

Free Speech and Incitement to Religious Hatred

This piece is the product of discussions in the Humanist Philosophers' Group. The text is based on contributions from Brendan Larvor and Richard Norman, and was edited by the latter. It should not be regarded as representing the views of any one individual member of the Humanist Philosophers' Group.

In 2001, in the wake of the terrorist attacks on the US, the government pushed through an Anti-Terrorism, Crime and Security Bill. This originally included a clause which would have criminalised incitement to religious hatred, in terms parallel to the existing law against incitement to racial hatred. It was envisaged that the clause would in particular protect Muslims from attacks and abuse provoked by the terrorist actions. The clause was dropped because it proved controversial and was considered to require further discussion separately from the rest of the Bill, to which it was only loosely connected. Lord Avebury subsequently introduced a Religious Offences Bill, again proposing to make incitement to religious hatred a crime, and coupling this with the proposal to decriminalise the common law offence of blasphemy. This Bill was given a second reading in January 2002, and was then referred to a House of Lords Select Committee on Religious Offences, which reported in April 2003. Its report was inconclusive, but drew attention to the European Union's Council Framework Decision on Racism and Xenophobia. This will call for criminal legislation by all the member states of the EU, and is likely to propose that public incitement to discrimination, violence or hatred should be punishable when directed against groups or individuals 'defined by reference to race, colour, religion, descent, or national or ethnic origin'.

All these proposals raise fundamental questions about freedom of expression and about the limits, if any, which should be set to it. The questions are especially pressing for humanists, for whom the freedom to criticise religious beliefs has an obvious relevance. The common law prohibition of blasphemy, though very rarely invoked now, does in principle set limits to such freedom. Are those limits unacceptable, and should the offence be abolished? Would a law against incitement to religious hatred be preferable, or would it too be an unacceptable infringement of liberty? On the one hand it looks as though it might be used to restrict criticism of religious beliefs, on the grounds that such criticism, if vigorously expressed, could be construed as stirring up feelings of hatred against the holders of the beliefs. On the other hand it could be seen as a necessary protection of people's freedom to hold and express their beliefs without being subject to attack.

These questions deserve thorough-going answers. The answers need to be guided by more than just immediate interests. It's not enough for humanists to object automatically to any restrictions on the freedom to criticise religion, just as it's not enough for religious believers to oppose all criticism of their religion. We have to ask, in more general terms: why does freedom of expression matter? Why is it valuable? And what sorts of reasons, if any, can justify restricting it?

The Value of Free Expression

The classic defence of freedom of expression is still John Stuart Mill's essay *On Liberty*, published in 1859. At the heart of Mill's defence is the claim that freedom of thought and discussion is valuable because it is the way to get at the truth. This claim, according to Mill, can be divided into three parts.

First, no one is infallible. The beliefs which we currently hold may, for all we know, actually be *false*. If they are, we need to know this, and the only way we can discover it is by allowing our beliefs to be criticised by others who disagree with us.

Second, even if the beliefs which we currently hold are in fact *true*, we will not properly understand why they are true unless we allow them to be criticised and have to defend them against criticisms.

Thirdly, the beliefs which we currently hold and those which are opposed to them may each contain a *part of the truth*, and in that case it is important for both sides of the argument to be expressed and recognised.

In short, Mill assumes that it is in all our interests to be able to sort out true beliefs from false ones, and we can only do this if we allow free debate and discussion in which all beliefs are open to criticism.

This defence of free speech, though powerful, is a limited one. Mill has in mind a context of intellectual debate, and he thinks of the free expression of ideas as contributing to such a debate. That does indeed cover the case of defending or criticising religious beliefs, and Mill often refers to examples of that kind. However, not all free expression of ideas, such as we might want to defend, is a contribution to intellectual debate. Think of the various kinds of artistic expression which it may be important to protect. People may consider it important to protect creative literature – novels and poems and plays – against censorship. Think for instance of the landmark legal case which allowed the publication of *Lady*

Chatterley's Lover in 1960. Similarly there are controversial cases to do with the visual arts. Pictures or films may be threatened with censorship on the grounds that they are sexually explicit, or excessively violent. Novels and poems, pictures and films may contribute to our understanding of the world in a broad sense but they are not contributions to intellectual debate in the narrow sense. They do not in any simple way defend or criticise beliefs which are true or false. Mill's case for free expression needs to be widened if it is to apply to such cases. The argument must be that free expression is necessary for a rich, lively and diverse culture in which the arts can flourish.

There is also a more specific argument linking the defence of free speech with the value of democracy. We can make effective and informed choices between different political parties, and between competing policies, only if all points of view are given a hearing. It is important that everyone should have some say in the political decisions which affect their lives, but they cannot do this unless they are acquainted with all the options and can listen to the arguments. Free speech, then, is an essential feature of a democratic society.

