BLASPHEMY AND OTHER EXPRESSIONS OF OFFENSIVE OPINION

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The law of blasphemy is presently in a state of transition in this country. After a long period of desuetude, the offence was suddenly revived in 1979 by the case of *Whitehouse v Lemon*.[1] Six years later, in 1985, the Law Commission recommended its total abolition without any replacement.[2] No legislation to effect that abolition has appeared, and given the controversy which that appearance would undoubtedly cause, it is unlikely that anything will happen in the immediate future. Nevertheless the situation contains an imbalance which suggests that it will not continue indefinitely. The interval before the inevitable next step provides an opportunity to ponder what that next step ought to be.

In what follows, two propositions are taken as givens, in the hope that no demonstration of their validity will be required here. They are, that equality before the law is desirable, and that order is better than disorder. Neither the religious or ethical arguments which are commonly deployed on blasphemy, nor the history of the offence of blasphemy in English law (a common law offence not depending on the provisions of any statute), will be canvassed. They are extensively covered by the Law Commission in its report, and in its preceding Working Paper.[3]

1. FUNDAMENTAL RIGHTS AND OBLIGATIONS

Pondering the question of what ought to be the next step requires reflection on matters of right and obligation which are fundamental to any society which claims to be a liberal society. Most fundamental of these, in that it applies to any state, liberal or tyrannical, is the freedom to live one's life in peace, secure in body and possessions. Any state must at least put down malefactors and suppress disorder; its first duty, and *raison d'être,* is the prevention of anarchy. Without the provision of this minimum security, Hobbes tells us, the life of man would be solitary, poor, nasty, brutish and short. All other rights and freedoms, including those regarded as fundamental to a liberal society, are necessarily subject to the individual's duty to obey measures designed to gain this security.

Among the fundamentals of a liberal society is one of general application, namely equality before the law. Any civilised system must be even-handed: it must treat its citizens alike. Especially must it treat them alike in their enjoyment of the other fundamental rights and liberties characteristic of civilised systems.

The fact that these other rights and liberties are enjoyed by all citizens, and are to some extent conflicting, inevitably means that they cannot be absolute. Not only must they be subject to the demands of public order, and of equality

1. *Whitehouse v Lemon* [1979] AC 617, [1979] 1 All ER 898, HL.
2. 'Offences against Religion and Public Worship' (Law Com no 145 (1985)).
3. Law Com Working Paper no 79.

before the law, but also each must be modified at least to the extent of accommodating the same right and others enjoyed by other people. There must be a balancing exercise between it and them, and balancing means that one must not be allowed to prevail over another to the extent that that other is reduced to practical worthlessness.

In elaborating these general assertions, we may take as examples the two freedoms which are most relevant to the matter being discussed, namely freedom of speech and expression of opinion, and freedom of religion and expression of belief. The right of free speech in A must be balanced against many things: against B's right to a fair reputation, against C's right not be deterred from walking the streets by fear of being confronted by gross indecency, against D's right not to be put in fear of being attacked physically. To put it another way, A's right to say or write anything he chooses must be limited by the law of defamation, obscenity and public order. There are other limitations on A's freedom of speech imposed by, for example, commercial confidentiality, contempt of court, the prohibition of fraud, state security, and other concepts embodying the rights of citizens, whether as individuals or collectively.

On the other hand, for freedom of speech to be worth anything at all, it must not be limited by what other citizens find objectionable or distasteful, where no important right of others is infringed by the speaker. If A could not say anything which others found unwelcome, he could hardly say anything at all. The matter is obviously one of balance. When one says that the exercise of a right by A, for example the right of free speech, must not *unduly* encroach on a right of B, for example the right to reputation, one is using not absolute, but qualified terms, and the size and nature of the qualifications are debateable. Different resolutions of the debate are arrived at in different countries; compare the very different laws on defamation found in England and in the United States. There are no absolutes on the question of even-handedness between speakers as a class and the possessors of reputations as a class; a society may strike the balance at various points without giving up its claims to be a liberal society. But in striking the balance *between* speakers, or *between* possessors of reputations, a system must be exactly even-handed. If A1 can lawfully say something affecting B's reputation, then so can A2 say that thing. If B1 can complain of something affecting his reputation, so can B2 complain of something which has a similar effect on his reputation.

Freedom of religion is the freedom to adhere to a religion of one's choice and to manifest one's religion or beliefs in worship and practice. Indeed, since belief is a private matter, in practical terms freedom of religion inheres in freedom to manifest it. That freedom is denied if manifestations by, for example, collective worship, public expression of belief, appropriate education of children, customary behaviour and dress, are forbidden or made unduly difficult. In large measure, this freedom will be secured by the equal application of the ordinary laws protecting all citizens. Burning a church is as much arson as burning a garage. Assault is forbidden whatever the beliefs or absence of beliefs of the victim. To provoke violence towards or by a group of citizens is an offence against public order irrespective of the beliefs of the group. Attacks on someone's reputation, which as we have seen cannot be justified by the utterer's right of free speech, are restrained whether or not the victim is a believer.

