BLASPHEMY

AN ANCIENT WRONG OR A MODERN RIGHT?

by

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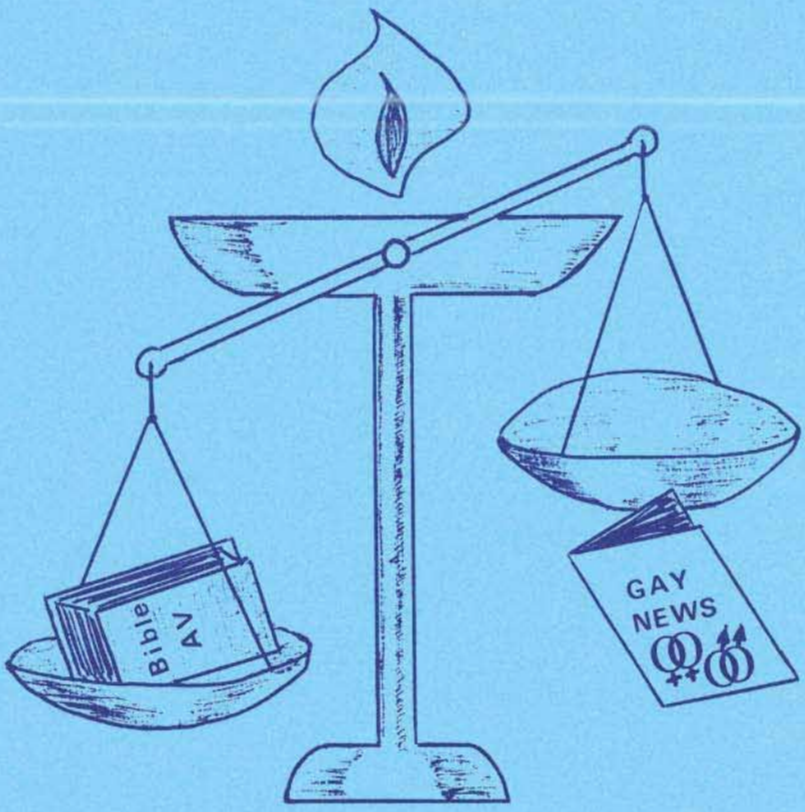

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BLASPHEMY: AN ANCIENT WRONG OR A MODERN RIGHT?

When Denis Lemon, the editor of *Gay News*, was privately prosecuted in 1977 by that self-appointed public morality gadfly, Mrs Mary Whitehouse, for publishing a blasphemous libel - namely, a poem by Professor James Kirkup entitled, "The Love that Dares to Speak its Name",accompanied by an illustration depicting Christ at Calvary being homosexually interfered with by a Roman soldier - he originally argued that the crime of blasphemy (or blasphemous libel) no longer existed as a common law offence. In the appeal courts he abandoned that contention and concentrated his forensic fire at the issue whether the prosecution had to show not merely the publisher's intention to publish the offending matter but also an intention to attack the Christian religion so violently and scurrilously as to insult its adherents to such an extent that a breach of the peace was likely. Ultimately in the House of Lords he failed, by 3 to 2, to persuade the Law Lords that the additional intention was a ore-requisite to the commission of the offence.

Since there had not been a prosecution in this country for blasphemous libel for more than 50 years, it could hardly be argued that the offence was in that exceptional class of offences which,on grounds of public morality or public order, requires the stricter liability under the criminal law. All their Lordships, while unanimously declaring their profound distaste, not to say outrage, at a poem that the jury had found vilified Christ in his life and crucifixion, did not, however, find the law in any state of certainty. They frankly conceded that, in the absence of any clear precedent or acknowledged statement of the law, the issue became one of legal policy in the society of to-day. So much has been recognised by the fact that the European Commission of Human Rights, to whom Mr Lemon has petitioned, complaining that the ruling of the Engish Courts violates certain provisions of the European Convention on Human Rights and Fundamental Freedoms, has questioned the U.K. Government whether the Courts were in fact declaring the established law or making new law. There, for the moment, the legal niceties rest.