These three defences of free expression all present it as a necessary condition of a certain kind of society. It is essential for the pursuit of truth, for the flourishing of the creative arts, and for a democratic political system. In each case free expression is defended by appeal to the *general good*. But we can also make the case for free expression in terms of the *rights of individuals*. We each of us want to be able to express our own political and religious and philosophical beliefs, we want to be able to express our deepest feelings and emotions, because these are essential to our sense of who we are. If we have to repress our most personal beliefs and feelings, our very identity is threatened. The argument here can be put in terms of reciprocity: each of us wants the right to free expression as something vital to our own life, and we respect the corresponding rights of others as a condition of their respecting our rights. Or again it can be put in terms of a principle of equality: basic human rights are possessed by all human beings equally, and respect for people's right to express their ideas and beliefs is an essential aspect of respect for all persons as equals.

These arguments together add up to a very strong case for freedom of expression. It does not necessarily follow, however, that that freedom should be *absolute*, that is, that there should be *no exceptions*. Note that all of the above defences imply that some kinds of speech and expression are more important, and worthier of protection, than others. They ascribe great value to speech which contributes to discussion and debate and the search for truth; to forms of expression in the creative arts and imaginative literature; and to speech and expression which are contributions to political debate. So, for instance, it may be important to defend explicit depictions of sexuality in the arts, but it is not immediately obvious that the same defence extends to the crudest kinds of pornography which make no claim to any artistic merit. It may be important for there to be free political debate about policies concerning immigration, and the treatment of refugees, and for all views to be expressed and heard. However, 'Fuck off, blacks, get back to where you came from' is not a contribution to that debate, and it is not, on the face of it, a mode of speech which merits any protection.

At the same time we need to be aware of the danger of distinguishing between kinds of speech which deserve to be protected and those which do not. The danger is that of a slippery slope. Once the law has the power to ban certain sorts of speech or expression, that power can all too easily be misused. It may become a convenient way of dealing with awkward political dissidents. It may be used against valuable forms of artistic expression which deliberately set out to shock or enrage. A court of law may not be the best body to distinguish, say, between crudely exploitative pornography and the artistic celebration of sexual pleasure. Allowing the publication of the former may be the price that has to be paid for a climate of free artistic expression.

Blasphemy

With this general background in mind, let's now look more closely at the relation between free speech and religious belief, and at the practical questions of whether there should be some restrictions on free speech on religious grounds, if so, what they should be, and whether the law should be changed. First, what about the existing common law offence of blasphemy? The law was last used in 1977, when the magazine *Gay News* was successfully prosecuted for publishing a poem in which a Roman centurion at the scene of the crucifixion fantasises about feelings of homosexual love for Jesus. Lord Avebury's bill proposed repeal of the law of blasphemy, and the Select Committee invited submissions on whether the law should be amended or abolished. Some Christian groups responded vociferously that it was essential to retain the law, maintaining that 'blasphemy is a public act of defiance against Almighty God' and that 'we do not want to see the holy name of Christ dragged through the mud'. Others have proposed extending the law, which at present protects only the Christian religion, so that it can be used to prosecute blasphemy against other religions such as Islam. (The militantly evangelical Christian groups are predictably opposed to such an extension.)

What is not clear in all this is why, if there is a god who is all-powerful and all-knowing, who created the whole of the universe and constantly maintains it in being, he should need the protection of the British legal system. To suppose that he is likely to be offended by those who take his name in vain is to ascribe to him a degree of sensitivity unworthy of a divine creator. Surely he can take it. And if he can't, he presumably has the power to punish those who blaspheme against him, and can safely be left to deal with the matter in his own way.

Some of the things said by some Christian groups in defence of the existing law of blasphemy suggest that their aim is not so much to protect the deity, but in some sense to protect society at large. They feel that a society in which the name of their god can be taken in vain and insulted with impunity would be, somehow, spiritually polluted. This is a vague notion, and one which those of us who are out of sympathy with it find difficult to understand, but perhaps it means something to some religious believers. Its very vagueness, however, makes it an unacceptable basis for any legal provision. Since it is impossible to pin down how society might be harmed or damaged by acts of blasphemy, it is equally impossible to say whether and when such acts should be punished in law.

