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The Unconstitutionality of Religious Vilification Laws in Australia: Why Religious Vilification Laws Are Contrary to the Implied Freedom of Political Communication Affirmed in the Australian Constitution

*Dr. Augusto Zimmermann**

ABSTRACT

This article explains the weakness of the argument that religious vilification laws promote harmony and tolerance among religious groups. Rather, they are based on a form of postmodern theory that denies the existence of truth and could be used as a weapon by certain individuals to silence any criticism of their beliefs. These laws have become an invitation to people with extreme views to avoid debate by claiming that they, rather than their beliefs, have been attacked. The author then explains the philosophical underpinnings of religious vilification laws and argues that there is no a priori reason why religious speech could not at the same time be characterized as political communication for the purposes of the implied freedom in the Australian Constitution. Rather, the text and structure of the Constitution gives full rise to the proposition that there is an implied freedom to discuss religious matters, particularly when these matters involve serious public interest. This freedom is a right of the citizen that works as a form of constitutional immunity from public and/or political restrictions that are not adapted to the ultimate goal of preserving freedom of speech, which is an essential element of every (democratic) system of representative government.

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I. INTRODUCTION

Religious vilification laws are supposedly designed to promote greater tolerance and harmony among religious groups. Yet these laws are conceptually unsound and produce results that are often antithetical to the tolerance the laws' advocates claim or hope for. Aiming at promoting "cultural diversity," these laws have become a permanent vehicle for religious extremists to silence the debate by allowing them to claim that they, rather than their beliefs, have been attacked. After critically analyzing the religious vilification law enacted in the Australian state of Victoria, this article explains why it is reasonable to suggest that there might exist under the Australian Constitution an implied right of freedom of speech concerning religious matters, which is in turn derived from the implied freedom of communication founded upon the constitutionally prescribed system of representative government.

II. THE VICTORIAN RACIAL AND RELIGIOUS TOLERANCE ACT (2001)

Of greatest concern in Australia has been the enactment of anti-incitement laws on the grounds of religious vilification. Although the country has no federal legislation aiming at prohibiting "religious vilification," three Australian states have passed such laws, namely Queensland,¹ Tasmania,² and Victoria. Since these laws are sufficiently similar that the considerations about them are substantially the same, the Victorian Racial and Religious Tolerance Act 2001 (hereinafter "RTA") will be taken as a representative. The

1. Queensland passed legislation introducing religion vilification laws in 2001. This Act is called the *Anti-Discrimination Amendment Act 2001* (Qld) (Austl.). In a very similar provision to Victoria's law, Queensland outlines that a person must not publically act in a way that would "incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of [their] religion." *Id.* at s 124A(1). The provision also provides the circumstances in which such an act could be legal: the act must be public, done reasonably and in good faith, for academic, artistic, scientific or research purposes; a publication of material that would be subject to the defense of absolute privilege in defamation case; or the publication of a fair report of a public act. Queensland also criminalizes serious religious vilification. The section dealing with serious religious vilification is comparable to the Victorian section.

2. Like Queensland and Victoria, Tasmania also has legislation containing provisions against religious vilification. Section 19 of the *Anti-Discrimination Act 1998* (Tas.) (Austl.) outlines that one must not publically act in a way which would incite "hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of [their] religious belief[s] or affiliation[s]."

Victorian Act was passed on June 27, 2000, and became law on January 1, 2001.³ Section 8(1) of the RRTA provides:

A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.⁴

The RRTA states that motives are irrelevant,⁵ and that religious belief need only be the substantial ground for the conduct.⁶ The RRTA further states that it is irrelevant whether the statement is true or false.⁷ Section 11 states that there is no contravention of sections 7 or 8 if the person is able to establish that the act was, in the circumstances, reasonable and in good faith for the purpose of genuine academic, artistic, religious, or scientific interest.⁸ Further, if the accused can establish that they reasonably believed that the conduct would be seen or heard only by themselves, then they will not be held to have contravened section 8.⁹

A. Race vs. Religious Issues

The RRTA is a law aimed at preventing instances of either religious or racial vilification, thus applying to religion the same formulations which are applied to race. However, if people cannot choose the color of their skin, religion is, to some degree at least, a matter of personal choice and not an immutable characteristic. In contrast to racial issues, where one finds no questions of “true” or “false,” religious beliefs involve ultimate claims to truth and error. As Ivan Hare points out, “religions inevitably make competing and often incompatible claims about the nature of the true god, the origins of the universe, the path to enlightenment and how to live a good life and so on. These sorts of claims are not mirrored in racial

3. *Racial and Religious Tolerance Act 2001* (Vic) n. 1 (Austl.), available at http://www.austlii.edu.au/au/legis/vic/consol_act/rarta2001265/s31.htm.

4. *Id.* s 7(1).

5. *Id.* s 9(1).

6. *Id.* s 9(2).

7. *Id.* s 10.

8. *Id.* s 11.

9. *Id.* s 12.

discourse.”¹⁰ Therefore, one must assume that the laws of a democratic society “should be less ready to protect people from vilification based on the voluntary life choices of its citizens compared to an unchangeable attribute of their birth.”¹¹

B. Inversion of the Onus of the Proof

The RRTA allows anyone to file a complaint of religious vilification.¹² The burden of proof rests with the person who has been charged, instead of staying with the person who claims to be offended.¹³ This is a major breach of the rule-of-law principle that one is innocent until proven guilty. Those who are charged under the Victorian Act are required to prove why they have not committed vilification or why they would qualify for any exemptions. In so doing, they must bear all the legal expenses. In the meantime, those who bring the charges get the full backing of the state, often with all costs borne by the taxpayer.¹⁴ Of course, the risk of being dragged into court will deter many people from arguing the merits of someone’s religious beliefs and convictions. This self-imposed censorship of ideas will inevitably cause the “chilling effect” of limiting freedom of speech, because of “the fear of litigation and its risk of financial ruin, jail, collegial ostracism, or embarrassment.”¹⁵

C. Motive and Truth Are Irrelevant

The RRTA declares that the truth of a statement cannot be relied upon as a defense against the charge of vilification.¹⁶ In addition, section 10 states that in determining whether a person has

10. Ivan Hare, *Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred*, PUBLIC LAW 521, 531 (2006).

11. Rex Tauati Ahdar, *Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law*, 26 U. QUEENSL. L. J. 293, 301 (2007).

12. *Racial and Religious Tolerance Act 2001* (Vic) s 19 (Austl.).

13. *Id.* s 9(1).

14. Bill Muehlenberg, *The Problems with Vilification Legislation*, ON LINE OPINION (Sept. 7, 2005), <http://www.onlineopinion.com.au/view.asp?article=3792>.

15. Joel Harrison, *Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression*, 12 AUCKLAND U. L. REV. 71, 79 (2006).

16. Section 9 (1) of the *Racial and Religious Tolerance Act 2001* (Vic) (Austl.) states: “In determining whether a person has contravened section 7 or 8, the person’s motive in engaging in any conduct is irrelevant.”

committed religious vilification, “it is irrelevant whether or not the person has made an assumption about the race or religious belief or activity of another person or class of persons that was incorrect at the time that the contravention is alleged to have taken place.”¹⁷ In other words, a person’s motive for engaging in such conduct is not deemed relevant for the purposes of the legislation, unless it falls within the exceptions of “good faith” art, academic, religion, science, or public interest.¹⁸ According to Joel Harrison, such legal exemptions reveal “a desire to impose the civility (fictional or otherwise) of academia onto the public sphere.”¹⁹ However, if stating the truth is irrelevant for the purposes of religious vilification, then section 8 “might be contravened by conduct which has the effect of inciting religious hatred even where the inciter had no intention to do so.”²⁰

III. THE CASE OF THE TWO PASTORS

Although religious vilification laws are designed to penalize individuals who offend others on the basis of their beliefs, in practice they might lead to more inter-religious strife and social conflict.²¹ Perhaps the most compelling argument against such laws is the *Catch the Fire Ministries*²² case in Victoria. This decision, the first major litigation on the subject in Australia, bears out all the concerns that religious vilification laws can be used as a weapon by radical groups to silence any form of criticism toward their religious beliefs.

In 2002, three Muslims were encouraged to attend a seminar held by evangelical Christians on the subject of Islam by a Muslim employee who works for the Victorian government at the Equal Opportunity Commission.²³ Importantly, this was a seminar only for Christians, and the three Muslims had not disclosed their identity.²⁴

17. *Id.* s 10.

18. *Id.* s 11.

19. Harrison, *supra* note 15, at 86.

20. Ahdar, *supra* note 11, at 301.

21. Harrison, *supra* note 15, at 72.

22. *Islamic Council of Victoria v Catch the Fire Ministries, Inc.* [2004] VCAT 2510 (Austl.), available at <http://www.austlii.edu.au/au/cases/vic/VCAT/2004/2510.html>.

23. *Id.* at ¶¶ 63, 67.

24. So, even material designed for one particular religious group may need to be censored for fear of attracting unwelcome complaint.

But as Harrison points out, “in what is truly disquieting, the attendees were encouraged to attend at the behest of May Halou who was both a member of the Executive of the ICV (Islamic Council of Victoria) and employed by the Equal Opportunity Commission, the Act’s primary administrative body.”²⁵ None of those Muslims attended the entire seminar, “but pursuant to a deliberate plan each had sat in at different times to ensure that the complete event was covered.”²⁶ Each stated that they were “very upset” at what they heard.²⁷

On December 17, 2004, Judge Michael Higgins, presiding at the Victorian Civil and Administrative Tribunal (VCAT), found both the speakers and organizers of that seminar, Pastors Daniel Scot and Danny Nalliah, guilty of inciting religious hatred against Victorian Muslims.²⁸ In reality, the evidence of vilification against them was not based on whether the attendees felt hatred or contempt toward Muslims, but whether the three Muslim attendees (who did not reveal their faith and were technically not invited) felt offended by the comments about the Koran during the course of the seminar, even though they confessed under cross-examination that their knowledge of the Book was “slight.”²⁹

One significant aspect of the decision is that Judge Higgins found that “all [the] seven witnesses for the complainants could be relied upon, [and yet,] in one way or another, he rejected all the five witnesses for the respondents and refused [their] requests to call two . . . expert witnesses.”³⁰ He then relied solely on the expert

25. Harrison, *supra* note 15, at ¶ 77.

26. Ahdar, *supra* note 11, at 293. See also *Catch the Fire Ministries, Inc.* [2004] VCAT at ¶ 76.

27. *Catch the Fire Ministries, Inc.* [2004] VCAT at ¶ 77.

28. Barney Zwartz, *Historic Win in Religious Hatred Case*, THE AGE (December 18, 2004), <http://www.theage.com.au/news/National/Historic-win-in-religious-hatred-case/2004/12/17/1102787271940.html>.

29. For example, one of the complainants, Jan Patricia Jackson, said that she had been a Muslim for some four years, but that she is not a scholar of the Qur’an. She conceded that if Pastor Scot said that he had read the Qur’an as many times as he had and that was accurate, then he would have a better understanding than she would as to what was in the Qur’an.

Catch the Fire Ministries, Inc. [2004] VCAT at ¶ 63.

30. *Id.* at ¶ 374 (e). See also Mark Durie, *Catch the Fire and Daniel Scot’s (In)Credible Testimony*, ON LINE OPINION (Feb. 18, 2005), <http://www.onlineopinion.com.au/view.asp?article=3050>; *Catch the Fire Ministries, Inc.* [2004] VCAT at ¶ 375 (m).

witnesses for the complainants to reveal his view on what he believes to be the best or “more reasonable” interpretation of the Koran.³¹ However, as Robert Spencer reminds,

There are some hints that the outcome of the case was virtually predetermined. When during the trial Scot began to read verses from the Koran that discriminate against women, a lawyer for the Islamic Council of Victoria, the organization that brought the suit, stopped him: reading the verses aloud, she said, would itself be religious vilification.³²

In the course of court proceedings, and in response to Pastor Scot’s assertion that “the prophet said all you who believe fight those disbelievers who are in your neighbourhood,”³³ Judge Higgins relied on the expertise of Dr. Abdul Kazi for the ICV to assert that although the reference was correct, “the word ‘fighting/combating’ has been taken literally, rather than figuratively.”³⁴ When asked whether Muslims would be bound to treat the life of Mohammed as an example of the morality which they would then apply in their own personal lives, Dr. Kazi replied: “That is so in a general sense, but you do not follow it in every way.”³⁵ Judge Higgins happily accepted all these “liberal” interpretations, also relying on Dr. Kazi’s opinion that the term “jihad” cannot be applied literally, and that any such interpretation of the Koran “is totally false.”³⁶ And yet, as law professors Rex Ahdar and Nicholas Aroney point out, “traditional Islamic jurisprudence has [actually] tended to be literalistic in its interpretation of the Qur’an and Sunna.”³⁷ Although *jihad* includes the individual Muslim’s spiritual struggle, in traditional Islamic jurisprudence, according to general doctrine and in historical

31. *Catch the Fire Ministries, Inc.* [2004] VCAT at ¶ 375 (m).

