POSTMODERNIST INTOLERANCE

Strange as it seems, moral relativists and religious absolutists are allies.

John Locke is called the "father of classical liberalism" because his great contributions to political philosophy are reflected in, among other things, the United States' Declaration of Independence. Yet it is curious to note that Locke's defense of religious freedom, which is in line with what most of the greatest thinkers in the classical tradition thought, was not grounded on a doubt about "truth" or any sympathy for the beliefs that he thought should be tolerated. Instead, Locke argued in *A Letter Concerning Toleration* that many opinions he proposed to tolerate were actually "false and absurd," at least according to his opinion. He was adamant that, since there is a God, humans are obliged to observe his moral laws with the "utmost care, application and diligence in seeking out and performing them." Although insisting that there is "only one way to heaven," still Locke believed that everyone is *individually* responsible for finding "the narrow way and the strait gate that leads to heaven." In essence, Locke advocated that since "man cannot be forced to be saved," then, as Jeremy Waldron summarizes it, "religious truth must be left to individual conscience and individual discernment."[1]

That nobody can be regarded as a free citizen without freedom of speech and freedom of conscience is the very essence of the classical liberal defense of religious toleration. But given the moral relativism of our time, regrettably, this traditional view of religious tolerance is gradually becoming discarded, being replaced by a new approach that denies the possibility of truth, proclaiming the moral equivalence of all religions. Indeed, Western societies have now moved away from the free exercise of religious expressions, choosing rather to impose the unreasonable assumption that all beliefs are equal in value and deserve our respect.

But once we slide from the classical idea of tolerance to this morally relativist postulate, intolerance ceases to represent a rational rejection of particular ideas and instead morphs into a censor of all questions and statements that contradict the general assumption that all opinions, all religious beliefs, are equally valid. As such, to question the assumption that some religions are actually better than others becomes, by its very definition, the ultimate act of intolerance and must therefore be condemned. The classical link between tolerance and judgement is lost due to our refusal to pass any valid judgement, creating a position that conceives "tolerance" merely as the superficial signifier of acceptance and affirmation of anyone and everyone.

Religious Vilifications Laws

Although the previous federal government considered in 2012 extending its anti-discrimination laws to include a protection against offences or insults to religion, fortunately Australia still remains devoid of federal legislation that specifically establishes the crime

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of religious vilification. The proposed legislation adopted a concept of religious discrimination that criminalised "conduct that offends, insults, or intimidates" another person on religious grounds. Since there is no element of objectivity in the words "reasonably likely to offend," people would have become culpable for discrimination even if they were telling the truth, thus making the truth of a statement irrelevant for the purpose of identifying discrimination.

The anti-discrimination draft bill apparently sought to consolidate the existing Commonwealth anti-discrimination laws into a single act. However, in reality, it would have gone much further than simply consolidating those laws, because the draft bill effectively expanded the scope of anti-discrimination laws while simultaneously imposing significant restrictions on freedom of speech and freedom of religion, including at the workplace. As such, James Spigelman QC commented that this would have the practical effect of reintroducing the crime of blasphemy into Australia's law.[2]

The good news is that, thanks to widespread community outcry, the federal government shelved that draft bill. However, three Australian states have introduced state laws designed to prohibit religious vilification: Queensland, Tasmania, and Victoria. The government in South Australia proposed to amend its racial anti-discrimination laws to include religious vilification, but the proposal was rejected after the public objected. Similarly, in Western Australia the then Labor government dropped the idea once it realised that "it was too hard to devise laws that could be fair and workable."[3]

In Tasmania, on the other hand, Section 19 of the Anti-Discrimination Act 1998 (Tas) determines that no one can publically act in a way that incites "hatred towards, serious contempt for, or severe ridicule of a person or persons on the basis of their religious beliefs or affiliations."

In Queensland, the Anti-Discrimination Amendment Act 2001 (Qld) mandates that a person must not publically act in a way that would "incite hatred towards, serious contempt for, or severe ridicule of a person or persons on the basis of their religion." This provision, dealing with serious religious vilification, is comparable to the Victorian provision.

