

# Freedom of Expression and the Cartoon Controversy<sup>1</sup>

## Abstract

The paper examines the Danish cartoon controversy in the light of Thomas Scanlon's rule-consequentialist theory of a right to freedom of expression. According to that theory some categories of expressions should be shielded from governmental interventions while others need not enjoy such protection (the difference being that with respect to the former, crucial expressive interests are at stake, while this is not case with respect to the latter). The paper argues that the acts of expressions involved in the cartoon controversy do not fall within the categories that should enjoy immunity according to Scanlon's theory. Still, the theory in question does not necessarily lead to the conclusion that the cartoons should not be legally prohibited or sanctioned in other ways. In particular, the relevant harms involved may be reassessed in different ways, each, or together (or in some combination), sufficing for a verdict in favour of prohibiting (or of meeting with informal sanctions) expressions such as the cartoons. The harms in focus of the considered reassessment are the following: (i) harms pertaining to violent reactions provoked by expressions; (ii) inequality-generating harms pertaining to expressions; (iii) harms of informal sanctions or self-imposed reticence in particular cases such as the cartoon controversy (the harms of such measures perhaps being of a limited nature relative to the harms they prevent). The last reassessment proposes using the theory of act-consequentialism instead of the theory of rule-consequentialism.

## **I. Introduction**

On 30 September 2005 the Danish newspaper *Jyllands-Posten* published an article entitled 'The Face of Muhammed'. The article contained illustrations of Muhammed. Many Muslims found the cartoons degrading and insulting. The publication of this article and the reaction or inaction of the Danish government in this regard had major repercussions. It led to a series of protests and riots in Muslims countries.<sup>2</sup> These events had as consequences significant and immediate harms such as the loss of lives of a number of participants in these riots, and major damage to official Danish buildings. Furthermore, the crisis had a considerable negative impact on Danish commercial interests as well as on the general reputation of Denmark abroad. The apparent harms involved have contributed to domestic and international debate about the liberal doctrine of freedom of speech. In fact, a striking aspect of any non-trivial doctrine of freedom of speech is that it apparently permits acts of expression causing harms of a nature which would normally justify governmental restrictions.<sup>3</sup>

This article aims to account for an arguably attractive<sup>4</sup> conceptual and normative approach to the right of freedom of expression and to apply this approach to the Danish Cartoon Controversy. In particular, it aims to ponder the question whether expressions such as the cartoons in question should be legally proscribed or whether they fall within the group of expressions properly protected by the right of freedom of expression. Furthermore, even in the case that moral reasons obtain for not legally forbidding expressions such as the Danish cartoons, moral reasons may obtain for individuals and institutions such as the press to act in accordance with an ethos of reticence within the legal frames (that is, to abstain from certain acts of

expressions even though not legally required to do so). The article investigates as well whether such reasons obtain.

## **II. Scanlon's theory of freedom of expression<sup>5</sup>**

Notions of rights such as the right to freedom of expression are often appealed to in attacks on certain forms of consequentialist reasoning. Such critiques point, for example, to the counterintuitive results of allowing policy decisions to be taken unconstrained by rights or other protections of individual interests. In the absence of such constraints, the argument goes, considerations of social interest or utility would justify overriding individual interests or making exceptions to generally useful rules protecting these interests in the normal case (but not when circumstances with certain features obtain, namely when such exceptions bring some immediate good and do not undermine the general rule, or the harm done to the general rule is outweighed by the immediate good achieved). For example, punishing an innocent, breaking a promise, and abstaining from compliance with the general rules pertaining to the achievement of some public good, may be justified in so far as some sort of strict constraint on this type of actions do not obtain. This appears to be a strong reason for invoking a notion of individual rights and it seems to rest rights on a foundation independent of social interest or social utility.<sup>6</sup>

At this point, consequentialists seem, however, to have a strong reply. While admitting that rights may serve as important constraints on policy decisions, they may ask how the justification of rights themselves can plausibly avoid some appeal to the general social interest or the like. This is a profound point made by John Stuart Mill and by contemporary authors such as Scanlon and John Rawls and

most recently by Brad Hooker.<sup>7</sup> It lays the ground for a rule-consequentialist position accounting, that is, for appropriate rules in terms of the set of rules that most efficiently promote social interests. It proposes a forceful and constructive way in which rights such as the right of freedom of expression can be defended. Especially, it facilitates a clear account of what a right is, of how a right may be justified, and of exactly what a given right forbids (or at least account for how this is to be determined).

