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Joshua Foster

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ARTICLE

**PROPHETS, CARTOONS, AND LEGAL
NORMS: RETHINKING THE UNITED
NATIONS DEFAMATION OF RELIGION
PROVISIONS**

JOSHUA FOSTER[†]

INTRODUCTION

In 1948, the international community sought to create a normative scheme of universal human rights legislation with the creation of the Universal Declaration of Human Rights (“UDHR”) by the United Nations.¹ The project has faced the inevitable difficulty in finding any baseline source of agreement between the cultures represented at the United Nations. Efforts to identify universal values upon which normative human rights principles can be built have proven difficult at best, with some claiming that the entire venture is necessarily an abject failure.²

[†] Associate, Fulbright & Jaworski L.L.P. J.D., 2008, St. John's University School of Law; M.A., Theology, 2004, Boston College; B.A., English and Theology, 2002, Boston College. The author is eternally grateful to his parents Barry and Beverly Foster for their love and guidance throughout his life and to Kelly Foster for always being an inspiration and an aspiration.

¹ The Universal Declaration of Human Rights (“UDHR”) was passed in 1948, largely in response to the atrocities committed during World War II. *See* Franklin & Eleanor Roosevelt Inst., *Didn't Nazi Tyranny End All Hope for Protecting Human Rights in the Modern World?* (Aug. 28, 1998), <http://www.udhr.org/Introduction/question4.htm>. One reason for its genesis was the consensus that the United Nations Charter did not adequately define the rights it allegedly protected. *See* Franklin & Eleanor Roosevelt Inst., *Drafting and Adoption: The Universal Declaration of Human Rights* (Aug. 27, 1998), <http://www.udhr.org/history/overview.htm>. The Declaration was adopted by a vote of forty-eight to zero, with eight abstentions. United Nations Ass'n of Can., *Questions and Answers About the Universal Declaration of Human Rights*, <http://www.unac.org/rights/question.html> (last visited Jan. 10, 2009).

² In an op-ed for a Canadian newspaper, Bush advisor Richard Perle stated that “coalitions of the willing . . . are . . . the [only] alternative to the anarchy of the

Notwithstanding the criticism, the international community must continually adapt to changing political and cultural climates with strong statements proclaiming the inviolability of certain common ideals, if for no other reason than to articulate a critical philosophical framework.

Particularly vexing for the proponents of universal human rights has been the issue of religious freedom.³ The difficulties inherent with forging consensus in a multicultural paradigm become even more difficult—potentially even impossible—when debating the boundaries of religious freedom.⁴ Historically, efforts at identifying basic rights to be protected on both a national and an international level have taken the form of promulgating “universal” principles—a baseline threshold upon which, theoretically, we can achieve agreement through cross-cultural dialogue.⁵

subject failure of the United Nations.” Richard Perle, *Coalitions of the Willing Are Our Best Hope*, NAT’L POST (Can.), Mar. 21, 2003, at A19.

³ The UDHR set forth the seminal language that has been adopted, debated, and altered by subsequent U.N. documents, international agreements, and domestic legislation. It provides, in pertinent part, that “[e]veryone has the right to freedom of thought, conscience and religion.” Universal Declaration of Human Rights, G.A. Res. 217A, art. 18, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR]. Much of the debate over the extent of religious freedom centers around the very meaning of each of those somewhat ambiguous terms.

⁴ See Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT’L L. 527, 552 (2001) (“This difficulty achieving consensus, moreover, increases exponentially when we recognize that, since the adoption of the UDHR in 1948, the membership of the United Nations has increased from 56 to 185 states. The United Nations today embraces societies that manifest cultural divergences potentially far more varied and severe than the already intractable Cold War ideological rift that preoccupied the drafters.” (footnote omitted)).

⁵ The U.N. has been the preeminent organization that has sought to define and secure these rights. For example, the first, and perhaps most famous, of these efforts is the Universal Declaration on Human Rights, which was promulgated in 1948. UDHR, *supra* note 3, pmb. Subsequent documents and treaties have drawn on the language of the Universal Declaration on Human Rights in explicitly identifying universal values and mores, although not directly in their titles. See, e.g., Declaration on the Right to Development, G.A. Res. 41/128, at 186, U.N. Doc. A/Res/41/128 (Dec. 4, 1986) (“Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized . . .” (footnote omitted)); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at 194, U.N. Doc. A/Res/34/180 (Dec. 18, 1979) [hereinafter Elimination of Discrimination Against Women] (“[A]ll human beings are born free and equal in dignity and rights and . . . everyone is entitled to all the rights and freedoms set forth therein . . .”); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), pmb., U.N. GAOR,

The project of creating a universal human rights scheme that respects religious freedom has undergone many philosophical justifications, ranging from simple social cohesion to a focus on freedom and equality.⁶ However, the most successful—defined as the prevailing justification that appears in these international documents—is a focus upon human dignity.⁷ For purposes of this Article, human dignity is defined broadly as the notion that there is something inherent in the individual human being that *mandates*, as a matter of principle, that certain things should be done for her and certain things should not.⁸ Rights defined in subsequent international documents are premised on individual autonomy and dignity reflected in the first article of the UDHR, which states that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁹ This statement seemingly evinces both social and legal obligations by referencing both an individual moral obligation related to interpersonal behavior and a broader legal obligation to create an environment conducive to the flourishing of these principles.¹⁰

This statement, however, can create a philosophical—not to mention theological, sociological, and political—minefield, and history has demonstrated that international efforts at creating a

Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR] (recognizing “the inherent dignity and . . . the equal and inalienable rights of all members of the human family”). The United Nations Charter itself reaffirms a “faith in fundamental human rights” and the “equal rights of men and women and of nations large and small.” U.N. Charter pmb1.

⁶ For example, social cohesion is a prudential justification, essentially maintaining that protecting religious dissenters will result in less social strife. By contrast, natural law justifications posit that religious liberty is a value that can be proven through reason, independent of any revealed truth. Freedom and equality entail protection of religious freedom precisely because we do not want to discriminate based on religious belief. This, in turn, depends upon recognizing the inherent value in not discriminating on any basis to begin with.

⁷ Countless U.N. documents have focused on human dignity as a philosophical justification, largely because it represents a baseline principle that most, if not all, cultures can begin to agree upon. See *infra* Part II.A.4.

⁸ The intersection of what should be done and what should be refrained from is the subject of immense debate and is the focus of this Article in the context of religious liberty and defamation.

⁹ UDHR, *supra* note 3, art. 1.

¹⁰ In other words, it seems that international human rights norms are conceived of as individual rights vis-à-vis the state, in addition to individual rights vis-à-vis the person.

universal scheme to protect these rights can be woefully lacking, either in theory or in practice. In fashioning a “universality hermeneutic,” either nations agree on broad, somewhat undefined principles—even if they do not agree on the underlying rationale for the principle—or nations fail to agree and maintain competing visions of the rights and obligations at issue.¹¹

In 2005, these competing tensions came into serious conflict—both philosophically and literally—when the Danish newspaper *Jyllands-Posten* printed a series of twelve cartoons depicting the Prophet Muhammad in various satirical caricatures.¹² Particularly controversial was one cartoon depicting Muhammad with his turban in the shape of a bomb.¹³ Protests erupted worldwide in response to the perceived affront to the Islamic faith¹⁴ after a number of newspapers reprinted the cartoons.¹⁵ These protests resulted in over 100 deaths worldwide, including Muslim men and children who were trampled during

¹¹ A perfect example of these competing visions centers on the role of religious freedom, more specifically the freedom to change one’s religion, in Islam as compared with Europe. In the International Covenant on Civil and Political Rights, a majority of the international community declared that freedoms of religion and conscience include the ability to change one’s belief system according to his or her conscience. ICCPR, *supra* note 5, art. 18(1). However, Islamic nations resisted this aspect of the ICCPR and ultimately refused to sign. In response, these Islamic nations promulgated the Cairo Declaration of Human Rights, which many claim to be the Islamic version of the UDHR. This covenant noted, among other provisions, that freedom of religion and conscience is to be respected; however, it is always subject to the Shari’a. Cairo Declaration on Human Rights in Islam, art. 24 (Aug. 5, 1990), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.htm?tbl=RSDLEGAL&page=research&id=3ae6b3822c>. Of course, the Shari’a forbids Muslims from leaving the Islamic faith, and many Islamic theocracies consider this apostasy a capital offense.

¹² See Dan Bilefsky, *Denmark Is Unlikely Front in Islam-West Culture War*, N.Y. TIMES, Jan. 8, 2006, § 1, at 3.

¹³ *Id.* Many commentators have noted that the cartoons are relatively “uninteresting.” See, e.g., Anver M. Emon, *On the Pope, Cartoons, and Apostates: Shari’a 2006*, 22 J.L. & RELIGION 303, 308 (2006). Whether this sentiment belies a lack of sensitivity to the Muslim world is a question unto itself and, unfortunately, can only be dealt with tangentially in this Article.

¹⁴ Arabic newspapers provided fuel for the fire by printing cartoons in the Arab world that were far more offensive than those that originally appeared in the Danish newspaper. See Lorenzo Vidino, *Creating Outrage: Meet the Imam Behind the Cartoon Overreaction*, NAT’L REV. ONLINE, Feb. 6, 2006, <http://www.nationalreview.com/comment/vidino200602060735.asp>.

¹⁵ See Anthony Shadid & Kevin Sullivan, *Anatomy of the Cartoon Protest Movement*, WASH. POST, Feb. 16, 2006, at A1. The reason for the strong reaction in the Muslim world is the deeply-held belief in Islam that any depiction of Muhammad is blasphemous. See *id.*

riots.¹⁶ The backlash extended beyond violence and resulted in significant political and economic ramifications for the small country of Denmark.¹⁷

In response—undoubtedly to the immense political pressure and worldwide violence—the United Nations Human Rights Council passed a resolution to combat the “defamation of religion.”¹⁸ The Human Rights Council had previously passed several versions of the resolution over the objection of non-Muslim countries, though it garnered little publicity presumably due to the lack of a flashpoint to bring it attention. The resolution passed in 2006 drew upon reports offered by two Special Rapporteurs, who studied the situation from two distinct perspectives based upon their defined specialties.¹⁹ The Rapporteurs reached different conclusions as to the nature of the discrimination experienced by Muslims.²⁰

The controversy demonstrates a conflict between two different philosophies regarding the relative value of the rights at stake, namely, the right to free expression embodied in the printing of the cartoons and the 2006 Resolution’s attempt to create a new right to be free from hearing or viewing defamatory statements about one’s religion. Significantly, the international community supporting these provisions attempts to divine this alleged new right from the well-established religious liberty

¹⁶ Nigeria experienced over 100 deaths alone. Lydia Polgreen, *Nigeria Counts 100 Deaths over Danish Caricatures*, N.Y. TIMES, Feb. 24, 2006, at A8.