In New South Wales, a proposed amendment to the Anti-Discrimination Act 1977 (NSW) would have added the term "ethno-religious" to the definition of race. Fortunately, this bill was decisively voted down in March 2006. In a parliamentary speech, Bob Carr, then premier, deemed the idea of a religious vilification law "deeply regrettable" and "highly counterproductive," reminding his colleagues that such laws are "too easy to abuse" and "questionable to say the least." He referred to the example of the Satanist incarcerated in Victoria (for abducting and molesting a teenager girl) who made a complaint under the Victorian Racial and Religious Tolerance Act after attending a Salvation Army course held in prison. He argued that the Salvation Army posed a danger to his safety for running a course that discriminated against him on the basis of his religious belief. Judge Morris dismissed the case as frivolous but warned of the need for the legislation to be amended to prevent "preposterous litigation."[4] Since then a new section has been inserted to allow an exception to vilification on the grounds of conveying, teaching religion or proselytising.

In determining whether a person has vilified another, the Victorian legislation states that "the person's motive in engaging in any such conduct is irrelevant." By declaring the irrelevance of truth and motivation, a person may be condemned for "inciting hatred" even though he or she actually had no intention to do so, unless the accused falls within the exceptions of good faith, art, academic, religion, science, or public interest. These exceptions create a two-tiered system of speech in which only the "learned" can freely express their ideas but the "irrational masses" are restrained from doing so. Cardinal Pell explains the anomaly:

> Citizens rightly resent any attempt to limit their free speech more than the free speech of their "betters." It is quite unfair that the deliberate conduct of the artist or the politician is exempted but the clumsy contribution of the less educated is made criminal. If any serious movement for racial and religious persecution were to

> gain momentum, then no doubt it would have been led and nourished by certain misguided politicians, academics and artists.[5]

Postmodernist Roots of Religious Vilification Laws

Whereas the truth has always been a primary element of defence in defamation cases, and rightly so, the advent of postmodern philosophy (which postulates that truth is socially constructed) has introduced a belief that truth is invariably relative. But if truth is always relative, then, one might conclude, there is "no such thing as free speech" (as the title of a book by postmodernist Stanley Fish states). After all, if everything is relative who are we to criticise someone's different ideas? This perhaps helps explain why vilification laws often hold the premise that that truth of a statement cannot be relied as a defence. Such a law is elaborated by individuals who are deeply sceptical of objective truth, religious or otherwise.

These "unenlightened" legislators have therefore embraced the postmodernist fallacy of denying objective truth and meaning.

Curiously, all of the most influential postmodern thinkers have been atheists. This would include the likes of Foucault, Lyotard, Bataille, Barthes, Baudrillard, Macherey, Deleuze, Guattari, Lacan, and Derrida.[6] Broadly speaking, these philosophers "agree with Nietzsche that 'God'—which is to say, the supreme being of classical theism—has become unbelievable, as have the autonomous self and the meaning of history."[7] Alister McGrath spoke of the intimate relationship between postmodern philosophy and old-fashioned atheism:

> Many Postmodern writers are, after all, atheist (at least in the sense of not actively believing in God). The very idea of deconstruction seems to suggest that the idea of God ought to be eliminated from Western culture as a power play on the part of churches and others with vested interests in its survival.[8]

Perhaps this explains why religious vilification laws do not seem to take religious claims seriously. Under postmodern theory, of course, what one takes as truth is no more than a Christian perspective, a Jewish perspective, a Muslim perspective, a Hindu perspective, and so forth. Each of them is "correct" in terms of its own religious context, so "truth" can be readily dismissed as naïve at best and deceptive at worst, in the latter situation an attempt by a group to impose its own perspective on all the others. And yet, as law professor Carl Esbeck reminds us, "one who has never disagreed with others about religion is not … commendably tolerant, but is treating religious difference as trivial, as if religious beliefs do not matter. That is just a soft form of religious bigotry."[9]

Postmodernists often conclude that religion is politically divisive because, allegedly, religious people believe in ideas of absolute truth that are intolerant to different opinions pertaining to other "truths." Of course, the assumption is simply mistaken because, as Locke and others in the classical tradition previously demonstrated, one may express quite strong religious convictions about the veracity of a faith and still remain completely tolerant towards "erroneous" opinions. However, the idea of imposing by law the limitation of religious conviction to merely private preference has filtered down from the postmodernist academic elite to our "unenlightened" legislators who now think they can silence robust discussions on grounds of preserving "tolerance." These "unenlightened" legislators have therefore embraced the postmodernist fallacy of denying objective truth and meaning; they see any claim to the truth simply in terms of *personal preference*.