32. Robert Spencer, *Religious Vilification*, HUMAN EVENTS (Jan. 24, 2005), <http://www.humanevents.com/2004/12/22/pastors-found-guilty-of-religious-vilification-of-muslims/>.

33. KORAN 9:23.

34. *Catch the Fire Ministries, Inc.* [2004] VCAT at ¶ 157 (xi).

35. *Id.* at ¶ 180.

36. *Id.* at ¶ 157 (xvi).

37. Rex Ahdar & Nicholas Aroney, *The Topography of Shari’a in the Western Political Landscape*, in SHARI’A IN THE WEST 19 (Rex Ahdar & Nicholas Aroney eds., 2010) (emphasis added).

tradition, “the term *jihad* consists of military action with the primary objective of the expansion of Islam and, if need be, of its defence.”³⁸

In reply to the assertion by Pastor Scot that Mohammed was a pedophile for marrying Aishah when he was at the age of fifty-four and she was only six and consummating the marriage when she was nine, the following was stated by Dr. Kazi and paraphrased by Judge Higgins: “One cannot use a set of cultural values and people living them at one time [and] make a value and moral judgment on a totally different people in a different cultural context.”³⁹ Enabled to rely on such moral relativism, Higgins went on to reveal a great interest to enter the complex theological debate of what the Koran does and does not require of its followers.⁴⁰ This is not to say that the views of Pastor Scot are necessarily better than those of Dr. Kazi, endorsed by Judge Higgins; rather, the question is whether a secular judge (or tribunal) with no apparent theological expertise should be engaging in and deciding on such complex theological issues.

In reality, the “liberal” interpretation of Islam given by Judge Higgins is highly debatable. It is an interpretation that has been fiercely contested in many theological circles, although it allowed him to regard the defendants as some sort of religious extremists for not agreeing with that view. These two pastors seemingly presented an “extremist view” of Islam that bears no relationship to “mainstream” Australian Muslim beliefs.⁴¹ The pastors thus joined a class of religious extremists who have misused Islamic doctrine and misrepresented the supposed peaceful nature of Islam. Hence, when questioned whether Pastor Nalliah believed the God of Islam to be the same as the God of Christianity, his reply that he strongly rejects

38. John Azumah, *Spreading Islam: Personal and Community Motivations for Jihad and Terrorism*, in *ISLAM: HUMAN RIGHTS AND PUBLIC POLICY* 125 (David Claydon ed., 2009). Dr. John Azumah is a professor of Islam at the London School of Theology. He completed his MA and PhD in Islam at the University of Birmingham. According to him, “The doctrine of *jihad* originates from a form of dualism in Islam, which teaches a perpetual struggle between Allah and Satan, good and evil, belief and unbelief, Islam and non-Islam, Muslim and non-Muslim. Muslims are believed to be on the side of Allah and non-Muslims on the side of Satan and therefore enemies of Allah.” *Id.* at 128. The Koran declares in 4:76: “Those who are believers fight in the way of Allah, and the unbelievers fight in the idols’ way. So fight the friends of Satan; surely the guile of Satan is ever feeble.”

39. *Catch the Fire Ministries, Inc.* [2004] VCAT at ¶ 180.

40. Harrison, *supra* note 15, at 76.

41. *Catch the Fire Ministries, Inc.* [2004] VCAT at ¶ 387.

such proposition was interpreted by Judge Higgins as a further evidence of his “extreme views.”⁴²

To make it worse, the extraordinary statement for the ICV by Professor Gary Bouma that “Charismatic Christianity is as offensive to [Australians] as is Wahhabist Islam” was quoted approvingly by Judge Higgins.⁴³ In the opinion of Professor Bouma, to raise fears about the possible Islamization of Australia’s society “would be like a group raising fears about the rise of Pentecostals in Australia, because large numbers of Pentecostals hold certain views in the United States.”⁴⁴

Ironically, in condemning the supposed “objectionable” elements of Scot’s speech, Professor Bouma and Judge Higgins have incidentally partaken in “disparaging an entire religious worldview to which many adhere, sending a message of authoritative public condemnation.”⁴⁵ Judge Higgins even regarded as evidence of religious vilification to denounce the harsh persecution endured by millions of Christian minorities in Muslim-majority countries as a result of Islamic teachings.⁴⁶ Such an approach, writes Dr. Mark Durie, “constitutes a dangerous limitation on freedom of speech and the capacity of Christians to take up the cause of the persecuted church.”⁴⁷

Not content in effectively vilifying an entire segment of the Australian Christian community by calling them the extremist equivalent of Islamic Wahabbism, Judge Higgins declared that “Islam agrees substantially with Christian beliefs save for particular events.”⁴⁸ Yet, according to the Rev. Dr. David Palmer, who is the Convener of the Victorian Presbyterian Church’s *Church and Nation Committee*, the theological assumption that the Koran substantially agrees with core Christian beliefs would be “news to most Muslims and Christians, if not downright offensive to both.”⁴⁹

42. *Id.* at ¶¶ 310, 375.

43. *Id.* at ¶ 136.

44. *Id.*

45. Harrison, *supra* note 15, at 92.

46. *Catch the Fire Ministries, Inc.* [2004] VCAT at ¶¶ 44, 391.

47. *Id.*

48. *Id.* at ¶ 376.

49. See Barney Schwartz, *Law Curbs Free Speech, Says Church*, THE AGE (Mar. 30, 2005), <http://www.theage.com.au/news/National/Law-curbs-free-speech-says->

Of course, such assumption that Christianity and Islam are similar religions may be expected from a secular judge without any apparent theological training. What is not so acceptable, however, is having a secular judge deciding rather complex, sometimes quite controversial, theological issues. For example, since Judge Higgins relied on his own secular worldview and completely ignored “the theological values attached to the concept of mercy in Islam,”⁵⁰ he assumed to be “illogical and unsustainable” Pastor Scot’s opinion that mercy towards a thief under Islamic jurisprudence is to be shown only after the thief’s hand has been cut off.⁵¹ And yet, the Hadiths are clear that mercy is indeed to be applied only after the thief’s hand is amputated.⁵²

church/2005/03/29/1111862390121.html?from=moreStories. Indeed, as Dr. Mark Durie points out:

There are profound and far-reaching differences in the attributes of [Yahweh] of the Bible and Allah of the Quran. The same is found to apply when one compares Jesus and the Holy Spirit of the Bible with Isa and the Ruh Al-Qudus of the Quran. These differences are deep and significant enough to make it reasonable to reject the claim that Christians and Muslims worship the same God or honour the same Christ.

MARK DURIE, REVELATION: DO WE WORSHIP THE SAME GOD? JESUS, HOLY SPIRIT, GOD IN CHRISTIANITY AND ISLAM 137 (2006). Rex M. Rogers, President of Cornerstone University and Grand Rapids Baptist Seminary, explains the basic differences between Islam and Christianity:

Muslims presuppose that ‘there is no God but Allah and Muhammad is his prophet.’ They are monotheists, but their god has no partners (thus no Trinity), he does not beget (thus Jesus is not his Son), and he is responsible for good and evil. In the Islamic belief system, Allah is god of fate and fear. He is arbitrary and even capricious in his dealings with human beings. Muslims, therefore, cannot fully explain concepts like love, forgiveness, or peace, because the meaning of these concepts depends on the existence of a God who is both righteous and loving and who defines forgiveness in the work of his Son, Jesus.

REX M. ROGERS, CHRISTIAN LIBERTY: LIVING FOR GOD IN A CHANGING CULTURE 47 (2003).

50. Mark Durie, *Catch the Fire and Daniel Scot’s (In)Credible Testimony*, ON LINE OPINION (Feb. 18, 2005), <http://www.onlineopinion.com.au/view.asp?article=3050>.

51. *Catch the Fire Ministries, Inc.* [2004] VCAT at ¶ 276.

52. 69 Hadith, in SAHIH MUSLIM, THE BOOK PERTAINING TO PUNISHMENTS PRESCRIBED BY ISLAM (KITAB AL-HUDUD), available at http://www.searchtruth.com/book_display.php?book=17&translator=2&start=10&number=4184. Sura 5:38 in the Koran states: “Cut off the hands of thieves, whether they are male or female, as punishment for what they have done – a deterrent from God: God is almighty and wise. But if anyone repents after his wrongdoing and makes amends, God will accept his repentance: God is most forgiving and merciful.” Thus the Hadith says that the repentance of a thief is accepted only after the thief’s hand is cut off: “The Prophet cut off the hand of a lady, and that lady used to come to me, and I used to convey her message to the Prophet and she repented, and her repentance was sincere.” *Bukhari* 81:72. Haddith by one Bukhari, 8:793, says the same: “Abu Abdullah said: ‘If a thief repents after his hand has been cut off, then his witness will be accepted. Similarly, if any person upon whom any

Following the decision, a “remedy” or “penalty” was announced on June 22, 2005.⁵³ Judge Higgins ruled that the defendants had vilified Muslims and that, among other things, they would have to place a public statement expressing their apologies on their website as well as in two leading newspapers at the total cost of \$70,000.⁵⁴ These advertisements would reach 2.5 million people, rather than the less than 250 who attended the seminar.⁵⁵ As one might expect, the respondents appealed the decision. On August 14, 2006, the Court of Appeal found the decision to have contained numerous and quite substantial errors of fact.⁵⁶ Judge Higgins, for example, had accused Pastor Scot of stating that “Muslims are demons,”⁵⁷ when in fact he had merely pointed out that the Koran states that Allah had sent a group of demons (“jinn”), who, when they heard the Koran, became Muslims.⁵⁸ There were many other errors and some quite serious misrepresentations in his judgment.⁵⁹ As a result, the Court of Appeal found no other alternative but to remit the matter to the Tribunal to be heard before a different judge, as well as have the orders requiring a public apology set aside.⁶⁰

After the decision by the Court of Appeal, the case ended up being resolved through mediation between the parties and without the need for re-hearing, thus ending a litigation process that lasted five years.⁶¹ Regardless of its outcome, it is worth considering that the defendants spent a very substantial amount of money in litigation, the costs exceeding one million dollars.⁶² The excessive cost of litigation can of course easily result in the denial of justice.

legal punishment has been inflicted, repents, his witness will be accepted.” ASK THE KORAN, <http://www.ask-the-quran.com/english/search/thief%20repents.html?start=0> (last visited Sept. 7, 2013).

53. *Islamic Council of Victoria v Catch the Fire Ministries, Inc.* [2005] VCAT 1159 (Austl.).

54. *Id.* at ¶ 16.

55. *Catch the Fire Ministries, Inc.* [2004] VCAT at ¶¶33, 383.

56. *Catch the Fire Ministries, Inc. v Islamic Council of Victoria* [2006] VSCA 284 (Austl.).

57. *Catch the Fire Ministries Inc.* [2004] VCAT at ¶80.

58. Ian C.F. Spry, *Legal Notes: The Totalitarian Effects of Anti-Free Speech Legislation*, 2008 NAT'L OBSERVER 64, 65.

59. *Id.*

60. Ahdar, *supra* note 11, at 305.

61. *Id.* at 305.

62. Paul Sheehan, *Spreading the Word of Intolerance*, SYDNEY MORNING HERALD (October 4, 2004), <http://www.smh.com.au/articles/2004/10/03/1096741896292.html#>.

Since it may lie far beyond the financial capacity of most individuals and small organizations, defendants accused of religious vilification may be compelled to settle their cases with unfair concessions in the hope of avoiding costly litigation. This is in itself a form of punishment and a further denial of freedom of speech, meaning that the most vulnerable in this battleground are those who lack the resources and organizational clout to fund litigation.