¹⁷ See Shadid & Sullivan, *supra* note 15; Vidino, *supra* note 14. The Islamic rage related to the Danish cartoons reappeared in the “Teddy Bear Controversy” two years later. See, e.g., Jeffrey Gettleman, *Hundreds of Sudanese Demand Execution of British Teacher*, N.Y. TIMES, Dec. 1, 2007, at A6. In that case, a British teacher, Gillian Gibbons, teaching in Sudan, allowed her class to name a teddy bear after a popular child in the classroom whose name was Muhammad. Ms. Gibbons was sentenced to fifteen days in jail for her offense, although under Sudanese law the maximum penalty is six months incarceration and forty lashes. *Id.*

¹⁸ Combating Defamation of Religions, G.A. Res. 61/164, U.N. Doc. A/RES/61/164 (Dec. 19, 2006) [hereinafter 2006 Resolution]; see also U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Human Rights, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, ¶ 4, U.N. Doc. E/CN.4/2005/18/Add.4 (Dec. 13, 2004) (prepared by Doudou Diene) [hereinafter ECOSOC Report on All Forms of Discrimination].

¹⁹ See David Keane, *Addressing the Aggravated Meeting Points of Race and Religion*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 367, 394–95 (2006) (discussing the Special Rapporteur reports in the context of the Danish cartoon controversy).

²⁰ See *id.* at 395–97.

rights provisions already recognized by a majority of the international community at large.

This Article contends that the U.N.'s response to the outcry over the Danish cartoons continues to mistake the extent to which human dignity warrants its conclusion.²¹ In fact, the U.N.'s response has the opposite effect of inhibiting the full expression of human dignity by taking an overly paternalistic response in contravention of what human dignity demands.²² A legal scheme that emphasizes greater protection of free speech in this delicate balance adequately protects the normative values stemming from principles of human dignity. Furthermore, the potential effect of implementing defamation of religion legislation domestically would be to drastically impinge on other, well-established human rights, creating the opposite effect that the resolutions intended.

Part I of this Article examines the Danish cartoon controversy in more detail and attempts to identify the values that came into such harsh conflict. Part II examines the structure of the U.N. prior to the controversy, specifically the committees and the commissions created to focus on religious liberties, and it identifies the governing principles in place at the time of the publications. Part II also examines the U.N.'s response to the controversy and the new dynamic achieved by the 2006 Resolution.²³ Part III contrasts the U.N.'s response with the American dynamic, which is an example of a "free speech model." Part IV argues that the 2006 Resolution functions to undermine the concept of human dignity that it professes to

²¹ It is important to note that this Article *does not* seek to answer an altogether different question: Should the newspaper have published the cartoons as a matter of morality? This Article is only concerned with the legal framework that the U.N. has attempted to institute and whether the scheme protects human dignity better than the American legal system in the context of "defamatory" editorials aimed at religious entities. It is not concerned with whether, as a matter of individual or group ethics, these statements should be made, just whether the statements should be allowed.

²² This is not meant to suggest that a response was not warranted. The incredible outcry and extreme violence that shook much of Europe and the Arab world would certainly legitimize some sort of international response.

²³ Throughout this Article, the term "Defamation Resolutions" will be used to refer to all of the defamation of religion resolutions passed by the United Nations. References to the 2006 Resolution will refer specifically to the version passed in 2006, which has particular significance due to the context in which it was passed, although the actual provision does not differ from previous versions. See *infra* notes 50–53 and accompanying text and Part II.B.2.

protect. Finally, Part IV argues that the 2006 Resolution is dangerously vague and has the practical effect of impinging other human rights in its enforcement. Accordingly, despite its alleged shortcomings, a system that seeks to protect free expression to a greater degree, like the American system, is more philosophically consistent with the normative values of human dignity underpinning international human rights than the 2006 Resolution.

I. THE DANISH CARTOON CONTROVERSY

As Muslim countries have gained exposure to other cultures in modern society, they have come increasingly into conflict with Western countries, often with bitter results.²⁴ This tension stems from many sources, which will be discussed further below, and often erupts into violence or leads to racism from both sides. This became the most evident in the recent controversy surrounding the publication of satirical cartoons in the Danish newspaper, *Jyllands-Posten*; though, the incident hardly marks the first time the Muslim world reacted to allegedly blasphemous words and images.²⁵

In 2005, *Jyllands-Posten* printed a series of cartoons featuring images of the prophet Muhammad. The cartoons depicting Muhammad are “rather uninteresting” to American eyes.²⁶ One American newspaper source described the cartoons as “tame to the point of dullness, especially compared to the biting editorial cartoons that routinely appear in [U.S.] and European newspapers.”²⁷ Most of the cartoons simply depicted

²⁴ The underlying reasons for this tension are beyond the scope of this Article. What remains clear, however, is that a significant amount of the backlash is directly attributable to the lack of basic understanding in the West of Islamic culture and jurisprudence. See TARIQ RAMADAN, *WESTERN MUSLIMS AND THE FUTURE OF ISLAM* 31 (2004) (“[The misunderstanding of Shari’a] has reached the extent that many Muslim intellectuals do not dare even to refer to the concept for fear of frightening people or arousing suspicion of all their work by the mere mention of the word.”).

²⁵ See Peter Goodspeed, *Orchestrated ‘Clash of Civilizations’: Global Protests Were Anything but Spontaneous*, NAT’L POST (Can.), Feb. 9, 2006, at A12 (discussing previous conflicts between politically Muslim countries and the West); Shadid & Sullivan, *supra* note 15. Other incidents include, most prominently, the *fatwah* leveled against British author, Salman Rushdie, in 1989 for blasphemy due to his book *The Satanic Verses*. See Mouhajjer, *Islam Was Made to Govern*, MIDDLE E. DEF. NEWS, Dec. 11, 1989.

²⁶ Emon, *supra* note 13.

²⁷ Jeff Jacoby, *We Are All Danes Now*, BOSTON GLOBE, Feb. 5, 2006, at E11. Jacoby goes on to condemn the protests over the cartoons in unequivocal terms. *Id.*

Muhammad in various caricatures, with the most inflammatory cartoon depicting Muhammad with a turban shaped as a bomb.²⁸ Most commentaries in the United States expressed confusion as to the reaction, which would seemingly be viewed as a simple expression of free speech at home.

Muslims in Europe and around the world took deep offense to the publication. Initially, the reaction in Europe was somewhat muted, with small, relatively uneventful protests dotting the landscape.²⁹ However, the Muslim world quickly erupted as they became exposed to the cartoons on regional television and newspapers.³⁰ Soon, protests ignited all over the globe as Muslims expressed their sense of outrage at the perceived indignity of the cartoons. Tens of thousands of Muslims protested and engaged in massive rioting, torching embassies and other government buildings, and violent reprisal against police, which resulted in over 100 deaths worldwide,

However, Jacoby fails, like so many other public commentaries on the issue, to emphasize that his opinions apply to a small segment of the Muslim population, namely radical Islamists. This backlash has become a significant problem in many areas and serves to stunt mature, intellectual discussion of the problem.

²⁸ See Kareem Fahim, *More than 1,000 Protest Cartoon Depiction of Prophet*, N.Y. TIMES, Feb. 18, 2006, at B3.

²⁹ In fact, the controversy did not take great hold until several European newspapers reprinted the cartoons several months later. See Carlotta Gall & Craig S. Smith, *Muslim Protests Against Cartoons Spread*, N.Y. TIMES, Feb. 7, 2006, at A8 (describing the increasing tension and violence in the weeks following the republication).

³⁰ It should be noted that Muslim religious leaders were largely responsible for inciting this reaction in the Arab world. It is well documented that Muslim leaders drafted additional cartoons, amounting to at least sixty in total, for distribution throughout their countries. It is readily apparent that they intentionally exacerbated the controversy to stir up a harsh Muslim reaction.

Danish Imams initially led the charge by creating a dossier to be circulated throughout the Arab world. The aim was to demonstrate the culture of Islamophobia that existed in England. See Martin Asser, *What the Muhammad Cartoons Portray*, BBC NEWS, Feb. 9, 2006, http://news.bbc.co.uk/2/hi/middle_east/4693292.stm. In particular, the Imams circulated three additional images. *Id.* One image was of a man wearing a pig mask and was presented under the auspices of a Western depiction of Muhammed. *Id.*

Furthermore, there is evidence that Muslim nations take measures to blaspheme other cultures and religious traditions, particularly Judaism. For example, in response to the controversy, Iran held an art exhibition featuring exclusively anti-Jewish art, entitled the "Holocaust International Cartoon Contest." See Michael Slackman, *Iran Exhibits Anti-Jewish Art as Reply to Danish Cartoons*, N.Y. TIMES, Aug. 25, 2006, at A8. This hypocrisy is at the heart of the controversy about whether a universal human right or ethic can even be created and will be discussed below.

including a number of children and teenagers.³¹ The political fallout included the boycott of Danish goods, the removal of diplomats, and a rebuke from the E.U.³² The outrage was largely directed at Europe, specifically Christian populations, and continued for months. Although this Article is two and one half years removed from the initial publication, the controversy still simmers and reappears regularly. As recently as January 2008, three Muslim militants were arrested in Denmark for plotting to kill Kurt Westergaard, the artist responsible for the most controversial cartoon.³³ In response, seventeen Danish newspapers reprinted the cartoons three weeks later.³⁴ Most recently, Osama bin Laden referenced the cartoon controversy as a rallying cry for Muslim extremists.³⁵

The newspaper that initially printed the cartoons, and specifically the cultural editor, Flemming Rose, actually solicited the depictions in September 2005.³⁶ Rose came up with the contest after hearing that Danish writer Kare Bluitgen could not find artists willing to illustrate a children's book about Muhammad because they feared violent reprisal from Muslim communities.³⁷ He stated that while he knew that Islam prohibited the depictions of Muhammad, he certainly did not

³¹ See Griff Witte & Ellen Nakashima, *Cartoon Protests Stoke Anti-American Mood*, WASH. POST, Feb. 7, 2006, at A15 (discussing attacks on embassies in Afghanistan and around the world); *15 Killed in Nigerian Cartoon Protests*, MSNBC NEWS, Feb. 18, 2006, <http://www.msnbc.msn.com/id/11383819> ("Nigerian Muslims protesting caricatures of the Prophet Muhammad attacked Christians and burned churches . . . killing at least 15 people . . ."); *Muslim Cartoon Fury Claims Lives*, BBC NEWS, Feb. 6, 2006, http://news.bbc.co.uk/2/hi/south_asia/4684652.stm (reporting that five were killed in Afghanistan and a teenage boy was killed in Somalia).

