The Law Commission

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CRIMINAL LAW

OFFENCES AGAINST RELIGION AND PUBLIC WORSHIP

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OFFENCES AGAINST RELIGION AND PUBLIC WORSHIP

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THE LAW COMMISSION

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To the Right Honourable the Lord Hailsham of St. Marylebone, C. H., Lord High Chancellor of Great Britain

PART I

INTRODUCTION

1.1 This report contains our final recommendations for abolishing or repealing certain common law and old statutory offences in the field of offences relating to religion and public worship. The recommendations relate, in the first place, to offences against religion. In that context we recommend the abolition of the common law offences of blasphemy and blasphemous libel. In regard to offences relating to public worship, we recommend the abolition of certain common law offences concerned with disturbances to public worship. A draft Bill which would give effect to these recommendations is to be found in Appendix A.

1.2 Our work in this area commenced in the wake of the trial in July 1977 of the editor of *Gay News*[1] on a charge of blasphemous libel, the first such case to come to trial since 1922. After a preliminary invitation for views on the subject initiated through the correspondence columns of selected newspapers and journals, we published our working paper in April 1981 containing provisional proposals for reform of the law. By this time, the *Gay News* case had come before the Court of Appeal and House of Lords.[2] Substantial work on a report was delayed pending the disposal of proceedings in this case before the European Commission of Human Rights,[3] which on 7 May 1982 declared the application made to be inadmissible.

1.3 This report takes account of the exceptionally heavy response to the provisional proposals in our working paper. The weight of that response related to the proposals made in regard to the law of blasphemy and it will be convenient to describe the nature of that response in Part II of this report, which deals with that subject. Part III deals with offences relating to disturbances in places of worship and Part IV summarises our recommendations.

1.4 In this introduction it remains only to note, as we customarily do in our reports relating to substantive criminal offences, that our work is undertaken as

[1] *R.* v. *Lemon, R.* v. *Gay News Ltd.*, Central Criminal Court, 11 July 1977 (Judge King-Hamilton Q.C.).

[2] See [1979] Q.B. 10(C.A.) and [1979] A.C. 617 *sub nom. Whitehouse* v. *Lemon, Whitehouse* v. *Gay News Ltd.*

[3] *Gay News Ltd.and Another* v. *United Kingdom.* Application No. 8710/79, 5 E.H.R.R. 123.

part of our programme for codification of the criminal law. Such codification necessarily entails the abolition of the offences which exist by virtue only of the common law and, so far as may be necessary, the enactment of new statutory offences in their place. The process of abolition and replacement requires here, as it has elsewhere in our programme, consideration of the need for the common law offences proposed for abolition and of any new offences to replace them. These considerations are of particular pertinence in the context of blasphemy and blasphemous libel, where in substance the offences exist wholly by virtue of judicial decisions made over a period of more than three centuries.[4]

[4] The one offence-creating statute, the Blasphemy Act 1697, was repealed by the Criminal Law Act 1967, s.13 and Sched. 4, Pt. 1. Certain ancient statutory offences of heresy and the like, contained in the Sacrament Act 1547, the Act of Supremacy 1558 and the Act of Uniformity 1662, were repealed by the Statute Law (Repeals) Act 1969 and the Church of England (Worship and Doctrine) Measure 1974.

PART II

BLASPHEMY AND BLASPHEMOUS LIBEL

A. What is blasphemy?

2.1 There is no single, comprehensive definition of the common law offence of blasphemy and its written form of blasphemous libel, and none was offered by the House of Lords in the case of *Whitehouse* v. *Lemon* ("the *Gay News* case").[1] But the trial judge in that case said in the course of his summing up that blasphemous libel is committed if there is published any writing concerning God or Christ, the Christian religion, the Bible, or some sacred subject, using words which are scurrilous, abusive or offensive and which tend to vilify the Christian religion and therefore have a tendency to lead to a breach of the peace. And Lord Scarman in that case[2] approved the definition in *Stephen's Digest of Criminal Law*[3] which differs only by omitting from the definition offered by the trial judge the reference to a tendency to lead to a breach of the peace; this, Lord Scarman said, was no more than a reminder of the character of the offence rather than an essential element of it.[4] Both definitions emphasise the strongly offensive character that material must possess in order for it to be penalised by the common law, which distinguishes the legal definition of blasphemy from its far broader dictionary meaning of any "impious or profane talk".[5] Having regard to the character of the response to our working paper which we describe below, it is worth emphasising here that this report is concerned only with the common law offence: it has no bearing upon and makes no recommendations affecting the legal position relating to what some may consider to be distasteful language in the media or elsewhere save in so far as that language may fall within the bounds of the offence of blasphemy as described above.

2.2 Our working paper contained a detailed examination of the history of this offence and of its constituent elements,[6] which we do not repeat here. For present purposes it is sufficient to note, first, that it appears that the offence protects only the Christian religion, together with the rituals and doctrines of the Church of England.[7] Secondly, it is now established that no mental element is required for commission of the offence other than an intention to publish the offending words.[8] Thirdly, there are statutory provisions which require the

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[1] [1979] A.C. 617.

[2] [1979] A.C. 617 at pp. 665–666.

[3] Article 214, 9th ed. (1950), which states–

"Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not as to the substance of the doctrines themselves. Everyone who publishes any blasphemous document is guilty . . . of publishing a blasphemous libel. Everyone who speaks blasphemous words is guilty of . . . blasphemy".

[4] See [1979] A.C. 617, 662 *per* Lord Scarman.

[5] Concise Oxford Dictionary, 6th ed., (1976).

[6] See Working Paper No. 79, paras. 2.2-2.25 and 3.1-3.9.

[7] See *R.* v. *Gathercole* (1838) 2 Lew. C.C.237, 254; 168 E.R. 1140, 1145, *per* Alderson B.; but see *Bowman* v. *Secular Society Ltd.* [1917] A.C. 406, 460 *per* Lord Sumner.

[8] *Whitehouse* v. *Lemon* [1979] A.C. 617.

order of a "judge at Chambers" to be obtained for the institution of any proceedings against a newspaper editor and effectively prevent the publication of the blasphemy in question even in "fair and accurate" reports of proceedings.[9] Finally, like most offences at common law, the offence is triable only on indictment and punishable with a fine and imprisonment, upon which there are no statutory limits.

B. The working paper and response to it

1. THE WORKING PAPER

2.3 Working Paper No. 79 examined what we considered to be the shortcomings in the present law,[10] reaching in turn the provisional conclusions that it suffered from an unacceptable degree of uncertainty; that in so far as it required only an intention to publish the offending words, the offence was to an undesirable extent one of strict liability; and that, in the circumstances now prevailing in this country, the limitation of its protection to Christianity and, it would seem, the tenets of the Church of England, could not be justified.

2.4 After examining other offences and concluding that some, but not all, of the ground covered by blasphemy and blasphemous libel is also covered by other, more modern, statutory offences, the paper then examined the rationales for retaining in the criminal law an offence penalising insults directed against religion.[11] It distinguished four arguments—(i) the protection of religion and religious beliefs, (ii) the protection of society, (iii) the protection of individual feelings, and (iv) the protection of public order. Of these, the working paper concluded that (iii) was the most persuasive. Even so, it found that the arguments were quite evenly balanced and, in particular, that, while the presence of a pressing social need might justify the imposition of penalties for incitement to racial hatred, there was no corresponding need in the context of religion which might justify an offence of blasphemy.[12]

2.5 Accordingly, the working paper examined the form which a new offence might take in order to assess whether there were insuperable difficulties in specifying with precision its possible constituent elements, for "where the case for a law is finely balanced, the inability to state clearly what the law requires can be allowed to weigh against it."[13] The paper came to the conclusion that, while an offence of wounding or outraging the feelings of adherents of any religious group could be envisaged, it seemed impossible to construct a sufficiently precise definition of what was meant by "religion" in this context, and that other elements would also have an unacceptable degree of imprecision; this shortcoming, in the view expressed by the working paper, fatally flawed this possible offence. The provisional conclusion of the paper was, therefore, that in the absence of a pressing need for an offence, the common law offences

[9] See, respectively, the Law of Libel Amendment Act 1888, ss. 8 and 3. Another statutory provision, the Libel Act 1843, s. 7, applying to criminal and blasphemous libel, enables a person accused of publishing a libel because of the acts of another done with his authority to prove that it was done without his authority, consent or knowledge, and not from want of due care or caution. See further Appendix, cl. 2 and Explanatory Note.

[10] See paras. 6.1–6.11; and see para. 2.18, below.

[11] Working Paper No. 79, paras. 7.1–7.26.

[12] See Public Order Act 1936, s. 5A (inserted by the Race Relations Act 1976, s. 70); and see further Working Paper No. 79, paras. 5.9–5.12 and 7.16, and para. 2.29, below.

[13] See Working Paper No. 79, para. 9.2 and n. 422.

of blasphemy and blasphemous libel should be abolished without replacement. These arguments and provisional conclusions were summarised in a leaflet made available to the public on request, to which was appended a questionnaire.

2. THE RESPONSE

(a) The character of the response

2.6 There was a heavy response to the working paper's principal proposal to abolish the common law offences. The comments derived from a little over 1,800 organisations, groups and individuals. Many of the letters from individuals indicated that the views expressed were those of the family concerned and their friends. About 150 of the submissions made reference to the summary leaflet and questionnaire. In addition, the Commission received more than 175 petitions, bearing a total of 11,770 signatures. Commentators included most of the main religious organisations in England and Wales, with the notable exceptions of organisations representing Hindus, Sikhs and Buddhists. No formal response was received from the Catholic Church, although several Catholic groups made submissions. In addition to these religious groups, more than 100 individual ministers of religion, belonging to Christian Churches of a variety of denominations, commented. A number of detailed comments were received from atheist, humanist and "gay rights" groups. Comments were received from the principal legal organisations and a few individual lawyers. There were also several detailed submissions from academics, both legal and non-legal. Given the large number of organisations and individuals commenting, it would be impracticable to list all the names, but many of the organisations are listed at note 15, below.

2.7 There is no doubt that the subject of blasphemy is a sensitive one to some people, and for this reason a large response to the working paper was to be expected. Apart from the usual publicity accorded to our working papers at the time of publication (national press, radio and television), the proposals in Working Paper No. 79 subsequently formed the subject of a number of discussion programmes on radio and television. A substantial number of those who wrote appear to have done so as a result of hearing about the proposals from these sources. It is also clear that a majority of those who wrote urging the retention of the law of blasphemy, or who signed petitions calling for this, did so in response to organised campaigns, including one by the National Viewers' and Listeners' Association. Letters were published in local newspapers signed by the Association's President urging people to write to us to oppose our proposal "to tidy up the law". In addition, petition forms from various sources were printed and circulated, particularly in churches, inviting signatures against our proposals. It is relevant to note that over one quarter of correspondents complained of the use of bad language in broadcasting (a point stressed in the NVALA letters to the local press), and most of these commentators clearly regarded this as the most important reason for maintaining and, indeed, in many cases, strengthening criminal sanctions.[14] Again, a similar proportion of correspondents gave no reasons for expressing their opinion opposing the abolition of the law of blasphemy.

[14] We have noted that the common law is not concerned with mere "profane" language unless it has the strongly offensive character required by the offences of blasphemy and blasphemous libel; see para. 2.1, above.

2.8 It will already be apparent that the response which we have described was overwhelmingly against the working paper's main provisional proposal to abolish blasphemy without replacement. Of the 1,800 contributions, over 1,700 expressed the view that an offence of blasphemy should be retained in one form or another. All of the 11,770 petitioners were of the same view. Only slightly more than 80 (29 organisations and 52 individuals) expressed themselves in favour of the abolition of blasphemy without replacement. Of these, about 30 said that they were generally in favour of all the working paper's proposals, while the remainder either restricted their comments to the principal proposal for abolishing the common law or said that they were opposed to the proposal for a new offence penalising disturbances in places of religious worship. If one focusses upon the organisations and individuals who, it is clear, adverted to the contents of the working paper and summary, it becomes apparent that, while with some notable exceptions opinion within the Churches was generally against the proposal to abolish a crime of blasphemy, the opinion of lawyers, professional groups and academic commentators was for the greater part in favour of this proposal. The list below, which is far from exhaustive, gives some indication of how opinion amongst organisations was divided on this issue.[15] Some assessment of this response in relation to the arguments for and against retention of an offence of blasphemy canvassed in the working paper is needed by way of background to the decisions of policy taken in this report.

(b) The response favouring retention of an offence of blasphemy

2.9 We have mentioned that the working paper set out the arguments in support of criminal sanctions in this field under four broad headings; the protection of religion and religious beliefs, the protection of society, the protection of individual feelings, and the protection of public order. We advert to these arguments again below;[16] our concern here is the character of the

[15] Those favouring ABOLITION of the law of blasphemy included: *Church groups* Baptist Union of Great Britain and Ireland (not unanimous), Free Church Federal Council (Executive Committee), General Assembly of Unitarian and Free Christian Churches, Methodist Church (Division of Social Responsibility), Mothers' Union (majority) *Humanists* British Humanist Association, National Secular Society, Thomas Paine Society *Legal Profession* Criminal Bar Association, Justices' Clerks' Society, The Law Society, Prosecuting Solicitors' Society of England and Wales, the Senate of the Inns of Court and the Bar, Society of Conservative Lawyers *Other organisations* Society of Public Teachers of Law, Association of Chief Police Officers of England and Wales, Cinematograph Exhibitors' Association of Great Britain and Ireland, National Union of Journalists, Writers Guild of Great Britain. Those favouring RETENTION of a law of blasphemy included: *Church groups* Official response of the Archbishop of Canterbury supporting submission of a Working Party, Catholic Union of Great Britain, National Board of Catholic Women, Catholic Men's Society of Great Britain, British Evangelical Council, Consortium of Christian Organisations, Sovereign Grace Union, Protestant Reformation Society, Elim Pentecostal Church, Lord's Day Observance Society, Gospel Standard Strict Baptist Societies, District Free Church Federal Councils, Loyal Orange Lodges, Trinitarian Bible Society, Mothers' Union (minority) *Other religions* Union of Liberal and Progressive Synagogues, Union of Muslim Societies of U.K. and Eire *Women's Groups* Women's National Commission, National Council of Women of Great Britain, World Women's Christian Temperance Union *Other organisations etc.* Christian Lawyers' Action Group, Plowden Legal Society, the Home Office, Nationwide Festival of Light, National Viewers' and Listeners' Association. A number of articles about the working paper were published in legal journals, including J. R. Spencer, "Blasphemy—The Law Commission's Working Paper" [1981] Crim. L.R. 810 and G. Robertson, "Blasphemy: The Law Commission Working Paper" [1981] Public Law 295 (both favouring abolition) and St. John Robilliard (1981) 44 M.L.R. 556.