IV. CRIMINALIZATION OF TRUTH-TELLING

Whereas Western societies in the past defined religious freedom as dependent on our freedom to search for truth, now “we put the emphasis upon creating a social, harmonious, and multicultural community.”⁶³ In the *Catch the Fire* case, the Tribunal reminded us in its ruling that the truth is not a defense under the RRTA, thus opening the way for “vilification” to occur under the law, even though statements may be true. Of course, if a statement is true, it should be open to be stated freely in a democratic society. As with defamation cases, truth should be a complete defense against any charges of religious vilification. But if it is illegal to speak the truth, it can also be said that vilification laws may punish truthful speech and reward academic rhetoric that may sometimes be rather deceptive. As such, it is interesting to note that the Victorian Act gave artists and academics an immunity that was not extended to religious practitioners in the original draft. One could not severely offend someone if one did it for religious purposes, but one could, and still can, do it for artistic ones.⁶⁴ Such exemptions are extremely problematic. Certain forms of communication, including academic and artistic, are granted full immunity to religious vilification. This creates some elitist distinctions that privilege the eloquent speaker over others so that only certain forms of expression are restricted.⁶⁵ The then Roman Catholic Archbishop of Melbourne, George Pell, correctly pointed out the strange anomaly and elitism of this provision:

63. Robert Forsyth, *Dangerous Protections: How Some Ways of Protecting the Freedom of Religion May Actually Diminish Religious Freedom*, Address at the Third Acton Lecture on Religion and Freedom (Sep. 24, 2001), in *CENTRE FOR INDEP. STUD.* 9 (2001).

64. *Id.* at 11.

65. Harrison, *supra* note 15, at 88.

Citizens rightly resent any attempt to limit their free speech more than the free speech of their 'betters.' It is quite unfair that the deliberate conduct of the artist or the politician is exempted but the clumsy contribution of the less educated is made criminal. If any serious movement for racial and religious persecution were to gain momentum, then no doubt it would have been led and nourished by certain misguided politicians, academics and artists.⁶⁶

In the *Catch the Fire* case, the finding that a seminar on Islam was not a "balanced discussion" rested on the broader assumption that Pastor Scot unduly engaged in a "unilateral uncontested dialogue." Such an idea that one ought to provide a "balanced" or "contested" discussion to escape the accusation of "vilification" is, quite frankly, absurd. According to Dr. Ian Spry QC, at the seminar, Pastor Scot had simply drawn attention to "a number of disturbing statements in the Koran, as well as a number of other statements in the Koran of which he 'expressed approval.'" Hence, in Dr. Spry's opinion,

The seminar appears on balance to have been a reasonable presentation. There are undoubtedly profoundly disturbing statements within the Koran, and some of the extreme statements made by Moslems within Australia are even more disturbing. Needless to say, discussion of these matters should not be repressed.⁶⁷

Nevertheless, Professor Garry Bouma, an expert witness for the ICV, thought that the seminar had been unbalanced.⁶⁸ He wrote later in the Victorian newspaper *The Age* that the RRTA had the positive effect of enforcing "the need for religious groups to behave honestly and honorably with each other," thus creating what he claims to constitute "religious maturity."⁶⁹ But in reality one could easily argue that what this kind of "maturity" actually implies is no more than the artificial creation of a debating club of pedantic academics, who may sometimes adopt the art of obscure rhetoric in

66. Gary Bouma, *THE AGE* (Mar. 16, 2001), <http://www.theage.com.au>.

67. Spry, *supra* note 58, at 65.

68. *Islamic Council of Victoria v Catch the Fire Ministries, Inc.* [2004] VCAT 2510 ¶ 149 (Austl.).

69. Gary Bouma, *Why Costello is Wrong on Vilification Laws*, *THE AGE* (June 1, 2004), <http://www.theage.com.au/articles/2004/05/31/1085855495283.html>.

order to avoid a more open and robust debate on any particular issue.

V. RELIGIOUS VILIFICATION LAWS AND POSTMODERN THEORY

As seen before, the truth of a statement is irrelevant for the purposes of religious vilification. If the truth of a statement cannot be used as a defense, why then should the truth itself be irrelevant for the purposes of religious vilification? The answer seems to be based on the fact that such laws rely on a postmodern assumption that truth is socially construed, and therefore irrelevant; that truth as such is related to the particularities of an individual's culture, religion, and social context. Since truth is relative to social context, then it is also "morally wrong" to criticize someone else's values or beliefs no matter how obnoxious these values and beliefs might be.

Although it is not really easy to define the term postmodernism, one may loosely define it as a label for a range of theoretical challenges to the objectivity of truth and knowledge. In Western societies, the idea of objective truth is traditionally related to the understanding about the relationship between the real world and statements that correspond to the real world. Postmodernists deny this tradition by claiming that there is no such thing as objective truth. For them, everything one knows is merely the subject of social context and, accordingly, cultural surroundings. This so being, religious vilification laws appear to be inspired by the work of postmodern scholars such as Stanley Fish, who claims that humanity has never been oriented toward "the truth," and that "there is no such thing as free speech."⁷⁰ On the contrary, Fish argues, any claim to free speech is actually invalid because every speech serves an "instrumental purpose" that eventually allows its regulation by the government in the public sphere.⁷¹

70. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH* (1994).

71. Peter Lowe and Annemarie Jonson, "There Is No Such Thing as Free Speech": An Interview with Stanley Fish, *AUSTRALIAN HUMAN. REV.* (Feb. 1998), <http://www.australianhumanitiesreview.org/archive/Issue-February-1998/fish.html>. Fish goes on to say:

When one speaks to another person, it is usually for an instrumental purpose: you are trying to get someone to do something, you are trying to urge an idea and, down the road, a course of action. There are reasons for which speech exists and it is in that sense that I say that there is no such thing as "free speech," that is, speech that has

Since the RRTA claims that the truth cannot be relied as a defense from the accusation of religious vilification, this law basically reflects the postmodern rejection or indifference to all matters of truth and objectivity. Such law is grounded on the skepticism of truth, which in turn is deemed relative and contingent to group thinking and social experience.⁷² Accordingly, what one takes for the “truth” is no more than his or her personal opinion and nothing else. In sum, what “truth” means under the postmodern reading of reality is no more than a Christian perspective, a Muslim perspective, a Hindu perspective, and so forth. Each of these “perspectives” must be conditioned and locked in the person’s own sphere of “religiosity,” so that any claim to universal truth can be dismissed as naïve at best and deceptive at worst, as a mere attempt by one of these groups to “impose” their own perspective upon the others.

VI. RELIGIOUS VILIFICATION LAW: BLASPHEMY LAW BY STEALTH?

One reasonable concern regarding vilification law is that some religious bodies could exploit such anti-incitement mechanisms to secure immunity from appropriate public scrutiny of their beliefs and practices. This concern has been proven to be correct, and the *Catch the Fire* case is merely one example. Whatever the merits of the arguments presented by the respondents in the case of the two pastors in that case, the regrettable episode vividly illustrates the great potential for exploitation of any such mechanisms by religious extremists who are reluctant to endure public criticism of their beliefs.

Of course, that case had many elements of a set-up, including the pre-arrangement by the Islamic Council of Victoria to send several

its rationale nothing more than its own production.

Id.

72. Charles Rice argues on the absurdity of such postmodern skepticism:

One who says we can never be certain of anything contradicts himself because he is certain of that proposition. If he says instead that he is not sure he can be sure of anything, he admits at least that he is sure he is not sure. Or some will say that all propositions are meaningless unless they can be empirically verified. But that statement itself cannot be empirically verified.

CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 132 (1999).

anonymous informants to a seminar held privately in a Melbourne church, followed by the coordinated lodging of a formal complaint with the Victorian Civil and Administrative Tribunal (VCAT).⁷³ Another discomfoting conclusion one can draw from the episode is that in the eyes of such a governmental agency, the rights of some religious people to engage in free speech may be less important than others. This perceived desire to shelter particular groups from public examination should be of great concern to all Australians, including those of strong religious belief and those with none.

Although we should not allow our rights and freedoms to be undermined by the inflated sensitivities of any religious group, vilifications laws may actually serve the undesirable purpose of creating a new and more disguised form of blasphemy law, which allows some religionists to make others keener to accept a vast range of religious restrictions to their freedoms in return for “being left alone.” This is particularly so when one takes into account that the RRTA was enacted at the insistence of the local Islamic community in Victoria.⁷⁴

Throughout the Muslim world, “accusations of blasphemy or insulting Islam are used systematically in much of that world to send individuals to jail or to bring about intimidation through threats, beatings and killings.”⁷⁵ It is applied against Muslims who are judged to be apostates and against non-Muslims when they are considered to have lost the “protection” afforded to them under the *dhimma* pact, or covenant protection.⁷⁶ Under Islamic jurisprudence, any such transgressions, if performed by Muslims, are regarded as evidence of apostasy, a capital offense.⁷⁷ Conversely, if the transgression is attributed to a non-Muslim living under Islamic rule, this is interpreted as annulling their *dhimmi* condition, for which the

73. Sheehan, *supra* note 62.

74. Spry, *supra* note 58, at 64.

75. Paul Marshall, *Blasphemy and Free Speech*, 41(2) *IMPRIMIS* 2 (2012). In these Islamic countries even Muslims themselves may be persecuted if they do not endorse the official interpretation of Islam: “Sunni, Shia and Sufi Muslims may be persecuted for differing from the version of Islam promulgated by locally hegemonic religious authorities. . . . Iran represses Sunnis and Suffis. In Egypt, Shia leaders have been imprisoned and tortured.” *Id.* at 3.

76. Mark Durie, *Sleeping into Sharia: Hate Speech and Islamic Blasphemy Strictures*, 15 *INT’L TRADE & BUS. L. REV.* 394, 396 (2012).

77. *Id.*

death penalty is also applied.⁷⁸ The offending *dhimmi* must be treated as “an object of war,” which according to Sharia law means “confiscation of property, enslavement (of wife and children), and death.”⁷⁹ As Michael Nazir-Ali points out, “there is unanimity among the lawyers that anyone who blasphemes against Muhammad is to be put to death, although *how* the execution is to be carried out varies from one person to another.”⁸⁰

According to recent legal scholarship, the execution of apostates from Islam is sanctioned by all five dominant streams of Islamic law, namely the *Hanafi* (Sunni), *Shafi'i* (Sunni), *Maliki* (Sunni), *Hanbali* (Sunni) and *Ja'fari* (Shi'a) legal codes, under which the State may impose the death penalty as a mandatory punishment (“*hudud*”) against adult male converts from Islam (“*irtidad*”).⁸¹ For adult women, death is prescribed by three of the five Islamic schools. The exceptions are *Hanafi* Islam, which allows for permanent imprisonment (until the woman recants), and *Ja'fari* Islam, which allows imprisonment and beating with rods (until death or recantation).⁸² With the exception of *Ja'fari* Islam, the death penalty is also applied to child apostates under Sharia law, with the penalty typically delayed until attainment of maturity. Even more unsettling is the fact that under three of the five Islamic legal codes, apostasy need not be articulated verbally to incur mandatory punishment; even inward apostasy is punishable.⁸³

78. *Id.*

79. *Id.*

80. Michael Nazir-Ali, *Islamic Law, Fundamental Freedoms, and Social Cohesion: Retrospect and Prospect*, in SHARI'A IN THE WEST 79 (Rex Ahdar & Nicholas Aroney eds., 2010).

81. PATRICK SOOKHDEO, FAITH, POWER AND TERRITORY: A HANDBOOK OF BRITISH ISLAM 24 (2008).

82. *Id.*

83. *Id.* In countries that are subject to Islamic law, writes Charles Moore, Believers who reject or insult Islam have no rights. Apostasy is punishable by death. In Iran, Saudi Arabia and Sudan, death is the penalty for those who convert from Islam to Christianity. In Pakistan, the blasphemy law prescribes death for anyone who, even accidentally, defiles the name of Mohammed. In a religion which, unlike Christianity, has no idea of a God who himself suffers humiliation, all insult must be avenged if the honour of God is to be upheld. Under Islam, Christians and Jews, born into their religion, have slightly more rights than apostates. They are ‘*dhimmis*’, second-class citizens who must pay the ‘*jiyza*’, a sort of poll tax, because of their beliefs. Their life is hard. In Saudi Arabia, they cannot worship in public at all, or be ministered to by clergy even in private. In Egypt, no Christian university is permitted.

Arguably, one of the greatest ironies of religious vilification laws is embodied in the fact that their chief beneficiaries end up being a small but vocal group of radical Islamists. Of course, it is not entirely clear why these radicals should merit any statutory protection from “hate speech.”⁸⁴ On the contrary, some of their most obnoxious statements may deserve our revulsion and criticism.⁸⁵ And yet to express any such revulsion or even the slightest indignation may incur the risk of being dragged into a court and accused of vilification under the existing laws. As Dr. Spry correctly points out:

Legislation of this kind operates in *terrorem*. After the ill-founded decision of Judge Higgins against Pastor Scot, many will be

In Iran, Christians cannot say their liturgy in the national language. In almost all Muslim countries, they are there on sufferance and, increasingly, because of radical Islamism, not even on that.