Why did Mr Lemon not boldly challenge the existence of the offence of blasphemy in the modern criminal laws of England? After all, no less a fundamentalist than Lord Denning had written in the first Hamlyn lectures in 1949 that there was no longer a danger that denial of Christianity was liable to shake the fabric of society and that the "offence of blasphemy is a dead letter". (See *Freedom Under the Law,* p.46). The law relating to both obscene libel and breaches of the peace is adequate enough to encompass any writings that went beyond the permissible bounds of the freedom of expression. The answer, of course, lies in the forensic process. Parliament had not expunged the common law offence of blasphemy, and had in recent times only taken off the statute book the myriad Blasphemy Acts of the 16th and 17th centuries. Furthermore Sir John Simon, when Attorney-General, in a written opinion for the Home Office in 1914 had pointed to the obsolescence of the crime, suggesting that it could conveniently be consigned to the legal history museum. But no legislative action has been forthcoming. The task of the advocate in the criminal justice forum to have overthrown an extant crime, however obsolescent, was a sisyphean one and unnecessarily burdensome in view of the availability of an argument that at least found favour with two Law Lords and with the further potential avenue afforded by the right to take any adverse ruling to Strasbourg. If, therefore, legal policy for the time being favours retention of this ancient crime - and indeed, in the eyes of Lord Scarman, its extension to protect the beliefs and sentiments of non-Christians in our pluralist society - there is everything to be said for advocating that social policy demands that we should be rid of this anachronistic crime, to the point where even an irrational and intemperate verbal assault on Christian and other religious beliefs is a right accorded to members of a free society in exercise of one of the most cherished fundamental freedoms.

Even if the freedom of expression is not absolute but is exercisable under the freedom to live under the rule of law, whose contours are determined by laws designed to protect other freedoms, the case for the abolition of the crime is overwhelming. I happen to believe, along with that great judge, Mr Justice Black, that the protection given to free speech by the First Amendment to the U.S. Constitution tolerates the widest range of utterances. Whether in the field of obscenity or blasphemy or subversion, an utterance which incites to unlawful acts is irrelevant to the protection afforded by such constitutional guarantees as the First Amendment. Any law can properly deal with conduct that upsets the social equilibrium; unfortunately the easy way for legislators and judges is to strike at the speaker or the writer and suppress him. But the philosophy of a free society is that mature people (and perhaps any failure to give effect to that philosophy is a mark of immaturity) will pick and choose among speakers, writers and publishers, turning their backs on those ideas that are repulsive, but suppressing none. In politics there are the untouchables, just as in religion there are the heretics. Until we reach maturity, I suppose we will continue to breed legislators and judges who will receive the plaudits somewhere among the mob. Even within the limits of a society that has not attained full maturity the freedom of expression in the democratic system can safely dispense with a law of blasphemy and thus further distinguish itself from what is permissible in other systems. The more we can distance ourselves in intellectual freedom from other systems of government the healthier will be our own and the more attractive the democratic form of government will become. Freedom of expression is an essential ingredient in the democratic system functioning under the rule of law.

There are many people who are positively disinterested in the survival of democracy, but those who are the communicators are not among them. No doubt there are communicators who are eager to act as the programmed mouthpieces for some eventual autocratic government of the extremes of left and right. Their freedom to speak is as vital as that claimed by the rest. But among the vast majority committed to freedoms in general there appears too often an anachronistic distortion deriving from a traditional liberal habit of assuming that the danger to our freedoms comes invariably from the side of government. This leads them,

perhaps unwittingly, to direct all their attention to restrictions emanating from government and discerning quite minute deviations from democratic propriety. Some of the concentration on freedom of information takes on this aspect. The attention devoted to non-governmental threats to freedom of speech thus becomes languid and myopic.

It is not the agents of government that shout down speakers at Universities; it is not governments that threaten the very life-blood of Fleet Street; nor is it governments that seek to curb the utterances of the irreligious. If the Church of England remains the established Church of State no one seriously to-day would echo Lord Eldon's famous observation: "The establishment is not for the purpose of making the Church political, but for the purpose of making the State religious." We live in practice in a secular State which accords freedom to all religious bodies. Encroachments upon the individual's freedom to deny the validity of others' religious convictions no less than to propagate his own beliefs, be they religious or irreligious, are far less likely to come from government than from unscrupulous minorities which claim their own freedoms but seek to deny them to others. We must of course look to government to ensure that those who are indifferent or hostile to the freedom of expression do not endanger our freedom. Failure to contain the intolerant and intolerable minority is the greatest threat to our freedom. But the failure of successive administrations to banish the law of blasphemy has left open the opportunity to a minority voice to resurrect the ancient wrong and so blemish this country's record for increasing tolerance. How was it, nevertheless, that in 1977 we found ourselves trapped by history? It is a story that should teach a lesson to all those who favour freedom of expression.