[16] See paras. 2.23–2.42, below.

response to them. Those among our commentators who gave reasons for favouring retention of an offence generally agreed with one or other of these justifications; many suggested that more than one of the justifications should be taken into account. All were agreed that freedom of speech should not be accorded primacy or that an offence would not unduly restrict this freedom. Many did not think that the possible uncertainty of an offence, as argued in our working paper, was a sufficient reason for not having one. A summary of the response favouring the retention of the offence grouped under the four headings used in the working paper will give some idea of the weight of opinion supporting each argument and of the nature of the comment in support.

Protection of religion and religious beliefs

2.10 This was the most frequently mentioned reason for retention of a crime of blasphemy, and was in particular supported by many commentators who did not appear to have read either the working paper or the leaflet. It was frequently asserted that blasphemy was not only an insult to God but also an offence against God. The Third Commandment was widely quoted to support this point of view. It is, however, noteworthy that several commentators from Christian groups or denominations recognised that, while this reason was likely to be regarded by believers as the most important reason, it could not provide any justification for non-believers.

2.11 A distinguished academic who in his submission to us supported retention thought that the fundamental argument for having a law against blasphemy was that God exists and that the Christian understanding of his nature is substantially true. To abolish blasphemy would constitute "an official declaration that England was no longer a Christian country". A distinguished theologian submitted that the working paper did not raise the question whether this argument might contribute to a justification based on some other considerations. "The state does not view the Christian religion with indifference, but in many ways recognizes and supports it. Otherwise the pressure for disestablishment would now be overwhelming. It is only . . . in this context that the feelings of Christian believers can be thought to deserve special protection." Similar views were expressed by some others.

Protection of society

2.12 This argument also commanded widespread support. Thus to quote from a few letters: "it protects the moral heart and fibre of this country"; "repeal of this law will add further to the degeneration of our society"; "it makes to many people in our society a far more favourable climate in which to live and work". Several commentators thought that the first argument leads inevitably to the second, or that it added weight to the case for retaining an offence. A few regarded it as the most important reason; a representative comment suggested that—

> "If scurrilous attacks on religious beliefs go unpunished by law they could embitter strongly held feelings within substantial groups of people, could destroy working relationships between different groups, and where religion and race are intimately bound together could deepen the tensions that already are a disturbing feature in some parts of this country. It is for this reason that our Working Party recommends that the protection of the law must be extended to all religious beliefs."

Many also quoted dicta from Lord Scarman's speech in *Whitehouse* v. *Lemon,* in particular the following passage—

> "I do not subscribe to the view that the common law offence of blasphemous libel serves no useful purpose in the modern law. On the contrary, I think that there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians. The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom. 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."[17]

Protection of individual feelings

2.13 Many of those who considered the arguments in the working paper accepted that this was the most important justification for the crime. The argument that religious feelings are uniquely significant or important "has to carry the main weight of justification" and is "decisive in favour of retaining the offence". The Church of England group which advised the Archbishop of Canterbury felt that to "vilify or outrage religious beliefs is peculiarly hurtful". They rejected the argument that there is no pressing social need for an offence:[18] "tendencies to undermine the mutual respect and forbearance which are essential to the flourishing of a free society are best resisted at an early stage, not when they have arguably become so ingrained as to be impossible in practice to control by the application of law."

Protection of public order

2.14 Blasphemy as a threat to public order requiring criminal sanctions over and above the present laws relating to public order was mentioned by only a comparatively small number of commentators. Some correspondents, particularly during July 1981, drew on the civil disturbances and riots then occurring as evidence of the continuing need for an offence of blasphemy. A few thought that the protection of public order was a sufficient reason for retaining an offence of blasphemy. But many of those who favoured this justification did not give it as their primary reason for retention. The Archbishop of Canterbury's group, for example, would not rule out this argument because "the more extravagant, violent or scurrilous the language which is used, the more likely it is to wound or outrage people's feelings than sober arguments, and to give rise to discord, unrest or even violence." However, most commentators who referred to this argument agreed with the conclusion of the working paper that reasons pertaining to public order are not sufficiently strong in this field to warrant curbs upon freedom of publication, and that existing offences in the public order field are adequate to deal with any situations likely to arise in consequence of the publication of blasphemous material.

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[17] [1979] A.C. 617, 658. Cf. para. 2.35, below. Dicta from Lord Scarman's speech also featured in NVLA publications with reference to our working paper: see para. 2.7, above.

[18] See paras. 2.36 and 2.42, below.

(c) The response favouring abolition without replacement

2.15. Among the reasons given by a substantial number of individuals and groups favouring abolition of the offence of blasphemy without replacement, the following are worthy of mention:

(i) Freedom of speech: the primacy to be accorded to this was the reason to which reference was most frequent; its mention by professional writers and writers' organisations is noteworthy.

(ii) The imposition of penalties on blasphemy was not a proper function of the criminal law; again this was mentioned by a substantial number of people.

(iii) A law of blasphemy was irrelevant in modern society because society is no longer based on religion.

(iv) Blasphemy was not a social problem of any significance.

(v) The cost of trials was disproportionate in terms of the benefit to society, having regard to the existing burden on the criminal justice system.

(vi) Other offences relating, for example, to obscenity and public order were adequate to deal with any problems which might arise.

(vii) Any new offence would be uncertain and too wide in scope.

(viii) There were objections to extending the offence to include other religions. There was substantial opposition to this; it was also a feature of the response of a small number of those favouring retention of an offence.

(ix) There was support for the reasons for abolition given in Working Paper No. 79, to which further reference is made in our reconsideration of the arguments in section E, below.

(x) A new offence would be prone to misuse.

(xi) A new offence would be widely disregarded and unenforceable.

(xii) Prosecutions for a new offence would be likely to stimulate further the activities it was designed to prohibit.

(xiii) Religious feelings do not have a special status.

2.16. We do not expand upon these reasons further since many of them necessarily feature in the re-examination of the arguments which constitutes the greater part of this report's consideration of the law of blasphemy. Before commencing that re-examination we must first answer two questions: why abolish the common law? And would abolition in any event leave any distinct gap in the law?

C. Shortcomings in the present law

2.17. The first of these questions—why abolish the common law—may be answered briefly: its deficiencies are so serious and so fundamental that it ought not in our view to remain as it is, and no measure short of abolition would be adequate to deal with these deficiencies. This is an issue which was

examined in detail in our working paper but we see no need to recapitulate our arguments at similar length, since it appears to us that the conclusions then reached were substantially correct and the comment received on that paper has not been such as to cause us to question these conclusions. Nevertheless, this report would not be complete without an outline of our reasons.

2.18. The defects in the common law analysed in the working paper may be summarised as follows—

(i) The law is to an unacceptable degree uncertain. As we put it—

> "Once the judge has directed the jury as to the ingredients of the offence, it is for the jury to say whether the matter is "scurrilous" or "abusive" or "insulting" in relation to the Christian religion and thereby has a tendency to induce a breach of the peace . . . It is hardly an exaggeration to say that whether or not a publication is a blasphemous libel can only be judged *ex post facto* . . . Delimitation of a criminal offence by reference to jury application of one or more of several adjectives (all of which necessitate subjective interpretation and none of which is absolute) is hardly satisfactory[19] . . . While matter which is merely abusive is ignored in the law of defamatory libel, it becomes of the essence in blasphemous libel, provided that the jury finds it sufficiently scurrilous to amount to the offence."[20]

(ii) In so far as the law requires only an intention to publish the offending words and not an intention to blaspheme, the offence is to an undesirable extent one of strict liability. Furthermore, the absence of a mental element of an intent to blaspheme runs contrary to the general principle developed during the past century that a mental element is normally required as to all the elements of the prohibited conduct both in common law and statutory crimes, save in special cases of regulatory offences. The practical consequence of the exclusion of any requirement as to the intent of the defendant to blaspheme is that he cannot give admissible evidence as to what he claims to be his beliefs and purpose. It is thus quite possible for the offence to be committed by someone with profound religious beliefs and with entirely sincere motives, provided that the language in which he expresses himself is sufficiently shocking and insulting to be held blasphemous by a jury.

(iii) In the circumstances now prevailing in England and Wales, the limitation of the offence to the protection of Christianity and, it would seem, the tenets of the Church of England, cannot be justified.

We see no reason now to differ from the views expressed in the working paper.[21]

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[19] As one of our commentators observed, William Hone was in 1817 tried and acquitted of blasphemy on three occasions for his parodies of various parts of the Book of Common Prayer, while in 1819 the Birmingham bookseller Joseph Russell was convicted of blasphemy by another jury for selling the same works and sentenced to six months' imprisonment.

[20] See Working Paper No. 79, para. 6.1.

[21] See Working Paper No. 79, Part VI. It should be noted, however, that in giving its reasons for rejecting the admissibility of the applicant's case in *Gay News Ltd. and Another* v. *United Kingdom,* Application No. 8710/79, 5 E.H.R.R. 123, the European Commission of Human Rights expressed different views: see Decision on the Law, paras. 10–12.

D. What conduct is penalised only by the common law?

2.19 As regards the question whether abolition of the common law offences would in fact leave any distinct gap in the law, our working paper concluded that, while there is some overlap between the conduct penalised by other statutory offences and the conduct penalised by the common law offences of blasphemy and blasphemous libel, that overlap is not complete. That conclusion was reached after a consideration of, among others, the Obscene Publications Act 1959, the Public Order Act 1936, and offences relating to indecent displays. The law in relation to the last-mentioned has since been modernised by the enactment of the Indecent Displays (Control) Act 1981. This has not, however, altered our conclusion as to the nature and extent of the gap in the law currently filled by the common law offences of blasphemy and blasphemous libel. In the first place the offences penalise the publication of matter which vilifies Christianity without being obscene or indecent in terms of the legislation to which reference has been made. Today that gap may be more apparent than real.[22] Of perhaps greater significance is the gap which follows from the respective limits of section 5 of the Public Order Act 1936[23] and the common law. As we put it in the working paper[24]—

> "We think that the most significant distinction between the two offences is that blasphemous libel is wide enough to penalise the *sale* of certain books or other printed matter. There is no need for the *display* of material which would then and there be likely to occasion a breach of the peace, even if examination of the contents of such material at some later time might then induce its readers to take some action leading to a breach of the peace. On the other hand, we have suggested that by its limitation to *distribution and display,* the operation of section 5 is in practice likely to be restricted to material which on its face is likely to have some more immediate impact on the public peace."[25]

To which it may be added that "publication" in the law of blasphemy is so widely defined[26] that it covers not only all situations where there is some "public" element but also the passing in private of matter to a person who wishes to see it.[27] It is therefore clear that the common law extends beyond the bounds of section 5 of the Public Order Act 1936 in two important respects—

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[22] See paras. 2.45–2.46 and n. 79, below.

[23] Sect. 5 provides that: "Any person who in any public place or at any public meeting—

(a) uses threatening, abusive or insulting words or behaviour, or

(b) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting,

with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence and shall on summary conviction be liable to imprisonment for a term not exceeding six months or to a fine (on level 5) or both."

[24] Working Paper No. 79, para. 5.8.

[25] In our Report on Offences relating to Public Order (1983), Law Com. No. 123, paras. 5.14–5.18, we criticised s. 5 for its dependence on the requirement that the penalised conduct must be likely to occasion a breach of the peace; the offence is not committed if the only persons present are too frightened by the conduct to be likely to react in such a way. These criticisms have been accepted by the Government in their proposals to amend the section: see Review of Public Order Law (1985), Cmnd. 9510, para. 3.9.

[26] It includes passing material, in writing or orally, to one other person: Working Paper No. 79, para. 3.5.

[27] See J. R. Spencer, [1981] Crim. L.R. 810, at pp. 814–815.

(a) it penalises any form of publication of the published material, whether privately or in public, in writing or orally,[28] without the requirement under section 5 of public display; and

(b) there is, it now seems, no requirement that the publication of the material should be likely to occasion a breach of the peace.[29]

E. The arguments for a law of blasphemy reconsidered

2.20 The fundamental issue examined by our working paper was whether the gap in the law identified above which is at present met by the common law offences of blasphemy and blasphemous libel was such that, if those offences were to be abolished, it would be necessary to replace them by a new offence not suffering from their defects. Provisionally, our answer to this question was a qualified negative, a conclusion reached after a detailed examination of what we took to be the principal grounds which might be advanced for retention of an offence. Consideration of these arguments remains at the core of the discussion of an offence of blasphemy. If there is no argument which may properly be regarded as sufficiently powerful to justify the derogation from freedom of expression which any offence of blasphemy must occasion, that offence, whether it be the present common law or some statutory replacement of it, should in our view have no place in the criminal law. Accordingly the greater part of the remainder of the section of this report dealing with the law of blasphemy is devoted to a re-examination of the arguments put forward in our working paper in the light of subsequent comment upon them, together with a consideration of some further contentions raised by those commenting on the working paper.

2.21 In reviewing these arguments we are conscious that, as lawyers, we have no special qualifications for undertaking the task; a few of the commentators upon our working paper indeed queried our competence to consider a matter having theological and wide social implications.[30] That there are such implications we would not deny. But blasphemy and blasphemous libel, as offences at common law for which unlimited penalties are available, fall within our programme for codification of the criminal law. Moreover, they raise difficult legal problems, as the proceedings which culminated in the decision of the House of Lords in *Whitehouse* v. *Lemon*[31] amply demonstrate. The decision as to whether the offences should be abolished, or whether there should be a new offence to replace them, lies with Parliament. Our hope is that, if and when it has to consider that issue, it will regard the present report as a useful contribution to the discussion which will be required; and, in so far as legal matters are concerned, as an informed contribution.

2.22 It is, however, necessary for us to indicate at this stage that the conclusions reached in relation to the arguments reviewed are, save where otherwise specified, those of a majority only of the Commissioners. That majority among us has concluded that the weight of argument does not favour

[28] There is some limited authority for the view that, in considering whether an oral communication amounts to blasphemy, the place and circumstances of publication may be taken into account: *R.* v. *Boulter* (1908) 72 J.P. 188, 189 *per* Phillimore J.

[29] See para. 2.1, above.

[30] See e.g., *The Tablet*, 16 May 1981, p. 467.