Charles Moore, *Is It Only Mr. Bean Who Resists This New Religious Intolerance?*, DAILY TELEGRAPH (Dec. 11, 2004, 12:01 AM), <http://www.telegraph.co.uk/comment/columnists/charlesmoore/3613495/Is-it-only-Mr-Bean-who-resists-this-new-religious-intolerance.html>.

84. Pascal Bruckner comments on the need for the right to criticize Islam:

The process of questioning remains to be carried out by Islam, which is convinced that it is the last revealed religion and hence the only authentic one, with its book directly dictated by God to his Prophet. It considers itself not the heir of earlier faiths but rather a successor that invalidates them forever. The day when its highest authorities recognize the conquering, aggressive nature of their faith, when they ask to be pardoned for the holy wars waged in the name of the Qu’ran and for infamies committed against infidels, apostates, unbelievers, and women, when they apologize for the terrorist attacks that profane the name of God—that will be a day of progress and will help dissipate the suspicion that many people legitimately harbor regarding this sacrificial monotheism. Criticizing Islam, far from being reactionary, constitutes on the contrary the only progressive attitude at a time when millions of Muslims, reformers or liberals, aspire to practice their religion in peace without being subjected to the dictates of bearded doctrinaires. Banning barbarous customs such as lapidation, repudiation, polygamy, and clitoridectomy, subjecting the Qu’ran to hermeneutic reason, doing away with objectionable verses about Jews, Christians, and gays and appeals for the murder of apostates and infidels, daring to resume the Enlightenment movement that arose among Muslim elites at the end of the nineteenth century in the Middle East—that is the immense political, philosophical, and theological construction project that is opening up But with a suicidal blindness, our continent [i.e., Europe] kneels down before Allah’s madmen and gags and ignores the free-thinkers.

PASCAL BRUCKNER, *THE TYRANNY OF GUILT: AN ESSAY ON WESTERN MASOCHISM* 46–47 (2011).

85. For example, in January 2009, a Muslim cleric from Melbourne instructed his male married followers to hit and force sex upon their disobedient wives. *It’s OK to Hit Your Wife, Says Melbourne Cleric Samir Abu Hamza*, THE AUSTRALIAN (Jan. 22, 2009), <http://www.theaustralian.com.au/news/wife-hitting-lecture-taken-out-of-context/story-e6fgr6of-111118630373>. Statements such as this clearly deserve our revulsion and indignation.

unprepared to make critical comments or give warnings about Islam and about Moslems in Australia or abroad, however well-based those comments or warnings would be. In particular, in a world where Moslem terrorists are active, and where threats are made by them against Australia, and where some Moslem leaders in Australia express sympathy with terrorists, the ability of Australia to defend themselves and their interests is seriously diminished.⁸⁶

VII. WHY RELIGIONS ARE NOT EQUAL IN THE RECOGNITION OF BASIC HUMAN RIGHTS

What a person believes has a direct influence over what he or she becomes, and the same must be applied to his or her society. Culture is created as an expression of beliefs, and the values a society holds is dependent upon its people's religious views. For Rex M. Rogers, religion is the primary source of culture, because culture is basically "religion externalized."⁸⁷ Thus, T.S. Elliot famously described culture as a "lived religion."⁸⁸ Accordingly, if law is the structural framework holding a society together, then every law must be based on a "religious worldview" that inescapably influences the government, education, economics, and so forth.

Because of its postmodern underpinnings, religious vilification laws, such as the RRTA, seem to uphold the rather incredible premise of moral equivalence between all religions, so that no religious ideas or practices deserve to be strongly criticized and/or repudiated. In reality, different religions uphold different values and produce rather different kinds of society. Such differences, argues Dr. Durie, "extend to understandings of slavery, cast, marriage (e.g., monogamy, divorce, polygamy), the death penalty, euthanasia, the distribution of wealth, sexual politics, abortion, attitudes to truth, the nature of political representation, the whole legal system, and warfare. Treating religions as merely a matter of identity is a recipe for confusion."⁸⁹

86. Spry, *supra* note 58, at 65.

87. ROGERS, *supra* note 49, at 48.

88. T.S. ELLIOT, NOTES TOWARD A DEFINITION OF CULTURE 30 (1949).

89. Mark Durie, Notes on the Victorian Racial and Religious Tolerance Act (2001), Address at Seminar on Religious Tolerance Laws of the Christian Legal Society of Victoria (June 2, 2005).

In terms of our Western values and traditions, one must consider how Christianity played a significant role in the origins and development of liberal democracy, individual rights, and the rule of law. These values and traditions are associated with Christian principles, and to deny these principles results in a diminished understanding of our own culture and the values that underpin it. Under this Judeo-Christian framework, when citizens in the West are said to be “endowed by their Creator with certain unalienable rights,” they are entitled not to a “theocracy” but rather to the preservation of these basic rights and freedoms, no matter their ideological or religious convictions. Conversely, Thomas Jefferson asked rhetorically: “[How] [c]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?”⁹⁰ Statements such as these had an undeniable impact on the development of Western democracy. According to Sanford Lakoff, who is Emeritus Professor of Political Theory at the University of California, San Diego,

The Christian teaching with the greatest implications for democracy is the belief that because humanity is created in the image of God, all human beings are of equal worth in the sight of God. Along with the Greek Stoic belief in equality as a reflection of the universal capacity for reason, this belief shaped an emerging democratic consciousness, as Alexis de Tocqueville noted when he observed in the introduction to his study of democracy in America that Christianity, which has declared all men equal in the sight of God, cannot hesitate to acknowledge all citizens equal before the law.⁹¹

Every year a non-governmental institution called Freedom House organizes a survey on the situation of democracy and human rights throughout the world. These surveys appear to indicate that the denial of the broadest range of human rights comes from Marxist-communist and Muslim-majority countries: “These worse-rated countries represent a narrow range of systems of cultures.”⁹² The

90. R.J. RUSHDOONY, *THE POLITICS OF GUILT AND PITY* 135 (1978).

91. SANDORF LAKOFF, *DEMOCRACY: HISTORY, THEORY, PRACTICE* 90 (1996).

92. *Freedom in the World 2012: The Arab Uprisings and their Global Repercussions*, FREEDOM HOUSE (2012), http://www.freedomhouse.org/sites/default/files/FIW%202012%20Booklet_0.

worst violators of human rights are North Korea, Turkmenistan, Uzbekistan, Equatorial Guinea, Eritrea, Saudi Arabia, Syria, Somalia, and Tibet (under Chinese jurisdiction).⁹³ Because of this, it is possible that the majority ideologies in these countries are not completely democratic, and it is important to openly discuss the reasons for this.

In *The Price of Freedom Denied*, Brian J. Grim and Roger Finke examine the face of resurgent religious fundamentalism and debate about the place of religion in the world. Perhaps the most controversial finding is that in majority-Muslim countries “religious persecution is reported in 100 percent of cases.”⁹⁴ As they explain, “Religious persecution is not only more prevalent in Muslim-majority countries, but it also generally occurs at a more severe level.”⁹⁵ In these countries, says Paul Marshall, even Muslims themselves may be persecuted if they do not endorse the official interpretation of Islam: “Sunni, Shia and Sufi Muslims may be persecuted for differing from the version of Islam promulgated by locally hegemonic religious authorities. . . . Iran represses Sunnis and Suffis. In Egypt, Shia leaders have been imprisoned and tortured.”⁹⁶

VIII. THE TROUBLE WITH “MULTICULTURAL DEMOCRACY”

Not so long after the verdict against the two pastors was announced, a spokeswoman for the Victorian Premier was found stating that the RRTA was working as it should and there’s nothing to suggest that this is a bad law.⁹⁷ If the government of Victoria really believes the law is working well regardless of such outcomes, then one may assume that these outcomes were not entirely

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93. *Worst of the Worst 2012: The World’s Most Repressive Societies*, FREEDOM HOUSE (2012), <http://www.freedomhouse.org/report/special-reports/worst-worst-2012-worlds-most-repressive-societies>.

94. BRIAN J. GRIM & ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE 21ST CENTURY* 21 (2011).

95. *Id.* at 169.

96. Marshall, *supra* note 75.

97. Farrah Tomazin, *Victoria’s Vilification Act Easy to Abuse: Carr*, THE AGE (June 23, 2005), <http://www.theage.com.au/news/national/victorias-vilification-act-easy-to-abuse-carr/2005/06/22/1119321792051.html>.

unintended. What would the purpose behind such religious vilification law therefore be?

Prior to the enactment of the Victorian legislation, in a message printed in a Discussion Paper, the then Labor Premier Steve Bracks declared: "Victoria's most multicultural state and the diversity of its people is a great asset. Respect for this cultural diversity is vitally important to our community."⁹⁸ This being so, in reading the preamble of the RRTA, one finds the important statement that the legislation has been designed to advance a so-called "multicultural democracy."⁹⁹

Naturally, it is not hard to see the internal tensions within these ideas of "multiculturalism" and "democracy." A true democracy should be committed not so much to "cultural diversity," but instead to the status of the citizen as a human being endowed with basic rights to life, liberty, and property. And yet, securing the conditions of a multicultural society *and* preserving the basic rights of the individual are potentially competing principles that may have to be traded off against each other in each particular case.

In his seminal work on how democracies effectively work, Dr. Robert Dahl, Emeritus Professor of Political Science at Yale University, identified the underlying conditions in a country that would be favorable to the stability of democratic institutions. "Where these conditions are weakly absent democracy is unlikely to exist, or if it does, its existence is likely to be precarious."¹⁰⁰ Among conditions identified as "essential for the stability of democracy," he identified "weak sub-cultural pluralism" and "democratic beliefs and political culture."¹⁰¹ According to Professor Dahl, "democratic political institutions are more likely to develop and endure in a country that is culturally fairly homogeneous and less likely in a country with sharply differentiated and conflicting subcultures."¹⁰² Conversely, "cultural diversity," he argued, threatens to generate

98. Jenny Stokes, *Religious Vilification Laws in Victoria – Background to the Law and Cases*, SALT SHAKERS (June 2005), http://www.saltshakers.org.au/images/stories/attachments/252_300269_ARTICLES_ON_VILIFICATION.pdf.

99. *See Racial and Religious Tolerance Act 2001* (Vic) s 4(1)(a) (Austl.).

100. ROBERT A. DAHL, *ON DEMOCRACY* 147 (1998).

101. *Id.*

102. *Id.* at 150–51.

intractable social conflicts whereby democratic institutions would be simply impossible to be maintained. The following passage in his seminal *On Democracy* explains the potentially adverse consequences of state-sponsored “multiculturalism”:

Distinctive cultures are often formed around differences in language, religion, race, ethnic identity, and sometimes ideology. Members share a common identity and emotional ties; they sharply distinguish “us” from “them.” They turn toward other members of their group for personal relationships: friends, companions, marriage partners, neighbors, guests. They often engage in ceremonies and rituals that, among other things, define their group boundaries. In all these ways and others, a culture may become virtually a “way of life” for its members, a country within a country; a nation within a nation. In this case society is, so to speak, vertically stratified.

Hence, Professor Dahl concludes:

Cultural conflicts can erupt into the political arena, and typically they do: over religion, language, and dress codes in schools, for example; . . . or discriminatory practices by one group against another; or whether the government should support religion or religious institutions, and if so, which ones and in what ways; or practices by one group that another finds deeply offensive and wishes to prohibit, such as . . . cow slaughter, or “indecent” dress’, or how and whether territorial and political boundaries should be adapted to fit group desires and demands. And so on. And on. . . . Issues like these pose a special problem for democracy. Adherents of a particular culture often view their political demands as matters of principle, deep religious or quasi-religious conviction, cultural preservation, or group survival. As a consequence, they consider their demands too crucial to allow for compromise. They are nonnegotiable. Yet under a peaceful democratic process, settling political conflicts generally requires negotiation, conciliation, compromise.¹⁰³

What Professor Dahl suggests is that some religious allegiances may be non-negotiable, whereas democracy requires otherwise. This being the case, a more successful and stable democratic society “cannot be radically multicultural but depends for its successful

103. *Id.* at 150.

renewal across the generations on an undergirding culture that is held in common.”¹⁰⁴ This common culture, as John Gray points out, “needs not encompass a shared religion and it certainly need not to presuppose ethnic homogeneity, but it does demand widespread acceptance of certain norms and conventions of behavior and, in our times, it typically expressed a shared sense of nationality.”¹⁰⁵ By contrast, it would appear that locking people into enclaves of religion or ethnicity will not necessarily advance the inherent values of democracy and the rule of law.¹⁰⁶ After all, a basic precondition for democratic participation is precisely that all citizens must share common democratic values, and that they must be able to communicate with others in the common language of their other fellow citizens.