The first indictment of blasphemy belongs to the lax period when, after the fall of the Commonwealth, the restoration of the Monarchy was followed by outbursts of disorder. Such misdeeds had formerly been checked by the Star Chamber and the Ecclesiastical Courts, but these restraints had fallen away. The former had been abolished before the death of Charles I; and the spiritual Courts had suffered under Cromwell a paralysis from which they never fully recovered. Hence offences, which under the Monarchy had been punished by these courts alone, gained an unexpected freedom with the eclipse of Puritanism. The earliest instance of a charge of blasphemy grew out of a case of sedition. *Atwood's* case in 1614, fascinatingly retold by Prof. Nokes in his work, *A History of the Crime of Blasphemy*, published in 1928, reflected an attack upon the Church as part of the State. But the real beginnings could be discerned only later in the century.

In 1663 the dramatist Sir Charles Sedley and a group of his aristocratic-born companions exhibited themselves naked on the balcony of a tavern of ill-repute in Covent Garden before a crowd of several hundred persons. They made gestures and acts so gross that the crowd stoned them. Pepys recorded that the general opinion was that there no longer existed any authority that could legally repress such outrage to public decency. But Chief Justice Foster in the Court of King's Bench invented an offence. Sedley was indicted and fined £500 - a massive sum for those days. Thirteen years later in the same Court, under the presidency of Sir Matthew Hale, blasphemy was recognised as a crime punishable by the common law; the case attracted two private law reporters to record the legal innovation that stands as the earliest precedent.

A man named Taylor had uttered "divers blasphemous expressions, horrible to hear (viz.) that Jesus Christ was a bastard, a whoremaster and religion was a cheat; and that he (Taylor) neither feared God, the devil, nor man." At his trial he admitted speaking the words, except the word "bastard". For the rest he pretended that the words meant something other than their natural and ordinary meaning; for example, he said that by "whore master" he meant that Christ was master of the whores of Babylon. He was found guilty, fined "a thousand marks", to find sureties for his good behaviour during life, and he was ordered to be pilloried. Sir Matthew Hale said that such kinds of wicked blasphemous words were not only an offence to God and religion, but also a crime against the laws, state and government and therefore punishable in the common law courts. "For to say that religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law." A legal doctrine was thus established, which was deduced from the principle that Christianity was part of the law of England, a principle that maintained currency until 1917, when in the different context of a Chancery case, to decide whether the objects of the secular society constituted a valid trust, the principle was disavowed.

The judges before 1917 had fastened on to Hale's pronouncement to ensure the firm establishment of the crime of blasphemy. Half a century after Taylor's case the doctrine, that Christianity was part of the law of England, was confirmed in a prosecution against Mr Woolston, a Fellow of Sidney College, Cambridge. He published a series of essays which assailed in a coarse and offensive manner many of the Bible's stories, including those of the miracles of Christ. He insisted that he was contradicting their historical correctness in order to demonstrate that in reality they were only allegorical representations of important religious truths. Opinion has been divided whether Woolston was sincere or not. The Court evidently thought that sincere or not, he was guilty of blasphemy although Chief Justice Raymond did add: "We do not meddle with any differences of opinion. .....We interpose only when the very root of Christianity itself is struck at." In 1729 Woolston was fined, sent to prison for a year and ordered to remain there until he could find sureties for his good behaviour throughout life. He never found them.

A quarter of a millenium later the same attitude prevails. Mr Lemon, if he had defended himself like Woolston, or if he had made a statement from the dock (which modern practice has discouraged, with the right, since 1898, for a defendant to give evidence on oath in his defence) might have explained that Professor Kirkup's poem was intended to assert that Christ was a homosexual and that hence homo-

sexuals could justifiably claim that Christianity embraced them in its faith as much as its more sexually orthodox adherents. But the ruling that Mr Lemon's intention in publishing the poem was irrelevant deprived him of the opportunity of sowing the seeds of doubt in the jury's mind. Prof. Kirkup's poem is at worst a clumsy attempt to express the universality of Christ's love; there are some precedents for such in literary and theological writings, but since such evidence was irrelevant these fascinating questions were not pursued.

