

CHANGING OUR MINDS ABOUT THE CARTOON CONTROVERSY

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When a student newspaper at our university recently published an original editorial cartoon showing Mohammed and Jesus kissing in a “tunnel of tolerance,” we viewed this as a clear case of freedom of expression. And we were relieved when university officials, as we expected, likewise defended it as a legitimate exercise of free speech. The incident was, of course, a spin-off from the broader controversy over the twelve caricatures depicting the Prophet Mohammed originally published in the Danish newspaper *Jyllands-Posten*. Truth be told, we tended to think of the cartoon issue almost entirely as a matter of free speech. So we accepted pretty much at face value the claim made by the publisher of *The Western Standard* in defending the decision to give some of the now infamous Danish cartoons their Canadian debut. He said that “the only appropriate response to free speech is more free speech.”¹ And so we were pleased when Alberta prosecutors decided, as we knew they should, that republication of the cartoons should not be prosecuted under Canadian laws against hate speech.

For those of us who tend to think of ourselves as civil libertarians, the notion of imposing limits on freedom of expression is particularly troublesome and should only be done, if at all, with great and deliberate care. The violent reaction throughout the Muslim world, and in some extreme cases the calls to behead the Danish cartoonists, shocked us nearly into smugness over our own appreciation for the fundamental principle of liberty underlying our democratic life in Canada. And we were discomfited by the decision of some Canadian bookstores in choosing to ban the cartoon-carrying issue of *The Western Standard*, citing a potentially heightened risk to Canadian troops in Afghanistan. So we read with interest the critical commentary in the national press suggesting that the response in the Muslim world was largely an instance of Islamic elite manipulation, designed to place the West on the defensive, using tactics of moral intimidation.

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¹ Dawn Walton, “Harper defends free speech but regrets cartoons’ publication” *The Globe and Mail* (15 February 2006), online: The Globe and Mail <<http://www.theglobeandmail.com/servlet/story/LAC.20060215.CARTOONS15/TPStory>>.

As social scientists, our initial reactions to this affair no doubt derive in large measure from the long tradition of research stretching back to the mid-1950s to the work of Samuel Stouffer, who investigated the empirical bases of support for civil liberties. By documenting how public support for core political values may waver or even splinter in the heat of controversy, this work dispensed with the idea of democracy being based upon broad public consensus on fundamental issues such as freedom of expression. The key claim of these studies is that those in positions of responsibility and power are more likely than the ordinary citizen to stand by democratic values such as freedom of expression through tough times. Thus, the classic formulation suggests that, in present circumstances, university officials and government lawyers should on the whole be more likely than the average citizen to act in ways consistent with basic democratic principles. To be sure, this is not always the case. There are those who, through mischief or ambition, fail to act in ways consistent with our best democratic principles. However, the essential point of this research tradition is that democratic values are better served by focusing not upon the particular passions at stake in a specific controversy but upon the broader issues involved, thus taking a "sober second thought." And in this regard, those in positions of responsibility are often thought, on balance, to be a better bet to do so than those most exercised by a particular controversy or the public as a whole.

For the most part unwittingly, it is through the lens of this research tradition that we as interested citizens viewed the unfolding developments in the cartoon controversy. Yet when we turned back to our academic work, looking at some recent data we had been examining on the attitudes of Canadian lawyers, our findings did not comport with our comfortable understandings. The data presented us with an entirely different picture altogether. Consequently, we were compelled by our data to give the whole matter our own "sober second thought."

The data we were examining were collected in 2005 as part of a survey of legal scholars and professionals for Sujit Choudhry, Joseph Fletcher and David Schneiderman, all of the University of Toronto. The study was carried out online by the Hitachi Survey Research Centre at the University of Toronto at Mississauga. Some of the questions in this study were modeled on an earlier telephone survey of the Canadian public under the direction of Joseph Fletcher and Paul Howe, now at the University of New Brunswick. The field work for the latter study was conducted by Opinion Search, an Ottawa-based commercial polling firm in March of 1999 under commission of the Institute for Research on Public Policy. Naturally, only the present authors and none of the other individuals or organizations involved in either of the studies are responsible for the interpretations presented here.

