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On the Una's Lecture
“Religion and Freedom of Speech: Cartoons and Controversies”
by Robert Post, David Boies Professor of Law, Yale University
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Robert Post opens his paper by delimiting the set of questions his argument addresses: “How should the law respond to protests against the publication of Danish cartoons of Muhammad, and how should it mediate between the demands of religious sanctity and freedom of speech?” This is a very narrow question, which concerns only the coercive power of the state. It is quite distinct from the ethical issue of when and how one should speak. In what follows I argue that in fact Post goes much farther than simply opining on this narrow question. Instead, he offers a reading of the Danish cartoons that, far from eschewing ethical issues, encodes a very specific ethical position, one that is central to Post’s normative vision of what a liberal democracy should substantively be. I want to think through some of the assumptions undergirding Post’s argument, with particular attention to three issues: (a) Post’s characterization of the cartoons and the role they have played in Europe; (b) his characterization of “secular states” and “secular values;” (c) Post’s rhetorical use of the trope of “Muslim violence” to secure his argument for upholding free speech.

Let me begin with the first part of Post’s paper, which focuses on what he characterizes as a substantive (versus a procedural) conception of democracy, whose distinctive feature, Post argues, lies in the sense citizens collectively come to acquire that they are “engaged in the process of governing themselves” (6). This does not mean, Post tells us, that citizens should actually make the decisions but only that they have a collective feeling of authorship in the decisions of the state, a sense of self-rule or self-determination. He clarifies, “If democracy requires that citizens experience their government as their own, as representing them, they must experience the state as in some way responsive to their own values and ideas” (8). But this formulation immediately raises a problem that Post acknowledges: in a diverse and heterogeneous society where citizens disagree with each other, how is this possible? Interestingly, Post goes back to tenets of procedural democracy to answer this dilemma, and argues that citizens do not have to actually have their particular values and ideas necessarily upheld by the state, but only that they should “feel reassured” that their voices have been heard and taken into consideration. The venue that provides these citizens with this reassurance is the Habermasian public sphere, the marketplace of free speech and debate, where everyone freely expresses even the most egregious views, and it is through this process of expression that the citizen comes to acquire her sense of participation in the democratic process. Post acknowledges that “under conditions of modern heterogeneity, actual agreement is impossible.” If it is impossible, then why is it so important to the substantive notion of democracy that Post upholds? Because, he answers, it functions as a “regulative idea” for the formation of public opinion (p. 9).

It is at this point that I want to intervene in Post's argument. Post's suggestion that "agreement" largely functions as a regulatory ideal within a heterogeneous citizenry draws our attention to how the space of public debate is not simply a space of expression but also, importantly, of formation, in which both coercive, regulatory, and rhetorical power is necessary in order to produce the right kind of citizen subject who can inhabit the norms of a liberal democratic polity. Contra Post, the public sphere is not simply a domain of unhindered communication, but also a disciplinary space that inhibits certain kinds of speech while enabling others, equipping people to hear specific types of arguments while remaining deaf to others. [An obvious example is how norms of mass media limit and shape the content of our political discussions today.] Citizens who enter this public space of debate and discussion, moreover, enter it not as atomized preformed individuals, but also as members of distinct communities that dispose of unequal power. As a consequence, members of these communities enter the public sphere with very unequal abilities to speak and to be heard. A Muslim's ability to enunciate and be actually heard about the offence the Danish cartoons might have caused is limited by the protocols of acceptable public speech within Europe today.

A constitutive tension lies at the heart of liberal democratic law, one that remains unacknowledged in Post's account: the tension between law's claim to promote a level of formal equality amongst citizens of the state on the one hand, and its goal of maintaining public order on the other. The public order, as we well know, is constituted by moral, ethical, and political sensibilities that are taken to be necessary for the functioning of the state—sensibilities that are reflected in the culture of a nation's majority population. This majority sensibility is not simply a reflection of numbers, of more people versus less, but also involves the narratives, cultures, and traditions that constitute a collective identity. Importantly, these narratives and traditions include those that may be defined or interpreted as religious, and they inevitably differ from those that are drawn upon to constitute the collective identities of minorities within the state. Thus, the rule of law, through its connection to the public order, is firmly attached to majority-minority relations even though it is supposed to promote formal equality between citizens of the state. This is evident in the various legal rulings—whether in Western Europe or North America—where, despite the claim to state neutrality toward religious claims, secular liberal law has to continuously pronounce and define what proper religious behavior should or should not be. And in doing so, the law inevitably upholds views and ideals that are often the norms of its majority populations. These arguments are evident in a variety of politically contentious cases that include (in the last ten years): the display of Christmas crèches or the Ten Commandments in American public space, the use of peyote in Native American spiritual rites, fierce debates over blasphemy law and human rights in England, and the banning of Muslim women's headscarves in French public schools. As each of these cases shows, Post's "regulatory ideal" of the public sphere does little to address the demands of minority populations of Euro-America to produce a consensus. In all these instances, it is the law that has had to settle these questions, and in doing so, it de facto takes on a theological role inasmuch as it defines what is properly religious versus what is not. Furthermore, in each instance the secular liberal state acts paradoxically against its own claim to religious neutrality, often upholding the religious norms of its majority population. Given that Muslims constitute a minority in Europe today, one might ask: What chance do Muslims have of hearing their religious sensitivities fairly addressed in European polities that regard themselves as constitutively and normatively Judeo-Christian? To

what extent is Post's assertion that "democratic norms" need to be upheld simply another way of asserting the supremacy of majoritarian norms in the interest of public order?