On the other hand, freedom of religion does not mean that special privileges must be accorded to believers. Words which advocate violence are not to be justified by the fact that they are uttered by adherents in furtherance of their beliefs. Freedom to observe the Sabbath, or to refrain from betting or drinking, is one thing; denying others the right to work on the Sabbath or to indulge in betting or drinking is quite another, and needs to be justified on grounds other than that the activity is prohibited by the beliefs of religionists. Failure to accord special privileges may be unwelcome to believers, but it is not a denial of their right to manifest their religion in any significant degree, and even if it were such it would still have to be balanced against the rights of others.

All that the law must avoid, to observe the religious freedom of a section of society, is the withdrawal of its ordinary protection from them, and also the placing of unusual burdens upon them. The latter, however, is a matter of degree. Not all such burdens will be thought oppressive and a significant denial of religious rights. A materialistic society might, without surrendering its claim to support religious tolerance, impose higher property taxes on buildings, such as churches, which have no useful economic purpose, or prohibit practising religionists from certain offices of state on the view that such people are not sufficiently single-minded in their devotion to the state.

2. BALANCING FREEDOM OF SPEECH AND FREEDOM OF RELIGION

How are freedom of speech and freedom of religion to be balanced? Each must stop short of making the other freedom, and other freedoms, so attenuated as to be worthless. Freedom of speech will not justify expressions of opinion which make it significantly more difficult for religionists to practise or otherwise manifest their beliefs, if the right of those religionists to do so is to be an effective one. But denial of religious doctrines will not normally hamper the manifestation of them, unless done in such a way as to intimidate or defame adherents, when the ordinary law which protects all citizens from intimidation or defamation will restrain it. On the other hand, freedom of religion must not make freedom of speech illusory. Restraining an expression of opinion which does *not* impinge on the ordinary rights given to all citizens would appear to have this effect. The restraint is in effect on the ground that the expression causes distress or annoyance or disgust in the hearer. The right to restrain on such grounds plainly cannot be given to all citizens who hold strong views on for example sport or politics, or free speech would be a mere shadow of a right. Limiting the right to those who hold religious views may not have that effect, but it will offend the principle of equality before the law; holders of other views are not similarly protected. You can prevent me from expressing unwelcome views on religion; I cannot prevent you from expressing unwelcome views on my politics. If the special treatment is limited to one or some religions only, the effect on free speech will be correspondingly smaller, but the affront to the principle of equality will be greater. Persons who are relevantly alike (religionists) are not treated alike. You can prevent me from offending your religious views, but I cannot prevent you from offending my religious views.

Possession of a right not given to others is a privilege. A privilege which impinges on the rights of others needs special justification. Since the expressing

of unwelcome views on one's religion does not make it significantly harder to practise that religion, the legal proscription of such expressions cannot be justified by the claims of religious freedom, but must be defended by appeal to other public needs. It has been defended by the need to preserve what is a basically a religious society. 'Religious beliefs and feelings matter to society', says Routledge;[4] they should therefore be protected as constituting the protection of society. The purpose of special restraints would be for the protection of all adherents of religion in the interests of society as a whole. That purpose, he says, could bind believers and non-believers in a common cause. Whether that purpose amounts to a justification is, as Routledge says, not a legal question but a political one; how does society see itself? 'It is not lawyers, *qua* lawyers, who can determine how society perceives itself and its social structure'. But lawyers can point out, as do the majority of the members of the Law Commission, that legal proscription would be unlikely to have the effect hoped for it. They give two reasons for this:

> (1) proscription could only reasonably be applied to scurrilous attacks which are *less* likely to undermine religious beliefs, and could not, as is now universally admitted, be applied to serious, sober, attacks, which are *more* likely to have a deleterious effect, 'since reasoned persuasion is ultimately far more effective than attacks devoid of intellectual content';[5]
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> (2) the existence of criminal sanctions seen as objectionable could lead to widespread flouting by those wishing to focus on their discriminatory character or to be seen as martyrs to the cause of freedom of expression, and to the stimulation of activities designed to display their unacceptable character and the impossibility of proper enforcement.[6]

The logic of the first objection is difficult to withstand, and the strength of the prophecy in the second objection is demonstrated by, for example, the campaign against the poll tax which produced not only its crop of individual 'martyrs' but also the determined exploitation of legal loopholes by both individuals and some local authorities.[7]

A justification which, if it can be made out, is less political and more constitutional is embodied in the claim that religious persons and their views are special, are not relevantly alike to persons generally and their views on other subjects, because there is something about religious views which causes their holders to suffer more acutely on hearing unwelcome opinions on those views than the holders of views on other subjects will suffer on hearing contradictory or hostile opinions on those views. If such a claim can be made out, it might justify special treatment, but there is a heavy burden of proof to be discharged.

The claim *has* been made, and the Law Commission devoted some time to examining the view that it is the special reverence for what is deemed sacred that makes people more susceptible to offence in relation to their religious beliefs than in relation to their political beliefs, even though their political convictions may be no less strong.[8] If this means that religious believers, as such, are more

4. Graham Routledge 'The Report of the Archbishop of Canterbury's Working Paper on Offences against Religion and Public Worship' (1989) 1 Ecc LJ (4) 27,31.
5. Law Com no 145, para 2.32.
6. Ibid, para 2. 36.
7. Note also the campaign against Sunday trading laws, which did nothing for the tradition of obedience to laws in being.
8. Law Com No 145, para 2.38

deeply hurt by attacks than are others, the Commission noted that that is a very dubious empirical observation. If it means that religious feelings are special in kind, it concluded that reverence for the Deity is no different in kind from reverence for any other person or institution which a substantial number of persons regard as beyond the reach of criticism, and extending the law's constraints to criticism of such objects as the Monarch, or the Flag, or some philosopher, artist or musician whose work had some special significance for some people would be to extend the law too far, to the detriment of freedom of speech.