[31] [1979] A.C. 617.

the view that abolition of the common law offences of blasphemy and blasphemous libel ought properly to be accompanied by recommendations for a new, statutory offence which would have the effect of penalising at least some of the material the publication of which is at present proscribed by the common law. The majority recommends abolition of the common law without replacement, and this view is reflected in the draft Bill which forms the Appendix to this report. The minority, however, support abolition but consider a new offence to be desirable, and their views are set out in the Note of Dissent at the end of this report. This divergence of opinion should be borne in mind in the discussion which follows.

1. THE PROTECTION OF RELIGION AND RELIGIOUS BELIEFS

2.23 As an argument for retention of a crime of blasphemy, the working paper first considered the view which regards this law as protecting the Deity and Christian institutions from affront and attack, irrespective of whether offence is caused to the feelings of believers. We pointed out that—

> "[this] viewpoint . . . fails to take into account the change in the relationship between Church and State, and that from the standpoint of the criminal law it has lost its validity since blasphemy ceased to be regarded as an offence rooted in sedition"[32]

and concluded that this consideration did not in contemporary circumstances justify the imposition of criminal sanctions for blasphemous conduct.

2.24 We have remarked that a large majority of our commentators regarded this as the strongest justification for retention of criminal penalties, the greater number of them referring in this context to the Christian religion alone.[33] But while the result of our consultation indicates how strongly a substantial number of people take this view, and while respecting the feelings of those who express it, we must point out that the argument is only capable of being advanced in respect of the God of one faith alone, and is apparently based on the questionable assertion that the Christian God, but none other, is in need of some kind of legal protection. It is, however, not the policy of the law to seek to assert the truth of any particular religion by means of the criminal law and none of us would maintain that this provides a satisfactory reason for retention of the criminal law in this area.

2.25 It has also been represented to us that any justification for a law of blasphemy which rests upon the notion that the Deity requires legal protection is also theologically not well founded. This is a matter upon which, as lawyers, we have no special qualification to comment, but the argument presented seems to us worth recording in the present context because of the character of

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[32] Working Paper No. 79, para. 7.6.

[33] One commentator even advanced the view that there is a "constitutional" argument for retention of the crime of blasphemy: because religion is interwoven with the fabric of the Constitution (e.g. the Coronation oath, Act of Succession), the sacred element of the institution of the Monarch must be protected from scurrilous abuse; blasphemy provides such protection, and there is no constitutional power to abolish it. None of us think this argument well-founded in terms of legal history, and the view propounded by Hale C. J. in 1676 *(Taylor's Case* (1676) 1 Vent. 293; 86 E.R. 189) that "Christianity is parcel of the laws of England" was disapproved one hundred years ago (*R.* v. *Ramsay and Foote* (1883) 15 Cox C.C. 231, 235 *per* Lord Coleridge C.J.). The argument is, we believe, an aspect of the one under consideration.

the response to our working paper. The reaction of many Christians to blasphemy is naturally one of distaste which arises because it impugns the position of one to whom unqualified honour and reverence are due; and the law is a means of curbing those who fail to show that honour. To the suggestion that any such law appears implicitly to assume that the Deity is in need of that assistance it may be answered, by those who urge the use of the law for this purpose, that the law is one means by which He has left the task of so assisting Him to His servants in this world. It is perhaps this point of view which underlay some of the comment at the time of our working paper, for example that—

> "it is surely the role of all those who accept Christianity as not only living faith but the surest hope of human redemption to assert . . . that no safeguard which protects their religion . . . can be abandoned."[34]

To such contentions there is an opposing argument: that it is inappropriate and indeed contrary to Christian precepts to invoke the power of the State in defence of the honour of the Deity and by such means to coerce others who are unwilling to refrain from expressing disrespect. This argument suggests that the better, more Christian, response is to attempt to convince anyone who insults God that he is wrong to do so; but this is a matter of persuasion rather than coercion, which is performed as a service to others and hence by this means to God. Which is the correct Christian reponse is matter on which we would not wish to pronounce. The value of the arguments lies in their indication that, even within the terms of the reference of the many who upon consultation supported the retention of the law of blasphemy as a proper means of defending the honour of the Deity, differing views are held by convinced Christians. In any event our consideration of the arguments assumes that the present law of blasphemy is unsatisfactory because of, among other factors, its limitation to the protection of the Christian religion alone[35] and it is essentially only in the context of the protection of Christianity by the common law that the considerations referred to in this paragraph have their relevance.

2. THE PROTECTION OF PUBLIC ORDER

2.26 This rationale for a law of blasphemy raises two issues: has publication or distribution of blasphemous material led in recent times, or does it seem likely to lead in present conditions, to public disorder? And, if so, would offences dealing with public disorder be incapable of dealing with it in the absence of an offence of blasphemy? The working paper answered these questions in the negative and, as we have noted, most of our commentators agreed.

2.27 Nevertheless, others have commented that the expression of views about religion may still lead to public disorder in contemporary circumstances.[36] Certainly we would not wish to deny that religion and religious beliefs remain sensitive subjects, for some people touching their deepest feelings; and for that reason we would not exclude the possibility of a link

[34] *The Tablet,* 16 May 1981, p. 467.

[35] See para. 2.18 (iii), above.

[36] See Robilliard, *Religion and the Law* (1984), p. 40. The author cites the complaints of a Manchester woman about material circulating in Manchester in a letter published in Pakistan in 1971 which led to riots there, and riots in and outside a Rotherham mosque during Ramadan in 1980 over certain religious differences. See as to the latter *The Times,* 28 June 1980.

between the issues of attacks upon religious beliefs and the maintenance of public order. But it does not in our view follow that the possibility of such attacks leading to disorder affords any real support for the retention of an offence which would, in essence, penalise the making of such attacks whether or not there was any risk to public order.

2.28 It must first be borne in mind that any such attacks made in public which are abusive (or threatening or insulting), provided that they are likely to occasion a breach of the peace, are already penalised by section 5 of the Public Order Act 1936 if such abuse is "used" or is incorporated in matter which is "distributed or displayed".[37] These are wide terms and, as we have noted, encompass all the forms in which such communications are likely to be made save only for the public availability of the material in question.[38] Support for an offence penalising attacks on religious beliefs can therefore draw support from considerations pertaining to public order only if it is possible to maintain that the private circulation or the public availability of such material, as distinct from its public communication, is likely to cause a public disturbance; for, as soon as any public communication takes place, in whatever form, section 5 would seem effectively to provide the necessary protection of the public peace. In our view, the possibility of public disturbance arising only from such availability is remote.

2.29 Yet even if such disturbance were to be less remote than we believe to be the case, it seems to us unlikely that in contemporary society the appropriate response would be an offence the essence of which would penalise the availability of material which in itself did no more than attack religion or religious beliefs. In our view it is more probable that the material at issue would be of a character liable to arouse hostility towards those holding the beliefs in question. The law already penalises those publishing or distributing abusive or insulting material which is liable to arouse hostility towards persons on account of their race: section 5A of the Public Order Act 1936, inserted by section 70 of the Race Relations Act 1976, so provides.[39] Recent authority indicates how closely linked are the concepts of a "racial group" under the Race Relations Act (and likewise under section 5A) and membership of a group which is distinguished by, amongst other factors, a common religion; the latter may be protected under this legislation because of its "ethnic origin".[40] If in future there appears to be a substantial problem relating to the availability of material which in form is an attack upon particular religious beliefs, but is in substance an attack on those holding such beliefs, it would seem to be a relatively simple

[37] See para. 2.19 and n. 23, above.

[38] *Ibid.*

[39] Sect. 5A states that "(1) A person commits an offence if—(a) he publishes or distributes written matter which is threatening, abusive or insulting; or (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, in a case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question". The Government propose certain amendments to the offence: see Review of Public Order Law (1985), Cmnd. 9510, paras. 6.6 *et seq.*

[40] The Public Order Act 1936, s. 5A(6) states that a "racial group" is a group of persons defined by reference to colour, race, nationality or ethnic or national origins. As to the meaning of "ethnic origins" under the Race Relations Act 1976, s. 3(1), see *Mandla* v. *Dowell Lee* [1983] A.C. 548. But see *Ealing London Borough Council* v. *Race Relations Board* [1972] A.C. 342, 354 *per* Lord Donovan.

task to amend section 5A of the Public Order Act 1936 specifically to penalise such material. We express no opinion on whether such an amendment is desirable.[41] We do, however, take the view that any problems arising in the context of public order in consequence of the availability of material of the kind under consideration would not appropriately be met by an offence of blasphemy: such an offence would fail to penalise the gravamen of the conduct requiring criminal sanctions, namely, the arousal of hostility against members of a particular group because of the beliefs which they hold.

3. THE PROTECTION OF SOCIETY

2.30 A third argument for the retention of an offence of blasphemy, discussed at length in our working paper,[42] is that blasphemous attacks on religion may have an adverse effect on society as a whole because of its potentially harmful effect on the stability of the community. We summed up this view by quoting from a comment contemporary with the outcome of the proceedings against Gay News in 1977,[43] to the effect that vilifying the sacred beliefs of a significant number of people—

> "can be more than a matter between the blasphemer and the insulted. It amounts to an attack on the fundamental decencies and mutual respect on which society operates, and could damage the stability of a community. Allowing total freedom to insult the religious beliefs of others can also have a profoundly adverse effect on the harmony that exists between different groups, particularly, perhaps, where racial and religious divisions go together."

Furthermore, a law of blasphemy is needed—

> "to register the fact that there are certain things that are so repellent to the general conscience and mind of the country that this hostility to them should have some form of expression."[44]

Our earlier review of the response to the working paper indicates, from the brief quotations from it which we have extracted as representative, that these expressions of opinion were shared by a substantial number of those commenting upon the paper.[45]

2.31 We do not doubt the depth of feeling of those who hold the view that blasphemous attacks upon religion and religious belief are damaging to society. As statements of belief or of what may in broad terms be regarded as the exposition of a political viewpoint the comments to this effect which we have quoted here and elsewhere in this report are doubtless unexceptionable. In our view, however, they fall short as a statement of the preconditions required for

[41] Legislation in force in Northern Ireland similar to s. 5A specifically penalises publication of material attacking persons on account of their religious beliefs, but is rarely used: see Public Order (NI) Order 1981, S.I. 1981 No. 609 (NI 17), and also Leopold [1977] Public Law 389, and Hadfield (1984) 35 N.I.L.Q. 231.

[42] See Working Paper No. 79, paras. 7.7–7.11.

[43] See *The Times*, 13 July 1977 and para. 1.2, above.

[44] *Hansard* (H.L.) vol. 389, col. 318, 23 February 1978 (Bishop of Leicester) in the debate on the Blasphemy (Abolition of Offence) Bill.

[45] See para. 2.12, above.

criminal sanctions which would penalise attacks in any terms upon religion and religious belief, and fail to answer the criticisms of this point of view which we put forward in our working paper.

2.32 It is common ground amongst those commenting on our working paper that no harm is done by rational and sober, as distinct from scurrilous or abusive, treatment of religious matters. But as we pointed out—

> "Statements that what the law permits is the "sober", "serious" or "rational" treatment of material, or in particular "rational discussion" as distinct from "scurrilous abuse", were commonplace in 19th century cases and were echoed in *Whitehouse* v. *Lemon*.[46] But as both that and earlier cases clearly indicate,[47] it is quite possible for a work of serious literature to induce outrage among some people; and it is equally possible for rational discussion, if it be sufficiently persuasive in setting forth an unpopular argument, to induce a violently unfavourable reaction. There is, however, a counterbalancing public interest in ensuring that such material is available to the public without the threat of legal penalties."[48]

We commented further that the argument that failure to treat religion and religious beliefs soberly and with respect may have adverse consequences for society—

> "seems to us to throw some doubt upon the validity of the distinction between the sober, serious and rational treatment of material and matter which is purely insulting. If society would indeed suffer as a result of an absence of respect shown to religious beliefs, it may be suggested that it will suffer all the more if such beliefs are subject to destructive analysis and criticism, even if temperately expressed, since reasoned persuasion is ultimately far more effective in its aim than attacks devoid of intellectual content. Yet it is precisely this type of publication which proponents of this argument are prepared to except from the ambit of criminal sanctions."[49]

2.33 Some of our commentators, including the group advising the Archbishop of Canterbury, accepted that, theoretically at least, this last argument might in the long run prove to be correct. Nonetheless, they took the view that it was possible to distinguish, as the law does at present, between matter

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[46] E.g. in the trial judge's direction to the jury, (transcript pp. 3, 13 and 19) and [1979] A.C. 617, 662 *per* Lord Scarman; and in the direction to the jury in *R.* v. *Hetherington* (1841) 4 St. Tr. N.S. 563, 590, quoted by the trial judge, the Court of Appeal and the House of Lords in *Whitehouse* v. *Lemon;* also *R.* v. *Ramsay and Foote* (1883) 15 Cox C.C. 231, 239 *per* Coleridge L.C.J.

[47] In 1817 Shelley tried to regain custody of his children after the death of his wife. Custody was refused by Eldon L.C. after objection that he was an atheist who had published a work ("Queen Mab") blasphemously deriding the truth of the Christian revelation and denying the existence of God as the creator of the universe (*Shelley* v. *Westbrooke* (1817) Jac. 266; 37 E.R. 850; and see Jacob, *Chancery Reports in the Time of Eldon* (1821) p. 266). In 1821 a bookseller, Clark, was prosecuted by the Society for the Suppression of Vice for selling the poem; he was convicted and imprisoned. In 1841, while proceedings were pending against him, Hetherington (see n. 46, above) prosecuted a bookseller for selling Shelley's complete works containing "Queen Mab"; he was convicted, notwithstanding an eloquent defence which mentioned writings alleged to be equally blasphemous by Shakespeare, Milton, Byron and others (*R.* v. *Moxon* (1841) St. Tr. N.S. 693). See Bonner, *Penalties upon Opinion* (3rd ed., 1934) pp. 43 and 68, and Walter, *Blasphemy in Britain* (1977) p.3.

[48] Working Paper No. 79, para. 7.9.

[49] *Ibid.*, para. 7.10.

and manner, and that no undue restriction on freedom of speech would be occasioned by imposition of penalties on matter containing or consisting of offensive abuse or insults. However, we remain unpersuaded that this distinction can be made without such undue restriction or, indeed, that the distinction is socially desirable.

2.34 In the first place, the distinction assumes that it is possible consistently to separate matter from manner. It may be doubted whether this assumption is well founded for—

> "it supposes that statements are capable of more or less offensive formulations which are nevertheless identical in meaning. The manner of assertion is treated as though it were so much verbal wrapping paper whose features had no bearing upon the content of the parcel . . . More often . . . manner and matter are so integrally related that it is impossible to distinguish the offensive manner from the offensive matter of a statement."[50]

Frequently matter and manner cannot easily be disentangled and upon analysis it is often the message which repels as much as the language in which it is couched. That may well have been so in regard to much if not all of the material found to be blasphemous in reported cases.[51] Matter which consists *only* of vulgar abuse or insults may thus on examination prove to be so insignificant in quantity and so insignificant as a social problem as scarcely to merit notice by the criminal law; and it seems to us that any wider categorisation may indeed have adverse consequences for freedom of speech and communication.