Offence

If there is any serious reason for having a law against blasphemy, it must surely be not to protect the deity, but to protect religious believers from material which is offensive. And *if* that is a good reason, then presumably it is also a reason to extend the same protection to the adherents of other faiths besides Christianity. The problem lies in that notion of 'offence', which is notoriously elastic. Just about anything can be offensive to someone or other. It may sometimes be an appropriate criticism of behaviour or language that it offends some people, if it is *simply* offensive and for no good reason. Why be gratuitously rude? Sometimes, however, mockery and ridicule are legitimate ways of criticising beliefs and ideas, including religious beliefs, even if they give offence. The freedom to criticise religion and religious leaders does not include a licence to hurl indiscriminate abuse, but it may include satire and parody as legitimate critical devices. Often the best way to show the flaws in a view is to throw it into sharp relief. This is as true in philosophy and religion as in politics. Voltaire's *Candide*, for instance, witnesses every kind of human misery in his travels, and by the end of his adventures all the ingenious theological manoeuvres to explain how God could permit such sufferings are revealed as sophistries. This effect could not have been achieved by dry argument. Nietzsche's Zarathustra enjoys a 'last supper' with his followers during which he explains the sickness of Christian values. The language of *The Anti-Christ* may seem intemperate, but Nietzsche's charge is precisely that Christianity is disgusting. He would have been hard pressed to convey his sense of nausea in detached, scientific prose. Monty Python's *Life of Brian* addresses the moral arrogance of Christianity by re-writing the story of its origins. *The Satanic Verses* performs a similar service for Islam.

Whatever one may think of these criticisms of religious beliefs, the point is that they are of a kind which need to be made in this distinctive way, a way which is bound to cause offence. A principle which stipulated that 'criticism is acceptable but ridicule is not' would prevent all sorts of useful and important points from being made. Perhaps we can distinguish between ridiculing *ideas* and ridiculing the *people* who hold them. The underlying distinction is one to which we shall return below and to which we shall attach importance. However, at the level of *ridicule* it is a difficult distinction to draw. Perhaps it is a distinction which we ought to try to make in our criticisms of others, and avoid belittling people whose beliefs we reject, but it is difficult to see how such fine discriminations between ridiculing beliefs and ridiculing those who hold them could be made by the law. The core problem remains that offence is essentially a subjective matter, in the strict sense. Whether something is offensive is simply a matter of whether someone *finds* it offensive. We can contrast the subjective concept of 'offence' with the objective concept of 'harm'. Whether a certain kind of behaviour harms other people may be difficult to determine, but there is a fact of the matter. Something is not shown to be harmful merely by the fact that someone *claims* to have been harmed by it. And this is why the appropriate test of whether certain freedoms ought to be restricted may be not whether they cause *offence* but whether they cause *harm*.

Harm

This takes us back to Mill. It was he who put forward 'the harm principle' as the test of when freedoms should be restricted:

...the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. (*On Liberty*, chapter 1)

In applying this test, Mill distinguishes between freedom to express opinions and freedom of action. He seems to think that the expression of beliefs and ideas cannot by itself harm anybody. The expression of

opinion becomes liable to restriction only when it is an incitement to *action*. This is the familiar idea that words themselves cannot hurt anybody. Actions can. And if the words are, as Mill puts, 'a positive instigation to some mischievous act' – that is, if they are something like 'Kill the bastards!' – then and only then should they be prohibited.

Mill's harm principle still stands up pretty well, and, up to a point, so does his distinction between freedom of speech and freedom of action. He is, however, rather too cavalier about the power of speech to harm. He seems to think that it does so only when it is a direct incitement to inflict physical harm on identifiable individuals. However, there are other ways in which speech can harm. If speech is used to stigmatise a particular social group, to make its members feel threatened and excluded, feel that they are second-class citizens, aliens and outcasts whose very presence is resented, that may be as significant a harm as the direct infliction of physical injury, and one which is equally capable of blighting people's lives. If there is a case for the prohibition of incitement to religious hatred, this is it. It may be said that such a law is not needed – that insofar as speech is an incitement to harm, all that we need are laws prohibiting the harms, and these we have already. But the harm that consists in intimidating and marginalising the members of a particular religion is a special kind of harm, and one that is inflicted on them just insofar as they are adherents of that religion. If, then, there is a case for special legislation to outlaw incitement to religious hatred, this is the form that the case would have to take.

Why, however, should we suppose that there is a special problem in the case of religion? If the physically disabled, for instance, are belittled, stigmatised and threatened publicly by certain kinds of language, is that not equally a case of speech which is a direct harm to others? If gays are abused and intimidated, is that not also an 'incitement to hatred' which harms them even if it does not lead to further action? If so, perhaps we should either extend the legislation against 'incitement to hatred' to protect all threatened and marginalised groups, or accept that such legislation would have to be so extensive as to be unworkable.