Consequentialist accounts of rights emphasize that rights are instruments that cater to a set of fundamental human *goals or interests*. In addition to well-being this may plausibly include interests in freedom or discretion; the power or capability of determining outcomes or of having the latter depend on the choices one makes may be considered a profound human interest.<sup>8</sup> Furthermore, a fundamental human interest in the equitable distribution of such discretion may be asserted.<sup>9</sup> In this way, distributional concerns may be included in a consequentialist position. The relevant interests with respect to expression include: (a) participant interests; (b) audience interests; (c) bystander interests.<sup>10</sup> *Participant interests* are interests in communicating something publicly. This might, for example, be a political or religious view or other aspects of a life-style. But it may as well be the alleged benefits of a product one intends to market. Correspondingly, the value of the categories of interests at stake is not necessarily on a par. *Audience interests* are interests in being exposed to a range of expressions including ones which one would tend to regard as unwelcome (recalling Mills point that such exposure may allow us to substitute a true view for a false or to strengthen our beliefs in the truth of the view we hold). This is arguably part of a necessary environment for making up one's own

mind, or for developing one's desires and beliefs in an informed and reasonable way.<sup>11</sup> In this way, the promotion of audience interests may be seen as a promotion of autonomy in the sense of the ability to exercise independent rational judgement.<sup>12</sup> Like participant interests, audience interests vary in nature and value. *Bystander interests* are interests in avoiding certain harms pertaining to acts of expression themselves. This might be the annoyance of a large crowd in the city including the litter it generates and the traffic congestion it causes. Furthermore, important bystander interests pertain to the likely consequences of expression in terms of the acts on the part of audiences it addresses.

*Rights*, according to this view, are constraints on discretion to act and correlative immunities in the absence of which serious harms to fundamental human interests are likely to obtain. To elaborate, a right is supported by, first, an empirical claim regarding the likely bad consequences if people and institutions were free to act in a certain way. The badness of the consequences derives from the fact that unfettered discretion to act in this way would be detrimental to certain human interests. Second, it is backed by an empirical assertion to the effect that certain constraints on discretion in these respects would suffice to prevent the consequences in question. Furthermore, the constraints come at a tolerable cost in terms of other interests.<sup>13</sup> A right of freedom of expression may then be taken to claim that bad consequences for expressive interests are likely to obtain in the absence of constraints on governmental regulation of expression, and that certain constraints of this nature suffice to avoid these bad consequences, and do not involve intolerable bad side-effects on other interests. If the right in question is a non-trivial one, the constraints involved imply that government cannot restrict certain acts of expression

in spite of the fact that undeniable harms are involved; harms that could plausibly be prevented by legally restricting the acts in question, and harms of a nature that would normally justify such regulation.<sup>14</sup>

A broad outline of the content of a right of freedom of expression, according to this view, may now be given. The theory sketched seems to justify a constraint on governmental regulation in one important domain, namely as regards the content, including viewpoint and subject matter, of expression. Absence of constraints on governmental regulation of such matter, historical experience suggests, is likely to tempt government to silence oppositional acts of expression and thus to be to the detriment of human interests, in particular audience interests. Constraints on governmental actions in this regard have, on the other hand, proved both sufficient to contain the temptation to regulate, and such regulation does not appear to have had significant bad side-effects on the satisfaction of other interests. On these grounds the theory in question may provide a solid justification of an important aspect of American constitutional tradition, namely the prohibition against content regulation or at least a presumption against such regulation.<sup>15</sup> Furthermore, it may account for a corresponding permissiveness with respect to content-neutral regulation, that is, regulation of the time, place and loudness of expressions.<sup>16</sup> In so far as considerations in favour of such regulations (for example, relevant bystander interests) are constrained by a considerable weight given to free expressions (to cater to participant and audience interests)—a thumb in the scale for the latter concern obtains—significant bad consequences, it may be held, are not likely to follow from such governmental regulation.<sup>17</sup>