A less elaborate but perhaps more persuasive treatment of the matter is that of Spencer,[9] who simply asks, what is the evidence for the double assumption that religious people are more easily and deeply hurt, and religious feelings are superior in quality to other human feelings? 'Who claims that religious feelings are qualitatively superior to, say, a husband's feelings for his dead wife, or a patriot's feelings for his country? And who says that a religious person is necessarily more sensitive to outrages on his feelings than the husband or the patriot . . ? Only those who have such feelings'. In short the burden of proof is by no means discharged. Spencer adds the telling point that if religious feelings in general are specially protected, this is necessarily discriminatory against non-believers, and 'religious propaganda sets many atheists' teeth on edge'.

These prescriptions are reflected in several articles of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention on Human Rights'). This is not a source of law in England, although its provisions are said to be given weight in English courts.[10] In fact there have been several references from United Kingdom courts to the European Court of Human Rights.[11]

Article 9(1) of the convention provides that 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to . . . manifest his religion or belief, in worship, teaching, practice and observance'; but by article 9(2) the freedom of manifestation is 'subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights or freedoms of others'.

By Article 10(1) 'everyone has the right of freedom of expression', which shall include freedom to hold opinions, and to receive and impart information and ideas without interference by public authority, which may, however, impose licensing on broadcasting, television and cinema. Under article 10(2) the exercise of these freedoms is made conditional, that is, 'they may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others. . .'

By Article 14, 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

9. J. R. Spencer 'Blasphemy: The Law Commission's Working Paper' [1981] Crim LR 810.
10. See eg *R. v Secretary of State for the Home Department, ex parte Bhajam Singh* [1976] QB 198, [1975] 2 All ER 1081, CA.
11. See eg *Ealing London Borough Council v Race Relations Board* [1972] AC 342, [1972] 1 All ER 105, HL, and *Ahmad v Inner London Education Authority* [1978] QB 36, [1978] 1 All ER 574, CA.

How far does English law, in securing the freedoms of religion and of expression embodied in articles 9 and 10, observe the even-handedness required by article 14? As to freedom of thought, conscience and religion, English law secures this through the operation of the ordinary law, imposing no special burdens and allowing very few special privileges, which are given without discrimination to all 'recognised' religions. No religionists are protected from otherwise lawful but unwelcome acts done *because* of their religion. As to freedom of speech, all religionists, like non-religionists, enjoy this without restrictions other than those required by national security, public safety etc, and conversely are not protected from the expression of unwelcome views by others except to the same extent.

3. SPECIAL TREATMENT FOR CHRISTIANITY

To this the offence of blasphemy appears to be a notable exception. Christianity and Christian believers are protected further than are citizens generally. The crime of blasphemy does not require an intent in the utterer to blaspheme[12] or to cause a breach of the peace or fear of violence, or even objective likelihood of such happening as a result of the utterance. (Nor, indeed, shock or distress in the person addressed, since the crime can be committed even though that person shares or welcomes the views expressed).[13] But it is only Christianity which is thus specially protected.[14] As to other religions, the expression of unwelcome sentiments is only redressible if that expression is intended or likely to cause a breach of the peace or unlawful violence (that is, only on the same grounds as apply to any expression of opinion on any subject).

The relationship between freedom of religion and freedom of expression was considered by the European Court of Human Rights in *Gay News Ltd and Lemon v United Kingdom*,[15] and by the English Divisional Court in *R v Chief Metropolitan Stipendiary Magistrate*.[16] This was in the context of the provision by English law of a crime of blasphemy which protects the adherents of Christianity, but not the adherents of any other religion, from having their religious views vilified. In *Gay News*, it was held that the prosecution of homosexual non-believers for blasphemy in attributing homosexual practices to Christ did not unjustifiably interfere with the defendants' freedom of expression, or with their freedom of thought and religion. It was certainly an interference with the former, and would have been an interference with the latter if the publication in issue had been an exercise of religious or other belief, which it wasn't; but it was in any event justifiable as an interference because such was necessary to protect the rights of citizens not to be offended in their religious feelings by publications.

In *Chief Metropolitan Magistrate*, a Muslim, who was not allowed to prosecute the publishers of Salman Rushdie's book *Satanic Verses*, complained that if English law contained no offence of blasphemy protecting the followers of

12. *Whitehouse v Lemon* [1979] AC 617, [1979] 1 All ER 898, HL. The decision was by a majority, with Lords Diplock and Edmund Davies dissenting.
13. J. R. Spencer 'Blasphemy: The Law Commission's Working Paper' [1981] Crim LR 810 at 814, 816; Law Com no 145, p. 11.
14. *R. v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 QB 429, [1991] 1 All ER 306, DC.
15. *Gay News Ltd and Lemon v United Kingdom* (Application 8710/79) (1982) 5 EHRR 123, E Ct HR.
16. *R. v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 QB 429, [1991] 1 All ER 306, DC.