In addition, it is always important to restate that democracy itself is as much a socio-political achievement as it is a legal-institutional one. In other words, democracy depends on cultural values that are historically linked to cultural traditions that are transmitted to citizens from generation to generation.¹⁰⁷ This is all obviously very important, although in *Considerations on Representative Government*, John Stuart Mill reminds us that some peoples may be culturally unqualified to accept the deeper moral implications of living under a democratic government.¹⁰⁸ Mill developed his critical argument on

104. JOHN GRAY, ENLIGHTENMENT’S WAKE 36 (2007).

105. *Id.*

106. Pascal Bruckner offers this insightful, though rather polemical, criticism of multiculturalism:

[U]nder the cover of respecting cultural or religious differences (the basic credo of multiculturalism), individuals are locked into an ethnic or racial definition, cast back into the trap from which we were trying to free them. Their good progressive friends set blacks and Arabs, forever prisoners of their history, back into the context of their former domination and subject them to ethnic chauvinism. As during the colonial era, they are put under house arrest in their skins, in their origins. By a perverse dialectic, the prejudices that were to be eradicated are reinforced: we can no longer see others as equals but must see them as . . . victims of perpetual oppression whose past ordeals interest us more than their present merits.

BRUCKNER, *supra* note 84, at 145.

107. Jeffrie G. Murphy reminds us that “[v]alues come to us trailing their historical past; and when we attempt to cut all [cultural] links to that past we risk cutting the life lines on which those values essentially depend.” Jeffrie Murphy, *Constitutionalism, Moral Skepticism, and Religious Belief*, in CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION (Alan S. Rosenbaum ed., 1988).

108. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 329 (1952).

the basis of his personal understanding that the realization of democratic government is strongly “determined by social circumstances.”¹⁰⁹ He considered that these circumstances are considerably malleable and could therefore be changed for either better or worse.¹¹⁰ Mill also believed that people could be taught to behave in a democratic manner.¹¹¹ And yet, he kept insisting that some patterns of cultural behavior are essential in determining the realization of democracy. As Mill explained:

The people for whom the form of government is intended must be willing to accept it; or at least not so unwilling as to oppose an insurmountable obstacle to its establishment. . . . A rude people . . . may be unable to practice the forbearance which . . . representative government demands: their passions may be too violent, or their personal pride too exacting, to forego private conflict, and leave to the laws the avenging of their real or supposed wrongs.¹¹²

This brings us to the matter of multiculturalism. An idea that started out in the sixties and early seventies, multiculturalism initially had the reasonable goal of including minority groups in Western societies. Nowadays, it is difficult to talk candidly about such an idea since the multicultural project has become no longer a fair understanding of other cultures, but a postmodern ideology aiming at the dilution of Western values and traditions.¹¹³

109. *Id.* at 331.

110. *Id.*

111. *Id.*

112. *Id.* at 329.

113. Irving Kristol argues:

It is in its most intense and extreme form that multiculturalism . . . is propagated by a coalition of nationalist-racist blacks, radical feminists, gays and lesbians, and handful of aspiring demagogues who claim to present various ethnic minorities. . . . This coalition’s multiculturalism is an ideology whose educational program is subordinated to a political program that is, above all, anti-American and anti-Western. It’s no exaggeration to say that these campus radicals (professors as well as students), having given up on the ‘class struggle’—the American workers all being conscientious objectors—have now moved to an agenda of ethnic-racial conflict. The agenda, in its educational dimension, has as its explicit purpose to induce the minds and sensibilities of minority students a ‘Third World consciousness’—that is the very phrase they use. In practice, this means an effort to persuade minority students to be contemptuous of and hostile to America and Western civilization as a whole, interpreted as an age-old system of oppression, colonialism, and exploitation. What

According to Professor Huntington, multiculturalism has now become an “anti-Western ideology” opposed to “Eurocentric concepts of democratic principles, culture, and identity.”¹¹⁴ Instead of attempting to globalize Western cultural values, such as universal human rights and individual freedom, such values are regarded as “ethnocentric products of Western history.”

In place of Western universalism, multiculturalists tell us to accept and embrace cultural relativism. Although the concept of cultural relativism preserves a certain gloss of tolerance and respect for other cultures, such a plea for acceptance and open-mindedness ceases when it comes to Western culture, whose history multiculturalists tend to “regard as little more than a crime against the rest of humanity. We cannot judge other cultures but we must condemn our own.”¹¹⁵ Indeed, the same multiculturalists who demand our unconditional respect for *any* existing culture, tend to exhibit a blatant disrespect for our own values and traditions.¹¹⁶ Such multiculturalism stands for a form of anti-Western ideology that promotes moral relativism and refuses to admit that culture (at the extremes) produces either a democratic society or social oppression, for instance, against women and minorities.¹¹⁷

There is also little doubt that multiculturalism may pose a considerable challenge to the idea of national identity. Multiculturalism elevates racial, ethnic, gender, religious, and other sub-national identities over common national identity and equal rights for *all* citizens. As advocated by some elite elements and special-interest groups, multiculturalism favors a new form of

these radicals blandly call multiculturalism is as much a ‘war against the West’ as Nazism and Stalinism ever were.

IRVING KRISTOL, *NEOCONSERVATISM: THE AUTOBIOGRAPHY OF AN IDEA* 52 (1995).

114. SAMUEL P. HUNTINGTON, *WHO ARE WE? AMERICA’S GREAT DEBATE* 173 (2004).

115. Keith Windschuttle, *September 11 and the End of Ideology*, in *BLAMING OURSELVES: SEPTEMBER 11 AND THE AGONY OF THE LEFT* 198 (Imre Salusinszky & Gregory Melleuish eds., 2002).

116. Hence, writes Ravi Zacharias, Christianity has become a “free game for ridicule and analysis by social critics, and is afforded no protection from hate and hostility by our so-called multicultural society.” RAVI ZACHARIAS, *DELIVER US FROM EVIL: RESTORING THE SOUL IN A DISINTEGRATING CULTURE* 214 (1996).

117. For a broad analysis of how culture shapes values such as democracy, economic development and human rights, see LAWRENCE E. HARRISON & SAMUEL P. HUNTINGTON, *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* (2000).

cultural apartheid, or social fragmentation, whereby ethnic differences are intensified and the social factors which have united the people and promoted immigrant assimilation are weakened. This is why multicultural policies have become a major factor for the increased tendency of some immigrant groups to actually maintain their primary loyalty to their original cultural identities, rather than attempt to embrace the cultural identity of their new nation. As a result of such multicultural policies, Roger Scruton comments, “[a]ll criticism of minority cultures is censured out of public debate, and new-comers quickly conclude that it is possible to reside in a . . . state as an antagonist and still enjoy all the rights and privileges that are the reward of citizenship.”¹¹⁸

Naturally, some may claim that those immigrants would be the first to support state-sponsored multiculturalism. However, it is also possible to suggest that the main impetus for multiculturalism does not come from the immigrants but from the local intellectual elite as well as the more powerful individuals within the cultural groups.¹¹⁹ Apart from these privileged individuals, common people gain very little from the amorphous atmosphere of multiculturalism save bewilderment and the loss of any sense of common national identity. Scruton thus explains that such loss of national identity brought about by multiculturalism has been causing some Western nations to fragment into small enclaves of ethnicity. “If people come from immigrant backgrounds that preserve the memory of a religious law, they will often revert to a religious experience of membership, and define themselves in opposition to the territorial jurisdiction by which they are ostensibly governed.”¹²⁰

118. ROGER SCRUTON, *THE WEST AND THE REST: GLOBALIZATION AND THE TERRORIST THREAT* 63 (2002).

119. According to Tammy Bruce:

Framing arguments about race as arguments about culture has the additional advantage for the Left of *removing the individual from the scene entirely*. Ironically, it also reinforces what is supposedly being resisted: the isolation of people because of their race. By defining society not as an entity made up of individual people but as a collection of cultures—such as white culture, black culture, Hispanic culture—the Left effectively isolates us, whether we like it or not, into special-interest groups. The culture has the identity, eclipsing the individual. We’re no longer individuals with unique minds and talents; we’re defined instead by the color of our skin, by the country in which we were born, by the religion we practice.

TAMMY BRUCE, *THE NEW THOUGHT POLICE* 166 (2001).

120. SCRUTON, *supra* note 118, at 68.

For example, in Britain, a study commissioned by Policy Exchange has found that multicultural policies have alienated entire generations of young Muslims.¹²¹ It has made them increasingly more radical and anti-Western—much more so than their parents' generation.¹²² This study also reveals that four out of ten young British Muslims desire to live under Sharia law and that they support punishment by death for Muslims who convert to another religion. Furthermore, thirteen percent of all young British Muslims have expressed a sincere admiration of terrorist organizations such as Hamas and Hezbollah, which are prepared to “fight the West.” According to Dr. Munira Mirza, the scholar who conducted the survey, “the emergence of a strong Muslim identity in Britain is, in part, a result of multicultural policies implemented since the 1980s which have emphasized difference at the expense of shared national identity and divided people along ethnic, religious and cultural lines.”¹²³

121. *Multiculturalism Drives Young Muslims to Shun British Values*, DAILY MAIL (Jan. 29, 2007), <http://www.dailymail.co.uk/news/article-432075/Multiculturalism-drives-young-Muslims-shun-British-values.html#>.

122. Wolfgang Kasper explains how multiculturalism may contribute to the radicalization of the children and grandchildren of immigrants:

The task of integrating immigrants does not stop with the first generation, in particular if they hail from non-Western origins. The first generation typically focuses on getting on within the existing system, but the second and third generations tend to challenge the existing regime. We have already observed a wave of multiculturalism and the politicization of cultural change. Playing the multicultural card brought political advantage to the leaders who promoted the vision of multiculturalism, whether they were spokesmen for immigrant groups or politicians who sought migrant-group support in elections. Leaders with more traditional theories about government and social harmony have opposed the new multiculturalism.

WOLFGANG KASPER, *THE MERITS OF WESTERN CIVILISATION: AN INTRODUCTION* 73 (2011).

123. See Murphy, *supra* note 107. As further evidence that part of the Muslim population in Britain has been radicalized and unwilling to accept the norms that rule a democratic society, just after Ayatollah Khomeini on February 14, 1989, issued his *fatwa* condemning to death Salman Rushdie for writing *Satanic Verses* (1988), there were many British Muslims who wished to carry the death sentence against the writer. John Gray comments:

The evidence of the Rushdie affair is that a minority of fundamentalist Muslims are unwilling to accept the norms that govern civil society in Britain. Here a policy of toleration must be willing to be repressive—to arrest and charge those who have made death threats against the writer or those associated with him. Toleration does not mandate turning a blind eye on those who flout the practices of freedom of expression that are among the central defining elements of liberal society in Britain: it mandates their suppression. . . . Difference of religious belief and of irreligion, of

The media has recently reported a violent protest on the streets of Sydney by hundreds of hardcore Muslims who attacked the police and were equipped with banners and posters with slogans such as “Sharia will dominate the world” and “Behead all those who insult the Prophet.”¹²⁴ These extremists may live in Australia but they are “militant Muslims above all else, above all reason, above all restraint, and above [the] law[.]”¹²⁵ Indeed, the Sydney affair seems to indicate that a minority of Muslims are unwilling to accept the norms that govern civil society in Australia. Of course, these radical religionists would have more to think about if we resisted their demands rather than caving to them. Attempting to appease the radicals only reinforces their bigotry and hatred toward the West.¹²⁶ As John Gray points out, “toleration does not mandate turning a blind eye on those who flout the practices of freedom of expression that are among the central defining elements of liberal society in [Australia]: it mandates their suppression.”¹²⁷ Instead, some Australian intellectuals and politicians are quite inclined to respond to such events, or just the threat of violence, with further appeasement and self-censorship.

One of the key questions facing Western societies is how Muslims will adapt to living as minority communities in non-Muslim polities. Abdullah Saeed, who is Sultan of Oman Professor of Arab and Islamic Studies at the University of Melbourne, sees Muslim views on living in the West as comprising three different categories.

conceptions of the good and of ethnic inheritance may be many and significant, and yet the inhabitants of a country may yet be recognizably practitioners of a shared form of life. The kind of diversity that is incompatible with civil society in Britain is that which rejects the constitutive practices that give it its identity. Central among these are freedom of expression and its precondition the rule of law. Cultural traditions that repudiate these practices cannot be objects of toleration for liberal civil society in Britain or anywhere else.