³² See Fahim, *supra* note 28; Gall & Smith, *supra* note 29.

³³ See Agence France-Presse, *Denmark: Papers Reprint Muhammad Cartoon*, N.Y. TIMES, Feb. 14, 2008, at A12.

³⁴ See *id.*

³⁵ To mark the fifth anniversary of the war in Iraq, Osama bin Laden released a tape in which he discusses the Danish cartoon controversy. Specifically, bin Laden stated that Europe would be punished for the cartoons. See Philip Pullella, *Vatican Rejects bin Laden's "New Crusade" Charges*, REUTERS, Mar. 20, 2008, <http://www.reuters.com/article/worldNews/idUSL2043585320080320?feedType=RSS&feedName=worldNews&rpc=22&sp=true>.

³⁶ See Dan Bilefsky, *Danish Cartoon Editor on Indefinite Leave*, N.Y. TIMES, Feb. 11, 2006, at A5. Rose invited twenty-five cartoonists to create pictures of Muhammad "how they saw him." *Id.* Twelve cartoonists responded. See *id.*

³⁷ See *id.*

expect the reaction that followed.³⁸ According to Rose, his decision to publish the cartoons had nothing to do with latent prejudice, racism, or religious insensitivity:

Equal treatment is the democratic way to overcome traditional barriers of blood and soil for newcomers. To me, that means treating immigrants just as I would any other Danes Those images in no way exceeded the bounds of taste, satire and humor to which I would subject any other Dane, whether the queen, the head of the church or the prime minister. By treating a Muslim figure the same way that I would a Christian or Jewish icon, I was sending an important message: You are not strangers, you are here to stay, and we accept you as an integrated part of our life It was an act of inclusion, not exclusion; an act of respect and recognition.³⁹

Whether Rose is genuine in his statement, his “equal opportunity offender” approach did not find traction or legitimacy in Muslim eyes. Rose, however, has found at least modest support in his home country, with several news organizations expressing solidarity with him by reprinting the cartoons, sparking new hostilities between Denmark and the Muslim community.⁴⁰

The outrage from the Muslim community stems from its religious belief that depictions of Muhammad are blasphemous. As the reaction to the cartoons indicates, this belief is a deeply held conviction, and the publication of the cartoons was seen as a severe insult for which the newspaper had to pay.⁴¹ To make matters worse, Denmark is a small country steeped in a long

³⁸ See *id.*

³⁹ Flemming Rose, Op-Ed., *Why I Published the Muhammad Cartoons*, N.Y.TIMES.COM, May 31, 2006, http://www.nytimes.com/2006/05/31/world/europe/31spiegel.html?pagewanted=1&_r=1&sq=why%20i%20published%20the%20muhammad%20cartoons&st=cse&scp=1.

⁴⁰ See Michael Kimmelman, *Outrage at Cartoons Still Tests the Danes*, N.Y. TIMES, Mar. 20, 2008, at E1 (interviewing Kurt Westergaard, the cartoonist who drew the image of Muhammad with a bomb in his turban, about his life in hiding in Denmark).

⁴¹ See *Protesters Burn Consulate over Cartoons*, CNN.COM, Feb. 5, 2006, <http://www.cnn.com/2006/WORLD/asiapcf/02/05/cartoon.protests/index.html>. It should be noted that Iran reacted very publicly to the controversy by displaying an art exhibit entitled “Holocaust International Cartoon Contest” in Tehran that featured over 200 cartoons satirizing members of the Jewish faith. See Slackman, *supra* note 30. Iran’s President Mahmoud Ahmadinejad claimed that his intent was to expose Western hypocrisy at condemning his denial of the Holocaust while supporting the publication of the Danish cartoons. See *id.*

tradition of cultural homogeneity and is perceived as being unforgiving to foreigners, particularly immigrants.⁴² These tensions, be they racial, ethnic, or religious, also had been previously exacerbated by Pope Benedict XVI's proclamation that Europe and Christianity share a common identity.⁴³

Another significant factor contributing to Muslim indignation is the Danish government's response to the controversy. After the publication, the Muslim community called upon the government to assess civil and criminal penalties against the newspaper and its editors. Denmark's criminal code includes two relevant provisions criminalizing both hate speech and blasphemy. The hate speech law makes it a crime for "[a]ny person [to] . . . persecute[] or incite[] hatred against any group of the Danish population because of its creed, race or nationality."⁴⁴ Denmark's blasphemy law criminalized actions by "[a]ny person who exposes to ridicule or insults the dogmas or worship of any lawfully existing religious community."⁴⁵

The public prosecutor assigned to investigate the case concluded that based upon these provisions, no criminal behavior had occurred.⁴⁶ The prosecutor stated that the publication

⁴² See Lauren Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 14 COLUM. J. EUR. L. 99, 129–30 (2008) (discussing the cartoon controversy and Denmark's welfare system and the resulting hostility toward Muslim immigrants).

⁴³ Benedict XVI, Meeting with the Representatives of Science at the University of Regensburg: Faith, Reason, and the University (Sept. 12, 2006), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html. Particularly controversial was Pope Benedict's reference to Emperor Manuel II Paleologous, a medieval Byzantine Emperor, who stated: "Show me just what Mohammed brought that was new, and there you will find things only evil and inhuman . . ." *Id.* The Pope was met with protests for his statement, perceived to be religiously insensitive, despite his insistence that he did not share the Emperor's view. See *Christian Leader Joins Muslims in Denouncing Pope's Remarks*, FOXNEWS.COM, Sept. 16, 2006, <http://www.foxnews.com/story/0,2933,214167,00.html>.

⁴⁴ BORGERLIG STRAFFELOV § 266b, translated in Danish Criminal Code § 266b (G.E.C. Gad, 1958).

⁴⁵ *Id.* § 140.

⁴⁶ See Ministry of Foreign Affairs of Denmark, Response by the Danish Government to Letter of 24 November 2005 from UN Special Rapporteur on Freedom of Religion or Belief, Ms. Asma Jahangir, and UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Doudou Diène, Regarding Cartoons Representing the Prophet Mohammed Published in a Newspaper 2 (Jan. 23, 2006), available at <http://www.um.dk/NR/rdonlyres/00D9E6F7-32DC-4C5A-8E24-F0C96E813C06/0/060123final.pdf>.

concerned an incident of public interest.⁴⁷ Where a publication concerns some public interest, journalists have more editorial freedom.⁴⁸ This proclamation infuriated Muslims in Denmark who felt that although the government provided statutory protections for incidents such as this, the public dismissal of any charges represented a patent hostility toward the Muslim community.⁴⁹

II. UNITED NATIONS STRUCTURE AND RESPONSE

In response to the protests around the world stemming from the cartoon controversy, the United Nations Human Rights Council in 2006 quickly debated and passed a nonbinding resolution condemning the “defamation of religion.”⁵⁰ The Resolution urges participant countries to pass legislation that would protect religious groups from being exposed to defamatory words and images.⁵¹ This Resolution does not represent the first foray into the “defamation of religion” field, as the U.N. has debated this phenomenon since 1999 and issued periodic resolutions tracking the same language.⁵² The 2006 Resolution was adopted by a vote of twenty-four to fourteen with nine abstentions and mentions no religion other than Islam, a clear indication that the Council was concerned with the rise of

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Richard N. Winfield, *An Editorial Controversy Metastasizing: Denmark's Hate Speech Laws*, 24 COMM. LAW. 35, 35–36 (2006).

⁵⁰ See generally 2006 Resolution, *supra* note 18.

⁵¹ *Id.* The 2006 Resolution urges member states to provide protection against “acts of hatred, discrimination, intimidation and coercion resulting from defamation of religions.” *Id.* ¶ 10. The provision further urges states to “complement legal systems with intellectual and moral strategies to combat religious hatred and intolerance.” *Id.* Given its passage shortly after the cartoon controversy, it is safe to assume that the U.N. intended that these provisions cover these types of publications. Specifically, it appears that the U.N. is urging its member states to criminalize publications that would offend a religious believer on the basis of his beliefs and therefore, criminalize the action taken by the Danish newspaper. Evidently, the provisions in place in Denmark simply did not protect religious minorities sufficiently in the eyes of the Human Rights Council.

It should also be noted that the second phrase that advocates for moral strategies to combat religious hatred should undoubtedly be acceptable to nearly all countries. This provision is not objectionable to the premise of this Article. However, the prior phrase presents problems, which are discussed below.

⁵² See U.N. Econ. & Soc. Council [ECOSOC], *Combating Defamation of Religions*, at 56, U.N. Doc. E/2002/23-E/CN.4/2002/200 (Apr. 15, 2002).

Islamaphobia.⁵³ To fully understand this response, one must examine United Nations materials, including the various U.N. bodies and documents relating to the development of the defamation of religion principle.