Islam from attacks on their religion, this was a breach of article 9 of the convention (freedom of religion). But it was held to be no breach to fail to provide a crime preventing vilification of a religion, because that freedom was not absolute and might properly be made subject to the freedoms of others; it must tolerate certain restrictions including that of not including the right to bring proceedings for blasphemy where it cannot be shown that a domestic law has been offended against. Indeed, if there were such a right, it would violate the freedom of expression of the publishers; that freedom also had exceptions, but the publishers of the work did not come within any of them.

So far, the result of both cases can be summed up as saying that if the law chooses to protect religionists from vilification of their views, that does not unjustifiably restrict the freedom of speech or the freedom of thought or religion of others; but if, on the other hand, the law chooses not to offer that protection, that failure is not an unjustifiable limit on freedom of religion, because of the counterclaims of freedom of expression in others. This might be accepted as a pragmatic attempt to balance conflicting freedoms. What is not so easily accepted is the way both cases dealt with the argument that if the law chooses to protect only one religion, this is a breach of article 14 of the convention, which requires rights and freedoms to be secured without discrimination on any ground such as sex, race, colour, religion or other opinion. In *Gay News,* the European Commission of Human Rights denied the publishers' claim on the ground that there was no evidence that they were singled out *as* homosexuals or unbelievers, but as publishers of the libel – they would have been prosecuted if they had been Christian heterosexuals; and also because the distinction English law made between Christianity and other religions 'relates to the object of legal protection, not to the personal status of the offender'.[17] In other words, article 14 allows the state to protect some classes of citizens but not others, provided it does not prosecute some classes of citizens but not others. In *Chief Metropolitan Magistrate,* this latter argument was accepted as one reason for disposing of the complaint of a Muslim that his co-religionists were discriminated against in that they were denied the enjoyment of rights and freedoms when Christians were not similarly denied.

This argument that there is no discrimination in the selective protection of some religionists provided that all citizens, religionists and others, are equally subject to the law's penalties will be found by many to be legalistic and unconvincing. Even if the protection of the law of blasphemy is not necessary for the full exercise of Christians' freedom of belief, it is an advantage enjoyed by them and denied to others. And as to the equal infliction of penalties on all citizens, in the nature of things, blasphemy will more often be deployed against non-Christians, since vilification of Christian beliefs will more often come from them than from Christians. Certainly both the majority and the minority of the Law Commission were troubled by the lack of even-handedness exhibited by the present law,[18] as was Lord Scarman in *Whitehouse v Lemon.*[19]

4. CORRECTING THE IMBALANCE

To correct the imbalance involves either abolishing blasphemy as to Christianity or extending it to other religions. There are opinions in favour of doing the latter. In *Whitehouse v Lemon,* Lord Scarman, although he was clear

17. *Gay News Ltd and Lemon v United Kingdom* (Application 8710/79) (1982) 5 EHRR 123 at 131, E Ct HR.
18. Law Com no 145, para 2.18 (iii); and Law Com Working Paper No 79, para 6.9.
19. *Whitehouse v Lemon* [1979] AC 617 at 658, [1079] 1 All ER 898 at 921, HL.

that the existing crime did not so extend and that it was not for the judges to extend it, was in favour. 'In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all, but also to protect them from scurrility, vilification, ridicule and contempt'.[20]

He thought that the movement of statute law in recent times was in that direction, instancing the adoption of article 9 of the European Convention on Human Rights – 'By necessary implication the article imposes a duty on all of us to refrain from insulting or outraging the religious feelings of others'.[21] He also instanced the removal of any requirement of an intention to provoke a breach of the peace to secure a conviction of inciting racial hatred, by section 70(2) of the Race Relations Act 1976. And the minority of members of the Law Commission, while agreeing with the proposal to abolish the existing law of blasphemy, wished to replace it with a new offence which would penalise the publication of grossly abusive or insulting material relating to any religion for the purpose of outraging religious feelings.[22]

However, the majority were not in favour of extending blasphemy, partly on the ground that a new tidied-up offence would be more used than the common law offence has been hitherto, particularly by adherents of religions which are exceptionally intolerant of criticism or who possess strongly heterodox views which they wish to draw to the attention of society,[23] and partly on the ground that a new extended offence would involve excessive restrictions on freedom of speech,[24] quite apart from difficulties involved in defining the religions protected and excluding some self-styled religions which are not regarded as such by others.[25]

Moreover, there is force in the arguments accepted by the Divisional Court in *Chief Metropolitan Magistrate* as constituting another reason for holding that the failure of our law of blasphemy to cover Islam or other religions was not a breach of article 14 of the convention. Even if it were a discrimination in the exercise of freedom of religion, it had an objective and reasonable justification. The point taken was that blasphemy as it existed – an offence of strict liability with no defence that the defendant had not intended to blaspheme – was a dangerous weapon well capable of resulting in unreasonable interferences with freedom of expression in breach of article 10. Extending it would make it more dangerous, and 'would encourage intolerance, divisiveness and unreasonable interference with freedom of expression'.[26] The makers of the convention could not have intended our law to do that, and the United Kingdom was therefore not in breach by failing to extend blasphemy to other religions. In the view of the court, extending blasphemy would do more harm than good, as encouraging intolerance, divisiveness, unreasonable interferences with freedom of expression. 'Fundamentalist Christians, Jews or Muslims could then seek to invoke the offence of blasphemy against each other's religions, doctrines, tenets, commandments or practices'.[27]

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20. [1979] AC 617 at 658, [1979] 1 All ER 898 at 921, HL.
21. [1979] AC 617 at 665, [1979] 1 All ER 898 at 927, HL.
22. Law Com no 145, paras 5.2, 5.3.
23. Ibid, para 2.47.
24. Ibid, para 2.50.
25. Ibid, para 2.58.
26. The argument of counsel for the publishers of *Satanic Verses,* apparently accepted by the court: *R. v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 QB 429 at 451, [1991] 1 All ER 306 at 321, 322, DC.
27. [1991] 1 QB 429 at 451, [1991] 1 All ER 306 at 322, DC.