Characteristic of these early incursions by the common law into conduct that challenged religious beliefs was the direct link between Church and State. It was not without significance that not merely did blasphemous libel grow out of seditious libel but it was also regarded as a species of criminal libel. It was clear from the indictments of the 18th century that the offences of criminal libel were never regarded as four distinct crimes - defamatory libel, seditious libel, blasphemous libel and obscene libel - but four different modes of committing a single criminal offence. Defendants were often charged with a single count in the indictment alleging a libel of two types. It is not uninteresting to observe that the prosecutor of Denis Lemon had included in the particulars of his offence that the blasphemous libel concerning the Christian religion was "an obscene poem". It is common ground that obscenity is not an essential ingredient in the offence of blasphemy. Why then include it in the formal document setting out the alleged offence? The fact that the prosecutor considered Professor Kirkup's poem obscene reveals the gravaman of the charge - namely, a writing that was deeply offensive to the public generally. So Lord Diplock observed, "the poem and accompanying drawing were likely to shock and arouse resentment among believing Christians *and indeed many unbelievers*" (my italics). But to have charged Mr Lemon with publishing an obscene libel the prosecutor would have let in a mass of expert evidence designed to establish the statutory defence that it was published for the public good; in short, that it was literature and not pornography. The poem in its first dozen or so lines reflects the author's poetic qualities; thereafter it descends in tone and quality.

The prosecutor was of course bowing to precedent. In *Wilkes* (1763) the charge was publishing an "obscene and injurious libel" and in *Cobbett* (1804) a second charge for publishing the same matter alleged a "scandalous malicious and seditious libel". Since objections to an indictment on the grounds of duplicity were rife in those days, it is significant that no such objection was taken in *Wilkes* or *Cobbett*. The reason was simply that they were seen as prosecutions for the single offence of criminal libel. The splitting off of the four species of criminal libel as separate offences developed only in the 19th century. By that time blasphemous libel had become a potent instrument in the hands of prosecutors to stifle a wide variety of irreverential and irreligious literature. But it was all directed at protecting Anglican sensibilities. Even after religious toleration became the received wisdom, the law only prohibited attacks on the established Church. In *Gathercole* (1838) Baron Alderson ruled:

> "If this is only a libel on the whole Roman Catholic Church generally, the defendant is entitled to be acquitted. A person, without being liable to prosecution for it, may attack Judaism or Mahomedanism, or even any sect of the Christian religion, save the established religion of the country."

And so it is to this day.

It is the period of 1790-1830 that witnessed a spate of prosecutions that entrenched the offence of blasphemy in the criminal calendar, several of them focusing on Tom Paine's famous work, *The Age of Reason*. The most conspicuous prosecution of the early cases was that of Williams (1797) conducted for the Crown by Erskine, who reckoned that his speech in that case was the greatest of his admittedly outstanding forensic career. It was, curiously, in that case that Lord Kenyon, whose literary attainments were meagre, uttered the *faux pas* of re-naming Julian the Apostate as "Apologist" (the poet Coleridge recorded that Lord Kenyon had called him "Julian the Apostle"). Erskine's indictment includes the notion that the blasphemy uttered by Tom Paine was directed at public disorder. It said that he intended by his publication to "asperse, vilify and ridicule" the Christian religion "against the peace". The case is also significant in that it perpetuates the *Woolston* doctrine that all denials of Christianity, however inoffensively expressed, constituted the offence. It was in the comparative liberation of the end of the 19th century that the offence only merited penal censure after being restricted in scope to the "mischievous abuse" of intellectual liberty. As early as 1833 Lord Macaulay protested in a parliamentary speech that: "It is monstrous to see any judge try a man for blasphemy under the present law. Every man ought to be at liberty to discuss the evidence of religion". "But", he added, "no man ought to be at liberty to force, upon *unwilling* ears and eyes, sounds and sights which might cause irritation ..... If I were a judge in India, I should have no scruple about punishing a Christian who should pollute a mosque." When Macaulay had the opportunity as a legislator in India, the Penal Code provided (and still provides) that it is an offence punishable with a year's imprisonment to utter any word or make any sound in the hearing of a person, or make any gesture or place any object in the sight of a person, "*with the deliberate intention of wounding that person's religious teaching.*" The United Kingdom is now a pluralist society, as India was then, and remains today. And indeed the Race Relations Act 1976, by amendment to the Public Order Act 1936, makes it an offence for any person to incite racial hatred likely to cause a breach of the peace, without the requirement of proving an intention to provoke a breach of the peace. Has not Parliament thereby properly prescribed the limits of the criminal law in relation to insulting behaviour? But I run ahead of myself.