A. *United Nations Background*

In 1945, the United Nations was founded by fifty-one countries “committed to preserving peace through international cooperation.”⁵⁴ Currently, the United Nations comprises 192 member countries, nearly every nation in the world.⁵⁵ The United Nations Charter, which formally established the U.N., identifies the fundamental aims for the organization including promoting social progress, and most importantly for this Article’s purposes, to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person.”⁵⁶ The U.N. accomplishes this aim through the cooperation of member states on various committees. While some U.N. documents, such as international treaties, are binding upon the member states who sign them, many of the U.N. provisions are nonbinding. These nonbinding resolutions urge states to take legal and legislative action domestically to ensure the protection of the relevant rights and are often preferable for countries precisely because they do not require action.⁵⁷ However, many argue that failing to adopt nonbinding resolutions domestically has significant political consequences over time, and some consider the provisions to constitute bona fide international law that defines the obligations of member states by virtue of their membership.⁵⁸

⁵³ See *How the Islamic States Dominate the UN Human Rights Council*, INT’L HUMANIST & ETHICAL UNION, Apr. 2, 2007, <http://www.iheu.org/node/2546>. One of the major criticisms of the Human Rights Council’s predecessor, also symptomatic of its predecessor, the Commission on Human Rights, is that the Council is dominated by bloc-based voting. Accordingly, many of these votes can be predictable, yielding what some commentators describe as international norms supported primarily by non-democratic regimes. See Posting of Ilya Somin to The Volokh Conspiracy, <http://www.volokh.com/posts/1207205558.shtml> (Apr. 3, 2008, 02:52 EST). United Nations, UN in Brief (2000),

⁵⁴ UNITED NATIONS, UN IN BRIEF (2000), http://www.un.org/Overview/uninbrief/chapter1_intro.html

⁵⁵ *Id.*

⁵⁶ U.N. Charter pmbl.

⁵⁷ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 301 reporters’ notes 2 (discussing the effect of nonbinding international documents).

⁵⁸ See generally 44B AM. JUR. 2D INTERNATIONAL LAW § 7 (2008) (discussing the force and effect of international law).

1. Creating a Human Rights Framework

One of the major initiatives of the U.N. is to ensure the protection of human rights for citizens across the globe. The first document proclaiming the primacy of human rights is the United Nations Declaration on Human Rights, published in 1948.⁵⁹ The General Assembly, the general body where all member states are represented in a parliamentary fashion, passed the Declaration by a vote of forty-eight to zero, with eight abstentions.⁶⁰ For this Article's purposes, the most important provision appears in article 18:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.⁶¹

This sweeping statement laid the groundwork for the myriad of international covenants, declarations, and protocols that have attempted to clarify the exact meaning of this passage. However, its broad language does not permit an easy interpretation, particularly when considered against the grand scope of the U.N. experiment. The very fact that several countries abstained from voting to pass the resolution in the General Assembly speaks volumes to the varying perspectives from which countries approach the problem. Upon the passage of the Declaration, the U.N. was prepared to turn to deliberation on implementation measures.

2. Organizational Structure

The main human rights body responsible for review and implementation of human rights norms is the United Nations Human Rights Council, a charter-based body. The General Assembly created the Human Rights Council in 2006 to replace the oft-criticized United Nations Commission on Human Rights.⁶²

⁵⁹ UDHR, *supra* note 3.

⁶⁰ United Nations Ass'n in Can., *supra* note 1. The eight abstentions are comprised of the Soviet bloc and Saudi Arabia. Saudi Arabia's abstention from this declaration, and many other similar U.N. resolutions, will be discussed extensively below and provides a good example of the tension between Muslim theocracies and other secular political systems.

⁶¹ UDHR, *supra* note 3.

⁶² G.A. Res. 60/251 ¶¶ 1, 5(g), U.N. Doc. A/RES/60/251 (Mar. 15, 2006).

The Human Rights Council is a subsidiary body of the General Assembly composed of forty-seven members.⁶³ The principal human rights official in the United Nations is the High Commissioner for Human Rights, who leads the Office of the United Nations High Commissioner for Human Rights (“OHCHR”). The OHCHR “spearheads the United Nations’ human rights efforts.”⁶⁴

The Human Rights Council is both a deliberative and actionable body.⁶⁵ One main function of the Council is to provide recommended human rights resolutions to the General Assembly to be voted on by the entire U.N. membership. The Council is also authorized to monitor human rights violations across the globe and to provide reports to the General Assembly. Special procedures have been established to effectuate the Council’s monitoring function.⁶⁶ The mechanism for such monitoring is primarily the Special Rapporteurs who are selected for their expertise in a given field.⁶⁷ Special Rapporteurs are appointed by the Human Rights Council and have a specific mandate to investigate and monitor human rights compliance and

⁶³ This number is reduced from the membership of fifty-three in the defunct Commission on Human Rights. One of the biggest criticisms of the Commission of Human Rights was the inability to keep human rights abusers off the council itself. However, disbanding the Commission and replacing it with the Human Rights Council has done little to alleviate criticisms of bias, most notably by levying allegations solely against Israel. Jackson Diehl, Editorial, *A Shadow on the Human Rights Movement*, WASH. POST, June 25, 2007, at A19.

⁶⁴ Office of the High Comm’r for Human Rights, United Nations, *Who We Are*, <http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx> (last visited Jan. 10, 2009).

⁶⁵ For example, the HRC is charged with promulgating human rights norms by engaging in debate and deliberation. The Human Rights Council is also responsible for monitoring compliance with human rights treaties and recommending action to the General Assembly. See Office of the High Comm’r for Human Rights, United Nations, *The Human Rights Council*, <http://www2.ohchr.org/english/bodies/hrcouncil> (last visited Sept. 12, 2008).

⁶⁶ Office of the High Comm’r for Human Rights, United Nations, *Special Procedures of the Human Rights Council*, <http://www2.ohchr.org/english/bodies/chr/special/index.htm> (last visited Sept. 7, 2008).

⁶⁷ Two Special Rapporteurs have importance for our purposes: the Special Rapporteur on Freedom of Religion or Belief and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance. As the names indicate, the Special Rapporteurs are divided into very thematic areas and are considered experts in very narrow fields. Most Special Rapporteurs receive information concerning allegations of human rights abuses and send urgent appeals to the government demanding clarification. In 2007, over 1,000 letters were sent to 128 countries. *Id.*

recommend solutions to human rights problems to the Council. Alternatively, the Council can create a working group to monitor compliance, as opposed to the Special Rapporteurs who operate individually.

In addition to the Human Rights Council, the U.N. contains several bodies whose tasks are to implement and monitor compliance with human rights treaties.⁶⁸ Unlike the Council, these bodies are only concerned with monitoring compliance based on the seven core human rights treaties.⁶⁹

3. Implementation

While the provisions mentioned above created the philosophical framework against which human rights would be understood in the international context, the U.N. has grappled with its implementation through the aforementioned bodies. The General Assembly has continued to issue proclamations and covenants, further defining the broad language of the Declaration and establishing norms for implementation.⁷⁰ There are essentially two U.N. documents that provide protection for the freedom of religion and belief: *The International Covenant on Civil and Political Rights* (“ICCPR”)⁷¹ and the *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Belief* (“1981 Resolution”).⁷²

⁶⁸ These include the Human Rights Committee; the Committee on Economic, Social, and Cultural Rights; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination Against Women; the Committee Against Torture; the Committee on the Rights of the Child; and the Committee on Migrant Workers. Information on all of the bodies is available at Office of the High Commissioner for Human Rights, United Nations, Human Rights Bodies, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Sept. 7, 2008).

⁶⁹ *Id.*

⁷⁰ See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX), at 47, U.N. Doc. A/2106/Annex (Dec. 21, 1965) (“Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein . . .” (emphasis omitted)); UDHR, *supra* note 3, at 71 (recognizing “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”).

⁷¹ ICCPR, *supra* note 5.

⁷² Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 25, 1981) [hereinafter 1981 Resolution].

The ICCPR specifically identifies the notion of defamation against groups generally and only marginally mentions religious-based defamation. The operative provision provides that “[e]veryone shall have the right to hold opinions without interference.”⁷³ Perhaps more importantly, the ICCPR provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The exercise of the[se] rights . . . carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security . . . or of public health or morals.⁷⁴

This approach appears similar to the American approach to free speech in that it seeks to protect, to the fullest extent possible, the right to free expression, provided it does not impinge upon the rights of others.⁷⁵ While in the United States there is no explicit provision providing protection for the listener to seek information, the ICCPR statement that everyone has “the right to freedom of expression”⁷⁶ and its brief explanation is strikingly similar to the American approach, though defined differently.⁷⁷

The ICCPR does not specifically target defamation of religion as an operative “carve-out” for protection. However, article 20, which places two important limitations on the right to free expression apart from the catch-all provisions, states: “Any advocacy of national, racial or *religious hatred* that constitutes *incitement* to discrimination, hostility or violence *shall be prohibited by law*.”⁷⁸ Thus, the ICCPR contains an implicit

⁷³ ICCPR, *supra* note 5, art. 19(1).

⁷⁴ *Id.* art. 19(2)–(3).

⁷⁵ *See infra* Part III.

⁷⁶ ICCPR, *supra* note 5, art. 19(2).

⁷⁷ *Compare id.* (“Everyone shall have the right to freedom of expression . . .”), with U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”). The U.N. takes a “positive rights” approach whereas the United States takes a “negative rights” approach. What is remarkable about the U.N. formulation is that when considered alongside the provision prohibiting abridgment except under certain highly specific situations, the result appears analogous.

⁷⁸ ICCPR, *supra* note 5, art. 20(2) (emphases added).

tension between the right to free expression and the necessity of curtailing this right when religious hostility will be created. Furthermore, the ICCPR provides an *individual* with the right to free expression—both in expressing and receiving other’s expression—while seemingly offering group protection against these rights.⁷⁹

The 1981 Resolution identifies several protections afforded by religious liberties in much more explicit detail than the ICCPR. This Resolution begins by explicitly stating that everyone has the “right to freedom of thought, conscience and religion.”⁸⁰ It goes further to identify associated rights and obligations, including the freedom to manifest one’s belief in public and private,⁸¹ freedom from coercion,⁸² and freedom from discrimination based on religious belief.⁸³ Significantly, the 1981 Resolution explicitly states that these rights and negative freedoms stem from the principle of human dignity. It states in relevant part:

Discrimination between human beings on the grounds of religion or belief *constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations*, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.⁸⁴

This provision indicates the philosophical continuity with the U.N.’s previous declarations and underscores the foundational role that human dignity plays in these international documents. The 1981 Resolution makes clear that the U.N. defines the rights and obligations found within its documents with reference to the fundamental notion of human dignity enshrined in the UDHR.

⁷⁹ See, e.g., Karen Eltis, *Genetic Determinism and Discrimination: A Call To Re-Orient Prevailing Human Rights Discourse To Better Comport with the Public Implications of Individual Genetic Testing*, 35 J.L. MED. & ETHICS 282, 284 (2007) (noting that the Canadian Constitution is modeled after the ICCPR and focuses upon individual rather than collective rights).