2.35 Such restrictions would in particular have adverse consequences for what many would consider to be proper criticism of matters pertaining to religion and religious belief. Ridicule has for long been an acceptable means of focussing attention upon a particular aspect of religious practice or dogma which its opponents regard as offending against the wider interests of society, and in that context use of abuse or insults may well be a legitimate means of expressing a point of view upon the matter at issue. The imposition of criminal penalties upon such abuse or insults becomes, in our view, peculiarly difficult to defend in the context of a "plural" or multi-racial, multi-religious society. Here one person's incisive comment (or indeed seemingly innocent comment) may be another's "blasphemy", and to forbid use of the strongest language in relation, for example, to practices which some may rightly regard as not in the best interests of society as a whole would, it seems to us, be altogether unacceptable.[52] But such would be the consequence if, as many of our commentators urged, a crime of blasphemy were to be extended to religions other than Christianity. Of course, such abuse or insults directed at the beliefs or practices

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[50] Jones, "Blasphemy, Offensiveness and Law" (1980) B.J. Pol. S. 10, p. 129 at p. 143 and Working Paper No. 79, para. 7.9.

[51] See further Working Paper No. 79, para. 7.9. See also the cases described in J.R. Spencer, "Blasphemy: The Law Commission's Working Paper" [1981] Crim. L.R. at pp. 816–818; and as to the poem which figured in *Whitehouse* v. *Lemon,* Jones, *ibid.,* at p. 143.

[52] Cf. the dictum in *Whitehouse* v. *Lemon* [1979] A.C. 617, 658 by Lord Scarman, quoted at para. 2.12, above. See also the comment by Professor J.C. Smith in [1979] Crim. L.R. at pp. 312–313 on Lord Scarman's dictum, suggesting that "vilification, ridicule, and contempt may be decidedly in the public interest. Should it not be possible to attack in the strongest terms religious beliefs that adulterers should be stoned to death and that thieves should have the offending hand lopped off, however offensive that may be to the holders of the belief?".

of a particular religion may in substance amount to an attack upon adherents of that religion because of the views they hold. The line may be a fine one; but as we have emphasised above,[53] if such attacks appear to be or become a real social problem, the appropriate response in our view is not to extend the law of blasphemy but rather to adapt the present offence penalising the publication of matter likely to arouse hatred towards persons on account of their race so that it would penalise publication of matter likely to arouse hostility to others on account of their religious beliefs.

2.36 Finally, in relation to the issue of the protection of society we must reiterate the view more tentatively adumbrated in our working paper[54] that it is questionable whether the criminal law is an appropriate means of enforcing respect for religious beliefs or modes of discussing them, or whether it is capable of doing so without resort to measures which most people would regard as unacceptable infringements upon freedom of expression. Some of our commentators criticised us for raising the possibility that—

> "special protection for the religious believer could lead to widespread flouting of legal sanctions by those wishing to focus attention upon its discriminatory character or to be seen as martyrs in the cause of freedom of expression",

and that where little need could be demonstrated for criminal sanctions, such special protection—

> "might well stimulate activities designed to display its unacceptable character and the impossibility of securing its proper enforcement".[55]

Yet unpalatable though it may be to some, if on proper analysis there is little or no justification for an offence, and indeed substantial reasons why society should not impose criminal sanctions, it is likely that its mere existence will be a source of conflict, particularly if it affects the sensitive area of freedom of speech. The view to the contrary that prevention of particular forms of expression, even if not prevalent, is preferable to attempts to deal with them after they have become prevalent[56] may be attractive in theoretical terms. But it is a commonplace that differences of view on religious matters run deep, and the existence of the criminal law is unlikely to deter those with a determination to express their views, even in the sharpest terms, about practices and beliefs which they consider undesirable; and as we have pointed out, in the circumstances of today, one person's comment may be blasphemous in the eyes of another. The existence of a religion and system of beliefs common to most or all members of society might eliminate this difficulty but that is not now the position: the law does not assert the truth of a single system of religious

[53] See para. 2.29, above.

[54] See Working Paper No. 79, paras 7.10 and 7.17.

[55] See e.g. Hofler, (1984) 18 Law Teacher 203, at pp. 206–207. Significantly, however, our view was supported by one of the police organisations which favoured abolition of the common law without replacement. It is also noteworthy that the poem which figured in *Whitehouse* v. *Lemon* was deliberately republished and widely distributed by others after the defendant's conviction in 1977.

[56] See para. 2.13, above.

beliefs,[57] and the view once held by the common law that "Christianity is parcel of the laws of England"[58] was disapproved by the courts over a century ago.[59]

4. THE PROTECTION OF RELIGIOUS FEELINGS

2.37 Finally we refer to the argument which in our working paper we regarded as the most persuasive—albeit far from decisive—in favour of the retention of a criminal offence of blasphemy,[60] namely, that the criminal law should provide some protection to religious believers from suffering offences to their feelings. The degree of offence caused by blasphemous attacks may be so great, it may be argued, that mental distress is caused, and criminal sanctions are accordingly needed:

> "Blasphemy is an act of violence to the mind and spirit and deeply spiritual feelings of very large numbers, millions and millions, of people capable of entertaining such feelings. It is an assault upon the mind and spirit just as much as mayhem is an assault upon the body."[61]

But why should freedom of speech be curtailed in this specific area because a particular publication is thought to be grossly insulting to the feelings of others? In our working paper we thought that the distinction between religious and other beliefs was most convincingly made in terms of the sacred nature of the former:

> "It is the special reverence felt 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. Ribald, obscene or abusive attacks upon God or Christ are the verbal equivalents of acts of desecration . . . For the religious adherent, the sacred is identified primarily as the divine or what is especially associated with the divine and only incidentally in terms of his feelings towards it."[62]

And the argument for the protection of religious feelings was, as we have indicated, stressed by a majority of those commenting upon our working paper who favoured retention of criminal sanctions.

2.38 If indeed it is a "special reverence felt for what is deemed sacred" which distinguishes the offence felt by people in consequence of attacks upon religious beliefs, can this justify the imposition of criminal penalties upon those who outrage the feelings of such people by means of these attacks? It seems to us that there are major obstacles in accepting such a justification. Further enquiry needs to be made as to why such reverence is to be regarded as "special". For example, is that reverence special in kind or in degree? If it is special only in *degree,* this is by itself scarcely a solid foundation for the

[57] See para. 2.24, above.

[58] *Taylor's Case* (1676) 1 Vent. 293; 86 E.R. 189 *per* Hale C.J.

[59] *R.* v. *Ramsay and Foote* (1883) 15 Cox C.C. 231, 235 *per* Lord Coleridge C.J.; see para 2.24, n. 33, above.

[60] See Working Paper No. 79, paras. 7.12–7.21.

[61] *Hansard* (H.L.), vol. 389, col. 290, 23 February 1978 (Earl of Halsbury) in the debate on the Blasphemy (Abolition of Offence) Bill.

[62] Jones, "Blasphemy, Offensiveness and Law" (1980) B.J. Pol. S. 10, p. 138. See also C.L. Ten, "Blasphemy and Obscenity" (1978) Br. Jo. of Law and Society, Vol. 5, No. 1, p. 89; "Intention to Blaspheme" (1979) 129 New L.J. p. 205.

imposition of criminal penalties upon others for provoking feelings of outrage; for logically the special reverence for sacred matters can upon this interpretation imply no more than that believers are more readily provoked, or provoked to a greater extent, by attacks upon their beliefs than other people are by attacks on other matters, or that they are more easily and more deeply hurt than others;[63] all of which, as one of our commentators remarked, seems "a very dubious empirical generalization", certainly as regards this country.

2.39 If on the other hand the nature of reverence for sacred matters is considered to be special in *kind*, it may be questioned whether there is any real ground for maintaining that there is a difference between the reverence felt for God and other kinds of reverence, for example, for the Monarch or for parents. Blasphemy is, rather, a special *case* of irreverence: for the religious believer, contempt for God can never be justifiable and must always therefore be deplored; such contempt expressed towards other persons or institutions will be deplored by others in equal measure in so far as that contempt is regarded as unjust or without real foundation. In other words, reverence for God, it may be argued, does not differ fundamentally in character from the reverence accorded to any person against whom those according the respect are unwilling to entertain grounds of criticism.

2.40 If the argument we have outlined is correct, as we believe it is, it ought to follow that the protection given to adherents of organised religion by a law of blasphemy should be extended to protect the susceptibilities of those who have a similar unqualified reverence for another person or institution, whether this be a person holding a unique position in the minds of a substantial number of people such as the Monarch, or an object which is the focus of similar feelings such as the national flag,[64] or even a philosopher, artist or musician whose work has for some the spiritual significance which religion possesses for others. Many people in England and Wales no doubt respect the feelings of reverence of religious believers, even if they do not share their beliefs, and would regard gratuitous outrage to such feelings as wrong,[65] but it must be recognised that the mutuality of respect which this implies, and the equality of treatment which the law should provide, would mean that a substantial extension of the criminal law would be required to protect the feelings of individuals in all the cases to which we have referred. But it is only necessary to suggest this to realise the implications which such an extension of the law would have for freedom of speech: the limitation would, we believe, be seen by most people as altogether excessive. So also is it, in our view, in the sphere of religious matters: freedom of speech is in this context indivisible and the nature of religious feelings, it seems to us, provides no sufficient foundation for the imposition of penalties upon those who do no more than outrage those feelings. Consequently, there can be no ground for distinguishing between the mode of criticism of or comment upon God and religion and modes of criticism or comment upon any other matter; and in other areas these are limited only by considerations of public order and security, obscenity or damage to reputation.

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[63] See J.R. Spencer, "Blasphemy: The Law Commission's Working Paper" [1981] Crim. L.R. at pp. 815–816.

[64] Desecration of the national flag is an offence in some countries and expressly provided for in the American Law Institute's Model Penal Code (1962), s.250.9.

[65] Cf. Note of Dissent, p. 41, below, para. 3.2.

2.41 In one respect we think our views may need clarification. In our working paper[66] we queried—without suggesting an answer—whether respect for political ideals or any other strongly held beliefs could be distinguished from respect for religious beliefs. We think that there is some substance in the suggestion of one of our commentators that there is here an analogy with blasphemy only when the political or other belief focusses esteem upon a particular person; and political beliefs frequently concern matters of policy rather than persons. It may follow that there cannot often be such an equivalence between political and religious beliefs simply because, while the holding of religious beliefs entails an unqualified reverence for God on the part of believers, the holding of particular political or social beliefs does not usually entail a similar unqualified reverence for a person connected with or expounding those beliefs. Yet if this is the case, the comparison merely underlines the argument that while reverence for God may to the believer differ in degree, it nonetheless does not differ in kind from reverence for other individuals or institutions.

2.42 Irrespective, however, of such issues as the nature of religious feelings and their special character, some commentators on our working paper referred to the protection afforded by legislation to people on account of their race and demanded why similar protection should not be given in respect of religion or religious beliefs for the benefit of those whose feelings are outraged by attacks upon them. Our concern here is limited to the criminal law, and in that context the relevant legislation is section 5A of the Public Order Act 1936, inserted by the Race Relations Act 1976; the terms of this provision have already been set out.[67] We dealt with this contention in our working paper and see no need to qualify our analysis. We said [68]—

> "Where overwhelming social pressures make it necessary, the general presumption in favour of freedom of speech both as to matter and manner may require modification either for the benefit of particular members of society or for the benefit of society as a whole. Such a course may be thought legitimate where the existing laws relating to security and public order have demonstrated their inadequacy, and where, in the absence of checks, the freedom to attack others by publication may lead to damage in terms of, for example, reputation or economic loss; here the law of civil defamation intervenes. And the special and pressing problem of racial discrimination led to the provisions in the Race Relations Acts 1965 and 1976, in order to help overcome the peculiar threat to the immigrant population which Parliament identified. The example of these provisions has. . . been urged by the proponents of criminal sanctions as a precedent for an offence in this area .... But it does not follow that some members of society have been subjected to something approaching the same difficulties, pressures or attacks in respect of their religious beliefs as others have been on account of their race, and that those beliefs should therefore be protected in a similar manner. We incline to the view that the case for control of expressions of hostility towards religious beliefs by the criminal law gains support from the race relations legislation only if it can be demonstrated that there is a degree of hostility towards such beliefs

[66] Working Paper No. 79, para. 7.16.
[67] See para. 2.29 and n. 39, above.
[68] Working Paper No. 79, para. 7.16.

similar to that which prompted that legislation. In fact there does not seem to us to be any genuine ground for accepting the proposition that religious beliefs are under threat or subject to overt hostility of the kind or to the extent which necessitated the protection afforded to ethnic minorities by section 5A of the Public Order Act 1936. Indeed, that section has a relevance to the laws of blasphemy perhaps not appreciated by those who invoke it as a precedent; for it suggests that, leaving aside the general laws relating to public order and obscenity, it is only in the most exceptional circumstances where particular social tensions are in issue that the criminal law ought properly to intervene to control the written or spoken word .... It was the importation of revolutionary and anti-clerical ideas in the late 18th and early 19th century which at the time gave rise to frequent prosecutions for blasphemous libel because of the fear that the dissemination of such ideas endangered the stability of society. By contrast, today it is the large-scale immigration of post War years which, it may be argued, has engendered fears for that stability; hence the wholly exceptional remedy in the criminal law represented by the section of the Public Order Act 1936 (inserted by the Race Relations Act 1976) which penalises incitement to racial hatred."

Only one observation needs in our view to be added to this analysis. If indeed it appears that in future expressions of hostility towards people on account of their religious beliefs becomes, or risks becoming, a real social problem, it would as we have pointed out be appropriate to amend section 5A accordingly.[69] An extended offence of blasphemy penalising individuals for the outrage they cause by attacks on religious feelings would seem to us to aim at the wrong target,[70] and as we conclude below could not in any event avoid being unacceptably wide.[71]

5. SOME FURTHER ARGUMENTS CONSIDERED

2.43 Thus far our review of the arguments which would favour the retention of a law of blasphemy indicates that, in our view, none is sufficiently powerful to persuade us of the need for such retention, and that in relation to each there are arguments of greater weight against that conclusion. In the course of that review we have taken into account the views expressed upon consultation in relation to the arguments set out in our working paper. Further objections to abolition were raised by that consultation and, given the weight of opinion voiced by a majority during the course of it, it is important that consideration be given to them. These objections perhaps differ in emphasis from those already examined, which were concerned essentially with the possible rationale for a law of blasphemy; those now to be discussed advert more specifically to the practical effect, if any, of abolishing the existing common law offences.