No doubt a tidied-up offence of the sort proposed by the minority would not be such a potent engine of oppression and social discord as the present absolute offence would be if it were applied to all religions, but it would probably still go too far in restricting freedom of expression.

In this connection it has to be remembered that historically blasphemy has invariably been used offensively, not defensively. As Spencer notes, 'Far from being the law under which Christians have defended themselves from persecution, blasphemy is the law with which Christians have made unbelievers suffer in the same sort of way in which evangelising Christians in communist countries are sometimes made to suffer for their beliefs today'.[28] There is no reason to suppose that the adherents of other religions would invoke an extended law of blasphemy in any less aggressive manner than Christians have invoked the present offence.

It is true that recent years have seen the rise of what might be called 'active atheism'; for example militant gays regularly performing a scene in which Christ is subjected to homosexual rape.[29] This is not only grossly offensive towards Christians (and not only towards Christians), but also might be characterised as actually aggressive towards Christians. But it does not make it significantly more difficult for Christians to manifest their religion, and is therefore not an attack on their religion in the sense of an interference with freedom of religion (the only relevent sense, it was suggested earlier). It is not persecution, against which believers need protection further than is provided by the law against public disorder or obscenity.

Nor must it be lost sight of that, although abolishing blasphemy would remove discrimination between religionists, it would do nothing to remove discrimination against non-believers: indeed it would increase the range of restrictions on their freedom of speech.

5. RELYING ON PUBLIC ORDER LAW

The alternative is to abolish blasphemy without replacement. Perhaps the law relating to public order might suffice? Since 1936 there has existed an offence which in its original form consisted in using threatening abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace was likely to be occasioned. This was in section 5 of Public Order Act 1936, and in 1965 it was extended to cover the distribution or display of any writing, sign or visible representation which was threatening, abusive or insulting with similar intent to cause or likelihood of breach of the peace.[30]

In another report,[31] the Law Commission had criticised this as requiring a breach of the peace as likely or intended, and so not applying if the persons present were too terrified to act. This criticism was met when the law was altered by the Public Order Act 1986, and the range of prohibited conduct was widened. The present law has two offences.

Section 4(1) of the Public Order Act 1986 replaces Section 5 of the 1936 Act and provides that a person is guilty of an offence if he:

28. J. R. Spencer 'Blasphemy: The Law Commission's Working Paper' [1981] Crim LR 810 at 819.
29. See the Sunday Telegraph, 11 July 1991.
30. By Race Relations Act 1967, s 7.
31. 'Offences relating to Public Order' (Law Com no 123 (1983)), paras 5.14-5.18.

(a) uses towards another person threatening, abusive or insulting words or behaviour, or

(b) distributes or displays to another person any writing, sign or other similar representation which is threatening, abusive or insulting, with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

The offence may be committed in a public or a private place, except that it is no offence where the words or behaviour are used or the writing etc is distributed or displayed by a person inside a dwelling and the other person is also inside that or another dwelling.[32]

In some respects the law is widened by this section. The *locus* need not be a public place in the full sense of that expression. It may be what might be called a quasi-public place, the only exception where no offence is committed being a dwelling or dwellings with all parties inside it or them. Moreover there is now no reference to a breach of the peace, that being replaced by immediate unlawful violence. The accused must intend the other person to believe in this, or he must intend to provoke it, or his conduct must be such that such a belief is likely, or that such unlawful violence is likely to be provoked. But the scope of the law has also been narrowed, in that the unlawful violence must in all cases be 'immediate'.[33] There was no requirement in the old law that the breach of the peace intended to be provoked or likely to be occasioned should be 'immediate'.

With its insistence on feared or likely immediate unlawful violence (to mention only one of its limitations), this offence has obvious limitations as a control on unwelcome opinions offered to a religionist. It is true that the 1986 Act goes on in section 5 to add a completely new offence prohibiting the causing of *distress,* rather than fear of immediate unlawful violence, but that offence is obviously designed as a public order offence. The offence in section 5 is committed where one uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress.[34] The reference to distress might appear at first sight to offer protection from unwelcome opinions, since distress might well be caused to one hearing his cherished beliefs attacked. But the words or display have to be 'threatening, abusive or insulting', not merely unwelcome or repugnant. Moreover, although 'distress' is not defined, on the principle *sociis noscitur,* that word takes its character from its neighbours, 'harassment' and 'alarm', and will undoubtedly be held not to mean 'annoyance' or 'repugnance'. Moreover again, the offence must, like that in section 4, be committed in a quasi-public place,[35] and does not cover private conversations as blasphemy does. The offence appears to be aimed at, for example, hooligans kicking over dustbins in the night, and seems a mile away from covering the distress caused by hearing unpalatable opinions.