⁸⁰ 1981 Resolution, *supra* note 72, art. 1(1).

⁸¹ *Id.*

⁸² *Id.* art. 1(2).

⁸³ *Id.* art. 2(1).

⁸⁴ *Id.* art. 3 (emphasis added).

4. Human Dignity Rationale

The United Nations Charter enshrines this notion of human dignity upon which international law is built: “We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, *in the dignity and worth of the human person . . .*”⁸⁵ The UDHR reflects this principle at several points in the preamble:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world

. . . .

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom⁸⁶

Article 1 goes even further and states that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁸⁷ Thus, the formative documents of the United Nations espouse an individual ethic grounded entirely in the inherent dignity of the human person. However, the UDHR seemingly leaves for another day the definition of human dignity. Most likely, the drafters intentionally refrained from defining the term to allow subsequent documents and developments to define its contours, notwithstanding the question as to whether it can even be defined.⁸⁸

Subsequent U.N. documents and resolutions also reflect this ethical framework. For example, the ICCPR explicitly references the United Nations Charter in identifying its philosophical basis in the preamble: “*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the

⁸⁵ U.N. Charter pmb. (emphasis added).

⁸⁶ UDHR, *supra* note 3, at 72.

⁸⁷ *Id.* art. 1.

⁸⁸ See, e.g., Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 534 (2003) (recognizing the difficulty in defining human dignity).

foundation of freedom, justice and peace in the world.”⁸⁹ Similarly, the 1981 Resolution notes that any violation of its provisions amounts to an affront of human dignity and is, therefore, a violation of fundamental human rights.⁹⁰ It is clear that the United Nations has consistently defined human rights with reference to human dignity.

This reliance upon the human dignity rationale stems from the nature of the United Nations venture. In essence, it is the only way to identify a truly “universal” set of human rights that all cultures can agree upon and in which all can find some common elements.⁹¹ The inherent problem in identifying universal values is that one necessarily begins to assert his or her values upon another culture. By relying on human dignity, the U.N. has effectively reduced the analysis to a baseline level which all can provisionally agree upon.⁹² In other words, the U.N. successfully drafted its formative documents based upon broad, largely undefined principles that member countries did not disagree with on a philosophical level at the very outset, given the open-ended nature of the definition.

B. *Defamation of Religion Provisions*

1. Prior Provisions

In 1999, Pakistan authored a proposed resolution for the Commission of Human Rights—the predecessor to the Human Rights Council—entitled *Defamation of Islam*.⁹³ The proposal

⁸⁹ ICCPR, *supra* note 5, at 52–53.

⁹⁰ See 1981 Resolution, *supra* note 72, art. 3; *supra* notes 59–61 and accompanying text.

⁹¹ The obvious counter to this observation is that not all countries are willing to sign various United Nations documents. This clearly demonstrates the significant challenges that arise in attempting to identify universal, cross-cultural values. Whether a truly universal ethic, on any subject matter at all, is even possible is beyond the scope of this Article.

⁹² This much is evidenced by the initial vote for the UDHR of forty-eight to zero. See *supra* note 60 and accompanying text. While eight countries abstained, all were members of the Soviet bloc, allowing geopolitical forces to play a role. See *supra* note 60 and accompanying text. Jacques Maritain, one of the prominent authors of the UDHR, famously quipped when asked whether they had reached an agreement, stating that they had as long as they did not ask each other why. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 77 (2001).

⁹³ U.N. Econ. & Soc. Council [ECOSOC], *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination: Submitted by Pakistan, on Behalf of*

was severely criticized for highlighting only a single religion and led to the subsequent name change to *Defamation of Religion*.⁹⁴ The resolution was passed in August 1999 and a new resolution was subsequently adopted in each of the following years, tracking the same themes.⁹⁵ In 2002, the Commission on Human Rights passed a slightly different resolution entitled *Combating Defamation of Religions*.⁹⁶ In this newer version, the document specifically singles out Islam as a religious tradition that has experienced significant backlash.⁹⁷ It is not difficult to ascertain that this slightly stronger document was pushed through in the aftermath of the events of September 11, 2001 in the United States.⁹⁸ In fact, the Special Rapporteur noted to the Commission a rise in “Islamaphobia” in the West.⁹⁹

2. “Defamation of Religion” 2006

The Commission on Human Rights and, subsequently, the Human Rights Council have successfully passed resolutions every year since the 1999 Resolution, with subtle name changes and slightly altered provisions.¹⁰⁰ These resolutions went largely unnoticed in the international community, most likely because

the States Members of the United Nations That Are Members of the Organization of the Islamic Conference, U.N. Doc E/CN.4/1999/L.40 (Apr. 20, 1999).

⁹⁴ See Press Release, United Nations, IPI Worried by Use of “Defamation of Religions” Phrase in Int’l Statements, Fears It May Encourage Media Persecution (Sept. 29, 2006).

⁹⁵ See *id.*

⁹⁶ G.A. Res. 2002/9, U.N. Doc. E/CN.4/2002/200 (Apr. 15, 2002).

⁹⁷ *Id.* ¶¶ 2–3, 7.

⁹⁸ Human Rights Council, *Implementation of General Assembly Resolution 60/1251 of 15 March 2006 Entitled “Human Rights Council”: Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, further to Human Rights Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance*, ¶ 7, U.N. Doc. A/HRC/2/3 (Sept. 20, 2006) (submitted by Asma Jahangir & Doudou Diène). The Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène noted that racism is a serious threat to democracy due to the centrality of the amalgamation of the factors of race, culture, and religion in the post-9/11 ideological atmosphere of intolerance and polarization. *Id.*

⁹⁹ ECOSOC Report on All Forms of Discrimination, *supra* note 18, ¶¶ 2, 16.

¹⁰⁰ The names of the various resolutions began as “Defamation of Religions.” Subsequent versions included “Combating Defamation of Religions as a Means To Promote Human Rights, Social Harmony and Religious and Cultural Diversity” and ultimately, “Combating Defamation of Religions.” See *supra* notes 93–95 and accompanying text.

they are nonbinding and the product of two U.N. bodies that have been strongly criticized by Western democracies.¹⁰¹ With the exception of scattered interest groups, the resolutions were passed with almost no fanfare. In 2006, the Human Rights Commission once again passed the resolution entitled, as before, *Combating Defamation of Religions*.¹⁰² However, this resolution took on increased significance in light of the worldwide violence stemming from the Danish cartoons and the resulting confusion by many non-Muslims in the aftermath that simply could not comprehend the reaction.¹⁰³

So what has changed from 1999 to 2006? First, as mentioned just above, the context. To many sensibilities, it would seem natural that the Muslim world would push the U.N. to adopt protective measures in light of the rise of the small number of visible, fundamental Islamicists, such that they would not experience a similar backlash that inevitably would follow. Secondly, the increasing number of member countries that support these resolutions, coupled with the repeated passage of the resolutions, serves to legitimize the otherwise nonbinding international agreements.

The General Assembly resolutions may contain soft international law. With the passage of time and compliant state behavior, some resolutions pave the way for the formation of a multilateral treaty or customary international law. In almost all cases, these resolutions reflect the international community's

¹⁰¹ See, e.g., Jeroen Gutter, *Special Procedures and the Human Rights Council: Achievements and Challenges Ahead*, 7 HUM. RTS. L. REV. 93, 93 (2007) ("The life of the Commission on Human Rights... was turbulent and scattered with criticism...").

¹⁰² In 2005, the resolution passed by a vote of 101 to 53, with 37 non-committed states in the General Assembly. See Liaquat Ali Khan, *Combating Defamation of Religions*, MEDIA WITH CONSCIENCE, Dec. 31, 2006, <http://mwcnews.net/content/view/11529/2/1/1>. In 2006, the number of member countries voting for passage of the resolution increased from 10 to 111. *Id.* However, the number of countries who voted against the resolution actually increased by a single vote to fifty-four, while the number of non-committed countries decreased to twenty-seven. *Id.* These numbers indicate that a substantial opposition continues to exist to the defamation of religion resolutions. However, the resolutions have also received increasing support over the past year as well.

¹⁰³ Many in the West expressed their objection to this resolution in light of the reaction across the Muslim world. It should be noted, however, that a significant number of countries registered strong objections to the resolutions all along. Many of the objections in 2006 were simply renewed objections with a more definitive context.

views, which cannot be dismissed as mere opinions. These views, even when they fall short of *opinio juris*, influence multilateral relations and compose the sociology of international law.¹⁰⁴

The practical result is that the defamation of religion resolutions have taken on an increased importance in international law and international relations, despite having undergone little change.

C. *Operative Provisions*

Given the increased importance of the resolutions, what do they provide for in practical terms? First, the 2006 Resolution itself urges countries to establish measures to ensure that political institutions and other organizations do not help create an atmosphere of violence and hostility toward religious groups.¹⁰⁵ Specifically, the Resolution provides: “The Commission on Human Rights . . . [u]rges States to take resolute action to prohibit the dissemination of racist and xenophobic ideas and material aimed at any religion or its followers that constitute incitement to discrimination, hostility or violence”¹⁰⁶ The Resolution also notes that the Commission “[d]eplores the use of the print, audio-visual and electronic media, including the Internet, and any other means to incite acts of violence, xenophobia or related intolerance and discrimination against Islam or any other religion.”¹⁰⁷ These provisions are directly aimed at preventing publications such as those in Denmark.

As is evident, this obligation on the government is quite broad and rather indefinite. Given the relative novelty of these provisions taking on a major role in international relations, there is very little to draw upon to make substantive determinations as to what sort of material falls within these categories.¹⁰⁸ However, given the context and slightly increased support in 2006, it is safe to assume that at the very least the Resolution is intended to touch on controversies such as the Danish cartoons. In fact, this Resolution, coupled with others passed in the wake of the cartoon

¹⁰⁴ Khan, *supra* note 102.

¹⁰⁵ *Id.*

¹⁰⁶ 2006 Resolution, *supra* note 18, ¶ 9 (emphasis omitted).

¹⁰⁷ *Id.* ¶ 6.