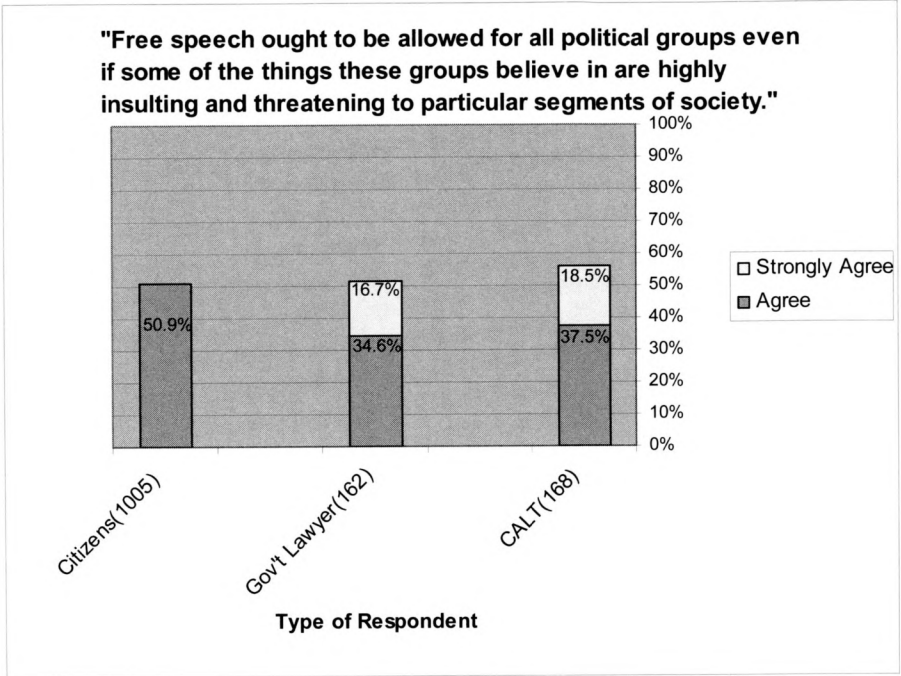
Although not designed to elicit views on the debate over the Danish cartoons, we couldn't help but notice that one of the questions asked in both the general population and law surveys has some obvious relevance to the current situation. As is customary in survey research the item asks respondents whether they agree or disagree with the statement that follows. In this case it read: "*Free speech ought to be allowed for all political groups even if some of the things these groups believe are highly insulting and threatening to particular segments of society.*" In

the legal survey, respondents were additionally permitted to differentiate between strongly agreeing or disagreeing and simply agreeing or disagreeing with the statement.

Consistent with the research tradition mentioned above, the results for the Canadian population reveal considerably less than thoroughgoing support for free speech. Essentially, half of the population comes down on either side of the question. From a civil libertarian perspective, the views of the Canadian public at large seem to offer no more commitment to freedom of expression than that determined by a coin-toss.

Of course the question wording does not address the particulars of the current controversy in Canada over (re)publication of the Danish cartoons, but rather is about a principle that lies behind the issue at hand. We can gain some confidence regarding the applicability of these results, however, when we compare them with those obtained with an online question posed by the *Globe & Mail* to its readers on February 6, 2006: "If you owned a newspaper, would you have published a cartoon depicting the Prophet Mohammed?" The approximately 21,000 readers choosing to respond to the question split very nearly in half, with 49% replying "yes" and 51% "no." Now admittedly, the *Globe & Mail* query does not pass muster as a scientific survey of the Canadian population at large. Still, it is instructive in that its outcome very nearly perfectly mirrors what we found in asking a random sample of Canadians our question about the principle of free speech. Using both measures what we find is that Canadians are split down the middle on the issue of free speech. So, consistent with the traditional research literature, there is some reason to believe that Canadians are less than fully committed in their support for the principle and practice of free speech, though on average they are perhaps more so than the editorial boards at many of Canada's newspapers.

In turning to look at the results obtained on the free speech question in our survey of lawyers, based upon the traditional research literature, we would expect to find greater support for the principle of freedom of expression in the legal community than among the public at large. The surprise awaiting us can be seen in the following chart. It presents the results on the free-speech question for a sample of government lawyers as well as one of law professors. And for purposes of comparison, we also plot the results reported above for the public at large.



As we saw before, Canadian citizens split 50-50 in responding to our question about insulting free speech. When we look at the results for government lawyers we find just barely more than half of them agreeing to support the free-speech option. These results are obtained by posing our question to precisely the sort of person (Crowns and ministry officials) to whom, in the current controversy, appeals were directed asking that the reprinting of the offending cartoons be declared as hate speech, as well as the sort of person who could have influence on just such a determination. The results for the government lawyers differ by less than a single percentage point from those for the citizens at large. Any thoughts we might have had that the legal community might be a better bet to defend free speech, again based on the traditional civil liberties research studies, began to crumble before our eyes as we looked closely at these data.

The rest of the job is accomplished when we turn to look at the results for the sample of respondents drawn from the Canadian Association of Law Teachers (CALT).

Law professors, as it turns out, are only barely more likely than either government lawyers or the average Canadian to endorse free speech for those who may be seen as insulting or threatening. And law professors not only study and teach the jurisprudence regarding free speech, they are the sort of people who, as university administrators, make decisions on our campuses about what is and what is not acceptable speech.

While one might expect, as we clearly did, that fundamental rights such as freedom of expression would receive an extra measure of support from legal elites, the data at hand obviously suggest otherwise. Evidently, our view of at least the Canadian aspect of the Danish cartoon imbroglio has been based upon a serious misunderstanding of the dynamics of opinion in Canada on issues of free speech today. This has led us to begin to reconsider our take on the whole matter.