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[69] See para. 2.29, above.

[70] J. R. Spencer has pointed out that the common law has invariably been used by members of the majority religion as a weapon against non-believers, this being one result of the common law's concern with protecting beliefs as distinct from the social effects of attacks on people because they hold those beliefs: "Blasphemy: The Law Commission's Working Paper" [1981] Crim. L.R. at pp. 816–818.

[71] See para. 2.49, below.

2.44 A frequently voiced objection to abolition was the possibility that abolition of the common law would lead to the publication of a flood of blasphemous material which would be without any substantive legal control or sanction. We find this argument dubious in itself and entirely speculative as to the likely result of abolition. It appears to be based on two assumptions. The first is that only the existence of this archaic and unsatisfactory offence is currently effective to prevent those awaiting to flood the market. It must, however, be recollected that there was no prosecution for blasphemy between 1922 and 1976, and that by 1949 Lord Denning pronounced the common law crime to be "a dead letter", simply because the danger to society contemplated by it no longer existed.[72] We are aware that there were a few instances other than the *Gay News* case in which proceedings at common law were contemplated, but it is in our view significant that they were satisfactorily resolved without recourse to the criminal law.[73] We have no greater evidence to support our view than have the proponents of this argument; but it seems to us to be more likely that abolition in present circumstances would have no greater effect than the abolition or repeal of other offences which have outlived their usefulness.[74] It could indeed be that the consequences of abolition would be beneficial for freedom of speech: this was certainly the view of some of our commentators who as authors or publishers expressed concern at the implications of the recent use of the common law.

2.45 The second assumption underlying this objection seems to be that the common law offence is the only means of controlling objectionable material of the kind which it penalises. We have, however, indicated[75] that the area covered exclusively by that offence is remarkably narrow and, in our view, without significance in the context of the general purposes of the criminal law. Moreover, two areas where concern has been expressed over the possibility of the wider dissemination of blasphemous material, namely, the broadcasting media and the cinema, are subject to their own systems of control, the former largely by means of internal regulation,[76] the latter through local licensing arrangements.[77]

2.46 A variant upon the objection discussed above is the suggestion that society might see Parliament's abolition of the common law without replacement as in some sense the bestowing by Parliament of its approval of the conduct currently penalised by the common law. Such an implication would, we believe, be unwarranted. Abolition of the common law would undoubtedly be seen, quite properly, as disapproval of an unsatisfactory and archaic offence. It might even be seen as removal of the protection by means of the criminal law of a particular religion, a form of protection which many in

[72] *Freedom under the Law,* Hamlyn Lectures, 1st series, 1949, p. 46.

[73] See e.g. Tracey and Morrison, *Whitehouse* (1979) pp. 110–114 as to the screening by the BBC of an episode in a popular television series in 1972 containing possibly blasphemous material, which the BBC later admitted should not have been shown; the D.P.P. declined to prosecute.

[74] E.g. the abolition of champerty and maintenance by the Criminal Law Act 1967. But cf. Lord Scarman in *Whitehouse* v. *Lemon,* para. 2.13, above.

[75] See paras. 2.19 and 2.28, above.

[76] See as to the I.B.A. the Independent Broadcasting Authority Act 1973, s. 4(1)(a) and *R.* v. *I.B.A., Ex parte Whitehouse, The Times* 4 April 1985; and as to the B.B.C., Robertson, *Obscenity* (1979) pp. 270–271 and 343.

[77] See Cinemas Act 1985.

modern society, where people profess a variety of faiths or none at all, would regard as unnecessarily discriminatory. But we do not think abolition could properly be seen as condoning such material as was the subject of proceedings in the *Gay News* case.[78] Abolition of the common law would, we think, imply in relation to such material only that its publication would be subject to the constraints of the legislation relating to obscenity and indecent displays,[79] and to the statutory provisions relating to public order, and that the mere publication or availability of such material[80] would not otherwise constitute a social problem of a magnitude sufficient to attract the penalties of the criminal law. In cases which are not caught by the legislation to which we have referred, the material concerned may indeed be acutely offensive to some people.[81] But as we have indicated elsewhere,[82] material on many another subject which may be comparably offensive to a substantial number of people is not subject to the criminal law; and the hurt which any such material—whether or not relating to religious matters—may inflict upon the sensitivities of particular segments of the population is in our view not in itself a sufficient argument for constraints upon its publication or availability.

2.47 Finally, we have considered whether there would be any positive harm to the wider interests of society in replacing the common law by an offence applying to the publication of material relating to religions in general, including Christianity; for, if such an offence would answer the demands of those individuals who, to judge by our consultation, feel the need for it, what objection could there be to its provision, if such provision could be made without conflicting with other and competing interests? Again, any answer as to the likely effect of the availability of such an offence must be speculative. It is, however, possible that a new offence, however restrictively drafted, would be used to a greater extent than the common law has been,[83] particularly by adherents of religions who are exceptionally intolerant of criticism or who possess strongly heterodox views to which they wish to draw the attention of society. Only intervention by means of consent at the stage of initiating prosecutions could obviate this risk, and the task of the Law Officers or the Director of Public Prosecutions in giving such consent could not in our view be other than invidious. In any event, the possibility of replacing the common law raises in turn the question whether it is, in fact, practicable to make provision for an offence which, while extending some protection to all religions, would avoid excessive restrictions on freedom of speech. This question was canvassed extensively in our working paper[84] and we do not propose to cover the same ground at similar length. Nevertheless we think that some indication of the possible difficulties is desirable.

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[78] *Whitehouse* v. *Lemon* [1979] A.C. 617.

[79] Proceedings in the case related to both a poem and its accompanying drawing. The defence admitted that, subject to any defence under the Obscene Publications Act 1959, it would have been liable to conviction under that Act: *ibid.*, [1979] Q.B.10, 14 (C.A.). It is also noteworthy that in 1977, after the conviction of *Gay News*, a secularist who sent a copy of the poem in question through the post was convicted of sending an indecent article through the post under the Post Office Act 1953, s. 11: Robertson, *Obscenity* (1979), p. 242.

[80] See paras. 2.19 and 2.28, above.

[81] Cf. Note of Dissent, p. 41, below, para. 4.3.

[82] See para. 2.40, above.

[83] See Robilliard, *Religion and the Law* (1984), p. 41.

[84] See Working Paper No. 79, Part VIII and para. 2.5, above.

(a) Outraging religious feelings

2.48 We believe that any offence which applies to or gives some protection to religions in general would meet insuperable difficulties, however formulated. We have considered three possibilities, of which the first would penalise the publication of grossly abusive or insulting matter relating to a religion, which would in substance extend the scope of the common law offences of blasphemy and blasphemous libel to other religions. To this might be added a mental element, for example, of a purpose to outrage religious feelings.[85] For a variety of reasons, we do not think that such an offence would be acceptable. Defining the subject matter as that which is grossly abusive or offensive would in this context provide an offence of excessive width, even though it would doubtless be acceptable elsewhere in the criminal law;[86] for what might be regarded as acceptable language or comment by adherents of one religion may, as we have pointed out,[87] be thought grossly offensive by adherents of another, and to forbid the use of even the strongest language by way of comment upon religious practices which some may consider undesirable would not in our view be in the wider interests of society. The addition of a mental element, however stringent, would not seem to us to make this possible offence substantially more acceptable: some religious tenets or practices may deserve criticism or ridicule in the sharpest terms; abuse or insult cannot be excluded from the weapons of such criticism; and the purpose of the critic of such matters may indeed be to shock or outrage his readers by the use of abuse or insult, the better to realise the effect of that criticism.

2.49 Further difficulty attaches to the concepts of "religion" and "matters relating to a religion". There would in our view be dangers to society in leaving the concept of religion undefined.[88] It is clear that there are, from time to time, organisations which regard themselves as religions but are regarded by others as unworthy of that distinction,[89] and we foresee grave difficulties for the courts if, in the absence of definition, the exclusion of these organisations from the protection offered by an offence was nonetheless desired on grounds of public policy. Reliance here upon existing criteria developed in a different context, for example, the concept of the advancement of religion in the law of charities, would probably not secure this aim and might also lead to surprising and, some would think, undesirable results.[90] Attempts to define the concept of religion

[85] Cf. Note of Dissent, p. 41, below, paras. 5.2, *et seq.*

[86] The terms "abusive" and "insulting" appear in the Public Order Act 1936, ss. 5 and 5A: see paras. 2.19 and 2.29, above.

[87] See para. 2.35, above.

[88] The difficulties of definition, and the dangers of an absence of a definition, were examined in Working Paper No. 79 at paras. 8.15-8.22.

[89] See e.g. *Church of Scientology* v. *D.H.S.S.* [1979] 1 W.L.R. 723, 744 *per* Templeman L.J.

[90] Thus, while a bequest to an enclosed Roman Catholic convent is not charitable as it is not for the public benefit (*Gilmour* v. *Coates* [1949] A.C. 426), a trust for the benefit of the Exclusive Brethren is charitable (*Holmes* v. *Attorney-General, The Times* 12 February 1981). The Holy Spirit Association for the Unification of World Christianity and the Sun Myung Moon Foundation, two institutions associated with the Unification Church ("the Moonies"), have been registered as charities for the advancement of religion. See generally *Tudor on Charities* 7th ed. (1984), pp. 53 *et seq*, and also Keeton and Sheridan, *The Modern Law of Charities* 2nd ed. (1971), p. 52, where the law as to religious charities is described as "in the same unholy mess as that relating to other types of charity".

would, we believe, meet with no less formidable difficulties. For example, a list of specified, major religions which the offence was designed to protect might well include major religions whose spiritual leaders would not wish to seek such protection,[91] yet exclude religions whose less numerous adherents would regard this exclusion as an invidious distinction. Adoption of an existing statutory definition, such as certification under the Places of Worship Registration Act 1855,[92] would again involve reliance upon criteria designed for another context which are inappropriate to a modern criminal offence of general application outside the confines of places of worship.[93]

2.50 The difficulties attendant on the concept of religion in this context would be compounded by the application of this possible offence to abuse and insults about matters relating to a religion. Inclusion of all such matters without qualification would result in an offence of remarkable breadth which, it seems to us, would curb freedom of expression to an unacceptable extent.[94] If the rationale for such an offence is the protection of the feelings of religious believers against attacks on persons, objects or beliefs which they revere,[95] it would seem to us necessary to limit any offence accordingly. Yet if it were to be so limited, it seems inescapable that in all but the most obvious cases the court would require the reception of expert evidence to determine which persons, objects or beliefs are held in reverence by a particular religion: in a society of many faiths and of none, neither the public nor the courts can be assumed to have this knowledge without some assistance. Thus in effect, expert evidence might well be needed in order to determine the ambit of the offence in any particular case. We cannot regard this as a desirable outcome to reform of the law.[96]

2.51 The difficulties which we see in this possible offence could only be resolved, in our view, by reliance on a consent to the institution of proceedings by the Director of Public Prosecutions or the Attorney General. Where consent is required, it is entirely proper that considerations of public policy should be reviewed before consent is given; but it is not, or should not in our

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[91] See e.g. Sangharakshita (D.P.E. Lingwood), *Buddhism and Blasphemy* (1978).

[92] See para. 3.7, below.

[93] There is no publicly available list of religions certified by the Registrar General under the Act. There is a list of congregations whose premises have at some time been accepted for certification under the Act (see para. 3.7, n.14, below) but its completeness is not absolutely guaranteed by the General Register Office and inclusion on the list does not indicate that the place of meeting of any particular congregation remains certified. Information kindly supplied to us by the Office in 1979.

[94] On its face, it would cover not only religious beliefs but also religious architecture, art, literature etc.

[95] Cf. Note of Dissent, p. 41, below, para. 3.2.

[96] The nearest parallel is the defence of public good under the Obscene Publications Act 1959, s.4; but under that provision consideration of expert evidence arises only after a conclusion has already been reached that the article in question is obscene within the meaning of the Act (*Attorney General's Reference (No. 3 of 1977)* [1978] 1 W.L.R. 1123). In the ordinary course, "in so far as it is possible for them to do so, the courts set themselves against receiving evidence from any witness as to the very matter which the judge or jury has to decide": Cross, *Evidence* 5th ed. (1979), p. 442; and see *ibid.*, pp. 450–451. And see *R.* v. *Skirving*, *R.* v. *Grossman*, [1985] 2 W.L.R. 1001 (Obscene Publications Act 1959, s.2(1)), where it was held that expert evidence upon the effects of ingesting drugs did not go to the very matter to be decided by the jury, but gave proper assistance to the jury in deciding whether the description in a book of such ingestion would "tend to deprave or corrupt."

view be, the function of the consent to resolve difficulties in the application of a criminal offence which arise from irresolvable problems in determining its proper limits. The potential breadth of this possible offence is in our view clear, and we have mentioned that the task of those assigned the responsibility of giving consent might be heavy: determined attempts to use the offence by minorities in an area where feelings notoriously run deep is an obvious possibility. For the foregoing reasons we take the view that this possible offence, however drafted, would either be unavoidably wide or would raise substantial difficulties in practice. Futhermore, we believe its availability would not be conducive to the interests of a society which is at the same time both multi-religious and secular, and would be wasteful of the limited resources possessed by the community for the control of crime.

(b) Public display of offensive religious matter

2.52 Secondly, we have considered an offence which would penalise the public display of matters offensive to religious susceptibilities. This might at first sight seem to provide an element of the public interest which would be an acceptable justification; for, as one of our commentators rightly remarked,[97] while it is difficult to defend an offence such as blasphemous libel, which forbids a person being shown matter which he wishes to read, there is more to be said for one which forbids the display of such matter to those who may be disgusted or offended by it. But it seems clear to us that, unless the display were also to be indecent or such as might provoke a breach of the peace—in which event it would be wholly covered by other offences[98]—any offence dependent on the criterion of public display would be so wide as to be generally unacceptable; for what is acceptable in the eyes of adherents of one religion may well be grossly offensive in the eyes of another.[99]

(c) Inciting religious hatred

2.53 Finally, we advert again to the possibility of ensuring that the law penalises anyone who, in the guise of an attack on religious beliefs, is in substance attacking groups, particularly minority groups, because of the beliefs which they hold. This is not germane to an offence of blasphemy as such, nor do we wish to suggest in this report that the law at present requires to make provision to this effect. But as we have made clear elsewhere,[100] should in future such a provision be regarded as necessary, it would appear to be possible to amend the existing offence relating to publications likely to arouse racial hostility with this end in view.