The first half of the 19th century refutes Macaulay's assertion. Tom Paine's publishers, both Richard Carlisle and his sister Mary (1819 and 1821) were prosecuted for publishing the famous work, the former of them being a devout Christian but passionately defending the right of others to attack the Christian religion. In 1841 the Commissioners on Criminal Law in the sixth of their series of learned reports, laid

down that "the law distinctly forbids *all* denial of the Christian religion", but they added that in practice "the course has been to withhold the application of the penal law unless insulting language is used." Contemporaneously, in the case of *Hetherington* (1840) the Attorney-General said that an attack on the violence and obscenity of the Old Testament was "careless of the effect it might have on the morals of the unthinking working class." Chief Justice Denman said that criminality lies "in a great degree, on a question as to the tone and style and spirit" of the work. Hetherington was a bookseller whose defence was that he sold the blasphemies in the ordinary course of trade and did not read them. He in fact disapproved of the words used when they were drawn to his attention. His motive of profit in selling the book availed him nought; he was duly convicted. So outraged was Hetherington that he quickly turned prosecutor, on the fair view that literary salons should not be immune from the heretical imaginings of even great poets. The year following his conviction a man called Moxon was convicted of publishing Shelley's *Queen Mab*, a free-thinking and socialist gospel. Serjeant Talfourd defended him with eloquence and Chief Justice Denman summed up in favour. Talfourd's line of defence was that while Shelley's work did contain some censurable (*note,* not censorable) passages, the publication of those works in their entirety was desirable "in the cause of genius, the cause of learning, the cause of history, the cause of thought." He was, however, convicted and bound over to come up for judgment; he was never called on to be punished because before that happened Hetherington dropped the prosecution upon being paid his costs by Moxon. In the later, leading case on obscene libel (*Hicklin* in 1868) Lord Blackburn said "It was a prosecution instituted merely for the purpose of vexation and annoyance". That is a comment that might justifiably be directed at all private prosecutions in the area of public and private morality.

The next year, 1842, witnessed yet another prosecution for blasphemy exhibiting the evangelical fervour of the times. The case of *Holyoake* (1842) was significant for the reaction it produced on his conviction. It lead to the campaign throughout the rest of the century by the secularists to the cause of liberty. The lesson of this period was that the repressive activities of prosecutors in the name of Christianity provided recruits for the opposition. The effect of the revivification of the dead hand of the blasphemy laws in 1977 is more than likely to arouse the opposition to promote legislative action. The "famous victory" claimed by Mrs Whitehouse in the conviction of Mr Lemon may yet turn out to be a pyrrhic one.

In his brilliant article "The Evolution of the Law of Blasphemy" in the Cambridge Law Journal in 1922, Professor C.S. Kenny wrote that a more tolerant theory of the criminal law was beginning to emerge. In 1812 an academic lawyer's voice was raised in protest. In successive editions throughout the 19th century, Mr Starkie (later Downing Professor of Law at Cambridge and one of the Criminal Law Commissioners between 1833 and 1845) wrote that "the law visits not the honest errors, but the malice of mankind"; he urged that the penalties for blasphemy should be limited to cases where the offender intended either to insult sacred subjects by contumacious language or to mislead his readers by wilful misrepresentation." As Professor Kenny observed, Starkie's view accorded fully with the spirit of Bishop Jeremy Taylor's somewhat over-graphic words: "You may as well cure the colic by brushing the man's clothes, or fill his belly by a syllogism, as prosecute him for blasphemy. The blasphemer may be provoked into confidence and vexed into resoluteness. So instead of erecting a trophy to God you build a monument to the Devil."

The stringency of the blasphemy law became an embarrassment to the Government. In 1851 the Law Officers reluctantly advised the Home Office that John Stuart Mill was liable to prosecution for expressing mildly agnostic views in a public lecture, although they concluded: "We should in this case consider it highly inexpedient for the Government to institute any such proceedings". The public mood for modification of the law was present. Judges had created and developed the law to match what they perceived to be the social conditions. Now they were prepared to alter materially the gist of the offence from an attack on Christianity to the mode of expressing that attack. Christianity could be challenged, so long as it was done, if not decorously at least in moderate and respectful language.

In 1857 came the trial of Pooley, whose conviction aroused the protests of John Stuart Mill. Mr Justice Coleridge accepted the Starkie formulation of that which is blasphemous: "Every publication.....which contains matter relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, and is intended to wound the feelings of mankind, or to excite contempt and hatred against the Church by law established, or to promote immorality". The prosecutor, who did not dissent from that formulation, was the Judge's son, to become 25 years later Lord Chief Justice Coleridge in which capacity he was destined to play a significant part in developing this part of the criminal law.

The latter part of the 19th century remained quiet on the blasphemy front, largely because prosecutors had caught the message of Pooley's case and the mood in political circles was desirous of restricting the scope of the offence. The watershed of the change in the nature of the offence of blasphemy came in 1882. Two men, Foote and Ramsay, who published a weekly periodical, were in the habit of publishing hideously offensive religious caricatures - literary and pictorial. They were tried and convicted before Mr Justice North, and were imprisoned. The following April they were again prosecuted, an example of the myth of deterrence in sentences of imprisonment. They came before Lord Coleridge who delivered a judgment of remarkable eloquence. So important did he regard his judgment that he authorised its separate publication.