The constraint on governmental discretion to regulate expression with respect to content needs not apply indiscriminately to all categories of expression. We may, that is, distinguish between categories of expression in terms of subject matter or abstract content (e.g. between political and religious expressions on the one hand, and commercial expressions on the other).<sup>18</sup> While the regulation of the concrete content of a given category may affect important expressive interests in intolerable ways, this consequence of regulation may be absent with respect to other categories. The intuitive idea involved here is that we may agree on the importance of certain categories of expressions (e.g. political expressions) while disagreeing fiercely in terms of the concrete political views we hold and that both factors seem to support a prohibition on content regulation in this domain.<sup>19</sup> Thus, according to the present view, content regulation with respect to a given category of expression is prohibited in so far as the interests at stake are significant and they are likely to suffer harm in the absence of such constraints on governmental discretion. If the interests pertaining to a given category of expression are not significant, or if harms to the interests in the absence of such a prohibition are unlikely, then the right of freedom of expression does not disallow content regulation with respect to this category. For example, the category of political expressions may plausibly be of the former nature, that is, it may plausibly call for a ban on governmental regulation of the content of political expression. Governments, it may be held, if entrusted with the power to regulate political expression, are likely, and have in fact, used that freedom of discretion to silence opposition, in this way doing severe damage to significant expressive interests. On the other hand, certain well-defined categories or subcategories of hate-speech, for example, need not involve crucial expressive

interests, or the power to regulate this well-defined category is not likely to give rise to non-trivial harms done to the expressive interests involved.<sup>20</sup> It is not always (or even typically) clear to which category a given instance of expression pertains. For example, hateful expression may be of a political nature. If this is so, the verdict of the rule-consequentialist position is correspondingly less clear. This need not, however, constitute a fundamental problem of indeterminacy. Rather, in line with the fact-sensitivity of the view, whether or not a given act of expression ought to enjoy protection depends on a detailed analysis of the type of expression involved and its relation to expressive interests.

The category-sensitivity of Scanlon's theory of freedom of expression is an aspect of the general fact-sensitivity of the view. Whether or not a right obtains as well as the precise content of this right depend crucially on facts at different levels of generality. Hence the relevance and the content of a right properly change as circumstances change. A further feature of this view is that often when applied to concrete problematic cases the view itself cannot account for which rights should obtain and their precise nature. To do so it must rely on complex empirical studies.

As a non-trivial account of the right of freedom of expression—protecting a set of harmful acts from governmental restrictions although the harms are real and could plausibly be prevented by such restrictions—Scanlon's theory must account for the apparent irrationality involved. It does so by claiming, roughly, that the harms not prevented by not allowing government to restrict certain harmful acts are a tolerable cost in the light of the other harms prevented by imposing such a constraint on governmental authority. That is, while real harms could be prevented by governmental restrictions, granting government such discretion would involve

harms of a much greater magnitude. So taken in isolation the restriction on governmental authority appears irrational in virtue of the harms not prevented; but on a broader view the harms prevented by the restriction easily outweigh the harms its imposition involves.

### **III. Are acts of expression such as the Danish cartoons protected according to Scanlon's theory of freedom of expression?**

Whether or not acts of expressions such as the Danish cartoons are protected according to Scanlon's theory of freedom of expression depends, crucially, on the category of expression within which these acts of expression may be held to fall. It does so in that a constructive way of explicating Scanlon's theory is to derive categories of expression, granting them different status in terms of immunity from governmental intervention on the basis of considerations of fundamental expressive interests in conjunction with general empirical beliefs. Certain categories of expression call for protection against regulation of content in the light of the interests at stake and given the threat to these interests in the absence of such constraints, while other categories should not enjoy such protection in that the interests are not significant or the risk of harm to these interests in the absence of constraints is negligible. With a set of categories, derived in the suggested way, in place, certain instances of expressions may be subsumed under these categories implying an answer to the question whether this instance of expression is properly protected or not. Subsuming instances of expressions under relevant categories may not, however, as noted above, be a simple task. Accordingly, deciding on the status of an act of

expression with respect to protection may, at least in some cases, be more difficult than just indicated.

I believe that two categories of expression are especially relevant as candidates for categories within which the Danish cartoons fall. The first is political expressions, and the second is hate-speech or some subcategory of hate-speech. The category of political expression should, on realistic empirical assumptions, be shielded from governmental regulation of content. This ought to be the case in that granting government the authority to regulate the content of political expression or not restricting it from doing so involve notorious risks to important expressive interests; governments possessing such power have an irresistible temptation to silence oppositional voices to the detriment of crucial expressive interests (especially, participant and audience interests).