Racism and Religious Hatred

If there is a special problem in the case of religion, it is to be found in the nature of modern British society and the facts of multiracialism and multiculturalism. Abusive language which stigmatises and marginalises particular racial groups may create a climate of fear and division and conflict, even if that language is not a direct incitement to action. It was to combat this that legislation was introduced outlawing incitement to racial hatred, and though it has of course not eliminated the problem of racism, it may have done something to curb it. Most importantly the legislation functions as a public statement of the unacceptability of racism. There is also reason to think that it may have inhibited some of the worst excesses of racist groups, since they have taken legal advice to avoid being caught by the legislation. One consequence, however, has been that they have used the device of abusing *religious* groups as a way round the prohibition of incitement to *racial* hatred. To proclaim and propagate the view that 'blacks' or 'Pakis' are scum who have no place in our society would be an incitement to racial hatred, but to propagate that view about, say, *Moslems* would not as it stands be to incite hatred against a *racial* group, even though the clear intent would be for it to function in that way. As the Select Committee's Report says,

...extremist organisations are evading the racial offences under the Public Order Act 1986. They use religion as a surrogate for their real target of race, as the Police and the Home Office confirm (and we have seen a plethora of objectionable material in support of that view). ii[i]

This is what drives the argument that, in order to combat racism, it is necessary also to prohibit incitement to religious hatred. It is an argument that has to be taken very seriously, but it also requires us to look carefully at the relation between 'racial hatred' and 'religious hatred' and to consider not only the links but also possible differences. The original proposal in the Home Secretary's Anti-terrorism, Crime and Security Bill of 2001, repeated in Lord Avebury's proposed Religious Offences Bill, was simply to extend the offence of incitement to racial hatred to include incitement to religious hatred. That however may be too simple.

It is sometimes objected that there is a difference between 'incitement to racial hatred' and 'incitement to religious hatred', because one's racial identity is something one is born with, whereas one's religion is something one chooses. And it is also sometimes suggested that the difference between the two is a reason why incitement to racial hatred may need to be prohibited but incitement to religious hatred may not be. However, the distinction is not in fact a clear one. Many people are adherents of a religion without ever having chosen it. Maybe they should make a choice, but the fact remains that often they don't, they are born into a religious community and they stay in it because they are never prompted to question it, or because the social pressures preventing them from rejecting it are too great to resist. But even if the distinction can in fact be made, it is not clear why in itself it should carry much weight. If people are stigmatised, marginalised and intimidated because of their religious beliefs, that is not made

any more acceptable if the beliefs are ones which they have chosen. The nature of the harm remains the same.

Perhaps the underlying and important difference between religion and race is not so much that religion is *chosen* as that religion, unlike race, is a matter of *beliefs*. A religious group is not just a social and cultural group, held together by shared origins and shared traditions and practices. It is also a group identified by the beliefs which its members hold about, for instance, the nature of existence and about standards of right conduct for others as well as for themselves. Hence, unlike membership of a racial group, it raises again all our earlier concerns about the importance of free expression as a precondition for open debate and the search for truth. Criminalising incitement to religious hatred carries with it dangers which do not follow from the prohibition of incitement to racial hatred.

Consequently, if there is indeed a case for legislation to prohibit incitement to religious hatred, the legislation would have to be framed very carefully. For reasons which we have indicated, it would have to be formulated in such a way that it could not be used to inhibit criticism, including derision and mockery, of religious beliefs. It would have to distinguish between incitement to hatred of *beliefs* and incitement to hatred of *individuals or groups who hold* certain beliefs. Beliefs which to some are sacred and are an expression of their core identity may, to others, be hateful. This may be true both of religious beliefs and of anti-religious beliefs. The right to say that certain beliefs are hateful is an essential element of that freedom of speech and expression whose importance we have stressed. Hence, as the BHA put it in its evidence to the Select Committee, when considering possible legislation against incitement to religious hatred, 'the distinction between beliefs and persons is fundamental'. iii[iii] That distinction needs to be insisted on, even though some people may seek to deny it, and to insist that 'an attack on my religion is an attack on me'. It is not. Some people, no doubt, identify themselves so deeply with their religion that they regard any criticism of it as a personal affront. For all that, their case is different from that of people who are genuinely threatened and intimidated, by speech which is expressly intended to stir up hatred against them. Any proposed legislation must be confined to protecting people against such genuine harms.

ALSO ON FREE SPEECH:

[Free Speech in a multi-cultural society \(pdf\)](#)

This lecture was given in Derby by BHA member and former lecturer in counselling and human relations Geoff Heath. It should not be regarded as necessarily representing the views of the BHA.

[i] House of Lords, Select Committee on Religious Offences in England and Wales (Stationery Office, London , 2003) Volume III, Written Evidence , pp. 22, 36

[ii] Ibid. Volume I, Report , paragraph 17.

iii[iii] Ibid. Volume II, *Oral Evidence* , p.59, paragraph 4.1.