His direction to the jury was concerned with attacks upon the truth of Christianity and not with the old doctrine that any attack upon the Christian faith was without doubt blasphemy or blasphemous libel. He said in terms: "To asperse the truth of Christianity cannot *per se*

be sufficient to sustain a criminal prosecution for blasphemy". And he held that: "If the decencies of controversy are observed, even the fundamentals of religion may be attacked without the attackers being guilty of blasphemous libel." Two successive juries disagreed, which nowadays would involve the prosecution offering no evidence, on the sporting principle that being twice in jeopardy is more than enough. But prosecutors then were more relentless in pursuit of their prey. A third jury convicted Foote who was sentenced to a year's imprisonment.

The finer points of the law which had resoundingly mitigated the rigours of the old law were lost on a public dismayed by the result. Working class people were particulary incensed, and at the General Election of 1885 "the repeal of the blasphemy laws" was strongly urged upon all candidates for working-class constituencies. Professor Kenny in that same year (three years before he succeeded Maitland to the Readership in Law at Cambridge, when the latter became Downing Professor of Law, which Starkie had been elected to in 1823 and which Kenny himself was to succeed to in 1907 on Maitland's retirement) was elected to Parliament for Barnsley as a follower of Gladstone. One of his first parliamentary actions was to introduce the "Religious Prosecutions Abolition Bill" to do away with both the common law and various statutes. But Kenny felt it was essential, as Macaulay had insisted, to replace the blasphemy laws with a prohibition against intentional insults to religious feeling of whatever denomination. The general body of secularists at large refused to accept anything short of absolute licence to engage in religious controversy. Given the declared opposition of Bradlaugh and others, Kenny withdrew his Bill. Bradlaugh himself was personally not averse to the Macaulay substitute, and in 1887 he re-introduced Kenny's Bill (Kenny had by then given up his parliamentary seat for academia) without Macaulay's protective clause. The absence of any limitation on total licence to blaspheme was made so strong an objection to the measure that the second reading of the Bill was negatived by 111 votes to 46.

Parliament remained content to leave the law in the hands of the judiciary which had moved it away from the absurdly strict view taken as far back as 1676 in *Taylor's* case. Coleridge's liberal formula was thereafter consistently adopted by judges until 1917, when the House of Lords gave its imprimatur to the narrower application of the law. In *Bowman v. Secular Society* the courts rejected the argument that a trust for the propagation of anti-Christian doctrines was illegal. There the testator had given his residuary estate upon trust for the Secular Society Ltd. One of the society's fundamental objects was "to promote the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action." The testator's next of kin disputed the validity of the gift on the ground that the objects of the society were unlawful. The gift was held by the trial judge, a unanimous Court of Appeal and four out of five Law Lords. Only Lord Finlay took a contrary view. Yet even he accepted the rule laid down by Lord Coleridge in *Foote's* case, and he agreed that attacks upon Christianity would not be punishable if "decently conducted". But he considered that "the law will not *help* endeavours to undermine Christianity." His acceptance of the rule in *Foote's* case was confirmed by the other four law Lords. Their Lordships finally and authoritively disapproved of the view expressed from 1676 onwards that "Christianity is parcel of the laws of England" and that therefore to reproach the Christian religion was to speak in subversion of the law. Such disapproval did not, however, affect the correctness of the decision in *Taylor* or in any other of the long line of blasphemy cases.

All five Law Lords stressed that the rationale of the blasphemy laws was rooted in the maintenance of public order. Lord Parker, for example, was of the opinion that "to constitute blasphemy at common law there must be such an element of vilification, ridicule or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace." Their Lordships did not consider whether "wilful intention" to vilify Christ or the Christian religion was an ingredient of the offence.

By the end of the first World War it could be stated with confidence that blasphemy was still a criminal offence, although of decreasing application as a result of its limited scope; the general doctrine had become established and it was not the age for judicial abolition of crimes. Two minor aspects of the crime were settled in the last recorded case, before Mr Lemon was prosecuted in 1977. In 1922 a man named Gott was indicted for having handled and sold in Stratford Broadway, a busy thoroughfare in East London, some pamphlets containing coarse and scurrilous ridicule of some of the narratives in the Gospels. Evidence was adduced that passers-by had exclaimed: "You ought to be ashamed of yourself. Disgusting, disgusting!"