F. Conclusions and recommendation

2.54 Blasphemy and blasphemous libel at common law provide protection only for the Christian religion and, it seems, the tenets of the Church of England. We take the view that, where members of society have a multiplicity of faiths or none at all, it is invidious to single out that religion, albeit in

[97] See J. R. Spencer, [1981] Crim. L.R. at p. 815.

[98] Such matter is penalised by the Indecent Displays (Control) Act 1981 and the Public Order Act 1936, s. 5; see para. 2.19, above.

[99] See e.g. *The Times* report of 7 March 1985 that: "Egyptian police raided shoe shops and confiscated thousands of Chinese-made shoes branded as blasphemous by religious leaders because of the word 'Allah' inscribed on the soles or heels. They will all be burnt."

[100] See paras. 2.29, 2.35 and 2.42, above.

England the established religion, for protection. In our view, therefore, for this reason and for other reasons earlier summarised,[101] the common law cannot remain as it is. Our consultation confirmed this view: a large number of commentators, including those who wished to retain a law of blasphemy, thought that the limitations of the law as it stood could not be justified, and most of these agreed that, if there was to be a new offence in place of the common law, protection should extend, not merely to the beliefs of the various Christian Churches and denominations, but to the beliefs of other faiths.

2.55 There is, as we indicated at the outset of this report, no one agreed definition of blasphemy and blasphemous libel; being offences at common law, their constituent elements have been subject to change through the decisions of the courts over the three centuries of their history. In terms of legislation, therefore, it would scarcely be practicable, even if it were thought desirable, to amend the common law definition by statute. Consequently, the very acceptance of the need for radical change to the common law inevitably entails the abolition of the offences in their present form. This conclusion accords with the requirements for codifying the law which, as we have pointed out, entails the abolition of all common law offences and their replacement, so far as may be necessary, by new statutory offences.

2.56 The words just mentioned, "so far as may be necessary", are of vital importance in the present context. In our working paper we expressed the view that the arguments for and against abolition of the common law without replacement were finely balanced, and it was only the difficulties which we then saw in framing such a replacement, together with the perceived absence of a pressing need for a new offence, which persuaded us that, tentatively, we should propose outright abolition. A large majority of those commenting on our working paper wanted a law of blasphemy to be retained. A further analysis has been undertaken in the preceding section of this report of the principal arguments for such retention which takes account of our commentators' response to those arguments and of other contentions which they have advanced. In our view it is now clear that none of the arguments for retaining a law of blasphemy are sufficiently strong to support this view and each of them is outweighed by other considerations which persuade us that a law of blasphemy is not a necessary part of a modern criminal code. Moreover, we have no doubt that any replacement offence which might be devised would in practice prove to be unacceptably wide in ambit.

2.57 Our conclusion is therefore that the common law offences of blasphemy and blasphemous libel should be abolished without replacement and we so *recommend*. The draft Bill which forms the Appendix to this report makes provision accordingly.[102]

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[101] See para. 2.18, above.

[102] See cl. 1(a). Cl. 2 makes provision for the repeal of references to the common law in the Criminal Libel Act 1819 and the Law of Libel Amendment Act 1888 (see para. 2.1, above). This report makes no recommendations relating to the summary offences of profanity dealt with in Part XI of Working Paper No.79. These are to be found in the Metropolitan Police Act 1839, s. 54(12), the City of London Police Act 1839, s. 35(12) and the Town Police Clauses Act 1847, s. 28. We think these offences are best reviewed in the context of those Acts.

PART III

OFFENCES RELATING TO PUBLIC WORSHIP

A. Introduction

3.1 This part of the report is concerned with offences relating to disturbances to places of religious worship. The existing law is contained in certain old common law offences, which are never used, and a number of statutory provisions. Some of the latter are obsolete and never used; others, while somewhat archaic in form, are still in use; yet others are contained in modern legislation. All of them are described in more detail below.[1] In place of the archaic obsolete offences our working paper proposed the creation of an offence of threatening, abusive or insulting behaviour in a place of religious worship.[2]

3.2 The greater part of this report is devoted to a review of the common law offences of blasphemy and blasphemous libel, in relation to which a majority of us recommend abolition of the common law without replacement. This will no doubt be the subject of public debate which may or may not favour our recommendation. Until the outcome of that debate is clear, we do not think that we could justify, in terms of our present resources, the substantial work which would be necessary for the detailed reappraisal of our proposal for a new offence in the sphere of disturbances to public worship and for the task of drafting a new offence or offences, which we do not think could avoid some complexity. This conclusion is reinforced by the way in which the existing law operates, which seems not to cause undue difficulty. There is only one offence of importance among those which we proposed for repeal in our working paper, namely, section 2 of the Ecclesiastical Courts Jurisdiction Act 1860. This is apparently invoked only on quite rare occasions and, although it is archaic in character and has in the past given rise to some difficulties of interpretation, it seems that those difficulties have in large part been surmounted,[3] and that for the most part the provision has not proved unsatisfactory in practice. For these reasons we have decided not to recommend new legislation relating to disturbances to public worship in this report.

3.3 We are, however, conscious of the substantial effort made by our commentators in responding to the proposals in our working paper. Moreover, it may well be that ultimately a new offence or offences will be needed as part of a general package of reform of the law in the area covered by this report. We think it right, therefore, to give some indication of our response to the criticisms of our provisional proposals and the way in which these might be met in reformulated offences. We begin with an outline of the present law.

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[1] See paras. 3.4 *et seq.* below. Some of the statutes relevant in this context have been repealed in recent years, e.g. Toleration Act 1688, s. 15, repealed by the Statute Law (Repeals) Act 1969; Places of Religious Worship Act 1812, s. 12, repealed by the Courts Act 1971; and the Religious Disabilities Act 1846, s. 4, repealed by the Statute Law (Repeals) Act 1977.

[2] Working Paper No. 79, Part XII.

[3] See para. 3.8, below.

B. The present law

1. COMMON LAW

3.4 The precise breadth of the common law is difficult to gauge. There are very broad statements in Hawkins' *Pleas of the Crown*[4] to the effect that "all irreverent behaviour" in churches and churchyards has been regarded as criminal. More specifically there is authority,[5] by no means strong, for the propositions that it is an offence at common law—

(a) to disturb a priest of the established Church in the performance of divine worship,[6] and also, it seems, to disturb Methodists and Dissenters when engaged in their "decent and quiet devotions";[7] and

(b) to strike any person in a church or churchyard.[8]

2. STATUTE LAW

3.5 Section 59 of the *Cemeteries Clauses Act 1847* imposes a maximum fine of £50[9] on anyone who—

(a) plays any game or sport, or discharges firearms, save at a military funeral, in the cemetery; or

(b) wilfully and unlawfully disturbs any persons assembled in the cemetery for the purpose of burying any body therein; or

(c) commits any nuisance within the cemetery.

3.6 Section 2 of the *Ecclesiastical Courts Jurisdiction Act 1860* penalises, first, any person guilty of "riotous, violent or indecent behaviour" in any cathedral church, parish or district church or chapel of the Church of England or in any chapel of any religious denomination or in any certified place of religious worship, "whether during the celebration of divine service or at any other time", or in any churchyard or burial ground; and secondly, any person who shall "molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse" any preacher duly authorised to preach therein or any clergyman in holy orders ministering or celebrating any sacrament or any divine service, rite or office. Offenders are liable on summary conviction to a fine of £50 (level 1) or imprisonment without fine for two months[10] and an appeal lies to the Crown Court.[11] Under section 3, the offender may, upon

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[4] See 1 Hawk. c. 63, s. 23.

[5] See Halsbury's *Laws of England* (4th ed., 1975) Vol. 14, para. 1050; *Archbold* 41st ed. (1981), para. 23-9; *Russell on Crime* 12th ed., (1964) pp. 1525–7.

[6] *R.* v. *Parry* (1686) Trem. P.C. 239; *R.* v. *Wroughton* (1765) 3 Burr. 1683; 97 E.R. 1045.

[7] *R.* v. *Wroughton, ibid.*, at p. 1684 *per* Lord Mansfield.

[8] *Wilson* v. *Greaves* (1757) 1 Burr. 240, 243; 97 E.R. 293, 295 *per* Lord Mansfield; and see *Penhallo's Case* (1590) Cro. Eliz. 231; 78 E.R. 487.

[9] I.e. level 1: see Criminal Justice Act 1982, s. 46. By s. 1 the Act extends only to cemeteries authorised by subsequent Acts declaring it to be incorporated therewith. The Act was incorporated with many local Acts authorising the establishment of cemeteries and also temporarily with the Local Government Act 1972. The Act is, however, not now operative save in relation to a few cemetery companies. See Local Government Act 1972, s. 214 and Sch. 26, and the Local Authorities' Cemeteries Order 1977, S.I. 1977 No. 204, referred to in para. 3.12 below.

[10] Ecclesiastical Courts Jurisdiction Act 1860, s.2.

[11] Ecclesiastical Courts Jurisdiction Act 1860, s.4; Courts Act 1971, ss.8, 56(2), Sch. 1, Sch. 9, Part 1.

commission of the offence, immediately and forthwith be apprehended by any churchwarden[12] of the parish or place where the offence has been committed and taken before a justice of the peace.

3.7 The offences under section 2 of this Act ("the Act of 1860") apply to conduct of the kind prohibited taking place in Church of England buildings and in "any place of religious worship duly certified under the provisions of the Places of Worship Registration Act 1855". Section 2 of the 1855 Act enables specified places of worship to be certified in writing to the Registrar General of Births, Marriages and Deaths through the superintendants of local registries. The places of worship so specified include those of "Protestant Dissenters or other Protestants", "persons professing the Roman Catholic religion", "persons professing the Jewish religion" and "every place of meeting for religious worship of any other body or denomination of persons". Thus all certified places of worship, of whatever religion, have the protection provided by the offence under the Act of 1860. Certification will be effected if the Registrar General is satisfied that the object of the congregation is religious worship,[13] that the place of meeting is used mainly for religious worship, and that congregation is an identifiable, settled body.[14] "Worship" means having some at least of the characteristics of "submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession."[15]

3.8 It is noteworthy that, in the offence under the 1860 Act penalising any "riotous, violent or indecent" behaviour, "indecent" has a specialised meaning to be ascertained from its context in the statute. It is not referring to anything in the nature of tending to corrupt or deprave, nor used with any sexual connotation. It is used in the context of "riotous, violent or indecent" behaviour, within the genus of creating a disturbance in a sacred place. Thus there was held to be indecent behaviour when there were interruptions during a church service attended by members of the Government, the theme of the interruptions being a protest against Government members' participation in the service against a background of alleged support for the United States' policies in Vietnam.[16] Whether or not behaviour is indecent is a question of fact for the court.[17]

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[12] See Canon F15 of the Canons of the Church of England, para. 3.10, below; and see Police and Criminal Evidence Act 1984, Sch. VII.

[13] See *R.* v. *Registrar General, Epx. Segerdal* [1970] 2 Q.B. 697, 706 *per* Lord Denning, M.R.

[14] A register of all the places of worship in respect of which certificates have been given is open to public inspection, and certification has been extended to places of worship belonging to some six hundred sects. We are indebted to the General Register Office for information about the criteria applied.

[15] *Ex parte Segerdal* [1970] 2 Q.B. 697, 709 *per* Buckley L.J. A registered building is excepted from registration under the Charities Act 1960, is not liable to be rated, and may be registered for the solemnisation of marriages.

[16] *Abrahams* v. *Cavey* [1968] 1 Q.B. 479.

[17] *R.* v. *Farrant* [1973] Crim. L.R. 240 (Middlesex Crown Court, on appeal from justices): *held* an offence under the Act where persons were using "magic" symbols and incantations to try to raise the dead in an Anglican churchyard at midnight.

3.9 Another noteworthy feature of the Act of 1860 is that it is doubtful whether it applies to "royal peculiars", which include Westminster Abbey, or "peculiars".[18] Thus it may well be that the special protection which the offence under that section provides is not available to these buildings or those officiating in them.[19]

3.10 Section 36 of the *Offences against the Person Act 1861* imposes a maximum penalty of two years' imprisonment on anyone who—

(a) by threats or force, obstructs or prevents or endeavours to obstruct or prevent, any clergyman or other minister in or from (i) celebrating divine service or otherwise officiating in any church, chapel, meeting house or other place of divine worship, or (ii) performing his duty in the lawful burial of the dead in any churchyard or other burial place; or

(b) strikes or offers any violence to or, on any civil process, under pretence of executing such process, arrests any clergyman or other minister engaged in, or to the offender's knowledge about to engage in, any of the rites or duties referred to in (a), above, or who to the offender's knowledge is going to or returning from the performance thereof.[20]

Section 36 has been recommended for repeal without replacement by the Criminal Law Revision Committee.[21]

3.11 Section 7 of the *Burial Laws Amendment Act 1880* penalises any person—

(a) guilty of any riotous, violent or indecent behaviour at any burial under the Act, or wilfully obstructing such burial or any burial services; and

(b) in any churchyard or graveyard in which parishioners have a right of burial (section 1), who delivers any address, not being part of or incidental to a religious service and not otherwise permitted by any lawful authority, or who wilfully endeavours to bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or its members or minister, or any other person.[22]

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[18] "Peculiars" are exempt from episcopal visitation; the only ones remaining in England and Wales are Battle, Bocking and Stamford. "Royal peculiars" are visitable only by the Crown; they include Westminster Abbey, St George's Windsor, and the Chapels Royal. See Halsbury's *Laws of England* 4th ed. (1975), Vol. 14 p.238.

[19] Charges under the Act were dismissed on the occasion of a disturbance during a service in Westminster Abbey, apparently because there was no proof that the Abbey was a "district church" for the purposes of the Act: see *The Times*, 10 March 1970 (news item).

[20] The draft Criminal Code of 1879, s. 142 is based on this section and similar provisions are to be found in some Commonwealth codes based on the 1879 draft; see e.g. Canadian Criminal Code, s. 172.

[21] Fourteenth Report, Offences against the Person (1980), Cmnd. 7844, paras. 179-180.

[22] By virtue of the Powers of Criminal Courts Act 1973 s. 18(1), the maximum penalty is two years' imprisonment.