The second relevant category of expression is hate-speech, that is, speech that is prone to ‘arouse anger, alarm, or resentment on the basis of race, color, creed, religion, or gender’.<sup>21</sup> To restrict this category of expression as such seems impermissible according to the rule-consequentialist framework. Given that the category is a relatively broad one, restricting all instances of expression falling within it would be unacceptably harmful to important expressive interests. That is, many messages could not be given and society would be deprived of ideas constituting a part of a necessary deliberative framework. It does not follow that subcategories of hate-speech are not proscribable. A strong candidate appears to be the subcategory of fighting-words, that is, words that ‘are directed to individuals, form no essential part of any exposition of ideas, and their very utterance inflicts injury or tend to incite an immediate breach of the peace’<sup>22</sup> (the latter they do in

virtue of arousing anger, alarm, or resentment on the basis of race, color, creed, religion, or gender). Restricting this category would involve limited, if any, damage to expressive interests in that they are directed to individuals, not the public at large (meaning that restricting them would not effect audience interests adversely), and that the ideas implied can find other vehicles of expression (again audience interests do not suffer, neither do participant interests for that matter, if the expressions are banned). So constraints on governmental discretion to regulate this type of expression are not necessary to protect expressive interests. Furthermore, such constraints would affect other interest adversely in that government would be deprived of the means to avoid harmful breaches of the peace.

As already indicated, a given act of expression may be difficult to assign to a certain category. While the subcategory of hateful expressions cannot be political expressions (not being directed to the public as such), a hateful expression that is not a fighting word may count as a political expression. Both being protected categories of expression, according to the rule-consequentialist analysis, a mixed expression of the suggested kind present limited (if any) problems.

We may now consider in which category of expression the Danish cartoons fall (to the extent that it can be clearly assigned to one or the other) and accordingly whether restricting them is permitted or even required. The issue of category is a controversial one with respect to the Danish cartoons as it is in many other cases as well. According to one conception of the cartoons and the article in which they appeared they fall squarely within the category of political expressions, that is, constitute expressions the content regulation of which seems impermissible. This conception is represented by the newspaper's own verbal presentation of the

cartoons and by supporters, including leading politicians, accepting *Jyllands-Posten's* claim to be engaged in an investigation of factors that chill expression in contemporary debate.<sup>23</sup> That is, the cartoons are regarded as attempts to bring to public attention the problematic reticence of people with respect to Islam. A reticence which is partly induced by the sensibilities of certain Muslims. An extreme example of the latter (and the obvious reasons this provides for not expressing oneself critically as against Muslims) is the killing of the Dutch film maker Theo van Gough apparently induced by his instruction of the film *Submission Part 1* criticizing the status of women in Muslim culture. The cartoons address this reticence—and the Muslims sensibilities and related acts causing it—by going up against it. If seen in this way, the cartoons appear to be a clear political statement inviting to public debate on a profound public issue. Content regulation of expressions falling within this category is, as we have seen, impermissible according to the rule-consequentialist account of rights. Allowing such regulation is on pain of serious harms to fundamental deliberative interests (that is, participant interests and audience interests) and certain types of restrictions may deflect these harms and do so at the acceptable cost of allowing some undeniable harms to go unrestricted (namely the harms related to the content of expressions which the restrictions in question say cannot ground governmental intervention). Hence, regulating the acts of expression constituted by the cartoons on the ground of their content—for example, the fact that they address the sensitive issue of Muslims and freedom of speech and other liberal rights—appears impermissible.

According to an alternative interpretation of the cartoons they do not fall within the category of political expressions, rather they are properly seen as

instances of hate-speech or some subcategory of such speech. Expressions such as the cartoons reflect, according to this conception, an aspect of a hateful Danish public culture with regard to Muslims.<sup>24</sup> Let us assume this view to be correct. In order to assess whether the cartoons on this assumption are proscribable instances of expression according to the rule-consequentialist view we need to know whether or not they may be seen to fall within the proscribable subcategory of fighting words. Hate-speech as such, recall, is not proscribable according to this theory. The cartoons appear not to fall within the category of fighting words. The latter, recall, 'are directed to individuals, form no essential part of any exposition of ideas, and their very utterance inflicts injury or tend to incite an immediate breach of the peace'.<sup>25</sup> Now, drawing 5 involves swearing: "Prophet! You crazy bloke! Keeping women under the yoke!", but this is not fighting words according to the stated definition. So the cartoons do not seem to be instances of expression that could, given the theory relied upon here, be the legitimate target for governmental regulation.