GRAY, *supra* note 104, at 8.

124. *Mother of Toddler Holding Up ‘Beheading’ Poster at Sydney Protest Turns Herself In*, THE AUSTRALIAN (Sept. 18, 2012), <http://www.theaustralian.com.au/news/nation/mother-of-toddler-holding-up-beheading-poster-at-sydney-protest-turns-herself-in/story-e6frg6nf-1226476342768>.

125. Mervyn F. Bendle, *Violent Islamism Erupts on the Streets of Sydney*, NEWS WKLY. (Sept. 29, 2012), <http://www.newsweek.com.au/article.php?id=5334>.

126. IBN WARRAQ, *WHY THE WEST IS BEST: A MUSLIM APOSTATE’S DEFENSE OF LIBERAL DEMOCRACY* 211–12 (2011).

127. GRAY, *supra* note 104, at 37.

First, there are those Muslims who think “a Muslim cannot be bound by a national constitution that allows interest, alcohol, and [any] other behavior which contradicts Islamic teachings.”¹²⁸ Second, there are those who are still “undecided as to whether they want to be full members of Western societies.”¹²⁹ Finally, there are Muslims who are quite happy to live in Western countries, because they believe that, in a certain way, the Western legal systems are already “Islamic” insofar as they accept certain Islamic notions of justice and morality and allow them to exercise their basic religious duties.¹³⁰ Saeed believes that most Muslims living in Australia would fall into the third category: they believe the country’s “secular law” can be tolerated in their daily lives, “provided . . . that the law of the land supports [Islamic] notions of justice . . . and allows Muslims religious freedom to practice their fundamental beliefs.”¹³¹

Naturally, there are numerous potential points of tension in placing religion as a pre-condition for a citizen’s loyalty to the “secular law” of a nation. Australia and other Western countries are facing two serious threats. The first threat is extra-legal intimidation of a kind already endemic in the Islamic world and increasing in Europe. Australians, including many in conservative circles, have been held back from such an effort to help Muslims examine their own culture and beliefs out of fear, because they think it is much too dangerous to criticize the beliefs of those who might kill in the name of their god. The second threat comes from the criminalization of criticizing radical Islam through the encroachment of *de facto* blasphemy laws. Indeed, one of the most obvious efforts to appease radical Islam has been the enforcement of draconian laws on the grounds of “religious tolerance.” The Organization of Islamic Cooperation is currently taking steps toward outlawing “defamation of religion” (i.e., Islam) worldwide, and these efforts have, in effect, been abetted by Australian politicians under the guise of suppressing “hate speech.”¹³²

128. Abdullah Saeed, *Reflections on the Establishment of Shari’a Courts in Australia*, in SHARI’A IN THE WEST 233 (Rex Ahdar & Nicholas Aroney eds., 2010).

129. *Id.*

130. *Id.* at 235.

131. *Id.* at 233.

132. WARRAQ, *supra* note 126, at 211.

Rather than encouraging religious extremists in their efforts to legally stifle criticism and debate, Western authorities should firmly defend freedom of speech and freedom of expression. And yet, there is an ongoing demand for governments to provide “special rights” to religious groups on the basis of multiculturalism.¹³³ These groups would have their own “societal cultures” that, according to Will Kymlicka, provide their “members with meaningful ways to life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.”¹³⁴ Because cultures would play such a pervasive role in the lives of their individual members, multiculturalists claim that these groups should be accorded special rights or privileges—otherwise their minority status would be endangered by the dominant culture.¹³⁵

133. Professor Richard Thompson Ford of Stanford Law School comments on the grant of special rights to minority groups by multiculturalists:

[M]ulticulturalists sought to extend civil rights laws to ‘cultural difference’ in the 1980s and 1990s. In its cruder iterations, legal multiculturalism held that racial groups were defined by their distinctive cultural norms and practices: for example, black culture comprised Ebonics, ‘colored people’s time,’ hip-hop clothing styles, braided hairstyles, and dreadlocks. It seemed to follow that discrimination on the basis of these styles, affectations, and habits was as bad as discrimination on the basis of race. Legal multiculturalism drew on a strong psychotherapeutic stand in civil rights activism, which focused less on tangible economic or political injury than on self-esteem and dignity. Multiculturalists insisted that because minority cultural practices were essential to individual identity and self-worth, a society that favored dominant cultural norms and practices was not only narrow but unjust. Multiculturalists were among the first to grapple with the challenges of porous national borders, global mobility, and an ethnically diverse society, but the civil rights approach to these challenges supplied simplistic and formulaic answers to complex questions. The application of civil rights model to ‘culture’ treated contestable political conflicts over norms and morality and struggles over the distribution of resources as civil rights violations.”

RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* 18 (2011).

134. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 76 (1995).

135. See Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 71 *SOC. RES.* 529–48 (1994). To be fair, some multiculturalists do not claim that cultural groups should have special rights, but rather that such groups—even illiberal ones that violate their individual members’ rights, requiring them to conform to group beliefs or norms—have the right to be “left alone” in a liberal society, which of course is another highly controversial postulation. Chandran Kukathas, *Are There any Cultural Rights?*, 20(1) *POL. THEORY* 105–39 (1992).

But there are numerous and serious problems with the concept of group rights as advocated by multiculturalists and affirmative-action activists. Rights are not a single indivisible entity. They can and do conflict. Too much emphasis on group rights may easily result in the reduction of basic rights to some individuals. Indeed, group rights that determine a person's rights on the basis of belonging to any ethnic, cultural, or religious group may eventually reduce the rights of the individual in that these rights stem directly from the group. If the individual does not belong to the group, his or her rights are automatically reduced or curtailed.¹³⁶ Furthermore, in prioritizing group rights at the expense of individual rights, multicultural policies tend to facilitate the oppression of women and other less powerful members of these different social groups.¹³⁷ Of course, special rights or affirmative action to special groups particularly ignore the basic fact that, with many of us living in Western pluralistic societies, our own ethnic inheritance is actually quite complex. In our pluralistic societies, John Gray correctly notes:

[Multiculturalist] policies which result in the creation of group rights are inevitably infected with arbitrariness and consequent inequity, since the groups selected for privileging are arbitrary, as is the determination of who belongs to which group. The nemesis of such policies . . . is a sort of reverse apartheid, in which people's opportunities and entitlements are decided by the morally arbitrary fact of ethnic origins rather than by their deserts or needs.¹³⁸

IX. HOW THE PRESENT "CULTURE OF OFFENDEDNESS" THREATENS OUR FREEDOM OF SPEECH

Given the democratic imperative that all citizens should be allowed to speak openly and publicly about their convictions,

136. ALVIN SCHMIDT, *HOW CHRISTIANITY CHANGED THE WORLD* 259 (2004).

137. As Ibn Warraq points out, multiculturalism often ends up providing cover for the most reactionary beliefs and practices of other cultures, rather than encouraging the more liberal strands to develop. An attentive ear is given mostly to the community elders and traditionalists, who often are the least educated and most determined to preserve their power in the status quo. Thus we essentially defend the most oppressive beliefs and practices of a minority culture, ignoring the denial of rights to its women or children.

WARRAQ, *supra* note 126, at 207.

138. GRAY, *supra* note 104, at 35.

religious or otherwise, the current notion of offendedness as defined by religious vilification laws is dangerously emotive. Those who now claim to be offended are speaking of an emotional state on which they claim to have received a real or perceived insult to their belief system. In such a case, “being offended does not necessarily involve any real harm but points instead to the fact that the mere presence of such an argument, image, or symbol evokes an emotional response of offendedness.”¹³⁹ Historically, however, the idea of being offended meant something quite different. To be offended implied something more than just being strongly challenged in our core ideas or beliefs. Today, however, as Dr. Albert Mohler Jr. points out, “desperate straits are no longer required in order for an individual or group to claim the emotional status of offendedness. All that is required is often the vaguest notion of emotional distaste at what another has said, done, proposed, or presented.”¹⁴⁰

The meaning of “tolerance” has suffered a remarkable transformation in our postmodern societies. Tolerance once meant to accept other people saying or doing what you personally do not agree with. For example, Hugo Grotius advocated religious tolerance not on the basis of moral relativism, but because, in his opinion, there is no other way to defend truth but by truth itself.¹⁴¹ Likewise, John Locke—and most of the great thinkers in the liberal tradition—did not argue for religious tolerance because of sympathy to other beliefs and practices that should be tolerated. Rather, he proposed to tolerate other religious beliefs, which, in his opinion, “are false and absurd.”¹⁴² In other words, Locke thought that everyone is *individually* responsible for finding out “the narrow way and the strait gate that leads to heaven.”¹⁴³ Although he believed that there is “only one way to heaven,” Locke argued that “a man cannot be forced to be saved,”¹⁴⁴ so that “religious truth must be left to individual conscience and individual discernment.”¹⁴⁵

139. R. ALBERT MOHLER JR., *CULTURE SHIFT: ENGAGING CURRENT ISSUES WITH TIMELESS TRUTH* 30–31 (2008).

140. *Id.* at 31.

141. HUGO GROTIUS, *THE TRUTH OF THE CHRISTIAN RELIGION* 86, 87 (2012).

142. JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 41 (1991).

143. *Id.* at 19.

144. *Id.* at 32.

145. JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991* at 98 (1993).

Today, however, tolerance has been reinterpreted as a psychological attitude that conveys empathy and perhaps even tacit consent.¹⁴⁶ In contemporary public discussion, argues Frank Furedi, “the connection between tolerance and judgment is in danger of being lost due to the current cultural obsession with being non-judgmental.”¹⁴⁷ Of course, when the meaning of “tolerance” can be distorted to such a manner that it now seems to represent “a superficial signifier of acceptance of affirmation of anyone and everyone,” such “tolerance” has now become a vice rather than a virtue.¹⁴⁸ After all, as Furedi also comments,

The act of tolerance demands reflection, restraint and a respect for the right of other people to find their way to their own truth. . . . The most troubling consequence of the rhetorical transformation of this term has been its disassociation from discrimination and judgment. When tolerance acquires the status of a default response connoting approval, people are protected from troubling themselves with the challenge of engaging with moral dilemmas.¹⁴⁹

The government of every democratic society has a particular responsibility to protect free speech and to resist the present “culture of offendedness.” Such culture threatens to shut down all significant public discourse. Of course, the right of citizens to speak publicly about their innermost convictions implies that the adherents of other convictions must be equally free to present their arguments in an equally public manner. This is the basic cost of living in a true democracy—a point made by Salman Rushdie, the British novelist who was put under an Islamic death sentence because he insulted Muslim sensibilities:

The idea that any kind of free society can be constructed in which people will never be offended or insulted is absurd. So too is the notion that people should have the right to call on the law to defend them against being offended or insulted. A fundamental decision needs to be made: Do we want to live in a free society or not? Democracy is not a tea party where people sit around making

146. Frank Furedi, *On Tolerance*, 28 POL. 30, 32 (2012).

147. *Id.*

148. *Id.* at 31.

149. *Id.* at 32.

polite conversation. In democracies people get extremely upset with each other. They argue vehemently against each other's positions.¹⁵⁰

Rushdie goes on to conclude:

People have the fundamental right to take an argument to the point where somebody is offended by what they say. It's no trick to support the free speech of somebody you agree with or to whose opinion you are indifferent. The defense of free speech begins at the point where people say something you can't stand. If you can't defend their right to say it, then you don't believe in free speech. You only believe in free speech as long as it doesn't get up your nose.¹⁵¹

In a democratic society the law should never create a right for people not to feel offended. The construction of such a right means the end of free speech and the free exchange of ideas.¹⁵² And yet, vilification laws, as mentioned above, are designed precisely to promote this sort of "tolerance" that penalizes any strong disapproval of a person's religious beliefs.¹⁵³ Given the ongoing atmosphere of fear and intimidation that such anti-discrimination laws have created, it is not uncommon to find discerning Australians who feel afraid of voicing any criticism of someone's beliefs.¹⁵⁴ Of course, nobody living in a democratic society should really expect to

150. Salman Rushdie, *Defend the Right to Be Offended*, OPENDEMOCRACY (Feb. 7, 2005), http://www.opendemocracy.net/faith-europe_islam/article_2331.jsp.

151. *Id.*

152. John Stuart Mill explained why the suppression of free speech harms not only the speaker but all of humanity:

But the peculiar evil of silencing the expression of opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error . . . We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.