The first jury disagreed; but on the second trial Gott was convicted. It being Gott's fourth conviction for similar offences, he was sentenced to nine months' imprisonment with hard labour. Gott was thus an incorrigible nuisance distributing his crude lampoons on the life of Christ to unwilling pedestrians in a public street, precisely the kind of candidate for control under public order legislation. It hardly required the blunderbuss of an Old Bailey trial for blasphemy.

While the public order aspect of the crime was reaffirmed, Mr Justice Avory laid down the rule - and it was not dissented from by the Court of Criminal Appeal - that it is not necessary that the offending words should cause a breach of the peace then and there at the time of publication. It would be sufficient if one were caused subsequently, "by someone taking the pamphlets home and reading them, and then the next day finding the vendor still selling them." Nor indeed need there be any actual breach of the peace at all; the mere tendency to provoke one suffices. This tendency, however, must not be measured by the susceptibilities of a person of strong religious feelings, but by those of the general community. The libel must be so bad as to be "offensive to anyone in sympathy with the Christian religion, whether he be a strong Christian or a lukewarm Christian, or merely a person sympathising with their ideals." The jury is the judge of that offensiveness. That view

was resoundingly upheld in Mr Lemon's case; indeed it is doubtful whether even the tendency to provoke a breach of the peace is required. But *Gott's* case did not settle the unanswered question: does the Crown have to establish any further intention on the part of the accused beyond an intention to publish a blasphemous libel? The House of Lords has now declared, by a bare majority, that the answer is no. The reason for the majority's answer is made explicit by Lord Scarman. He said: "It would be intolerable if by allowing an author or publisher to plead the excellence of his motives and the right of free speech he could evade the penalties of the law even though his words were blasphemous in the sense of constituting an outrage upon the religious feelings of his fellow citizens. This is no way forward for a successful plural society. The character of the words published matter; but not the motive of the author or publisher." Lord Scarman prefaced these remarks by a reference to Article 10(2) of the European Convention on Human Rights and Fundamental Freedoms which provides that freedom of expression is subject to such restrictions as are prescribed by law and are necessary for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others."

Professor Kenny wrote in his 1922 essay that "the judiciary law as to blasphemy has, then, reached at least a condition congenial with the tolerant spirit of modern times". He could arrive at that conclusion because he agreed with Professor Starkie's conclusion, that "wilful intention" is the criterion and test of guilt. No argumentative attack upon Christianity would be criminal unless it contained such an element of vilification, ridicule or irreverence as would be likely to exasperate the feelings of others. Christianity, he concluded, was thus protected against "wanton insult". In that vital respect Professor Kenny's view had been disproved.

The law of blasphemy is clearly indefensible on one ground. Its discrimination, wholly in favour of the established Church, is untenable. Not to speak of the rights of dissenting Christian sects or of the Jews, and, present in England to-day, adherents of Islam, Hinduism or Buddhism, is insulting to large minority groups. If the blasphemy law had reached the point of benignity, as Professor Kenny thought it had, such an extension to protect all religious susceptibilities might be acceptable. But, given that the law has taken a harsher view of conduct that seeks to propagate irreligious views, however unpalatably phrased or intemperately spoken, the question is posed: should a legislature, alive to the supreme importance of truth and to the value of unbiased (or even biased) inquiry and discussion as to the best avenue to truth, proscribe *any* written word?

Blasphemy to-day has been revived as a crime but in a new guise. Fashioned originally to protect the established Church from subversion by heretics and unbelievers, it is now being devised more directly to protect the religious sensitivities of the waning numbers of Christian adherents. No one seriously contends that blasphemous libels strike at the stability of an ordered society; nor is there any real supposition that breaches of the peace are likely to erupt because of attacks on Christianity. It might be otherwise if it were Islam that was being assailed. The truth is that the emphasis of the protectors has shifted. It is an intolerance towards what is regarded as the obscenity of the blasphemers.

Eroticism in religious contexts has long been a stock in trade for pornographers. Since the crime of obscene libel was created in 1727 to deal with just such a work - Edmond Curle's Venus in the Cloister - it hardly needs the back-up of blasphemy. In 1976 the Home Office received 10,000 letters of alarm at the very prospect of a pornographic film about the life of Christ. The possibility, however remote, that the producers of such a film might be acquitted of an obscenity charge, by raising the defence of public good, however spurious, led to an interest in the revival of the blasphemy laws. Even before *Gay News* had unobtrusively published Professor Kirkup's poem attributing homosexuality to Jesus Christ, the thought had crossed people's minds. In the event the idea of the film was dropped.