If the expressions in question are of a mixed nature (partly political, partly hateful, although not fighting words) the conclusion going against restriction seems to stick. In so far as expressions falling in one or the other category are proscribable, expressions of this mixed nature appear to enjoy the same protection.

Whether the cartoons fall within the category of political expressions or the category of hate-speech (or are of a mixed nature), the reason, according to the rule-consequentialist theory, that they are not condemnable in terms of legal sanctions, depends crucially on the empirical assumption that granting government such powers of discretion would give rise to more harms than would be prevented by such a measure. There might be exceptions though, for example, the category of

fighting-words. One reason for believing this category to be proscribable is the immediate harms it may cause to public order. It seems, however, to be the case that acts of expression not satisfying all the criteria for counting as fighting-words may fulfil the criterion of effecting breaches of public order. Such breaches may, in turn, plausibly be so harmful as to change the balance of reasons in favour of restrictions on expressions. Of special relevance to the case in question is the insult experienced by Muslims by the cartoons and riots triggered by this experience, including the casualties of these riots. While the direct harms of being insulted or morally outraged by expressions (or for that matter conduct) may not be considered a serious harm, the harms implied by the riots, including loss of lives, cannot go unnoticed. Rules may of course be unable to take into account (by prohibiting the relevant expressions) acts of violence triggered by certain expressions. But it may be the case, perhaps it often is, in a given time and place that certain properties of a group and certain properties of the position of this group in society suggest that a recognisable set of expressions would trigger violent acts on the part of this group. If this pattern is strong and reliable and if the harms involved are considerable, then, all things considered, human interests may be best promoted by restricting such expressions. This seems to constitute a serious counterweight in a consequentialist calculation to the harms that might obtain if government may regulate the content of expressions. One response to allowing rules in this way to be influenced by predictable, but not necessarily justified, reactions of groups in society would be to claim that such rules are not comprehensively justified (that is, it involves reference to acts of a given group which this group cannot justify to other groups in society).<sup>26</sup> In reply, this might be true, but it constitutes no objection to the view in question, in that the level of rights

we are operating on here constitutes the level of rules of regulation, not the level of fundamental principles,<sup>27</sup> and it is not controversial that such rules admit considerations of the wrongful behaviour of different groups.

Other harms from certain acts of expressions such as those involved in the Cartoon Controversy may affect the balance of reasons in direction of support of regulation. I have in mind the claim that expressions such as the cartoons critical of Muslims may have a tendency of sustaining structures that significantly put Muslims at a disadvantage in western societies. In fact, expressions of this type may help to create and sustain structures of inequality which in turn contribute to explaining why (perhaps even justifying that) Muslims react violently to the stream of derogatory expressions. The magnitude of these harms and thus whether they are more important to avoid by the use of governmental interventions (and whether it is feasible to do so) than it is to avoid the dangers of allowing government such discretion is a complex empirical question. The theory does not in itself assist in this matter. But if it is true it reduces the conflict to an empirical question, not a fundamental and insurmountable conflict between the tolerant and the intolerant or another unedifying contrast.

The picture of the relevant harms might be in need of revision in a third way. While Scanlon's theory primarily concerns rights in the sense of formal constraints on the discretion to act of individuals and institutions, it may be extended to informal constraints as well. That is, the legally coercive structure of society does not necessarily exhaust the relevant site of justice; neither does it necessarily exhaust a plausible theory of the right of freedom of expression.<sup>28</sup> It might be that reasons obtain for people to act in a certain way within the legally coercive structure of society, that is, with respect to the acts which the legal framework leaves people free

to perform (or not perform). Informal constraints on actions are interesting partly because it may be the case that conclusive reasons exist not to enforce certain types of behaviour, while the behaviour in question is morally desirable; so informal constraints may achieve the morally desirable result while avoiding imposing morally unacceptable formal or legal constraints. For example, reasons of privacy and values pertaining to the family may speak conclusively against legally coercive measures to enforce an equal distribution of the benefits and burdens within the family. On the other hand, an equal distribution of these benefits and burdens may, on a par with the equal distribution of other benefits and burdens, be desirable, and, perhaps, achievable in virtue of an informal egalitarian ethos.<sup>29</sup> In the context of a right of freedom of expression strong reasons may, as we have seen, obtain not to allow government to regulate the content of expressions. On the other hand, unregulated expression involve undeniable harms such as: people coming to believe a wrong or dangerous view; people acting on such a view; people being insulted by an act of expression and reacting violently; and patterns of inequality being sustained by certain types of expression. If such harms were avoidable without the use of legally coercive constraints, this seems obviously desirable; and they appear to be so by the use of an informal ethos of reticence with respect to expressions involving the harms mentioned.