Blasphemy Law by Stealth

Although religious vilification laws are undeniably postmodernist in their philosophical nature, ironically religious extremists can hijack these laws quite easily to secure immunity for their beliefs from public scrutiny. Indeed, anti-vilification laws in essence appear to serve the purpose of establishing a blasphemy law by stealth, a suspicion

reinforced by the strong insistence of the powerful Islamic Council of Victoria upon the enactment of Victoria's RRTA.

While the majority of Muslims living in Western democracies are law-abiding citizens, following a non-literalist version of their religion, there is now a widespread perception that many Western Muslims believe that blasphemers deserve some form of punishment.[10] Across the Muslim world accusations of insulting the Islamic faith are systematically dealt with by means of death threats, imprisonment, beatings, and the death penalty. In Muslim-majority countries, "religious persecution is reported in 100 percent of cases." Indeed, "religious persecution is not only more prevalent in Muslim-majority countries, but it also generally occurs at a more severe level." [11]

Of course, religious extremists living in Western democracies must find different ways to use our legal system to punish those who offend their beliefs. Regrettably, they find in religious vilification laws a suitable mechanism to strike fear in the hearts of the "enemies of the faith." Indeed, one of the greatest ironies of vilification laws is that their chief beneficiaries are a small but vocal group of religious extremists, although it is not clear why such people should merit statutory protection from severe criticism: surely the contrary is required. Some of their religious beliefs are deeply disturbing. For example, a Muslim cleric from Melbourne has notoriously declared that male Muslims should have the right, according to the legal dictates of their religion, to hit and force sex upon their disobedient wives.[12] Although such remarks deserve our strongest possible condemnation, even the slightest criticism of abhorrent statements may result in an individual being dragged into a secular court and charged with religious vilification.

The Unconstitutionality of Religious Vilification Laws

Whereas the Australian Constitution does not contain a comprehensive declaration of human rights, the High Court has found it to contain a few implied rights. Among these implied rights is the right to freedom of political communication, which the court declared protects insults, abuse, and ridicule. The court deemed these means of communication as legitimate parts of political discussion.[13]

Religion is rarely simply a private and personal matter. The very nature of religious speech is often intertwined with "political opinions, perspectives, philosophies and practices."[14] As such, religiously inspired speech must be constitutionally protected if sufficiently connected with politics. "Law which prohibits religious vilification will infringe the implied right to freedom of political communication."[15]

In other words, Australians are constitutionally entitled to criticise strongly and ultimately to reject any religious idea. They have the constitutional right to openly manifest their opinion as to why they might regard any aspect of a particular religious belief as ultimately mendacious, retrograde, and mindless. Otherwise, are we willing to create in this nation the same crime of blasphemy that the Organization of the Islamic Conference (OIC) demanded when it passed at the United Nations, in 2009, a motion that prohibits defaming religion and imposing strict limits on freedom of expression in the religious domain?

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The OIC basically wants relevant U.N. human rights conventions to be rewritten so as to ensure that no one is able to invoke freedom of speech when criticising a religion. Furthermore, it wants conventions banning racism to also encompass insults to religion. Curiously, that is precisely what the Racial and Religious Tolerance Act (2001) in Victoria does. It rests on precisely the same misguided idea of linking criticism of religion with racism.

Indeed, the Victorian legislation aims at preventing instances of either religious or racial vilification, thus applying to religion the same formulations which are applied to race.[16] Of course, linking religion with racism is problematic because, in contrast to racial issues, where one finds no questions of true or false, "religions inevitably make competing and often incompatible claims about the

nature of the true god, the origins of the universe, the path to enlightenment and how to live a good life and so on. These sorts of claims are not mirrored in racial discourse."[17] That being so, one would assume that the laws of a democratic society "should be less ready to protect people from vilification based on the voluntary life choices of its citizens compared to an unchangeable attribute of their birth."[18]

Conclusion

In an environment where radicalised Australians have not only expressed sympathy with Islamic terrorists but also become terrorists themselves, religious vilification laws have the deleterious effect of making citizens unprepared to criticise or even give warnings about the nature of particular religious beliefs, however well-based these concerns might be. This is the singular tragedy of "multicultural societies" which engender postmodernist legislation that reduces free speech on some of the most fundamental issues of public morality. Of course, there is no apparent reason why religious speech motivated by political concerns should not be characterised simultaneously as political communication for the purpose of receiving constitutional protection—as a basic right of the citizen derived from their freedom of political communication implied in the Australian Constitution.