32. Public Order Act 1986, s 4(2).
33. *R. v Horseferry Magistrates' Court, ex parte Siadatan* [1991] 1 QB 260, [1991] 1 All ER 324, DC.
34. Public Order Act 1986, s 5(1).
35. Ibid, s 5(2), which corresponds with s 4(2).

All this is a long way from blasphemy. Blasphemy at present restrains the publication of matter about Christianity which is scurrilous, abusive or offensive, and which tends to vilify the Christian religion. The publication need not be public, and need not risk breach of the peace or immediate unlawful violence.[36] In addition, matter which is obscene or indecent may be punished under the Obscene Publications Acts 1959 and 1964 or the Indecent Displays (Control) Act 1981. So if the offence of blasphemy were abolished, vilification of Christianity would be punishable only if it were public or quasi-public (that is, not in a dwelling) and attended with a risk of immediate unlawful violence, or if it were obscene.

The Law Commission, while acknowledging that the reach of blasphemy extended further than that of public order law,[37] thought that any diminution in the protection afforded to believers by the abolition of blasphemy would be more apparent than real, since the real gravamen of the offence in recent times would be likely to be the public display of obnoxious matter. Even if it were accepted (which the Commission did not accept) that such display was likely to cause public disorder, that, in their view, was no case for keeping blasphemy, since s.5 Public Order Act 1936 covered all that was practically necessary. Private circulation or public availability (as opposed to public display) was unlikely to cause disorder, and even if it were likely, it would, in contemporary society, be the wrong response to keep a crime penalizing attacks on *religion;* in practice it would be more probable that the material at issue would be such as to arouse hostility to *persons* on account of their beliefs. There was an offence[38] which punished the inciting of racial hatred, and if the incitement of hatred on religious grounds ever became a significant problem, the proper course was to amend s. 5A to cover religious hatred.[39]

Not every one will accept the Law Commission's view that what Christian believers would lose in the way of protection from offensive views by the abolition of blasphemy would be more apparent than real. Nevertheless, it is suggested here, that loss, real or apparent, must be accepted in the interests of freedom of speech and even-handedness between religionists of different faiths, and between religionists and non-believers.

6. RELIGIOUS AND OTHER GROUPS

However, abolishing the offence of blasphemy would do nothing to correct (and indeed would bring into greater prominence) another imbalance in the law, namely that between religious groups and what might be called ethnic groups. Various protections are given to groups defined by colour, race, nationality (including citizenship) or ethnic or racial origins.[40] Thus, by the Public Order Act 1986 it is an offence to stir up racial hatred against ethnic groups in various ways, notably in using threatening or abusive words or behaviour or displaying or publishing inflammatory material, or performing, or showing or recording or broadcasting such,[41] or even *possessing* inflammatory material with a view to its being displayed, published, distributed or broadcast.[42] None of these offences require any intent to cause or any objective likelihood of violence.

36. Law Com no 145, para 2.19.
37. Ibid.
38. *Public Order Act 1936, s 5A.*
39. *Law Com no 145, para 2.29.*
40. Public Order Act 1986, s 17, defining 'racial hatred'.
41. See ibid, ss 18-22.
42. Ibid, s 23.

Moreover, in the fields of employment, education, the provision of goods, facilities or services or the disposal or management of premises,[43] it is wrongful discrimination (although not a crime) to treat a person on ethnic grounds less favourably than others.[44] This is called direct discrimination, and would be committed by one who did not appoint to, or dismissed from, a position a person because he was coloured, or of foreign extraction. In the same fields, it is also discrimination to apply to a person a requirement or condition which is such that the proportion of persons in some ethnic group who can comply is considerably smaller than the proportion of persons not of that group who can comply.[45] *This is called indirect discrimination, and is found when someone applies to all* relevant persons (for example applicants for a job) a requirement bearing disproportionately heavily on members of a particular group. Discrimination as such is not directly relevant in the context of expression of opinion, but since section 3(1) of the Race Relations Act 1976 uses the same formula as section 17 of the Public Order Act 1986 in describing the groups covered – 'colour, race, nationality or ethnic or national origins' – discrimination cases on the meaning of the formula in the Race Relations Act 1976 are of authority as to its meaning in section 17 of the Public Order Act 1986.

The leading case is *Mandla v Dowell Lee*,[46] which concerned alleged discrimination against a Sikh. In considering whether Sikhs are a relevant group, the House of Lords left no doubt that Christians were not such a group. Christians are a religious group, but the word 'religion' does not appear in the formula. Are they covered by any of the words which do appear? Clearly, in British society, Christians are not of one colour or race or nationality or national origin. In that, Sikhs are like Christians, so it was held; but the House was able to find that Sikhs were an 'ethnic' group. According to Lord Templeman, for the purposes of the Race Relations Act 1976 'a group defined by ethnic origins must possess some of the characteristics of a race, namely group descent, a group of geographical origin, and group history.'[47] He held that Sikhs were more than a religious sect; 'they are almost a race and almost a nation'. Lord Fraser was more elaborate; according to him 'ethnic' still retains a racial flavour. A group must regard itself, and be regarded by others, as a distinct community, by virtue of certain characteristics, of which two are essential, if not necessarily sufficient. The essential characteristics are (1) a long shared history, of which the group is conscious as distinguishing it from other groups and the memory of which keeps it alive; and (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.[48] The other members of the House agreed with Lords Templeman and Fraser.