Secular values and secular state

It might be argued in response that when the law seeks to regulate religious practices and beliefs it departs from a "true secular model" (as some Americans argue was the case with the French law that banned the veil). Indeed, Post's own opposition to European blasphemy laws seems to suggest such a reading in that he sees these laws as "protecting the respect due to God" (p. 13), or protecting "the sacred." In a secular democratic society, Post argues, such a protection amounts to discrimination against those citizens who do not abide by any belief in the sanctity of God. But in portraying the matter in this way I think Post paints too simple a picture of a secular society and in turn secular law. As much of recent scholarship suggests, contrary to the ideological self-understanding of secularism (as the doctrinal separation of religion and state), secularism has historically entailed the regulation and re-formation of religious beliefs, doctrines, and practices to yield a particular normative conception of religion (which is largely Protestant Christian in its contours). Accordingly, the secular state does not simply cordon off religion from its regulatory ambition but seeks to remake it through the agency of the law. This remaking is shot through with tensions and paradoxes that cannot simply be attributed to the intransigency of religionists (Muslims or Christians). One particular tension of relevance to Post's argument is that between the principals of freedom of speech and freedom of religion, both of which are upheld by secular liberal democratic societies: what is regarded as "freedom of religion" by one group may well be challenged by another group as an imposition on their right to practice their religion freely. Indeed, many federal court cases in the U.S. on the issue of religion turn precisely around this problem. [Winnifred Sullivan's book, *The Impossibility of Religious Freedom*, explores the paradoxical implications of the First Amendment through a careful analysis of several cases around the issue of "freedom of religion" in U.S. courts where the judges often end up acting as de facto theologians.]

Muslim violence

Let me finally turn to Post's interpretation of the cartoons and his rhetorical use of the trope of Muslim violence to ground his argument. Post opens his essay by quickly drawing a picture of censorship and violence that supposedly swept throughout the world in response to the cartoons (as it has been reported widely, the protests did not immediately follow the publication of the cartoons but were ignited by a series of events including the failure of the Danish government to meet a delegation of Danish Muslim citizens). This opening serves to ground his claim that those who protested the cartoons were part of the "modern fundamentalist sect" and who seek to protect the rights of God. What is interesting to note is that almost all the examples Post cites of violent protests against the cartoons (the 139 deaths he mentions) were not only outside of Europe—which is Post's stated area of concern—but also, radically distinct in context. In Nigeria, for example, the cartoons were inserted into a pre-existing context of Muslim-Christian conflict; in Egypt, Jordan and Pakistan, on the other hand, the highly unpopular pro-Western governments exploited this issue to gain legitimacy in the eyes of their constituencies. Furthermore, many of the authorities Post quotes, from the IOC to Ayatollah Khamenei to the Pakistani mullahs, hail from undemocratic societies, and as such their views have little to do with

European concerns with free speech and norms of a democratic society, which Post stated at the outset was his chief concern. Given these distinct contexts and Post's stated concern with "democratic values," I am left wondering what function the trope of "Muslim violence" performs in Post's paper? Perhaps it serves to give expression to the European fear that Muslim residents of Europe, some of whom might not accept Europe's majoritarian secular liberal values, might nevertheless avail themselves of liberal laws to protect their traditions and identities from dissolution? If this is indeed the fear, then I am afraid Post's recourse to the language of law and its reformulation so as to prevent Muslim minorities from using the law to protect themselves can only yield an impossible impasse. Let me be clear: I too am against the idea of instituting laws to address the problem of mediating cultural and religious difference in secular liberal democratic society because I think issues of religious, cultural, or racial co-existence cannot be effectively arbitrated through the threat and promulgation of law. Instead, it depends crucially upon ethical norms that are taught and learned, not through the heavy arm of the law, but through a variety of cultural and social means. The reason, for example, that incidents of hate speech against Jews and Blacks have declined in parts of Europe and America is not because of fear of the law but because of the transformation of ethical and social norms of these countries.

But before we can even ponder the question of ethical norms for the adjudication of religious and cultural difference within a liberal democratic society, it would be important to at least entertain the idea that the cartoons might have offended Muslims not because they are inherently fundamentalist, intransigent, and interested in protecting God's sanctity over human sanctity (as Post consistently implies in his paper). It might require a more serious engagement with those who found the cartoons offensive, on what grounds (which were disparate), and a broader dialogue about what constitutes freedom of religion in a society that is multi-religious outside the narrow bounds of the much hailed "Judeo-Christian" tradition of Europe and America.

There are a number of ways in which Post's essay forecloses a serious engagement with ethical issues the Danish cartoon controversy raises. His legal analysis is crucially shaped by his positive valuation about the role the cartoons performed in the European public sphere. Post argues that these cartoons are somehow linked to important issues like gender justice in Islam and the use of political violence. Yet it is not clear to me how the cartoons are linked to these issues. Apart from the fact that the European and North American press is rife with often shrill commentary on Islam's "incomparable misogyny and violence," Post's all too quick and over-determined reading of these cartoons fixes at the outset what his analysis was supposed to have arrived at. If indeed Post's interest, as he states at the beginning of the paper, is to demarcate conditions for public debate, then it would be necessary to at least entertain the possibility (one even conceded by some European commentators) that the cartoons had caused an offence that required contemplation beyond the allegation of Muslim fundamentalism and intransigence. Yet this is something Post refuses to consider in his argument, foreclosing any engagement with what it might mean for a supposedly open liberal democratic society to deal with the sensibilities of a growing minority population whose concerns are often reduced to "Muslim intransigence" and Islam's propensity to violence.