¹⁰⁸ For example, the resolution does not attempt to define what constitutes “aiming” at a religion or religious group. Furthermore, the very question of what is a racist or xenophobic idea does not have a simple answer.

controversy, provides even more evidence of the HRC's intent to target these types of publications.¹⁰⁹

Ultimately, the Resolution leaves the international community at a crossroads with regard to the intersection of free speech and religious freedom.¹¹⁰ What is clear is that the U.N. has now demonstrated a willingness to curtail other freedoms identified in prior documents and resolutions in the face of religious insensitivities. The remaining question is whether this approach comports with the human dignity heritage of the U.N. and whether the practical implementation provides more security for individual human rights than the absence of any directives.

III. THE AMERICAN APPROACH

The American approach to defamation of religion is much more defined and clear than the emerging international scheme. At the outset, it is important to note that the U.S. scheme has the major advantage of being able to proscribe legally binding legislation as opposed to suggestions for countries to adopt. Additionally, the U.S. approach has two other distinct advantages: (1) a clearly defined political system as opposed to an amalgamation of political systems sitting at the same table and (2) over 225 years to develop—or adapt—a value structure underpinning the relevant provisions.

At the forefront of the American system are the First Amendment's protections concerning free expression.¹¹¹ In this context, the First Amendment's free speech protections are often viewed as being in tension with the Religion Clauses of the First Amendment.¹¹² While free speech is not necessarily given

¹⁰⁹ See, e.g., *U.N. Rights Body Condemns "Defamation" of Religion*, REUTERS, Mar. 30, 2007, <http://www.reuters.com/article/worldNews/idUSL3041411220070330>; *Free Speech Resolution Watered Down To Please Islamic States*, <http://blog.unwatch.org/?cat=9> (Mar. 28, 2006).

¹¹⁰ Compare ICCPR, *supra* note 5, art. 19(1)–(2) ("Everyone shall have the right to hold opinions without interference. . . . Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." (emphasis added)), with 2006 Resolution, *supra* note 18, ¶9 ("[P]rohibit the dissemination of racist and xenophobic ideas . . .").

¹¹¹ "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

¹¹² "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." *Id.*

primacy in the American constitutional scheme, the values enshrined in the religion clauses lend to a libertarian understanding of the relationship between free speech and religious liberties.¹¹³

In our liberal democracy, free speech guarantees are given extraordinarily high protections¹¹⁴ and are viewed as fundamental to the flourishing of our political system.¹¹⁵ A liberal democracy that encourages, and to some degree requires, participation in public discourse must have concomitant protection for the very speech that allows the democracy to flourish. The individual autonomy that free speech protects is inextricably bound with the success of a liberal democracy as it permits collective self-actualization. Robert Post noted:

Public discourse merits unique constitutional protection because it is the process through which the democratic “self,” the agent of self-government, is itself constituted through the reconciliation of individual and collective autonomy. Constitutional solicitude for public discourse, therefore, presupposes that those participating in public discourse are free and autonomous.¹¹⁶

Underlying this justification is the “free market of ideas” concept,¹¹⁷ which, in turn, presupposes that there is an intrinsic

¹¹³ Some scholars suggest that a value fundamental to the religion clauses, especially given their proximity to the free speech provisions, is that American citizens are entitled to be exposed to other religious viewpoints. In other words, the “marketplace of ideas” concept, discussed below, applies in the context of religion because it contributes to the search for truth, including religious truth. See James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1076 (2004).

¹¹⁴ Free speech holds such a high status in this country that government restrictions are scrutinized very carefully. For “content-based” restrictions where the government seeks to restrict speech based on the very content of the expression—as would be the case in restricting defamatory statements toward religion—the government restriction must pass “strict scrutiny.” See *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (applying strict scrutiny where government regulation prohibited displaying campaign materials within 100 feet of polling station on election day).

¹¹⁵ See generally Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961) (arguing that free speech is necessary in a liberal democracy).

¹¹⁶ Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1128 (1993).

¹¹⁷ This expression is attributed to Justice Holmes. Nicholas Wolfson, *A Transactional Cost Analysis of the First Amendment*, 14 GEO. MASON L. REV. 1, 25 (1991) (citing *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting)).

value in individuals being exposed to a broad range of ideas.¹¹⁸ In a pragmatic sense, a liberal democracy is built upon the principle that the citizenship ultimately retains control of the government in an indirect sense.¹¹⁹ Accordingly, without the ability to express thoughts and ideas, the citizenship literally cannot maintain any control of the government because a government that controls speech implicitly prevents active participation and grassroots development.¹²⁰ In other words, a liberal democracy will be choked off at the threshold without the free exchange of ideas that it requires for active participation and subsequent self-determination. Also, implicit in the free market of ideas is the economic justification that “truth”—whatever form it might take—is best accessible through the free market rather than state control.¹²¹

To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Abrams, 250 U.S. at 630.

¹¹⁸ This is true even if the ideas or concepts being espoused are odious and offensive to others. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”).

¹¹⁹ *See* James C. Kraska, *Global and Going Nowhere: Sustainable Development, Global Governance & Liberal Democracy*, 34 *DENV. J. INT’L L. & POLY* 247, 286 (2006) (“[A] liberal democracy include[s] . . . citizens instilled with civic virtue, effective popular control of the organs of government . . .”).

¹²⁰ *See generally* CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 241–52 (1993); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 *COLUM. L. REV.* 1635 (2005).

¹²¹ *See* Wolfson, *supra* note 117.

The normative dimension of the free market idea is simply that “[h]uman dignity depends on the freedom of the mind.”¹²² In other words, the First Amendment speech provisions protect “self-expression or autonomy interests of the individual.”¹²³ The profound implication of this statement is that “the unfettered freedom to express oneself in speech or writing, *or to listen to the same*, is essential to human dignity, creativity, and personhood.”¹²⁴ In other words, there is an identifiable, inherent good in being free to speak.¹²⁵ This strain of thought has its roots with John Stuart Mill, who claimed that freedom of speech advances the search for truth where no idea is silenced on its own merits.¹²⁶ He maintained that this search for truth was further legitimized because individuals would seek to defend their own beliefs based on the rationality of their positions, thereby reducing the concern for patently irrational beliefs coming to dominate the political landscape.¹²⁷

Despite the rather broad language that the Supreme Court has used in some cases to describe the extent of the protection afforded to speech under the First Amendment,¹²⁸ not all speech is protected. Historically, states have relied upon criminal statutes to provide protection from blasphemous speech.¹²⁹ However, these laws have long been discredited and held unconstitutional because they violate the First Amendment. In

¹²² Koppelman, *supra* note 120, at 1637.

¹²³ Wolfson, *supra* note 117.

¹²⁴ *Id.* (emphasis added). This notion of human dignity being protected by the United States’ libertarian approach to free speech might be strange to Europeans, who seemingly posit that human dignity is not protected by this approach. Rather, they view free speech as one value among many, all of which are to be balanced against the notion of human dignity. See Peter R. Teachout, *Making “Holocaust Denial” a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 658 (2006). By contrast, the American experience is that human dignity *is* protected and flourishes when individuals are exposed to various expressions and ideas, harmful or not. *Id.* at 659.

¹²⁵ See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–04 (1984) (“The First Amendment presupposes that the freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.”).

¹²⁶ JOHN STUART MILL, ON LIBERTY 64–67 (Currin V. Shields ed., The Liberal Arts Press 1956) (1859).

¹²⁷ *Id.* at 63–64.

¹²⁸ See, e.g., *Dennis v. United States*, 341 U.S. 494, 590 (1951) (Douglas, J., dissenting) (discussing that free speech is based on the common sense of the people).

¹²⁹ See Susan W. Brenner, *Law in an Era of Pervasive Technology*, 15 WIDENER L.J. 667, 694 (2006).

terms of strictly blasphemous speech, the United States “protects modes of expression that are deliberately provocative or shocking” and “reflects a concern that free expression not be chilled by uncertainty regarding where such fine lines might be drawn by courts.”¹³⁰

Accordingly, when seeking to criminalize allegedly blasphemous speech, citizens must either utilize advocacy along with social pressures to discourage the behavior or seek to fit the speech into one of the categories that the Supreme Court has carved out in their First Amendment jurisprudence as warranting no protection.¹³¹ To this point, the Supreme Court has refused to recognize an exception for hate speech. Instead, the Court will seek to characterize the particular speech into a different category with well-established protections.¹³²

An American citizen objecting to the publication of the Muhammad cartoons in an American newspaper would have few, if any, arguments warranting government proscription of the speech. For example, an argument drawing upon the “true threat” category would undoubtedly fail as there is no imminent danger posed by the speech.¹³³ Similarly, any argument claiming that the cartoons are fighting words will undoubtedly fail because the cartoons lack a specific target.¹³⁴ Essentially, there

¹³⁰ David M. Smolin, *Exporting the First Amendment?: Evangelism, Proselytism, and the International Religious Freedom Act*, 31 CUMB. L. REV. 685, 693 (2000).

¹³¹ Categories include: true threats, *Watts v. United States*, 394 U.S. 705, 708 (1969); obscenity, *Miller v. California*, 413 U.S. 15, 21 (1973); fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); and libel, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964).

¹³² For example, hate speech has not been officially recognized as an exception to the free speech provisions. Hate speech arguments are best framed as examples of other exceptions. *See, e.g., Virginia v. Black*, 538 U.S. 343, 347–48 (2003) (discussing that while a statute prohibiting cross-burning with an intent to intimidate is deemed constitutional, a jury instruction that cross-burning itself provides prima facie evidence of intent is unconstitutional). In *Black*, the Court carefully sidestepped the question of hate speech by couching the offense in the language of true threats. *Id.* at 360.

¹³³ “True threats” have traditionally been very narrowly drawn, requiring serious expression of intent to commit a criminal act that jeopardizes the safety and well-being of another. *See, e.g., Watts*, 394 U.S. at 708 (reversing conviction where man commented that he would like to assassinate the President). In the context of a cartoon, there is little chance that a court would agree that a caricature of Muhammad would be tantamount to a threat of physical harm.

¹³⁴ Like true threats, “fighting words” are narrowly construed, requiring offensive words to be directed at a specific person, resulting in a physical

is little judicial recourse for American citizens to protest the publication of something that is viewed as a simple caricature in the eyes of many Americans.