This type of reasoning may be particularly relevant to the case at hand in terms of the apparent support it lends to the popular view, both in academia and in the public at large, that while the newspaper that chose to publish the cartoons, or other medias, should not be legally prohibited from doing so, it acted wrongly in using the option of publishing the cartoons left open by the legal framework.<sup>30</sup> It

should instead have acted in accordance with some sort of ethos of civility requiring institutions and individuals not to ride roughshod over religious feelings and beliefs.

While this type of reasoning and its application to the case of hand appear to have some plausibility, it is not, in fact, sound. It is not so in that apparently the informal constraints relied upon share with the formal constraints they substitute the property making the latter wrong, namely that they serve to restrict expressions to the detriment of expressive interests. The formal constraints administered by the state may restrict expression in different ways and by the use of other methods, but informal constraints may restrict expression just as much. In this way both kinds of constraint may prevent certain types of harms, but at the same time they may involve immense harms to central expressive interests—harms the prevention of which, by the absence of governmental regulation of expression or of informal constraints, is more important than the harm that may be avoided in the presence of the constraints and thus harms in virtue of which the constraints (formal or informal) are morally wrong.

One response to this line of argument may be to narrow the case for informal restrictions in the following way. Informal restrictions should (as should, for that matter, legally coercive constraints), according to this view, be assessed in terms of the consequences of the specific act in question. That is, the morally relevant assessment concerns the specific act of reticence, including the particular circumstances pertaining to it. It does not concern whether a general ethos of reticence promotes human interest better than a liberal ethos. In brief, what the response in question suggests is that the cartoon case should, in opposition to the rule-consequentialist view the present paper relies on, be assessed according to an

act-consequentialist view. This view is compatible with recognizing the importance of rules, at least at the level of decision procedures or rules of policy.<sup>31</sup> That is, it may allow that in ordinary circumstances the fundamental goal of acting in an optimific manner is best promoted by following a set of rules of thumb (this may be so in virtue of a range of realistic informational and motivational constraints). But it may retain the act-utilitarian criterion of rightness and emphasize that in some extraordinary circumstances the rule of thumb should not be followed (when, that is, there is a realistic option to deviate from the rule of thumb, and human interests are likely to be promoted by doing so). Assessing the decision of the Danish newspaper to publish the cartoons from an act-consequentialist view, taking into consideration the relevant facts (including the number of casualties in the riots that followed), plausibly suggests that showing reticence in precisely these circumstances would have been the correct line of action. Note that the view suggested here to the effect that *Jyllands-Posten* acted morally wrong by publishing the cartoons is compatible with holding that *Jyllands-Posten* is not blameable for doing so. That is, a proponent of the view in question may hold that whether or not an act is wrong pertains to its actual consequences, while what matters from the perspective of blame is foreseeable consequences (and that, in the present case, JP could not have predicted the violent reactions caused by the publication).

The contrast between rule-consequentialism and act-consequentialism implied in the objection is a complicated and controversial one, but the defence of an informal restriction in the specific case of the cartoons resting on it can, I believe, be answered relatively quickly. I am willing to grant that this version of reassessing the costs of relevance to the case at hand may give rise to the view that publishing the

cartoon was morally wrong. What I deny, however, is that the reassessment under consideration can be used in support of the popular asymmetrical assessment of the cartoon crisis (holding that whilst expressions such as the cartoons should not be legally proscribed, it is morally wrong to express oneself in such a way within the legal frames of society). The reason is that in so far as strong reasons obtain for reticence in duly circumscribed circumstances, similar reasons appear to obtain for legal sanctions in comparable circumstances. Both types of constraints may promote important human interests while doing limited, if any, damage to other interests, including major expressive interests.