3.12 Section 214 of the *Local Government Act 1972* specifies the burial authorities who may provide and maintain cemeteries. "Cemetery" here includes a burial ground or any other place set aside for the interment of the dead, including any part of such a place set aside for the interment of ashes.[23] The Secretary of State may by order provide for their management, regulation and control, and impose a fine for contravening an order.[24] The current order [25] prohibits nuisances or wilful disturbances in a cemetery; wilful interference with any burials taking place in a cemetery, or with any grave, vault, tombstone or other memorial and flowers thereon; and games and sports in a cemetery. "Burial" here includes the interment of cremated human remains, and cemeteries include the chapels provided on any part of them.[26] Persons contravening the order are liable on summary conviction to a £200 fine and, in the case of a continuing offence, to £10 for each day during which the offence continues after conviction.[27]

3.13 Finally, it is to be noted that *Canon F15* of the *Canons of the Church of England*[28] states, in paragraph 2, that churchwardens and their assistants—

> "shall not suffer any person so to behave in the church, church porch, or churchyard during the time of divine service as to create disturbance. They shall also take care that nothing be done therein contrary to the law of the Church or of the Realm."

And in paragraph 3, that—

> "If any person be guilty of riotous, violent, or indecent behaviour in any church, chapel, or churchyard, whether in any time of divine service or not, or of disturbing, vexing, troubling, or mis-using any minister officiating therein, the said churchwardens or their assistants shall take care to restrain the offender and if necessary proceed against him according to law."

C. The working paper proposals and response

3.14 Leaving aside the provisions described in paragraphs 3.12–3.13, above, we took the view in our working paper that, of these offences, only that contained in the first part of section 2 of the Ecclesiastical Courts Jurisdiction Act 1860 (paragraph 3.6 above) still retained any useful function, although it was rather archaic in its language. The others were either entirely obsolete or had been superseded by later statutory provisions. We therefore provisionally proposed the abolition of the common law and repeal of the statutory provisions described in paragraphs 3.5–3.11, and the replacement of the first part of section 2 of the Act of 1860 by a new offence. This would have penalised anyone who, with intent to wound or outrage the feelings of those using the

[23] Sect. 214(8). The burial authorities are the councils of districts, London boroughs, parishes and communities, the Common Council of the City of London, the parish meetings of parishes having no parish council, and also joint boards established under the Public Health Act 1936, s. 6 or by or under local Acts for the provision and maintenance of cemeteries.

[24] Sect. 214(3).

[25] The Local Authorities' Cemeteries Order 1977, S.I. 1977 No. 204; see Articles 18–19.

[26] See Articles 2(2) and 6.

[27] Criminal Justice Act 1982, ss. 40(4)(5), 46. Actual damage may, of course, be penalised in proceedings under the Criminal Damage Act 1971.

[28] 2nd ed., (1975); and see also para. 3.6, above.

premises concerned, used threatening, abusive or insulting words or behaviour[29] at any time in any place of worship of the Church of England, in any other certified place of religious worship[30] or in any burial ground. The suggested maximum penalty was twelve months' imprisonment when tried on indictment.

3.15 Our provisional proposal was widely approved on consultation, and a majority agreed with the terms in which we suggested that a new offence should be formulated. Some, however, suggested alternatives to the descriptive words ("threatening, abusive or insulting") by which the proscribed words or behaviour were to be specified. Others favoured an extension of the places in which it might operate: for example, in the area immediately outside any church etc.,[31] and wherever religious gatherings are held, including public places temporarily so used. A majority also disliked the requirement of a mental element or favoured a wider mental element than that proposed. Before commenting further we think that attention must be given to the justification for new offences in this area.

D. Are new offences needed?

3.16 Given the policy expressed at the outset of this paper,[32] we reaffirm our view that the common law, which is both uncertain in extent and never used, should be abolished. We also reaffirm our provisional view that the old statutory provisions set out in preceding paragraphs should be repealed: it is in our view undesirable for this clutter of archaic provisions to be retained, particularly since most of them are never used. The issue which requires to be considered is whether there is any need to replace the offence contained in the first part of section 2 of the Ecclesiastical Courts Jurisdiction Act 1860, which we have noted is the only one of these old statutes to retain any present utility.[33] While, as we have indicated, our proposals for replacing this were welcomed by a majority on consultation, we think that the argument of those opposing any new offence must be answered.

3.17 The arguments opposing an offence are interlinked. They suggest that there is little evidence of a need for specific protection of places of religious worship and that other offences, such as criminal damage to property and public order legislation, are adequate. Thus there can be no need to treat places of worship any differently from other public buildings, such as assembly halls, and to do so would have unacceptable repercussions when, for example, a politician is invited to speak in a church; special protection against heckling is not, in such circumstances, justifiable.

3.18 Some of these arguments have, we admit, some cogency: if a politician is invited to speak during a service, it would be difficult, if not impossible, so to define any offence as to exclude the broad protection given by an offence for that part of the service alone. But such exceptional events do not invalidate the

[29] The terminology was borrowed from the Public Order Act 1936, s. 5; see para. 2.19, above.

[30] I.e. certified under the Places of Religious Worship Registration Act 1855; see para. 3.7, above.

[31] Suggested by the Archbishop of Canterbury's group.

[32] See para. 1.3, above.

[33] See para. 3.14, above.

case for an offence if the countervailing arguments are stronger, as we believe they are. It is not difficult to postulate instances where highly reprehensible behaviour calls for charges which under the general law would not constitute an offence, such as the instance cited in our working paper of a pig's head being placed in a mosque;[34] if this were done without causing damage and in the absence of worshippers, no offence would be committed, nor would there be in the case of the temporary appropriation or removal of church artefacts or their use for improper purposes. Quite apart from such instances, however, a special offence penalising offensive behaviour which seriously disturbs religious services or acts of desecration in places of worship is justifiable on the grounds that worshippers engaged in such activities or using such places for meditation or prayer should be entitled to do so free of undue disturbance which might cause outrage or offence. There is here an obvious difference between a law of blasphemy and a law protecting places of worship. In the former case, the wider interests of society must be given proper weight and in our view those interests outweigh the justification for an offence; in the latter, where particular activities are in progress or where premises are specially set aside for particular purposes, these justify the special protection which an offence would give. Where disturbances occur at public meetings held in other kinds of public buildings, other offences apply which penalise those behaving in a disorderly manner;[35] and, as for other places for private meetings, we have no evidence of the need for any special treatment being accorded to them. Churches and similar places together with acts of worship are, therefore, arguably in a unique situation which requires the availability of special provisions in the criminal law.

E. Possible new offences

3.19 For reasons already outlined,[36] we confine ourselves in this report to some indication of our response to the criticisms advanced in consultation upon the proposals in our working paper and of how these criticisms might be met in the formulation of new offences. The principal criticisms of the provisional proposals in our working paper were that—

(i) the descriptive words "threatening, abusive or insulting" were too restrictive in the context of interruptions to acts of worship or offensive behaviour in places of worship;

(ii) the mental element of intent to wound or outrage feelings was too restrictive; and

(iii) interruption to acts of worship wherever held should be penalised, whether or not these took place in certified places of worship.

[34] Two people were fined in 1980 under the Public Order Act 1936 s. 5 for depositing a pig's head in a mosque at Batley Carr ; the police had to be called to prevent disorder among the angry crowd of Muslims who gathered. See *Dewsbury Reporter,* 12 September 1980.

[35] See Public Meetings Act 1980, s. 1, Representation of the People Act 1983, s. 97, Public Order Act 1936, s. 5.

[36] See para. 3.2, above.

On reconsideration, we believe that there is substance in these criticisms, and that any new offence would have to accommodate them. However, if further elements were to be incorporated into a single offence which would take full account of these points, we think it likely that the result would be unduly complex. It now seems to us that the law needs to penalise two different types of behaviour: the disruption of church services and other acts of communal worship, wherever held; and conduct in the nature of desecration occurring in places of worship, regardless of whether it is at the time being used by anyone for worship. Our present view is that it would be neither possible nor appropriate to describe the conduct which needs to be penalised in each of these situations in identical terms. A brief description of possible offences will indicate the considerations which have led us to this view.

1. DISRUPTING SERVICES OF RELIGIOUS WORSHIP

3.20 Disruptive behaviour during a service differs in character from offensive acts of desecration which may take place at any time in a place of worship, and we believe new legislation would be best served by specifying each separately. The adjectives "threatening, abusive or insulting" suggested in our working paper are probably insufficiently wide. According to *Brutus* v. *Cozens*[37] they must be given their "ordinary" meaning, and—

> "Behaviour which evidences a disrespect or contempt for the rights of others does not of itself establish that the behaviour was threatening, abusive or insulting. Such behaviour may be very annoying to those who see it and cause resentment and protests but it does not suffice to show that the behaviour was annoying and did annoy, for a person can be guilty of annoying behaviour without that behaviour being insulting."[38]

Consequently, it now seems to us that any new offence would have to penalise disruptive behaviour by describing it in wider terms such as disruption by means of offensive or disorderly words or behaviour.[39] Such terms would be apt to describe conduct taking place on the occasion of a service of worship or other organised gathering for religious worship or observance and might appropriately be used to protect such acts of worship taking place whether or not in a recognised place of worship, for example, in premises or places temporarily in use for such a purpose.[40] We doubt, however, whether it would be practicable or advisable to extend such protection to worship in private dwellings and a limitation to acts of worship occurring in a public place might therefore be necessary. Moreover, some limitation on or definition of what is meant by a "religious service or act of worship" would clearly be required.[41] But given the more precise definition of the disruptive behaviour to be penalised by such an offence, we doubt the need for any mental element. Such conduct has an

[37] [1973] A.C. 854.

[38] *Ibid.*, at p.865 *per* Lord Dilhorne.

[39] Specification in such terms would exclude liability in cases of fire warnings or those following "the tradition of vigorous disputation in Methodist churches": *Abrahams* v. *Cavey* [1968] 1 Q.B. 479, 481 (evidence of Lord Soper).

[40] E.g. revivalist meetings in the Albert Hall, the Remembrance Day ceremony at the Cenotaph or an open air mass such as took place during the Pope's visit in 1982.

[41] Such a limitation could be effected by reference to services or gatherings for worship of the Church of England, the Church in Wales or of any religious body which has a place of worship certified under the Places of Worship Registration Act 1855: see para. 3.7, above.

immediate impact upon those participating which they are unable to avoid and, provided those responsible for disruption are aware of the nature of their conduct, there can be little scope for argument over the issue of intent: the nature of the act neither requires nor admits of further explanation.

2. OFFENSIVE BEHAVIOUR IN PLACES OF WORSHIP

3.21 Acts of desecration may also disrupt a religious gathering in a disorderly or offensive manner and some such acts might therefore be caught by the possible offence which we have already outlined. But many such acts would not necessarily fall within that description; nor need they take place during acts of worship. Furthermore, by their nature, their consequences are limited to the effects they have on recognised places of worship, as distinct from other public places which may from time to time be used for that purpose. Thus if such acts are to be penalised, as plainly we think must be the case, they now seem to us to require separate treatment from behaviour disruptive of religious services. Sometimes public order offences may be useful here as, indeed, they were in the case of the pig's head placed in a mosque to which we referred above,[42] where proceedings were taken under section 5 of the Public Order Act 1936. In others, damage to articles in places of worship may occur, in which event proceedings may be brought for criminal damage. But section 5 will not be available if such acts occur in a private place or if no-one is likely to occasion a breach of the peace in consequence;[43] while criminal damage may not necessarily occur if, for example, a receptacle for holy water is merely filled with objectionable matter. Such conduct requires to be specified in an offence tailored for the purpose.

3.22 That purpose might be effected by penalising behaviour in a place of worship which is likely to cause serious offence to anyone who ordinarily uses it for the purpose of worship. Any offence on these lines would, we believe, have to cover conduct occurring at any time, not merely on the occasion of acts of worship, and ought in consequence to be limited to acts taking place on premises, whether in public or in private, permanently in use for the purposes of worship or religious observances.[44] It might also be necessary to provide further limitations upon the scope of such an offence by way of defences. For example, since unwitting offence to some faiths might be given by some acts which the person responsible believed to be quite innocent in character, it might be necessary to provide a mental element or to permit the defendant to show that he did not know and could not reasonably have been expected to know that his conduct would be likely to cause serious offence to those using the premises for worship. Again, liability ought to be excluded if a person shows he did not know that the premises in question were a place of worship. An offence on these lines, like the one dealing with disruptive conduct, ought as we have indicated to be limited to summary trial; more serious conduct would almost certainly be capable of being dealt with by existing indictable offences.[45]

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[42] See para. 3.18 and n. 34, above.

[43] See *Parkin* v. *Norman* [1983] Q.B. 92; *Marsh* v. *Arscott* (1982) 75 Cr. App. R. 211, from which it is clear that no breach of the peace is likely to be occasioned under s.5 if no-one is present who is capable of being provoked to a breach of the peace; see further, para. 2.19, note 25, above.

[44] Again, some limitation would have to be placed on the premises to be protected; the same criterion used for the first suggested offence would seem appropriate: see para. 3.20, n. 41, above.

[45] See para. 3.21, above.

F. Abolitions and repeals

3.23 Although we make no recommendation for the creation of the two offences outlined above, we are in a position to recommend the abolition and repeal of certain offences relating to disturbances to religious worship which our researches and consultation have shown to be entirely obsolete.

1. ABOLITIONS

3.24 The common law offences in this area have, as we have indicated, not been used at all in modern times, and have been entirely superseded by statutory offences. There has been no reported case for some two hundred years and, indeed, the authority for the existence of the offences is thin. For the elimination of doubt, however, we *recommend* their abolition, and the draft Bill makes provision accordingly.[46]

2. REPEALS

3.25 We have pointed out that, of all the old statutory offences described in paragraphs 3.5-3.11, above, only section 2 of the Ecclesiastical Courts Jurisdiction Act 1860 is currently used. The others can in our view therefore be repealed; indeed, one of them has already been recommended for repeal elsewhere. The provisions concerned are—

Cemeteries Clauses Act 1847, section 59;
Offences against the Person Act 1861, section 36;
Burial Laws Amendment Act 1880, section 7.

The draft Bill does not refer to these provisions since we think that they can best be dealt with when the statutes concerned are examined as a whole with a view to repeal.

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[46] See Appendix A, cl. 1(b) and (c).
[47] See para. 3.10, above.

PART IV

SUMMARY OF RECOMMENDATIONS

4.1 We *recommend* the abolition without replacement of the following common law offences—

(a) blasphemy and blasphemous libel (paragraphs 2.20–2.57); and

(b) the offences, so far as they exist, of disturbing a religious service or religious devotions and striking a person in a church or churchyard (paragraphs 3.4 and 3.24).[1]

We do not recommend in this report the reform of statutory offences relating to disturbances of religious worship, but it would be desirable to modernise section 2 of the Ecclesiastical Courts Jurisdiction Act 1860 (penalising riotous, violent or indecent behaviour in a place of religious worship) and to repeal certain obsolete statutory offences in this area (paragraphs 3.5–3.11 and 3.17–3.27).