As the foregoing demonstrates, the United States is far more receptive to free speech than Europe and other countries around the world.¹³⁵ In essence, an individual seeking redress must prove to the satisfaction of the court that the speech falls into one of the categories that have been carved out of the First Amendment. Short of this, the Constitution protects virtually all forms of speech, even speech that is especially offensive or harmful to a particular group, because it contributes to both truth-seeking in a liberal democracy and the notion of self-autonomy that is fundamental to the U.S. political system.

IV. ANALYSIS

Given the significant emphasis placed on the concept of human dignity in U.N. human rights instruments, one must consider which approach best protects these principles in the context of the Danish cartoon controversy. A comparative analysis demonstrates that the American approach provides greater protection for the values underpinning these human dignity concepts, as it provides greater protections. The U.N. approach, on the other hand, unnecessarily impinges upon other well-recognized human rights.

A. *International Human Rights Should Be Reconceived as Reflecting an Individualistic Ethic Because It Allows Appropriate Balances Between Competing Rights*

The difficulty with the cartoon controversy is that it balances two different competing rights that are well-recognized on the international level: (1) free expression and (2) freedom from discrimination. Both the American and U.N. approaches contain

confrontation. See, e.g., *Chaplinsky*, 315 U.S. at 573 (upholding the arrest of a Jehovah's Witness causing a scene by insulting a group).

¹³⁵ This includes Denmark, which actually recognizes hate speech and blasphemy laws. See *infra* notes 159–160 and accompanying text. In fact, the Muslim community demanded that the regional public prosecutor bring charges based on the cartoons. See Winfield, *supra* note 49, at 36. After balancing the possible fallout, both politically and socially, the prosecutor decided not to prosecute the newspaper under the hate speech laws. *Id.* The Muslim community was obviously outraged, specifically because the state did not prosecute the case despite clear statutory authority. *Id.*

explicit normative justifications that stem from the derivative principle that human beings are endowed with fundamental human dignity.¹³⁶ When faced with competing interests, the approach that most adequately protects the integrity of both rights should prevail.¹³⁷ This inquiry begins with what human dignity demands of an individualistic ethic.

Because the U.N. has placed such emphasis with the individual and the individual's sense of worth and autonomy, one must consider the practical effect of inhibiting speech such as satirical cartoons. The U.N. has seemingly adopted a "positive rights" approach in continually formulating the resolution, which calls upon governments to formulate legislation to protect listeners from hearing a harmful message.¹³⁸ However, the provisions contained within the U.N. instruments do not necessarily require this result, and an emphasis on dignity as promoting individual autonomy provides a better perspective.

Kent Greenawalt provides an excellent conception of the interaction between the notion of autonomy and dignity. Greenawalt links the two in arguing that suppressing certain views fails to treat citizens equally and, thus, without dignity.¹³⁹ He is explicit that this suppression burdens the individual, stating that it "represents a kind of contempt for citizens that is objectionable independent of its consequences."¹⁴⁰ His conception highlights the problem inherent in the 2006 Resolution—applying defamation of religion prohibitions necessarily requires a significant curtailment of free expression with regard to certain views. As Greenawalt notes, this violates individual autonomy by failing to treat citizens equally, thus undermining individual dignity.¹⁴¹ This is particularly problematic in that it results in a large impingement of one of the most fundamental tenets of

¹³⁶ See *supra* Part II.A.4 and notes 122–124.

¹³⁷ See Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 301–02 (2007) (citing hate speech and freedom of thought, conscience, and religion as two examples of intersecting human rights that must be carefully balanced in enacting legislation).

¹³⁸ A "negative rights" approach would seek to curtail government interference with any rights. The United States adopts the negative rights approach in its attempt to give the widest latitude to the exercise of individual rights without interference.

¹³⁹ Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 152–53 (1989).

¹⁴⁰ *Id.* at 153.

¹⁴¹ *Id.*

human dignity. This result fails to provide an adequate balance between the rights, yielding an overprotection of certain values at the great expense of others.¹⁴²

Additionally, not only does this fail to treat citizens equally and with their requisite dignity, but it ironically results in permitting a group to assert its belief system on the majority. In the context of the Danish cartoons, disallowing their publication would result in forcing members of other religious faiths to accept and apply the prohibition on any religious caricatures, despite not experiencing the same level of offense.

By contrast, the American approach provides adequate protection to minority religious viewpoints without sacrificing more free expression than necessary. American law protects religious minorities from violence or discrimination without requiring a concomitant restraint on speech.¹⁴³ While Muslims in the United States would certainly have been offended by the publication of the cartoons in an American newspaper, American law does not value their perspective higher than any other, thereby treating individuals on an equal basis. While some might argue that the United States does not adequately prevent discrimination or incitement to hostility as referenced in U.N. provisions,¹⁴⁴ any deviation from international norms “is on behalf of a strong implementation of another vitally important human right[].”¹⁴⁵

B. The Resolution Results in an Overly Paternalistic View of Human Dignity

Greenawalt’s conception of human dignity underpinning free speech justifications also raises the issue of paternalism. Specifically, the 2006 Resolution encourages member countries to adopt regulations that criminalize allegedly defamatory statements, which necessarily must be grounded in its consistent human dignity justification.¹⁴⁶ Taken to the extreme, this implies that, as a matter of dignity, it is incumbent upon the state, which

¹⁴² See Donnelly, *supra* note 137, at 302–03.

¹⁴³ *Id.* at 303 (describing hate speech provisions).

¹⁴⁴ See ICCPR, *supra* note 5, art. 20(2) (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”).

¹⁴⁵ Donnelly, *supra* note 137, at 302.

¹⁴⁶ 2006 Resolution, *supra* note 18, ¶ 11.

is, more often than not, comprised of a number of different religious traditions, to identify what is appropriate to view and what is not rather than leaving that decision to the *individual's self-judgment*. This flies in the face of principles of human dignity and its corollary in autonomy and self-determination.

Of course, one must consider the argument that can be made by minority religious believers that a libertarian view of free speech, such as one finds in the United States, risks offending minority believers because free speech is inextricably bound up with the majority culture.¹⁴⁷ Notwithstanding the fact that minority religious views undoubtedly require protection from the state in many regards, it is inconsistent with this conception of human dignity to prevent an individual from being exposed to speech that is harmful to a particular group. Human dignity is implicated in many religious rights, such as the right to religious expression,¹⁴⁸ the right to freely change one's beliefs,¹⁴⁹ and the right not to be coerced into any belief.¹⁵⁰ All of these rights as identified in U.N. documents speak to an individual ethic, placing the autonomous individual at the center of the focus. However, the 2006 Resolution places religious groups over and above the individual in terms of the relative values of the rights at stake.

The foregoing is not meant to suggest that groups cannot be afforded certain protections. For example, nobody would deny that under U.N. conventions, a particular religious group has the

¹⁴⁷ See, e.g., Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 883 (1994) (arguing that hate speech regulation is necessary because free speech protection inevitably favors the white male majority in the United States without providing sufficient substantive protection for minorities).

¹⁴⁸ See ICCPR, *supra* note 5, art. 18(1) ("Th[e] right [to religious belief] shall include freedom . . . to manifest his religion or belief in worship, observance, practice and teaching."). Presumably, religious expression is also included in the free expression articles. See *id.* art. 19(2) (stating the right to expression, including the right to freely impart or receive information).

¹⁴⁹ See *id.* art. 18(1) ("This right shall include freedom to have or to adopt a religion or belief of his choice . . ."). This statement is understood to mean that one has the right to change religions as well. In fact, this very interpretation led to politically Islamic countries to either abstain or vote against the ICCPR, as Shari'a law is very clear that changing religion, or apostasy, is not allowed.

¹⁵⁰ *Id.* art. 18(2) ("No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.").

right to meet for worship services without state interference.¹⁵¹ However, the resolutions offering protection for defamation of religion stem from individual concerns. In other words, while on its surface it appears to offer religious groups protection, the U.N. is ultimately seeking to protect the individual from being offended by allegedly defamatory speech. Accordingly, these resolutions must be viewed as rooted in an individual ethic.

Furthermore, while the U.N. seeks to establish human rights norms throughout the globe, the primary aim is to identify universal values, which may be translated into principles and suggestions for countries that foster an atmosphere where these rights flourish fully. When rights inevitably come into conflict, it is incumbent upon the U.N. to establish provisions in which the rights enumerated therein are maximized to the greatest extent possible.¹⁵² With the defamation of religion resolutions, the U.N. has effectively stated that paternalistic notions of what is appropriate for religious believers to be exposed to outweigh the right to promulgate the speech. In other words, the U.N. has elevated a “human right” that finds no grounding in prior conventions on fundamental religious freedom rights above explicitly enumerated free expression rights. This is wholly inconsistent for an organization that has strived to maintain consistency based upon baseline principles that all cultures can find agreeable.

C. The Defamation of Religion Provisions Are Overly Vague for Implementation

Particularly troubling is the resolutions’ lack of an adequate definition for the term “defamation.” Admittedly, it is extraordinarily difficult to achieve international consensus on any matter, let alone definitions that satisfy everyone. However, the ambiguity inherent in the 2006 Resolution risks a broad range of differing interpretations which might run afoul of international human right norms.¹⁵³

¹⁵¹ See UDHR, *supra* note 3 (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”).

¹⁵² See Donnelly, *supra* note 137, at 302–03.

¹⁵³ See *infra* Part IV.D.1.

The only statements resembling a definition of defamation derive from the provision urging countries to adopt prohibitions against certain types of behavior. Specifically, the Resolution “[u]rges States to take resolute action to prohibit the dissemination [through political institutions and organizations] of racist and xenophobic ideas and material aimed at any religion or its followers that constitute incitement to discrimination, hostility or violence.”¹⁵⁴ The U.N. seemingly defines defamation as “racist” or “xenophobic” ideas, which must be aimed at a particular religion, but declines to further extrapolate on what this means. Such sweeping terms could conceivably encompass a tremendous amount of material depending upon the perspective of those making the determination. Conversely, these terms could be interpreted very narrowly, leaving some frustrated by a government’s perceived inaction despite statutory authorization to prohibit the material. More concerning is that the substantive a posteriori element of this provision, seemingly requiring some sort of public reaction. This requires the government to determine whether an idea is likely to have discriminatory effects. To make this determination, the government might be called upon to make a value judgment based upon the religious beliefs of the allegedly defamed religion.