But it is clear that the law of blasphemy no longer is concerned with attacks on, or criticism of, Christianity. It is being deployed to counter the indecent or obscene and certainly offensive treatment of subjects sacred to Christian believers; as such it is no longer a crime of disbelief or unbelief. It may be committed with the profoundest religious beliefs if the sentiments are expressed in an eccentric or shocking manner. The offence now, even in its latest form of strict liability, relates to outrageously indecent or irreverent remarks about God, holy personages or articles of Anglican faith. Since there is no need for any apprehension of a breach of the peace, such conduct can safely be encompassed by the law relating to obscene libel. Modern blasphemy is no more than the old law of obscene libel in the context of religious subjects. It lacks only the wider definition of a tendency to corrupt and there is no "public good" defence. There is no justification in public policy that obscenities in one aspect of writing should be treated differently from another.

How does the law of blasphemy stand in the light of the guaranteed freedoms under the European Convention? Article 10 of the Convention provides that everyone has the right to freedom of expression, which includes the freedom to hold opinions and ideas without interference by public authority. There are two relevant limitations upon the freedom - penalties *prescribed by law* that are *necessary in a democratic society* for the protection of morals and the reputation of or rights of others.

Prescribed by law

These words have been interpreted by the European Court of Human Rights in the *Sunday Times* case. It said that a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable a citizen to regulate his conduct; he must be able, if need be with appropriate advice, to foresee, to a degree which is reasonable in the circum-

stances, the consequences which a certain action may entail." The law must possess this certainty at the time the alleged offence was committed. At the time when *Gay News* appeared with the offending poem, the law could not be said with any degree of confidence to be in a state of certainty. Indeed so much has been acknowledged by the Law Lords who heard the appeal. Lord Diplock said that "the task of the House in the instant case is to give to it certainty"; and Lord Scarman said that "the history of the law is obscure and confused. It is, therefore, open for your Lordships' decision as a matter of principle".

Before the decision of the Court of Appeal, leading textbook writers indicated that the correct view of the law was the opposite of that taken by the Court in that case. Thus the leading modern work states: "There seems to be no clear modern authority on the nature of the *mens rea* (the guilty intent) required for blasphemous libel, but it ought to follow in principle "from the nature of the prescribed conduct that there must be proved at least the intention to ridicule the Christian religion so as to tend to provoke ordinary Christians (or possibly those actually addressed) to violence." The authors concluded that if the writer's or publisher's intention is to propagate sincerely held opinions and not to ridicule or provoke, he should have a defence, only if the matter in fact provoked people to violence."

The European Commission of Human Rights has already indicated its interest in this line of reasoning - namely, that the restriction of freedom of expression imposed by the crime of blasphemy was not "prescribed by law", and the conviction of Mr Lemon was contrary to the principle that the act did not constitute a criminal offence when it was committed.

The Commission has inquired particularly of the United Kingdom Government whether the decision of the House of Lords involved "merely a declaration of the existing law, or did it in fact amount to the creation of a new law ....?" We await the answers with keen anticipation.

Necessary in a democratic society

The European Court has interpreted the concept of "necessity" in this context to connote the "existence of a pressing social need". To satisfy such a need the restriction placed on freedom of expression must be "proportionate to the legitimate aim pursued". Historically the preservation of the State, and later of public order, was the only pressing social need shown by the blasphemy laws. In dealing with the cognate criminal offence of defamatory libel, which had as its rationale the prevention of disorder, Lord Diplock has expressed a firm view that the offence to-day is in violation of the guaranteed freedom of expression.

The European Court has itself ordered that "pluralism, toleration and broadmindedness" are the foundation of the principle of free speech. Blasphemy fails to pass muster because it cannot meet the requirement of proportionality to a legitimate crime.

Public outrage at the contents of an idea expressed should never be sufficient to warrant the suppression of that idea. If this were not so, toleration of the views of the minorities would be jeopardised whenever they were sufficiently unpopular with majorities. Such restrictions offend against the principle so eloquently expressed by Mr Justice Oliver Wendell Holmes: "The best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which the wishes of men for the ultimate good safely can be carried out."

The instrument of the blasphemy law, now that it transparently neither seeks to prevent subversion of the State nor to sustain public order, but is designed purely to mollify outraged Christian sensibilities, breaches the fundamental freedom. A law of blasphemy is a relic of earlier, less stable societies. As such it has no place in a modern criminal code. Whether it remains a sin to blaspheme is a question for theologians. But ecclesiastical disapproval is no basis for social condemnation as a crime.

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