Clearly some religious groups satisfy these tests, for example Sikhs and Jews, but adherents of major religions such as Christianity or Islam do not. In one

43. See the Race Relations Act 1976, Pt II (ss 4-16), and Pt III (ss 17-27).
44. Ibid, ss 1(a), 3.
45. Ibid, ss 1(b), 3.
46. *Mandla v Dowell Lee* [1983] 2 AC 548, [1983] 1 All ER 1062, HL.
47. [1983] 2 AC 548 at 569, [1983] 1 All ER 1062 at 1072, HL.
48. [1983] 2 AC 548 at 562, [1983] 1 All ER 1062 at 1067, HL.

industrial tribunal case,[49] an employer, determined to exclude religious extremists in the wake of the *Satanic Verses* affair, specified that no Muslims need apply. It was held that this was not direct discrimination. On the other hand, it was held to be a case of *indirect* discrimination, in that the employer had applied a condition (non-Muslim), such that the proportions of one ethnic group (Asians) who could comply was considerably smaller than the proportion of another ethnic group (Caucasians) who could comply. This follows from the distribution of the adherents of religions among the different ethnic groups in England. Some religionists are protected from discrimination, not because of their religion, but because of the ethnicity of the group in this country.

Now of course discrimination in employment etc is not what we are talking about. We are talking about protection from having one's religion scandalised. Where no public order is involved (that is, no intent to cause or likelihood of violence), religious groups as such are not protected, but ethnic groups are, from matter likely to cause hatred. The uneven distribution of religious adherents among ethnic groups in Britain means that adherents of Christianity are not within this law, whereas those of many minority religions, and even some universal religions which are heavily populated in this country with ethnics, for example Islam as to Asians, are within the law. Of course attacking a religion, even ferociously, is not necessarily the same as attacking religionists, but the one often amounts to the other. The reported comments of some Muslim extremists in the wake of the Salman Rushdie affair come perilously close to advocating hatred among their followers for the Christian majority. That is no offence under section 18 of the Public Order Act 1986, although the same expressions directed at Muslims probably would be. Advocating Paki bashing is an offence, and advocating Muslim bashing would probably be construed as an attack on Pakistanis or Asians.

This anomaly is entirely due to the failure to include 'religion' in the provisions of the Race Relations Act 1976 and the 'race' sections of the Public Order Act 1986. The reason for this failure is said to be that at the time when the law was first enacted there were particular pressing social dangers affecting immigrants which could not be dealt with by the ordinary law, and which needed this special law in order to be coped with.[50] There was no similar pressing social danger in respect of religionists, and therefore no justification for the extra interference with freedoms of speech and action which would be involved in the inclusion of 'religion' in the 'protected' formula.

It may be accepted that the second half of this diagnosis is still true. To protect all religionists from attacks not involving designed or likely violence would be going too far in the way of restricting freedom, and there is no special need to protect *them* as opposed to holders of *non*-religious beliefs. But the question remains, is the special need to protect ethnic groups still so pressing as to require special handling by the law? That protection has existed for thirty years. Has it removed or significantly reduced the pressing social need which called it into existence, or has it not? If it has not, it is a question whether the interference with the freedoms of the majority has been worthwhile, bearing in mind that since, for some, the interference is a constant irritant, it may well be counter-

49. See the Daily Telegraph, 27 September 1991.
50. See eg Law Com no 145, para 2.42; and Law Com Working Paper no 79, para 7.16.

productive, causing more social disharmony than it prevents. If the interference has removed or significantly reduced the social dangers, the argument that it is still needed is a difficult one to sustain, resting as it does on the fear that removal will cause a recrudescence of the troubles it has removed or lessened. That fear may be unrealistic, for it must be borne in mind that the prohibition in section 4 of the Public Order Act 1986 (of expressions intended or likely to cause unlawful violence or belief in such) would remain, not being part of the special protection of ethnic groups. It is the effect of removing the special protections in sections 17 to 23 of that Act and the anti-discrimination provisions in the Race Relations Act 1976 which is in issue; and against the likelihood, speculative as it must be, of the undesirable effects of their removal there must be set the unfortunate side effects of their thirty years of existence.

One not insignificant side effect of thirty years of protection from inflammatory material, and from discrimination in the fields of employment etc, is that it encourages some extreme religionists to believe that they have special privileges as such, that is, as religionists. To be precise, that the enforcement against them of ordinary laws which bind everyone is persecuting their religion. The use of threatening language causing fear of violence is an offence under the Public Order Act 1986, an offence which is in no way limited to ethnic attacks or religious attacks; it applies to any attacks. Yet when extremists after the *Satanic Verses* affair called for violence, as some did, no prosecutions followed, as they would have done in other circumstances. It is felt in some quarters that the invoking of that law, or indeed the older and more serious law on inciting murder, would be in some sense punishing people for their religious views, and the impression got around that the prosecuting authorities felt that action by them would be seen in that light. We have to remind ourselves that failure to mitigate the ordinary law in favour of religionists is not religious persecution; failure to grant special privileges is not persecution. By inadvertantly granting privileges to some religionists (by reason of their ethnic make-up), we allow that to be forgotten, and the contrary and illegitimate idea to take root and grow. Removing the special privileges of ethnic groups would at least make clearer that all laws bind all subjects equally.