JOHN STUART MILL, ON LIBERTY 33, 41 (2nd ed. 1859).

153. Religious vilification laws can be used to fuel more home-grown religious radicalism. Indeed, the tactics of intimidating and thereby silencing writers and media outlets has been commonly adopted by Islamists in Western societies.

154. ALVIN J. SCHMIDT, THE GREAT DIVIDE: THE FAILURE OF ISLAM AND THE TRIUMPH OF THE WEST 247 (2004).

be exempt from the possibility of facing strong criticism. As the European Court of Human Rights noted,

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others by doctrines hostile to their faith.¹⁵⁵

Naturally, it is quite understandable that a “multicultural society” would prefer people to moderate their claims and avoid comments that might cause offense to some religionists. But to require the citizens to have their speech controlled by the government in the name of tolerance is to go too far. Democracy involves the right of citizens to freely express their opinions without any fear or threat of punishment. As properly understood, democracy presupposes a process of open deliberation about ideas that requires freedom of unqualified speech. This kind of freedom is crucial in the area of religious debate, which

“represents the idea that a responsible citizenry must decide these questions of faith and truth themselves. Speech is the means by which we may offer counterarguments to compete against characterizations that we detest, and it forms the means by which communities can create their identities, even if it is in opposition to, or at the expense of, one another.”¹⁵⁶

In conclusion, freedom of speech is the oxygen that an authentic democracy breathes. As a basic tenet of democratic societies, freedom of speech involves a critical examination and assessment of belief systems in general so that citizens must be free to publicly criticize any culture or religion. Although a citizen’s opinion may not be the most politically correct, he or she still has the democratic right to expose it without the risk of persecution, even if his or her opinion is found to be an erring one. Above all, the right to the freedom to hold any religion should not become a right to freedom from one never being challenged about his or her religious beliefs. Conversely, any society that allows the government to create laws

155. *Otto-Preminger Inst. v Austria* (1995) 19 EHRR 34, 47 (Austl.).

156. Harrison, *supra* note 15, at 96.

that clamp down on the citizen's basic right to free speech has already started moving from authentic democracy to a less overtly or more disguised form of "elected dictatorship."

X. THE CONSTITUTIONAL INVALIDITY OF RELIGIOUS VILIFICATION LAWS

Besides Victoria, only two other Australian states have introduced religious vilification laws: Queensland and Tasmania. In Queensland, an amendment was passed to the Anti-Discrimination Act in 2001, which prohibits conduct that "incites hatred towards, serious contempt for, or severe ridicule."¹⁵⁷ This Act is divided into two parts and has a section on serious religious vilification that imposes fines and a six month prison term.¹⁵⁸

A case in Queensland decided under its vilification law relates to an election brochure published during the federal election campaign in 2011. Mr. Andrew Lamb, who ran as an independent candidate, published a brochure comparing the Bible and the Qur'an.¹⁵⁹ An injunction was applied by the Chairman of the Islamic Council of Queensland to the Anti-Discrimination Commission. The application was dismissed by President Sofronoff QC, who observed that

[o]ne result of acceding to the complainant's application to restrain further publication of the pamphlet would be to deny the voters of Moreton any further knowledge that Mr. Lamb holds views of this character. Although his holding those views may persuade some to vote for him, it is equally likely that this may persuade others to deny him their vote.¹⁶⁰

Thus he concluded: "In my view it is manifestly in the public interest that candidates' views on issues affecting the electorate be known."¹⁶¹

Whereas the Australian Constitution does not contain a comprehensive declaration of human rights, it does deal with some rights, and it also contains a few implied rights. Implied rights are

157. *Anti-Discrimination Amendment Act 2001* (Qld) (Austl.), available at <http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2001/01AC035.pdf>.

158. *Anti-Discrimination Amendment Act 2001* (Qld) ch 5A, s 131A (Austl.).

159. *Dean v Lamb* [2001] QADT 20 (Austl.), available at <http://www.austlii.edu.au/au/cases/qld/QADT/2001/20.html>.

160. *Id.*

161. *Id.*

those the High Court declared to exist even though they are not explicitly mentioned in the Constitution. As such, some rights and freedoms are deemed *implicit* in the basic law.¹⁶² Among these rights, the High Court determined that implied in the Constitution is a freedom of communication on political and public matters.¹⁶³ Accordingly, the court found an implied right to freedom of communication as a means of invalidating legislation on constitutional grounds.¹⁶⁴ This freedom operates as a restriction on federal and State legislative powers, creating a corresponding immunity from legislative control.¹⁶⁵ Furthermore, as Hanks, Gordon and Hill point out,

the Court has been prepared to take a relatively broad view of what constitutes protected political communication, given the origins of the freedom in the constitutional provisions pertaining to . . . representative and responsible government. The argument that the communication in question is far removed from federal politics rarely seems to interest the Court.¹⁶⁶

In *Nationwide News* (1992)¹⁶⁷ the majority of the High Court (Brennan, Deane, Toohey and Gaudron JJ) relied on an implied freedom of communication to strike down a Commonwealth law that made it an offence to make statements calculated to bring the Industrial Relations Commission or any of its members into disrepute.¹⁶⁸ The other Justices (Mason CJ, Dawson and McHugh JJ)

162. Of course, legal protection is given to rights against discrimination by statute law at both Commonwealth and State levels. *The Racial Discrimination Act 1975* (Cth) (Austl.), *Sex Discrimination Act 1984* (Cth) (Austl.), and *Disability Discrimination Act 1992* (Cth) (Austl.) prohibit discrimination on the stated grounds and offer a remedy where such discrimination occurs.

163. See *Nationwide News Pty Ltd. v Wills* (1992) 177 CLR 1 (Austl.); *Australian Capital Television Pty Ltd. v Commonwealth* (1992) 177 CLR 106 (Austl.); *Lange v Australian Broad. Corp.* (1997) 189 CLR 520 (Austl.); *Coleman v Power* (2004) 220 CLR 1 (Austl.).

164. See *Nationwide News Pty Ltd.* 177 CLR 1; *Australian Capital Television Pty Ltd.* 177 CLR 106.

165. *Lange* 189 CLR 520.

166. PETER HANKS, FRANCES GORDON & GRAEME HILL, *CONSTITUTIONAL LAW IN AUSTRALIA* 625 (2012). See, e.g., *Hogan v Hinch* (2011) 275 ALR 408, [48] (French CJ) [95], [99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell, JJ) (Austl.).

167. *Nationwide News Pty Ltd.* 177 CLR 1.

168. *Industrial Relations Act 1988* (Cth) s 199(1)(d)(ii) (Austl.). See *Nationwide News Pty Ltd.* 177 CLR at 52–53 (Brennan, J), 78–80 (Deane and Toohey, JJ), 95 (Gaudron, J).

struck down the law on other grounds.¹⁶⁹ In providing rationale for his decision, Brennan J stated that democracy implies “legal incidents” which are essential to its “effective maintenance.”¹⁷⁰ To sustain the democratic system required by the Australian Constitution, he concluded, “freedom of public discussion of political and economic matters is essential: it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.”¹⁷¹

Nationwide must be read in conjunction with *Australian Capital Television*¹⁷²—another landmark case involving defamation law, whereby the court further implied a freedom of communication in respect to political affairs as being derived from the system of representative democracy which the Constitution creates. The case involved a challenge to the validity of the *Political Broadcasts and Political Disclosures Act 1991*, which prohibited political advertisements on radio and television during election periods.¹⁷³ The question before the court was whether the Act was invalid as a contravention of an implied guarantee of freedom of communication. The majority (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) held that the Act contravened an implied guarantee of communication, at least in relation to public and political discussions.¹⁷⁴ Justice Brennan fully acknowledged such an implication but largely upheld the law on the grounds that it was proportionate to the legitimate aim of reducing corruption in the political process.¹⁷⁵ Only Justice Dawson rejected the concept.¹⁷⁶

169. These others members of the Court found the law invalid on the basis that it was not within power, the relevant power being the power incidental to § 51(xxxv), relying on substantially the same considerations as were taken into account by the members of the Court who relied on the implied freedom. See *Nationwide News Pty Ltd.* 177 CLR at 33–34 (Mason, CJ), 91 (Dawson, J), 103–05 (McHugh, J).

170. *Nationwide News Pty Ltd.* 177 CLR at 47 (Brennan, J).

171. *Id.* at ¶ 47 (Brennan, J).

172. *Australian Capital Television Pty Ltd. v Commonwealth* (1992) 177 CLR 106 (Austl.).

173. The *Political Broadcasts and Political Disclosures Act 1991* (Cth) (Austl.) had added Part IIID to the *Broadcasting Act 1942* (Cth) (Austl.). Section 95(a) prohibited political advertisements on radio or television during federal election periods. There were similar bans for Territory elections under section 95(c) and for State and local government elections under section 95(d).

174. *Australian Capital Television Pty Ltd.* 177 CLR at 133–46 (Mason, CJ), 75–76 (Deane and Toohey, JJ), 217 (Gaudron, J), 229–35 (McHugh, J).

175. *Id.* at 154, 159–61 (Brennan, J).

Justice Gaudron, for instance, described representative democracy as a fundamental part of the Australian Constitution, which necessarily entails “freedom of political discourse” as the communication not only between candidates and electors but also between the members of society generally.¹⁷⁷ Likewise, Chief Justice Mason held that freedom of communication (and discussion) in relation to public and political affairs is an indispensable element in democratic society, arguing for the “indivisibility” of freedom of communication as related to democratic issues:

Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community. . . . The concept of freedom to communicate with respect to public affairs and political discussion does not lend itself to subdivision. . . . The consequence is that the implied freedom of communication extends to all matters of public affairs and political discussion, notwithstanding that a particular matter at a given time might appear to have a primary or immediate connection with the affairs of a State, a local authority or a Territory and little or no connection with Commonwealth affairs.¹⁷⁸

In *Theophanous*¹⁷⁹ the High Court found an implied right that allows a defense to defamatory statements about persons engaged in public activity. The implied right was said to create a substantive defense in defamation proceedings. The case involved a statement made that was defamatory to a member of federal Parliament and former chairman of the Parliamentary Committee on Migration. He sued the newspaper for defamation because it published a letter to the editor that attacked his immigration policies and accused him of bias arising from his own ethnic background. The majority held that it was a defense to the statement to demonstrate that the letter had not been published recklessly and that the defendant did not know

176. *Id.* at 187.

177. *Id.* at 210 (Gaudron, J).

178. *Id.* at 138–42.

179. *Theophanous v Herald & Weekly Times Ltd.* (1994) 182 CLR 104 (Austl.).

the defamatory statement was false.¹⁸⁰ Furthermore, the Court also held that the implied freedom operates not only to invalidate federal statutes insofar as they unreasonably impair that freedom but also to impose a similar limit on the law of defamation whether embodied in the common law or in the statute law of the States.¹⁸¹

*Stephens v West Australian Newspapers Ltd.*¹⁸² involved a similar right to freedom of political communication. The West Australian newspaper claimed that six members of the state Legislative Council had wasted taxpayers' money by taking an overseas trip to investigate matters that could have been investigated in Western Australia. The trip was described as "a junket of mammoth proportions."¹⁸³ The six Legislative Councilors sued the newspaper for defamation, and the defendants pleaded a defense based on the implied freedom of political communication. The defamation was therefore related to state politicians and connected with a state issue, not a federal one. However, the majority (Mason CJ, Deane, Toohey and Gaudron, JJ) held that the implied constitutional right to freedom of political communication extends to all political discussion, including the discussion of state affairs.¹⁸⁴ This is important because it confirms that the implied right is something that the States also need to respect.

In *Lange v Australian Broadcasting Corp.*,¹⁸⁵ the High Court decided that the right to freedom of political communication encompasses information, opinions, and arguments concerning government and political matters that affect the people of Australia. The case involved some comments made by a television program about the plaintiff, a former Prime Minister of New Zealand, who brought an action for defamation against the Australian Broadcasting Corporation (ABC). The High Court held that the freedom of communication in relation to political and public affairs prevents the Commonwealth, States and Territories from introducing legislation that restricts communication on political matters, thus restating its original

180. *Id.* at 137 (Mason, CJ, Toohey and Gaudron, JJ).

181. *Id.* at 165 (Deane, J).

182. *Stephens v West Australian Newspapers Ltd.* (1994) 182 CLR 21 (Austl.).

183. *Id.*

184. *Id.* at 232 (Mason, CJ, Toohey and Gaudron, JJ).