Endnotes

1 Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge/UK: Cambridge, 1993) 98.
2 James Spigelman, "Free Speech Tripped Up by Offensive Line." *The Australian*, 11 December 2012.
3 Steve Edwards, "Do We Really Need Religious Vilification Laws?" *Policy* 21:1 (2005) 30–32.
4 *Fletcher v Salvation Army Australia* [2005] VCAT 1523.
5 *The Age*, 16 March 2001. Quoted in Robert Forsyth, "Dangerous Protections: How Some Ways of Protecting the Freedom of Religion May Actually Diminish Religious Freedom." Lecture delivered as the Third Acton Lecture on Religion and Freedom, Centre for Independent Studies, 24 September 2001.
6 Derrida was more cryptic about his atheism. Speaking before a convention of the American Academy of Religion in 2002, Derrida commented: "I rightly pass for an atheist." However, when asked why he would not say more plainly "I am an atheist," he replied, "Maybe I'm not an atheist." How can Derrida claim to be and not be an atheist? Both the existence and nonexistence of God requires a universal statement about reality, but Derrida is unwilling to make such an absolute claim. In this regard Derrida's theology is consistent with his postmodern inclination for ambiguity.
7 Kevin J. Vanhoozer, *Postmodern Theology*. Cambridge: Cambridge University Press, 2005. p. 22.
8 Alister McGrath, *The Twilight of Atheism*. New York: Doubleday, 2004. p. 227.
9 Carl H. Esbeck, "The Application of RFRA to Override Employment Nondiscrimination Clauses Embedded in Federal Social Services Programs." *Engage* 9:2 (2008), p. 9.
10 Ayaan Hirsi Ali, "The Painful Last Gasp of Islamist Hate." *The Weekend Australian*, 22–23 September 2012.
11 Brian J. Grim and Roger Finke, *The Prince of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century*. Cambridge: Cambridge University Press, 2011. p. 21.
12 "It's OK to Hit Your Wife, says Melbourne Cleric Samir Abu Hamza." *The Australian*, 22 January 2009.
13 *Coleman v Power* (2004) 220 CLR 1, 54, 78, 91. See also: *Roberts v Bass* [2002] HCA 1, 62-63; see also: *Attorney-General (SA) v Corop of Adelaide* [2013] HCA 3, 43.
14 Adrianne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374, 386-387.
15 Nicholas Aroney, "The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation." *Federal Law Review* 34:288 (2006), p. 313. See also Neil Foster, "Anti-Vilification Laws and Freedom of Religion in Australia—Is Defamation Enough?" Paper presented at the conference "Justice, Mercy and Conviction: Perspectives on Law, Religion and Ethics," University of Adelaide School of Law, 7–9 June 2013, p. 14.
16 According to Flemming Rose, the Danish editor who has to live in the shadow of death threats after publishing cartoons of the prophet Mohammed, the OIC has exploited those cartoons in the same way a coalition of countries led by the Soviet Union exploited the Nazis' genocide of the Jews to gain U.N. support for including constraints on freedom of speech in both the Covenant on Political Rights and the Convention on the Elimination of All Forms of Discrimination. Since this meant that the distinction between words and actions was blurred, the oppressive regimes that voted for those constraints were subsequently able to employ them to justify laws used to silence critical voices. Flemming Rose, *The Tyranny of Silence: How One Cartoon Ignited a Global Debate on the Future of Free Speech*. Washington, DC: Cato Institute, 2014. p.181–185
17 Ivan Hare, "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred." *Public Law* (2006), p. 521–531.
18 Rex Tauati Ahdar, "Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law." *The University of Queensland Law Journal* 26:2 (2007), pp. 293, 301.