Rather than providing a bulwark of support for the principle of freedom of expression, the legal community seems to be as divided in its views as is a random sample of Canadian citizens. Recognizing that neither samples of lawyers nor citizens express anything approaching a consensus in responding to our question on free speech, we began to appreciate where we had gone wrong in our own thinking about the cartoon controversy. Insofar as all three of our samples were divided in their views, the differences in opinion that we observed in the data cannot be due to a lack of understanding of basic principles of free speech, nor any lack of formal education. This recognition brings us into headlong contact with our own underlying assumption that those who do not support the free-speech option do so out of ignorance or some lack of understanding of its importance to democratic society. Upon reflection, the lack of understanding is, however, entirely our own.

At issue here is why people disagree over claims to democratic rights in this case. Reviewing our data reminds us that arguments over fundamental rights like freedom of expression are often live issues not only in the sense of lacking a consensus or agreed-upon solution, but also in the deeper sense of representing genuine predicaments in which citizens find it difficult to decide what to do.² Though the cartoon issue has led to talk of a clash between liberty and respect for minorities, the political dynamics implied by this assessment are rarely appreciated. Some see the debate as symptomatic of a broader clash between Islam and the West, but this too misconstrues the dynamics of the debate in Canada.

Upon reflection we begin to recognize that the cartoon issue represents a distinctive form of conflict not because it involves a clash between liberty on the one hand and claims for acceptance by a religious minority on the other, nor because it reflects a conflict between two values. It is distinctive because the structure of conflict is between two values that are positively correlated. And the key to recognizing this is that both the legal community and the citizenry are so sharply divided on the issue.

In saying that two values are positively correlated, we make use of social science jargon to say something quite basic and familiar. We are simply observing that the more importance that people, whether ordinary citizens or lawyers, attach to one value the more they attach to the other as well. And just such is the case for most Canadians when it comes to freedom of expression and acceptance of

² See Paul M. Sniderman *et al.*, *The Clash of Rights: Liberty, Equality and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1996).

minorities. Having to choose between them represents a genuine dilemma in a way that having to choose between liberty and authority, for example, does not. This further adds an inescapable volatility to views on the issue.

The traditional view that the legal community provides a special measure of fidelity to democratic principles when political passions are excited breaks down when applied to issues where the values at stake are positively correlated. This is signaled in our data by the lack of consensus evident in both the population at large and the legal community. More detailed statistical analyses than are appropriate here are required to confirm this view.³ Nevertheless, we have begun to change our tune.

Now we view the controversy over reprinting the Danish cartoons in Canadian publications as more deeply rooted in commitment to values than in a failure to understand them. Opinion is divided and susceptible to change because Canadians value free speech *and* acceptance of religious minorities. As such, the responses to our surveys, as well as attitudes toward the cartoon controversy, reflect in some measure the formal two-step approach of our legal system to "free speech" cases. Unlike the American approach, the Supreme Court of Canada views freedom of expression not as an absolute right but as one tempered by a justifiable limitation analysis.⁴

Finally, we have also come to appreciate some of the practical consequences of balancing two correlated values. Recent reports of disturbing incidents on our campus, most notably verbal and physical attacks on Muslims, have highlighted our own commitment to acceptance of minorities, sensitizing us to the arguments made against publication of the cartoons. And in this greater awareness, we have begun to experience some ambivalence of our own, attending rallies on both sides of the issue to express our support. We now better understand why Canadians and their legal community are divided on the issue. It can be very difficult to balance support for both freedom of expression and acceptance.

To be clear, we have changed our views about the controversy, not about the cartoons. We still regard their publication as a legitimate exercise of free speech. But as to the controversy, we have fully changed our minds. We now appreciate that opposition to the publication of such cartoons, at least in Canada, is not primarily rooted in ignorance or lack of understanding about the value of freedom of expression. Rather it is about placing equal weight (or perhaps greater weight) on

³ Analysis of additional items in our survey confirm, as we suggest here, that there is a substantial positive correlation ($r = +.298$) between support for multiculturalism and support for free speech. Moreover, further analysis shows that both values play a significant complementary role in determining responses to the question reported in the text.

⁴ We thank Lorraine Weinrib for this insight. This two-step approach, though perhaps most evident in freedom of expression cases, applies to all our rights and freedoms through the s. 1 analysis under the *Charter*. The key case in regard to expression is *Keegstra*, in which the Supreme Court affirmed the defendant's right to freedom of expression in the first step of its analysis and held in step two that certain limitations on that right were reasonable. See *R. v. Keegstra*, [1990] 3 S.C.R. 697.

something else that we also value. We now recognize and respect that opposition to the publication of the cartoons on Canadian campuses and newspapers has its foundation primarily in a legitimate desire to promote acceptance of religious minorities, not in ignorance of the value of free speech.