Furthermore, this ambiguous definition leads to possible double standards. Undoubtedly, one of the major aims of international human rights legislation is to ensure the protection of minority viewpoints.¹⁵⁵ To take the cartoon example, the Danish government is forced to make a determination—here evidenced by their inaction—as to whether the cartoons are racist and aimed at Islam or more likely whether they were aimed at inciting discrimination, hostility, or violence. Once again, this results in a minority viewpoint being permitted to press their perspective upon the majority due to their particular sensitivities and as a result, causing a degradation of the human right to free expression as a result.

¹⁵⁴ 2006 Resolution, *supra* note 18, ¶ 10.

¹⁵⁵ The U.N. has passed many resolutions, treaties, and covenants that address the rights of minorities. *See, e.g.*, Elimination of Discrimination Against Women, *supra* note 5; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

Hypothetically, had the Danish government decided to prosecute the newspaper according to its express authorization in the statute, it likely would have affirmed the action upon discrimination grounds. However, if a Muslim newspaper published a cartoon in Denmark depicting Jesus Christ carrying a gun or some analogous depiction, the Danish government would not be able to prosecute the newspaper on blasphemy grounds, given that the likelihood of discrimination simply would not be present because of the substantial Christian majority in the country.¹⁵⁶ Ultimately, the ambiguous definition results in varying interpretations entirely dependent upon the specific context. This is simply bad law, especially when presented in light of the allegedly universal nature of the human rights at stake.

By contrast, the American system provides much more structure for the general public. Obviously, there are no defamation of religion provisions requiring value judgments by the state. This does not mean, however, that minority religions do not have *any* protection against statements and images that cut very deeply. It does mean that the allegedly harmful statements must fall into one of the well-defined categories of speech that is not protected by the First Amendment mentioned previously.¹⁵⁷ Applying the American approach, the Danish cartoons would clearly not fall into any of these categories, and it would be incumbent upon Muslim citizens to express their outrage in an appropriate manner—to convince the public that they have a moral obligation to refrain from demeaning them so deeply. At its heart, the American approach requires an individual response stemming from an individual moral obligation, which is more closely akin to what the U.N. human rights doctrine requires.¹⁵⁸

D. Practical Result Does Not Guarantee Better Results

The 2006 Resolution urges member states to make necessary provisions to effectuate the defamation of religion provisions. This leaves two important questions to address. First, how have defamation laws impacted religious liberty in practice? Second,

¹⁵⁶ Of the 5.4 million citizens of Denmark, just over 200,000 are professed Muslims. See Bilefsky, *supra* note 12.

¹⁵⁷ See *supra* notes 128–132.

¹⁵⁸ See *supra* Part IV.A.

do the regulations called for by the 2006 Resolution require too much state interference?

1. The Danish Experience with Defamation Laws

The Danish experience with hate speech and blasphemy laws, which are in accordance with the 2006 Resolution (although they were in place long beforehand) warrant significant concern. The hate speech law makes it a crime for “[a]ny person [to] . . . persecute[] or incite[] hatred against any group of the Danish population because of its creed, race or nationality.”¹⁵⁹ Denmark’s blasphemy law criminalized actions by “[a]ny person who exposes to ridicule or insults the dogmas or worship of any lawfully existing religious community.”¹⁶⁰ Individuals convicted under the hate speech statute could be punished by up to two years imprisonment in addition to a fine.¹⁶¹ Punishment under the blasphemy laws carries a sentence of up to four months imprisonment in addition to a fine.¹⁶² Prosecutors are specifically authorized to prosecute news organizations that publish any words or images that insult or ridicule any religious group.¹⁶³

As the Danish cartoon incident made abundantly clear, even if the protections recommended by the U.N. 2006 Resolution are in place, it does not necessarily yield the result intended. In this specific example, the prosecutor to whom the Danish Muslim community appealed to for a prosecution of Flemming Rose or the newspaper ultimately decided not to proceed with criminal charges.¹⁶⁴ This result understandably incensed the Muslim population, who felt as though the state had affirmatively discriminated against their community despite a clear statutory authorization to prosecute.¹⁶⁵ In the end, the Danish government was caught in a human rights and religious liberty trap: Apply the vague blasphemy and hate speech laws on the books by prosecuting the newspaper and arguably curtail free expression protected under international law or decline to prosecute under the criminal laws and risk violating international provisions

¹⁵⁹ BORGERLIG STRAFFELOV § 266b, *translated in* Danish Criminal Code § 266b (G.E.C. Gad, 1958).

¹⁶⁰ *Id.* § 140.

¹⁶¹ Winfield, *supra* note 49, at 35.

¹⁶² *See id.*

¹⁶³ *See id.*

¹⁶⁴ *See id.*

¹⁶⁵ *See id.* at 36.

against religious discrimination. In either scenario, the Danish experience demonstrates the potential difficulties in administering the defamation of religion laws domestically while maintaining compliance with established international human right norms.

It should also be noted that these concerns are not limited to the Danish experience or to countries with separationist political structures. This could prove particularly troublesome in theocratic states, particularly Islamic theocracies. In Pakistan, which has been the driving force behind the defamation of religion resolutions all along,¹⁶⁶ the government is constructed and laws are crafted according to the precepts of Islamic Shari'a law. Shari'a, which currently carries the force of law in many Islamic countries, punishes the crime of apostasy, defined as the renunciation of a religious faith,¹⁶⁷ by death.¹⁶⁸ Extreme punishment may also be levied upon non-Muslims who attempt to practice their faith in any public manner.¹⁶⁹ In countries that do implement these Shari'a provisions to any degree,¹⁷⁰ religious liberties are extremely curtailed for non-Muslim citizens. The 2006 Resolution provides another tool for these governments to enforce legal penalties upon religious dissenters. It is not hard to imagine a theocratic government criminally punishing a religious dissenter claiming that the majority religion of the populace is not the true religion. All of these concerns inevitably reveal that the 2006 Resolution actually draws countries closer to violation

¹⁶⁶ Pakistan often spoke on behalf of the Organisation of the Islamic Conference, a bloc of Muslim states organized to debate and respond to concerns stemming from the United Nations human rights documents. See *U.N. Rights Body Condemns "Defamation" of Religion*, REUTERS ALERTNET, Mar. 30, 2007, <http://www.alertnet.org/thenews/newsdesk/L30414112.htm>.

¹⁶⁷ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 55 (10th ed. 1997) (defining apostasy).

¹⁶⁸ This issue arises often. On Easter day in 2008, Pope Benedict controversially baptized a Muslim into the Catholic faith. See Nicole Winfield, *Pope Baptizes Prominent Italian Muslim*, BREITBART.COM, Mar. 23, 2008, http://www.breitbart.com/article.php?id=D8VIR44G0&show_article=1. Magdi Allam, the Muslim being baptized, fully understood that the implication of his conversion would be a call for his murder from some in the Muslim community. *Id.*

¹⁶⁹ See Jeffrey Goldberg, *Washington Discovers Christian Persecution*, N.Y. TIMES, Dec. 21, 1997, § 6, at 46. Whether Pakistan, or any other country, strictly follows the tenets of Shari'a law to these extremes is an entirely different question. See *id.* Although, there is some indication that non-Muslims experience extreme discrimination in many Islamic theocracies, such as Iran. See *id.*

¹⁷⁰ Even in countries where Shari'a provisions are not strictly enforced, the penalties for blasphemy may differ depending on one's religious status.

of international human rights norms rather than offering further protection.

2. Does the Resolution Require Too Much Interference?

Mandating that member states adopt anti-defamation laws with respect to religion at the risk of international political pressure ultimately requires a state to take a position between competing viewpoints and further requires the state to determine what constitutes blasphemous speech versus non-violative speech. While this result may be compatible in certain countries in which the political system is closely tied to a particular religion, it would be incompatible with other political systems espousing religious neutrality. For example, a theocratic country such as Iran would have little difficulty in politically justifying a decision based on religious doctrine. However, requiring a government to interpret or inquire into a particular religious belief is wholly incompatible in a strict separationist political system. It is very difficult to believe that an arm of the United States Government would be permitted to determine whether the cartoons that appeared in the Danish newspaper were truly defamatory to the Muslim conscience. Furthermore, the mandate requires the state to make determinations based upon an ambiguous standard, as mentioned previously.¹⁷¹

Like the very notion of defamation of religion, hate speech and blasphemy laws tend to be rather vague and indefinable.¹⁷² What images amount to ridicule? What types of words degrade a group of persons for their religious beliefs? More to the point, do cartoons that depict Muhammad with a bomb-shaped turban ridicule any dogma of Islam? These are the questions that the Danish authorities were forced to confront and do not yield easy answers. By virtue of the laws' ambiguities, the government is forced into this fray and is forced to make difficult value determinations. As has been discussed, these value judgments can have a significant adverse impact on the minority religions that the laws are designed to protect.¹⁷³

¹⁷¹ See *supra* Part IV.C.

¹⁷² See *supra* notes 131–135 and accompanying text.

¹⁷³ See *supra* Part IV.C.

CONCLUSION

The Danish cartoon controversy demonstrates the delicate balance between competing human rights recognized on the international level. It is not difficult to see how deeply words and images can harm individuals, especially if those individuals have experienced and continue to experience discrimination worldwide. Nothing in this Article is intended to suggest that different religions, specifically Islam in this context, do not feel the pain of hurtful words. Nor does this Article intend to legitimize or give a seal of approval to any particular words or images on a moral or ethical level.

Rather, this Article intends to demonstrate the danger in overreacting to the cartoon controversy and the violence it begot by formulating paternalistic legal norms under the guise of human dignity. If the rights delineated in U.N. documents are conceived as containing an individualistic ethic based upon human autonomy, the 2006 Resolution signifies a concerning departure from the mandates of human dignity. Furthermore, domestic implementation of the Resolution in the member countries risks involving the government in questions that it cannot, and should not, be forced to ask.

This is not to suggest that the American structure is perfect. Permitting hurtful language and images in the United States risks breeding institutional resentment and possibly significant discrimination, especially in the aftermath of the events of September 11. However, this approach is intellectually honest in that it creates an atmosphere that is most conducive to the protection of human rights and places the ultimate responsibility for censorship with the individual. This is entirely consistent with the individual ethic espoused by U.N. human rights instruments. It presents a more viable and protective alternative than wholesale criminalization of defamatory speech against religion, whatever that term may mean.