7. OPTIONS FOR ACTION

Enough has been said to suggest that we depart from even-handedness at our peril. It is idle to look for perfect arrangements which suit everybody; one citizen's freedom is another citizen's restraint. Given this inevitable imperfection in our arrangements, departures from the principle of equality before the law must be kept as few as possible, since they produce distortions which add to the perceived imperfections of society. What, if anything, should be done about the departures presently existing in the area under discussion? One course which, given the difficulties and the absence of any political kudos attending any attempts at legislative change, is the likeliest to be pursued in practice, is to do nothing and leave matters exactly as they are now. There are the objections discussed earlier. Blasphemy not only offends against the right of free speech, but also unjustifiably discriminates against adherents of non-Christian religions and against adherents of no religion. The provisions of section 17 of the Public Order Act 1986 are also discriminatory in favour of non-Christian religions which have ethnic membership. It could be argued that the two discriminations roughly counterbalance each other; but it is very rough indeed, and the balance does not cover expressions of opinion which are not aimed at religion or ethnic groups.

These imbalances in the current law are serious enough to prompt suggestions for change, in spite of the practical difficulties in the way of reform. The starting point must be the abolition of the present law of blasphemy; the suggestions below consider what further change, if any, is desirable.

1. Abolish the offence of blasphemy and otherwise leave things as they are. This is the recommendation of the majority of members of the Law Commission. Although the consequent diminution in the rights presently enjoyed by Christians must be accepted in the interests of freedom of speech and even-handedness towards adherents of other faiths and towards non-believers, the objection to this course is that, because of the ethnic membership of some religions in this country, it leaves discrimination in favour of members of those religions and against Christians and non-believers, who are not identified with any ethnic group.

2. Abolish the offence of blasphemy and have an offence of outraging any religious feelings. This is the recommendation of the minority in the Law Commission report. The objections to this are: there are formidable problems of definition, and some views which would be classified as 'religious' may deserve criticism or ridicule in the strongest terms (for example Scientology), and as the majority point out,[51] abuse and insult cannot be excluded as weapons of criticism, for example criticism of ritual slaughter and the treatment of dead bodies, both a cherished part of the beliefs of some religionists. All recognised religions would have to be covered, otherwise even-handedness would be lost, but covering them all would be an enormous encroachment on individual expression, and would still discriminate against non-religionists.

3. Abolish the offence of blasphemy and amend section 17 of the Public Order Act 1986, the stirring-up hatred section (and its followers, sections 18 to 23), to include in the formula 'religion'. This is what the Law Commission proposes to be done if expressions of hostility towards *people* on account of their religious beliefs becomes a real social problem. There is a precedent for this in Northern Ireland,[52] and in a few foreign jurisdictions, for example India. The difficulty with this is that if it is not very tightly drawn and interpreted, it approximates to the previous proposal and shares its drawbacks. But if it is kept on a tight rein, (as it ought to be and as section 17 ought to be – fortunately there have been very few prosecutions and not much doctrine has emerged), it seems otiose, in view of the existence of the offence in section 4 of threatening or provoking violence. Moreover, it seems at the very least doubtful whether expressions of hostility towards *people* on account of their religious beliefs have become a large enough social problem as to need anything more than the prohibition of threatening or distressing expressions covered by sections 4 and 5.

4. Abolish not only the offence of blasphemy but also section 17 and its followers altogether. There would still remain section 4 preventing *threatening* expressions, and it might be thought that that is all that is needed. It covers all matters, so does not discriminate between adherents of different religions or between adherents and non-believers. Moreover, with its requirements of threatened or provoked violence it comes within a universally accepted derogation of the right of free speech. It is suggested that this course is to be preferred at the present juncture.

51. Law Com no 145, para 2.48.
52. Incitement of Hatred Act 1970, s 1 (Northern Ireland).

However, the case needs to be examined for abolishing the anti-discrimination provisions of the Race Relations Act 1976 in the fields of employment and the provision of various services. They were created to take account of an unprecedented wave of immigration in the fifties. Opinions will differ on whether they are still needed, but in deciding whether they should remain, one must bear in mind their drawbacks. One drawback is that the provisions are discriminatory against the majority and so provoke anti-ethnic feelings in some people in the majority. This drawback was recognised at the beginning, as was the impossibility of avoiding it by extending the provisions to cover all classes of people, since that would curtail the freedom of action of employers and providers of services to a quite unwarrantable extent. Nevertheless it was thought worth putting up with, in the hope that the resentment would in time disappear or at least diminish. Not only does it seem that that hope has not been fulfilled, but another drawback has more recently become apparent, namely that the anti-discrimination provisions, because of their fuzzy identification of ethnic religions with ethnic groups, encourage the belief that ethnic groups have on account of their religion certain immunities from the ordinary laws which are denied to Christians and non-believers.

An independant review of the effect of the anti-discrimination laws will be needed before their abolition can be recommended. However, one suggestion which has already been made,[53] namely that those laws should be extended expressly to cover religion, should be resisted. While that course would remove inequality of treatment between Christianity and other religions, it would increase the number of occasions when non-believers would feel that they had been discriminated against, for example in the matter of employment, and widen the incidence of the false belief referred to above that religionists are in some degree immune from the ordinary laws.

53. See letter to The Times, 21 September 1992, from the Chairman of the Council for Racial Equality.