

## A LIBERAL EGALITARIAN DEFENCE OF FREEDOM OF SPEECH

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### 1. INTRODUCTION

Western liberalism tends to favour an impersonal conception of authority. Law is seen to be legitimate and binding to the extent that members of the relevant politico-legal community can, upon reasonable reflection, perceive the rules of the law as possessing a moral authority which is independent of the promulgating authority. We can state the same proposition in negative terms - that is, laws in a liberal society are *not* impositions designed to achieve particular ends of the ruler. When we say that the rules of the law possess a moral authority, we do not necessarily invoke a fully-fledged notion of *lex natura* - although some liberals may speak in those terms. What we are saying is that the law must state a claim to the allegiance of those who have to obey which respects their status as rational human beings who possess ultimate responsibility for the proper ordering their lives.

From the point of view of the discipline of law, the typical liberal freedoms - such as freedom of speech, freedom of religion, freedom of association and the freedom to own private property - are perhaps better understood as the presence of clearly-defined and relatively stable restraints upon every member of the politico-legal community and upon the state, rather than simply as the absence of restraint. A person may be restrained only by reference to a *rule*. Rules, by their very nature, have a *universal* operation in the sense that they apply to every situation of a defined type. They must be *non-arbitrary* in the sense that the defined type of situation can be recognised by members of the politico-legal community as representing a stable category of situations which invoke the same moral imperatives. Rules treat people as *equal* one to another in so far as the rule-makers, being bound to observe the rules, cannot impose a rule upon others which they themselves would not be prepared to observe. The essentiality of these characteristics to any decent system of law has been a constant theme in liberal thought. Kant's definition of 'right' - that is, 'the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom' - embodies these characteristics.<sup>2</sup> Friedrich Hayek listed generality and equality of application, together with the fact that the rules are known and are certain, as the chief attributes of the rule of law.<sup>3</sup>

The typical Western liberal approach to freedom of speech provides an example of how the ideas of universality, non-arbitrariness and equality coalesce in practice. Western liberals favour a large measure of freedom of speech, but that freedom typically does not extend to circulating false or misleading information about other people, so as to damage their personal reputations. The freedom of speech, confined in that way, is underwritten by a prevailing attitude within the relevant community that certain types of restraints upon speech can be justified in a community of rational individuals who are responsible for ordering their own lives,

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<sup>2</sup> Immanuel Kant, *The Metaphysics of Morals* (ed Mary Gregor: 1996), p 24 [6:230]

<sup>3</sup> FA Hayek, *The Constitution of Liberty* (1960), pp 207-210

but other types of restraints cannot be justified. Publishing false information in circumstances where it is likely to damage another person's good reputation does not respect that person's responsibility for ordering her or his own life. Each rational person can recognise, anticipate and fear the prospect of some other person publishing damaging false information about them. This would be an arbitrary interference with that person's ability to use her or his own resources to pursue a particular life plan. Therefore, each person would prefer a rule whereby people are not permitted to publish false information about another, but, in regarding each other person as her or his equal, would understand her or his own obligation to observe the rule.

When considering the infamous reaction to the "Mohammed cartoons" published in the Danish newspaper in *Jyllands-Posten* in September 2005, a simple dismissal of the outrage among Moslems as an attack on our freedom of speech neither fairly represents the liberal tradition nor accords due respect to the people, whom we wish to embrace within our liberal politico-legal community, who happen to be Moslems. Restraints upon speech are sometimes perceived by liberal politico-legal communities to be justified. The notion that one should not use one's freedom of speech to damage the good reputation of an individual is not particularly controversial. A restriction upon freedom of speech so as to protect the beliefs or practices of a particular group of people from criticism is much more controversial. We need to consider whether there is a liberal justification for restraint in *that* type of case.