#### **IV. Conclusion**

Scanlon's theory of a right of freedom of expression gives rise to a set of categories of expression enjoying various degrees of immunity from governmental regulation. Of especial relevance to the Danish cartoon controversy are the category of political speech and the category of hate-speech. The former is, according to the theory in question, protected from governmental intervention in the sense of a prohibition on regulating the content of expressions falling within it. Regulating the entire category of hate-speech is also objectionable in term of the theory in question (such regulation would harm the expressive interests constituting the goal to be promoted according to this theory), but the subcategory of fighting words are proscribable (here expressive interests are not at stake in the same way or at all). The Danish cartoons do not, on realistic interpretations, fall within the latter category. Expressions such as the cartoons are not, however, as a matter of principle, immune from governmental restriction according to the view this paper relies upon. Such expressions may

namely involve harms in term of violent acts triggered by people being insulted by them and in virtue of patterns of inequality they may assist in creating and sustaining, and these harms may be of such a nature and magnitude that they counteract the risk of allowing governmental regulation of such expressions. While this opens at least one avenue for restriction of expressions such as the cartoons, another avenue does not seem plausible. The latter consists in arguing that some sort of informal constraint on expressions may substitute formal constraints and the harms involved by the use of the latter, in this way making a policy of restriction more attractive. This seems unsuccessful in that the informal constraints share with the formal constraints the property of restricting expression considerably—a property which makes both types of constraints wrong. It might, however, be the case that a narrow informal constraint applicable to case at hand is justifiable. If sound, this seems, however, to go with the justification of a parallel narrow formal constraint.

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<sup>1</sup> [Acknowledgements omitted]

<sup>2</sup> The recent republication of the cartoons by several Danish newspapers also caused protests, but not as severe as those following the original publication (although the recent attack on the Danish embassy in Islamabad may be linked to the republication).

<sup>3</sup> Thomas Scanlon, 'A Theory of Freedom of Expression', *Philosophy & Public Affairs*, 1 (1972), 204-226, pp. 204, 208.

<sup>4</sup> Regrettably, I do little in the way of supporting this view. My main focus is on trying to apply this influential theory—a rule-consequentialist account of rights—to the case at hand. At the end of the paper I briefly consider applying the alternative theory of act-consequentialism to the case at hand (recognizing, of course, that other theories of freedom of expression, including nonconsequentialist ones, should be considered in a comprehensive analysis of the case).

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<sup>5</sup> The theory in focus is the rule-consequentialist account Scanlon presents in the following articles: ‘Rights, Goals, and Fairness’, in Samuel Scheffler, ed., *Consequentialism and its Critics* (Oxford: Oxford University Press, 1988), pp. 74-92; ‘Freedom of Expression and Categories of Expression’, *University of Pittsburgh Law Review*, 40 (1979), 519-540; ‘Content regulation reconsidered’, in Judith Lichtenberg, ed., *Democracy and the Mass Media* (Cambridge: Cambridge University Press, 1990), pp. 331-354. Scanlon is, as well, the author of a nonconsequentialist theory. He presents this in ‘A Theory of Freedom of Expression’. This article suggests a different, more absolute, foundation for the restriction on content regulation also supported by the rule-consequentialist proposal outlined below in the text. While the latter supports this restriction because and in so far as the absence of such a restriction would involve unacceptable consequences for fundamental human interests (being in this sense fact-sensitive), the nonconsequentialist theory takes the constraint of content regulation to derive directly from a more fundamental constraint, that is, a constraint on justifications of governmental authority to the effect that such justifications should be compatible with regarding citizens as autonomous beings. That is, it, so to say, builds into its first principles resistance against content regulation. The prohibition against content regulation, according to this view, is independent of circumstances, including varying categories of expressions. Furthermore, a third view on freedom of expression may be derived from Scanlon’s recent contractualist view. See *What We Owe to Each Other* (Cambridge, Massachusetts, and London, England: Harvard University Press, 1998).

<sup>6</sup> Cf. Scanlon, ‘Rights, Goals, and Fairness’, pp. 74-75.

<sup>7</sup> John Stuart Mill, *Utilitarianism*, chap. 5 in *Utilitarianism, On Liberty, Considerations on Representative Government* (London: Everyman, 1993); Scanlon, ‘Rights, Goals, and Fairness’; John Rawls, ‘Two Concepts of Rules’, paper 2 in Samuel Freeman, ed., *Collected Papers, John Rawls* (Cambridge, Massachusetts, London, England: Harvard University Press, 1999); Brad Hooker, *Ideal Code, Real World* (Oxford: Clarendon Press, 2000). Scanlon and Rawls defend, of course, in more recent works, versions of contractualism.