(signed) RALPH GIBSON* *(Chairman)*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT*
JULIAN FARRAND
BRENDA HOGGETT

J. G. H. Gasson, *Secretary*
24 May 1985

[1] See Appendix, draft Blasphemy Bill, cl.1.
* Signatories of the Note of Dissent, below; see Report, para. 2.22.

NOTE OF DISSENT

1. INTRODUCTION

1.1 Two of us have been unable to agree with the main recommendation that the common law offence of blasphemy should be abolished without enactment of any new offence. We agree with the substance of the main criticisms of the existing common law offence of blasphemy[1] and with the recommendation that it should be abolished. We attach particular importance to the defect in the existing offence that it affords protection to one religion only. Our view, however, is that in abolishing the common law offence of blasphemy the preferable course would be to enact a new offence which would be free of the defects of the present law.

2. PRECONDITIONS FOR AN OFFENCE

2.1 Whether, with abolition, there should be enactment of a new statutory offence of blasphemy, depends upon the answers given to other questions, namely:

(i) Is there any proper purpose in a new offence of blasphemy which is consistent with the principles of a just system of criminal law?

(ii) Is any such purpose already effectively served by other provisions of the criminal law so that no new offence is necessary?

(iii) Can a new offence be devised in terms which are acceptable?

(iv) Is any such new offence likely to be of sufficient social utility to justify not only any restraints upon freedom of expression caused by its existence but also the demands upon resources resulting from prosecutions?

3. IS THERE ANY PROPER PURPOSE FOR A NEW OFFENCE?

3.1 We agree that if there is no argument which may properly be regarded as sufficiently powerful to justify the derogation from freedom of expression which any offence of blasphemy must occasion, then no such offence should have a place in the criminal law.[2] In our view, however, that argument is to be found in what we think should be seen as the duty on all citizens, in our society of different races and of people of different faiths and of no faith, not purposely to insult or outrage the religious feelings of others.[3]

3.2 Those who accept the teaching and discipline of religion, such as Christianity and other major religions, feel reverence for those persons, things and concepts which they regard as sacred. Most of these people also have mutual respect for the reverence of the sacred which they know is felt by the adherents of other religions. We acknowledge, of course, that we have no evidence of what the views of people are in fact, but we believe that, in this country, people generally share that respect for feelings of reverence even when they themselves do not adhere to any religion. If that is right, they would

[1] See paras. 2.17–2.18, above.

[2] See para. 2.20, above.

[3] See Report, para. 2.35 and Working Paper No. 79 paras. 7.1–7.14; and Lord Scarman: *Reg.* v. *Lemon and Gay News Ltd.* [1979] A.C. 617 at pp. 658B and 665 B-E and paras. 2.37–2.41, above. See also Working Paper No. 79, para. 6.6, where the passages cited from Lord Scarman's speech are examined critically.

regard it as morally wrong and offensive to cause outrage—if done deliberately and without reason— to that feeling of reverence. We would therefore wish adherence to a religion, with the reverence for the sacred which goes with it, to be recognised by the State as deserving of such protection as the State can give without impairment of the rights of others. We regard the provision of that protection as a proper purpose for the criminal law. The believer does not, we think, claim that protection for his own feelings as of right, or as essential, or even as important for his own spiritual well-being. The believers and those who have no religious faith can, however, join in wishing to afford that protection to all adherents of religion in the interest of society as a whole.

4. IS THERE ANY GAP: DO OTHER PROVISIONS OF THE CRIMINAL LAW EFFECTIVELY PROVIDE ANY REQUIRED PROTECTION?

4.1 This question is considered in paras. 5.1–5.15 and para. 7.1 of the working paper; and in para. 2.19 of this report. The Obscene Publications Act 1959 and the Indecent Displays (Control) Act 1981 would catch some material which would now constitute the common law offence of blasphemy if the material could be held to be "obscene" or "indecent" within the meaning of those Acts.[4] It seems to us that some forms of blasphemous material—such as, for example, hostile and mocking discussion of the concepts of the body and blood of Christ in the Mass or Holy Communion—would give grave offence to Christians, and to non-Christians who have respect for Christian beliefs, but would in many circumstances not be either "obscene" or "indecent" for the purposes of those statutes.[5]

4.2 The gap which exists between the respective limits of section 5 of the Public Order Act 1936 and of the common law offence of blasphemy is recognised in para 2.19 of this report. We attach, in this context, importance to the defect in section 5 of the Public Order Act 1936 which the Law Commission criticised in the Report on Offences relating to Public Order.[6]

4.3 The gaps in the law to which we have referred mean that, if the common law of blasphemy were abolished without replacement, there would be some cases, of which we have given an illustration in paragraph 4.1, where it would be possible for blasphemers deliberately to outrage the religious feelings of others and yet commit no breach of the law. Those cases could be so serious that, in our view, to be subjected to outrage of religious feelings in consequence of such activities, solely from the desire to inflict that outrage, would be seen by a substantial number of people as an experience little different in disagreeableness, or in its power to cause unhappiness, from that of being subjected to threatening words which do not result in actual violence. Thus it seems to us that abolition without replacement would leave a significant gap in the protection afforded to society by the criminal law which would not be effectively covered by other provisions.[7]

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[4] By s. 1 of the 1959 Act an article "shall be deemed to be obscene if its effect . . . is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it". Under the 1981 Act "indecency" is not defined: but see *R.* v. *Stanley* [1965] 2 Q.B. 327 and *Kosmos Publications Ltd.* v. *D.P.P.* [1975] Crim.L.R. 345.

[5] See Working Paper No. 79, para. 4.10, n. 189 for examples of conduct wounding to the religious feelings of Hindus and caught by the provisions of the Indian Penal Code.

[6] Law Com. No. 123 (1983), paras. 5.14–5.18; see further para. 2.19, n. 25, above.

[7] Cf. Report, para. 2.46.

5. CAN A NEW OFFENCE BE DEVISED WHICH IS ACCEPTABLE WITHIN A JUST SYSTEM OF CRIMINAL LAW?

5.1 The task of drafting an effective new offence of blasphemy, which sufficiently avoids the defects of the existing offence and which introduces no unacceptable limitations upon freedom of expression, is one of particular difficulty; and any proposed draft would require careful scrutiny in consultation. If the decision were made in principle that such a new offence was desirable, the task could, in our view, be carried out satisfactorily.

5.2 The nature of a possible new offence, which we envisage, would be as follows: it would penalise anyone who published grossly abusive or insulting material relating to a religion with the purpose of outraging religious feelings. The consent of the Director of Public Prosecutions would be required for the institution of proceedings. The offence should carry a maximum penalty on conviction on indictment of 12 months imprisonment and a fine. It is not common for an offence, with a requirement of consent to prosecute, to be triable either way on indictment or summarily,[8] but we see no reason to provide that such an offence be triable only on indictment.

5.3 It is fundamental that the new offence should not be limited to attacks upon the Church of England or Christianity but should extend to any religion. As to definition of "religion", major religions could be listed in the statute with power to add to the list by order; or reference could be made to religious groups having places of worship certified under the Places of Worship Registration Act 1855; or the statute could refer to "religion" without further definition.[9]

5.4 Any offence which is defined in terms of adjectives such as "abusive" or "insulting" has a degree of uncertainty. However, these words have for many years been used in the criminal law (e.g. section 5 of the Public Order Act 1936) and their meaning is sufficiently clear. The addition of the qualifying adverb "grossly" would emphasise the strong degree of abuse or insult necessary for commission of the offence. The degree of uncertainty which would result from such a definition would, in our view, be acceptable having regard to the strict mental element.

5.5 "Publication" of the offensive material should, for the new offence, be limited so as to exclude publication merely by the ordinary private spoken word, and so as to include only publication to the public at large by writing, broadcasting, etc.

5.6 The new offence should require proof of a mental element, namely that the grossly abusive or insulting material be published with the purpose to wound or outrage religious feelings. It is essential that the offence should not be capable of being committed in ignorance or inadvertence. The extension of the offence to other religions would increase the risk of unintentional publication of material which would be offensive or insulting. In clear cases the

[8] But see Mental Health Act 1983, ss. 127 and 139(1) and (2).

[9] See Working Paper, paras. 8.17-8.32. See also paras. 4.10-4.11 of Working Paper No. 79 for references to the Indian Penal Code which prohibits the "deliberate" outraging of the religious feelings of any person. The Code has existed for over a century and does not contain any definition of "religious".

purpose to outrage religious feelings would be capable of proof by the terms of the publication itself. The mere fact, however, that feelings were outraged would not be sufficient. It is the deliberate causing of outrage at which the new offence should strike.

5.7 The existing common law offence does not, and any new offence should not, seek to protect adherents of a religion, or the religion itself, from argument, or from the demonstration of the alleged or actual falsity, or mischief, of the teaching of that religion; this must be so even if such argument employs criticism or ridicule in sharp terms.[10] A statement which asserts folly or evil in that which the religious hold sacred will cause feelings of outrage in many of the religious, but it should not be an offence to publish such a statement merely because the maker of the statement knows that he will cause those feelings. The new offence should penalise only the publication of material which is proved to have been published with the purpose of causing outrage.

5.8 Under the existing law, expert theological evidence is normally inadmissible either for the prosecution or the defence.[11] It seems to us that for the purposes of any new offence, extending to all religions, evidence would on occasion be necessary if only to prove the relevant background of fact and belief by reference to which the jury could determine whether the material was abusive or insulting and whether there was proof of the purpose to outrage. Religious disputation within or between sects should not, and under the proposed new offence, we think, would not, become the material for criminal trials. Prosecutions would only be brought if there were clear evidence of grossly abusive material from which a purpose to cause outrage to religious feelings could be inferred.

5.9 In our view the private right of prosecution should not exist under the new offence. The existence of the new offence would be intended for the protection of the public good and should not be available as a means of contest between or within disputing sects, or as a means by which adherents of one religion should seek to control the manner of discussion of their own beliefs. We recognise that enactment of a new offence, in place of an antique existing offence, might for a short while stimulate a new interest in potentially blasphemous publications and that this could cause some burden in considering applications for leave. We would expect any large flow of such applications to decrease very rapidly as the Director of Public Prosecutions applied the strict standards of the proposed offence. There would be, we expect, a very small number of consents to prosecute.

5.10 As to mode of trial and penalty, it seems to us that the offence should be triable on indictment so that decisions on disputed factual issues could where necessary be made by a jury. The proposed maximum penalty of 12 months would, we think, rarely be imposed. The maximum penalty for incitement to racial hatred under section 5A of the Public Order Act 1936 is two years' imprisonment. It may seem to some that the new offence could properly carry the same maximum penalty.

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[10] See Report, para. 2.48.

[11] *Reg.* v. *Lemon and Gay News Ltd.* [1979] Q.B. 10 at 13.

6 WOULD A NEW OFFENCE BE OF SUFFICIENT UTILITY TO JUSTIFY THE RESULTING RESTRAINTS ON FREEDOM OF EXPRESSION AND ANY DEMANDS UPON THE CRIMINAL JUSTICE SYSTEM?

6.1 It may be argued that even if conviction and punishment would be justified in cases where the offence as proposed could be proved, nevertheless the restraints on freedom of expression caused by existence of the offence would be wider in effect because authors and publishers would fear prosecution under a new offence made "respectable" by enactment in Parliament. Better not to legislate at all—so the argument would run—because the unrestrained publication of blasphemous material which would be deterred or caught by a new offence would do less harm than would the restraint upon authors and publishers caused by fear of prosecution. It is our conclusion that the community as a whole would be better served by the existence of the restraint caused by the new offence, even though some publications might thereby be suppressed or modified which, if published, would not be, or might not be, caught by the offence. The right to publish critical material concerning any religion can be exercised without resort to grossly abusive or insulting material. In order to demonstrate the alleged folly or evil in a religion it is not necessary to form or to evince a purpose to outrage the religious feelings of adherents of that religion.

6.2 If the common law offence had not been and was not now in existence it would not be clear to us that present circumstances would require the creation of a new statutory offence. The expenditure of resources within the criminal justice system upon prosecutions under any new offence of blasphemy might be of doubtful justification having regard to any apparent social need. But the common law offence has been in existence and it is impossible to assess with any confidence what the effect of its known existence has been on publications of all sorts or what the effect would be of abolition without replacement. If Parliament were to announce the removal of the existing restraint of law upon publication of blasphemous material about the Christian religion, even if published for no purpose other than to cause outrage to religious feelings, it would demonstrate that Parliament attaches to respect for "reverence for the sacred" smaller value or importance than to the freedom to express such material, even for a hurtful and unjustifiable purpose. This, we think, would be an undesirable result which can properly be avoided.

RALPH GIBSON
BRIAN DAVENPORT

APPENDIX

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BILL

TO

Abolish the offence of blasphemy and certain other common law offences; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Abolition of offences.

1. The following common law offences are hereby abolished—

(*a*) blasphemy and blasphemous libel;

(*b*) any distinct offence of disturbing a religious service or religious devotions;

(*c*) any distinct offence of striking a person in a church or churchyard.

EXPLANATORY NOTES

Clause 1

1. This clause abolishes the offences at common law, the abolition of which is recommended in the report. Clause 1(a) abolishes the offences of blasphemy and blasphemous libel (paragraphs 2.54–2.57). Clause 1(b) and (c) abolishes the offences of disturbing divine worship or devotions and striking a person in a church or churchyard. These paragraphs refer to "any distinct offence" since there is some doubt, on the authorities, as to whether they exist; the most recent reported case dates from the mid-eighteenth century (paragraphs 3.4 and 3.24).

Repeals.

2. The following provisions are hereby repealed—

(*a*) in section 1 of the Criminal Libel Act 1819, the words "any blasphemous libel, or";

(*b*) in sections 3 and 4 of the Law of Libel Amendment Act 1888 the words "blasphemous or".

Clause 2

1. This repeals references to the common law offence of blasphemous libel in the Criminal Libel Act 1819 and to "blasphemous" matter in section 3 of the Law of Libel Amendment Act 1888 (which confers privilege on newspaper reports of court proceedings provided the matter is not "blasphemous or indecent").

Short title and extent.

3.–(1) This Act may be cited as the Blasphemy Act 1985.

(2) This Act shall not extend to Scotland or Northern Ireland.

Clause 3

1. This provides for the short title and extent of the Bill. No commencement date is specified, which means that, if and when enacted, it would come into force on Royal Assent.

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