European concept of Militant Democracy is far from dead.¹¹⁵ If protecting the country from terror, moreover, means assuring that nationals do not inflame Muslim populations around the world by burning religious books (or making incendiary critiques of Islam),¹¹⁶ then the anti-terror laws might cover much the same ground that anti-blaspemy laws do – albeit with different penalties and justifications.¹¹⁷

websites that promote terrorism. *Id.* A new anti-terror law adopted in 2017 gave the government the power to close places of worship that incite attacks or glorify terrorism. See French Anti-Terror Bill Explained: How Emergency Powers are Now Law, AFP, <https://www.thelocal.fr/20171004/french-anti-terror-bill-explained-how-emergency-powers-are-now-law>. Most recently, the Macron government is seeking to ban “fake news.” See Angelique Chrisafis, Emmanuel Macron promises ban on fake news during elections, *The Guardian* (Jan. 3, 2017), <https://www.theguardian.com/world/2018/jan/03/emmanuel-macron-ban-fake-news-french-president>. While the ban, largely a response to Russian attempts to interfere with the most recent French elections, is not directly related to terrorism, it does illustrate the dangers posed by the modern rationale of state security.

¹¹³ See Angelique Chrisafis, *French dissenters jailed after crackdown on speech than glorifies terrorism*, *THE GUARDIAN*, <https://www.theguardian.com/world/2015/jan/30/french-jailed-crackdown-speech-glorifies-terrorism>, (describing a man arrested for drunken driving who, after saying there should be more people like the Charlie Hebdo terrorists, was sentenced to four years in prison).

¹¹⁴ See Raphael Minder, *Crackdowns on Free Speech Rise Across a Europe Wary of Terror*, *NEW YORK TIMES* (Feb. 24, 2016), <https://www.nytimes.com/2016/02/25/world/europe/spain-europe-protest-free-speech.html>, (describing 18 month sentence imposed under Spain’s glorifying terrorism law).

¹¹⁵ The Militant Democracy concept holds that the democratic state has the right (and obligation) defend itself from its internal and external enemies. See Andras Sajó, ed. *MILITANT DEMOCRACY* (2004); see also Robert A. Kahn, *Why Do Europeans Ban Hate Speech? A Debate between Karl Loewenstein and Robert Post*, 41 *HOFSTRA L. REV.* 545 (2013) (describing emergence of Militant Democracy ideas in the 1930s).

¹¹⁶ This type of argument is not new. In 2009 Yale University Press insisted Jytte Klausen’s book on the Danish Cartoon Controversy, *The Cartoons that Shook The World*, could not include the cartoons themselves because it might lead to violence in some countries. Patricia Cohen, *Yale Bans Images of Muhammad in New Book by Jytte Klausen*, *NEW YORK TIMES* (Aug. 12, 2009), <http://www.nytimes.com/2009/08/13/books/13book.html>.

¹¹⁷ I am not suggesting an equivalence – moral or otherwise – between anti-blaspemy speech bans and anti-terror speech bans. As any number of reports will attest, the application of anti-blaspemy bans is widespread and barbaric.

This development puts anti-blasphemy campaigners in something of a quandary. What is more important – fighting terrorism (which for some in the anti-blasphemy movement means taking a hard but smart line against radical Islam); or protecting freedom of speech (which means opposing the anti-terror laws with the same vigor that they oppose anti-blasphemy law?). At best, one gets a sense of a moving target. At the very moment European countries are starting to throw off their (albeit rarely used) blasphemy laws, supporting terror has become the new taboo.¹¹⁸ Nor have the prime suspects in the blasphemy world made things any easier for the anti-blasphemy campaigners; according to a recent Brookings report by Joelle Fiss, U.N. Special Rapporteur on Freedom of Religion and Belief, Saudi Arabia views atheism as a form of terrorism.¹¹⁹ Developments like these illustrate the flexibility of the anti-terror rationale for censoring speech while exposing the depth of the problem of defining blasphemy in a post-modern world.

VI. CONCLUSION: THE HIDDEN VIRTUES OF BLASPHEMY BANS

Denmark continues the trend of European countries throwing off their anti-blasphemy laws. Whether this makes a difference in the global struggle against blasphemy bans (or reduces global terrorism) remains doubtful. A more open question, however, is the impact of repeal on Denmark itself. Will repeal encourage the same forces that have enacted ritual slaughter laws and required the serving of pork in public schools? What will happen the next time someone in Denmark burns a Quran? Will this pass without legal consequence, or will a particularly hard case pressure a civic-minded Danish prosecutor to act, this time under Denmark's hate speech laws? Here one gets the sense that here the old cliché is correct: The more things change, the more they stay the same.

On a broader scale we are seeing the replacement of blasphemy laws with anti-terrorism laws. Is this a good thing? On one level, replacing one rationale for punishing Quran burning with

Nevertheless, anti-terror speech bans are a “growth industry” when it comes to speech restrictions.

¹¹⁸ To be sure, sometimes Quran burning takes place in the context of extremist activity. While the concern about using anti-terror laws is still present, at least it concerns speech that is potentially prosecutable under traditional hate speech principles. Where, however, the prosecution rests entirely on the nature of the act (as opposed to the surrounding context), the use of anti-terror laws is quite worrying.

¹¹⁹ Fiss, *supra* note 25, at 7, n.15 (describing 2014 Saudi law).

another rationale strikes me as an even trade, a matter of indifference. At least that might be the perspective of someone sitting behind bars. On the other hand, one could see the change to anti-terror laws as an improvement, an element of modernization. No longer tied to religious values, we do not have to worry about protecting feelings. As socially tolerant, thick-skinned liberals, we know that only sticks and stones hurt us. Therefore, we replace sensitivity with security. We accept that – in a modern society – we have a duty not to take religion too seriously. Several South Park episodes later, we pride ourselves on our broadmindedness while responding to the crisis du jour by writing the security state a blank check to do what it will with our speech and privacy.

Is this a better state of affairs? Possibly. One might argue that given the growth of technology, income disparities and global conflict we were going to encounter speech restrictions from the security state in one way or another. There is, to be sure, an element of truth here. Nevertheless, in replacing blasphemy bans with anti-terror laws have we replaced embarrassing, flawed, rarely used norms – ones that are easy to lampoon – with a new, unexplored anti-terror norm that is popular, modern, and potentially limitless in application? It took centuries to weaken blasphemy bans to the point where they are seen as an anarchic holdover in large parts of the world. How long will it take to view the new anti-terror bans in the same light?¹²⁰

¹²⁰ Here I cannot help but think of colonial episodes like the eighteenth century Bourbon reforms in Latin America, or the imposition of direct British rule in India after 1857. In both situations, a central power that replaced a creaky, inefficient system with what looked superficially like more efficient colonial rule, but resulted in grievances (and ultimately independence) precisely because the colonial power was felt more directly by the colonized. One wonders if replacing blasphemy bans with the new anti-terror laws has this same quality.