<sup>8</sup> H.L.A. Hart, ‘Are There Any Natural Rights?’, *The Philosophical Review*, 64 (1955), 175-191, esp. pp. 185-191; Scanlon, ‘Rights, Goals, and Fairness’, pp. 76-77, 84; ‘The Significance of Choice’, in Stephen Darwall, ed., *Equal Freedom: Selected Tanner Lectures on Human Values* (Ann Arbor: The University of Michigan Press, 1995), pp. 39-104. This is also a point stressed consistently in the

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works of Amartya Sen, perhaps most clearly in his 'Well-Being, 'Agency and Freedom, The Dewey Lectures 1984', *The Journal of Philosophy*, LXXXII (1985), 169-221.

<sup>9</sup> E.g., Hooker, *Idea Code, Real World*, pp. 55-65; Scanlon, 'Rights, Goals, and Fairness', pp. 79-82.

<sup>10</sup> See Scanlon, 'Freedom of Expression and Categories of Expression', sec. II.

<sup>11</sup> Joshua Cohen, 'Freedom of Expression', *Philosophy & Public Affairs*, 22 (1993), 207-263, pp. 228-9; Scanlon, 'Freedom of Expression and Categories of Expression', p. 527.

<sup>12</sup> Scanlon, 'Freedom of Expression and Categories of Expression', p. 533.

<sup>13</sup> Scanlon, 'Freedom of expression and categories of expression', p. 535; 'Rights, Goals, and Fairness', pp. 84-5; 'Content regulation reconsidered', pp. 332-3.

<sup>14</sup> Scanlon, 'A Theory of Freedom of Expression', pp. 204, 208, 217.

<sup>15</sup> J. Cohen, 'Freedom of Expression', p. 213; Scanlon, 'Content regulation reconsidered', pp. 341ff.

<sup>16</sup> J. Cohen, 'Freedom of Expression', p. 213; Scanlon, 'A Theory of Freedom of Expression', p. 209.

<sup>17</sup> Scanlon, 'Content regulation reconsidered', pp. 341ff.

<sup>18</sup> Scanlon, 'Content regulation reconsidered', esp. p. 346.

<sup>19</sup> Scanlon, 'Freedom of Expression and Categories of Expression', pp. 522-523; 'Content regulation reconsidered', pp. 336-337.

<sup>20</sup> See Scanlon, 'Freedom of Expression and Categories of Expression', 'Content regulation reconsidered', J. Cohen, 'Freedom of Expression'.

<sup>21</sup> J. Cohen, 'Freedom of Expression', p. 253.

<sup>22</sup> J. Cohen, 'Freedom of Expression', p. 251.

<sup>23</sup> Cf. J. Cohen, 'Freedom of Expression', p. 232.

<sup>24</sup> Rune Engelbreth Larsen og Tøger Seidenfaden, *Karikaturkrisen: En undersøgelse af baggrund og ansvar* (København: Gyldendal, 2006).

<sup>25</sup> J. Cohen, 'Freedom of Expression', p. 251.

<sup>26</sup> See G.A. Cohen, 'Incentives, Inequality, and Community', in Stephen Darwall, ed., *Equal Freedom: Selected Tanner Lectures on Human Values* (Ann Arbor: The University of Michigan Press, 1995), pp. 331-397; Kasper Lippert-Rasmussen, 'Racial Profiling Versus Community', *Journal of Applied Philosophy*, 23 (2006), 191-205.

<sup>27</sup> Cf. G.A. Cohen, 'Facts and Principles', *Philosophy & Public Affairs*, 31, 3 (2003), 211-245, p. 241.

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<sup>28</sup> Cf. G.A. Cohen, 'Where the Action Is: On the Site of Distributive Justice', *Philosophy & Public Affairs*, 26 (1997), 3-31.

<sup>29</sup> See A. Williams, 'Incentives, Inequality, and Publicity', *Philosophy & Public Affairs*, 27 (1998), 225-247, p. 242.

<sup>30</sup> In academia this view is clearly stated by, e.g., Joseph H. Carens, 'Free Speech and Democratic Norms in the Danish Cartoons Controversy', *International Migration*, 44 (2006), 33-42, p. 37.

<sup>31</sup> R. Eugene Bales, 'Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure?', *American Philosophical Quarterly*, 8, 3 (1971), 257-265.