185. *Lange v Australian Broad. Corp.* (1997) 189 CLR 520 (Austl.).

position that the Constitution conceives a system of representative government that implies a “freedom of communication on matters of government and politics.”¹⁸⁶

Finally, in *Coleman*,¹⁸⁷ the majority of the Court considered that a law cannot, consistent with the implied freedom of political communication, prohibit speech of an insulting nature without significant qualifications. Standing in the majority, Justice McHugh held that insofar as the insulting words are used in the course of political discussion, “an unqualified prohibition on their use cannot be justified as compatible with the implied freedom.”¹⁸⁸ His Honor also observed that “insults are a legitimate part of the political discussion protected by the Constitution.”¹⁸⁹ Similarly, Justices Gummow and Hayne reminded that “insult and invective have been employed in political communication since the time of Demosthenes.”¹⁹⁰ Justice Kirby concurred, arguing that Australia’s politics have regularly included “insult and emotion, calumny and invective,” and that the implied freedom must allow for this.¹⁹¹ Therefore, the implied freedom has been found to protect insults, abuse, and ridicule made in the process of political communication. Such means of communication are recognized by the Court as a legitimate part of the political discussion in Australia.

Naturally, debates relating to the role of religion in political discussion might “be robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest.”¹⁹² The natural implication is that no law can prohibit religious speech that involves insults, abuse and/or ridicule, to the extent where such a speech is political in character.¹⁹³ Of course, religious speech may also be political speech and when they are intertwined, “the decision in *Coleman* suggests that, absent qualifications of the kind relied upon by the majority, law which

186. *Id.* at 558–59.

187. *Coleman v Power* (2004) 220 CLR 1 (Austl.).

188. *Id.* at 54.

189. *Id.* at 54.

190. *Id.* at 78.

191. *Id.* at 91.

192. *Roberts v Bass* [2002] CLR 1, 62–63 (Austl.).

193. Nicholas Aroney, *The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation*, 34 FED. L. REV. 288, 313 (2006).

prohibits religious vilification will infringe the implied freedom of political communication.”¹⁹⁴

The discussion about the limits of state control over religious speech was directly raised in *Attorney-General (SA) v Corporation of Adelaide*, a case in which a 5-1 majority of the court upheld the validity of a local bylaw that prohibited the preaching in public space without a license from the city. In his majority ruling, Chief Justice French reminded that “Freedom of speech is a long-established common law freedom. It has been linked to the proper functioning of representative democracies and on that basis has informed the application of public interest considerations to claimed restraints upon publication of information.”¹⁹⁵ However, he thought that the by-law in question was constitutionally valid because “the only purpose of the impugned provisions is to prevent obstruction of roads.”¹⁹⁶ Justices Crennan and Kiefel concurred. So it was left only to Justice Heydon to dissent as he contended that those bylaws were invalid on the basis of the common law principle that vague and ambiguous provisions authorizing the making of such regulations are not sufficient to authorize a dramatic impairment of the freedom of speech.¹⁹⁷ Overall, the decision is quite significant when considering the constitutional validity of religious vilification laws. As Noel Foster points out,

the decision in the Adelaide Preachers case . . . affirms, in very strong terms, the value of freedom of speech as both a common law principle, and also a constitutional constraint on law-making. It seems fairly clear, as accepted in this case, that “religiously inspired” comments may be protected as sufficiently connected with “politics,” although no doubt there may be room to argue the matter in some future fact scenario.¹⁹⁸

194. *Id.*

195. *Attorney-General (SA) v Corp. of Adelaide* [2013] HCA 3, 43 (Austl.).

196. *Id.* at 140. In sum, those regulations were held valid as a “reasonable” restraint on political speech for the purposes of traffic control.

197. *Corp. of Adelaide* [2013] HCA at 146.

198. Noel Foster, *Anti-Vilification Laws and Freedom of Religion in Australia—Is Defamation Enough?*, Paper presented at the conference Justice, Mercy and Conviction: Perspectives on Law, Religion and Ethics, University of Adelaide School of Law (June 7–9, 2013).

On the other hand, in an article on the subject Professor Nicholas Aroney contends that, if properly construed, religious vilification laws could apply in “only very limited circumstances and for this reason are likely to be upheld as consistent with the implied freedom of political communication.”¹⁹⁹ Aroney points to the interpretation by Judge Morris, the President of the Victorian Civil and Administrative Tribunal, who ruled that the RRTA “does not stop a person from engaging in conduct that involves contempt for, or severe ridicule of, a religious belief or activity, provide this does not incite hatred against, serious contempt for, or revulsion or severe ridicule of another person or a class of persons on the grounds of such belief or activity.”²⁰⁰ Hence, Aroney concludes:

To the extent that religious vilification laws are interpreted with principles such as these in mind, they are likely to leave sufficient room for freedom of religious discussion that happens to be relevantly political. The implied freedom of political communication means that the prohibitions imposed by religious vilification laws need to be interpreted narrowly, and the exceptions construed widely, in order to leave room for political communication. At the same time, however, to the extent that religious vilification laws are not (or cannot) interpreted in this way, there is good reason to think that they are unconstitutional.²⁰¹

Judge Morris must indeed be congratulated on his ability to recognize that at issue is the right of citizens living in a democratic society to cite statements of truth without the risk of being persecuted and sued by others, and no matter how undesirable these facts might be to a given person or minority group.²⁰² One cannot help but wonder whether those who drafted the Victorian vilification legislation were of the same mind as him, or whether other judges, given the pervasive social pressures of political correctness and multiculturalism, would actually have courage to do the same.

In *Deen v Lamb*, Mr. Lamb, an individual who was standing for local Parliament, was found to be protected by the implied right to

199. Aroney, *supra* note 193, at 317.

200. *Fletcher v Salvation Army* [2005] VCAT 1523 (Unreported, Morris P, Aug. 1, 2005) ¶ 7 (Austl.).

201. Aroney, *supra* note 193, at 318.

202. *Fletcher* [2005] VCAT at ¶ 7.

political communication when he printed a brochure comparing the Bible with the Qur'an.²⁰³ In *Islamic Council of Victoria v Catch the Fire Ministries, Inc.*, however, two pastors were initially found guilty of vilification for also comparing the Bible with the Koran, for quoting from the Koran, and for expressing concerns regarding the Islamization of Australia's society, as well as the danger of Islamic ideology "infiltrating" the Parliament and other institutions of power.²⁰⁴ Of course, those pastors clearly touched on matters of political relevance, such as the ideology of one's elected officials, immigration policies, prayer in schools, and the religious underpinnings of our country's legal system.²⁰⁵ Although the Victorian Court of Appeal rejected the first-level decision, which condemned those two pastors, still the court argued that section 8 of the RRTA was constitutionally valid and hence not violating the implied right to political communication.²⁰⁶

The High Court has never been faced with the opportunity to address the constitutional validity of religious vilification laws. Moreover, the question has curiously received very little scholarly attention. Of course, the scope of the implied right to political communication has been found to protect speech that is not in its nature political, so long as the "context, emphasis or content" is sufficiently political and limitations upon it would burden the implied freedom itself.²⁰⁷ Accordingly, the matter is basically whether the implied freedom of political communication can also give rise to an implied freedom of communication on religious grounds. I believe it clearly does. According to the Rev. Dr. Robert Forsyth, "religion is rarely simply a matter of private and personal issues alone. It involves communities and institutions and thus the need to give shape to the distinctive identity of those communities and institutions."²⁰⁸ Indeed, as Professor Adrienne Stone observes,

203. *Dean v Lamb* [2001] QADT 20 (Austl.).

204. *Islamic Council of Victoria v Catch the Fire Ministries, Inc.* [2004] VCAT 2510, 325, 326, 341 (Austl.).

205. *Id.* at 375.

206. *Catch the Fire Ministries, Inc. v Islamic Council of Victoria* [2006] VSCA 284 [210] (Austl.).

207. *Theophanous v Herald & Weekly Times Ltd.* (1994) 182 CLR 104, 124 (Austl.).

208. Forsyth, *supra* note 63, at 4.

religious speech is in its nature intertwined with “political opinions, perspectives, philosophies and practices.”²⁰⁹

But if religious and political matters are often intertwined, then one may easily conclude that any logical derivation to the limitation imposed on freedom of religious speech amounts to a violation of the implied freedom of political communication found in the Constitution, which means that the validity of religious vilification laws can reasonably be contested on the grounds of restricting the right of political communication that has been framed from a religious perspective. Of course, free speech is important because an informed public engaged in “critical reasoning” is necessary for representative democracy to flourish. Such critical reasoning takes place through political discourse in the public sphere, which in turn affects the way the citizens choose their political representatives. This political process is necessarily wide, reflecting the freedom to receive all information that may affect a citizen’s choices in the process of decision making. It seems reasonable then to consider that political communication may be easily embedded in a strong religious perspective. In such a context, political speech that is informed by a religious worldview should not be limited or restricted by the law, because the right to freedom of political communication should not be applied only to political statements based on non-religious ideas, but also to political statements based on religious ideas, even if such statements are deeply annoying or offensive to some, as so many political statements based on non-religious ideas are. As Aroney points out,

political discussion often involves disagreement about, and the defense or alternatively the criticism of, fundamental political perspectives, philosophies, and practices; and religion, religious beliefs and religious practices (as well as irreligious beliefs) not infrequently inform, or are tied up with, political perspectives, philosophies and practices. . . . And if political speech can at times involve what we might call political abuse (serious contempt, revulsion, severe ridicule and even hatred on political grounds), and if the line between religion and politics is itself a matter of political debate, it is doubtful . . . that speech that vilifies on the basis of

209. Adrienne Stone, *Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication*, 25 MELB. U. L. REV. 374, 386–87 (2001).

religion cannot, by definition, at the same time constitute speech that vilifies in a way that is politically relevant. And, if so, it follows that a law that prohibits religious vilification can, in at least some of its applications, constitute a relevant burden on freedom of political communication.²¹⁰

Although it is quite doubtful the High Court will ever consider religious vilification laws to be constitutionally invalid, the fact is that these laws obviously target communications that are very closely associated or mixed up with communications concerning government and political matters.²¹¹ I am convinced that these laws interfere with the type of political discourse that is sometimes based on particular religious perspectives or worldviews, thereby unduly imposing on citizens an unreasonable hindrance to political speech that is motivated by religion and/or a religious perspective. As Dr. Darryn Jensen points out, “civilized communities institute practices to minimize—and ideally to eliminate—any disadvantage that individuals suffer by reason of their race or other attributes that they cannot change.”²¹² Nonetheless, as he also explains, the objects of the Victorian Act are of a different kind. They appeal not to inherent conditions that are biologically immutable, but rather to religious-political ideals, which in turn become a criterion of reasonableness as an examination of what is politically acceptable. “Since the political ideals themselves are subject to different interpretations,” Jensen concludes, “the battle lines of interpretation [of religious vilification laws] are ultimately political battle lines.”²¹³

XI. CONCLUSION

One of the alleged objectives of religious vilification laws is to promote a more “harmonious” and “tolerant” society. But rather than promoting real tolerance among the different religious groups, vilification laws have emphasized separateness and promoted victimhood among these groups. They have incited inter-religious

210. Aroney, *supra* note 193, at 306.

211. *Id.*

212. Darryn Jensen, *The Battlelines of Interpretation in Racial Vilification Laws*, 27(2) POLICY 14, 18 (2011).

213. *Id.*

strife and community tension by criminalizing truth-telling and restricting freedom of speech, which is a cardinal precept of every open and democratic society. Ultimately, vilification laws make the government and its secular courts “complicit in a process of legal silencing undertaken by rival minority groups, engaging with them in debates of truth and falsehood, good and evil. The court decides essentially theological questions in the process of finding incitement to hatred against persons.”²¹⁴

In general terms, laws that make it a crime to voice comments deemed “offensive” to a religious group create undue fear and intimidation on people who wish to freely express their ideas and opinions. Such laws constitute a frontal attack on freedom of speech and expression; and this is why so many people in Australia seem quite reluctant to join public moral conversation, seeming to fear what others and even their own government might do in return. This is the tragedy of a so-called “multicultural” society which has embraced moral relativism and allowed the state to enact legislation that effectively prevents its citizens from speaking more freely and openly about fundamental issues of public morality.

As explained in this article, there is no apparent reason as to why speech about religious matters should not simultaneously be characterized as political communication for the purposes of the right to freedom of political communication implied in the Australian Constitution. Accordingly, religious vilification laws such as the Victorian *Racial and Religious Tolerance Act* unreasonably compromise the constitutional right to freedom of political communication, which is a basic right of the citizen as derived from our system of government and implied in the Australian Constitution.

214. Harrison, *supra* note 15, at 72.