## 2. THE MOHAMMED CARTOONS

Let us focus upon the cartoon by Jens Julius Hansen, in which the Prophet Mohammed is depicted standing in the heavens. As he is approached by a queue of singed individuals, whom we might assume to be Islamic suicide bombers, he says to them 'Stop, stop, we have run out of virgins!' Insofar as the objections can be translated into calls for legal restraint of a type of conduct, there would seem to be at least five different ways in which we could characterise the conduct which is to be restrained: -

- *Impiety* - An objector of the Islamic faith might say that the creator of this cartoon, by drawing a picture of the Prophet and, moreover, by depicting him in a comical way, does not accord to Allah and his prophet the respect that Moslems believe is due to them.
- *Criticism of Islam* - This objection proceeds from a conviction that Islam represents the truth and that, as truth, criticism of Islam cannot be a good thing.
- *Contempt for the Sacred Generally* - This objection begins with the observation that all civilisations have sacred symbols. It is argued that to make fun of or denigrate other people's sacred symbols is not a good use of one's freedom. What is desired is that all people show equal respect for one another's sacred symbols.
- *Giving Offence* - This objection maintains that, where the purpose of speech is to offend people or the speaker ought to have foreseen that some people would be offended, that speech is not a good use of one's freedom. The cartoon is, on this view, objectionable because it does not show due respect for the sensitivities of Moslems.

- *Encouraging Hatred of People* - This objection focuses upon the effect that the speech may have to good reputation of people who adhere to the Islamic religion. The cartoon is, on this view, objectionable because it draws attention to beliefs which some Moslems are supposed to have, which many non-Moslems regard with distaste. It is considered highly probable that the cartoon will create or reinforce a negative attitude towards Moslems among many non-Moslems.

Neither of the first two objections has any place in a liberal polity. It is only where the relevant politico-legal community is coextensive with the religious community which values faithfulness to Allah and respect for his prophet, that a rule of conduct which requires faithfulness and respect can have a claim to the allegiance of all members of the community. A liberal state, in contrast to a confessional state, does not insist upon presiding over a mono-confessional society. In Denmark, the state supports the Evangelical Lutheran Church in various ways but a person's civil rights are not contingent upon her or his possession of a favourable attitude towards Lutheranism.<sup>4</sup> Rational individuals who are responsible for the proper ordering of their own lives are allowed to decide for themselves what religion, if any, they shall follow. Similarly, outlawing criticism of Islam (or Lutheranism or Christianity generally) is incompatible with a liberal polity. If people are free to decide which religion they shall follow, freedom of discussion concerning different religious beliefs, their virtues and their weaknesses is desirable. In any event, the claim of any particular religion to be the true religion is always likely to be a contested claim.

The other three types of objection are more complex and less easily dismissed from a liberal point of view. They are premised upon the existence of a plurality of religious beliefs within a community. When Andres Serrano's controversial photograph *Piss Christ* was exhibited in the National Gallery in Melbourne, many Australian Christians were deeply offended. Two leading Australian moral philosophers (of whom one is also a prominent Roman Catholic clergyman) suggested that the Christians who argued that *Piss Christ* should not have been exhibited in a public art gallery were not claiming any special privilege for Christianity: -

[Christians] would be appalled if there were so-called art works displayed of defecating on the Star of David, vomiting on the Koran, or urinating on aboriginal totems. Respect for sacred symbolism is a mark of any civilized society, and would be valued alike by ethicists across the ethical spectrum. Thus when Australian Christians asked that their most sacred symbol not be thus insulted, they were not asking for special treatment, for some draconian power to limit others' freedom of expression: what they sought was equal respect from their society for the sacred iconography not just of their own faith but of all faiths, and for believers not only in this particular icon but of all kinds.<sup>5</sup>

This is not a plea for the banning of criticism of particular religious beliefs. It accepts that ideas of the sacred and sacred symbols are a permanent feature of human societies. Discussion of

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<sup>4</sup> *Danmarks Grundlov*, articles 4 and 70

<sup>5</sup> Anthony Fisher and Hayden Ramsay, 'Of Art and Blasphemy' (2000) 3 *Ethical Theory and Moral Practice* 137, p 164

matters of religion should be conducted in a way which pays due respect for other people's sensibilities. This line of argument embraces both the third and fourth types of objection.

The fifth type of objection - encouraging hatred - is no longer confined to the speculations of moral philosophers. In some Western liberal democracies, it is law. It is now *prima facie* unlawful in three Australian states to incite hatred or serious contempt or serious ridicule of people on the ground of their religion.<sup>6</sup> The religious vilification laws in the state of Victoria are considered at greater length later in this paper.

A popular counter-argument to these objections is based on the idea, often attributed to John Stuart Mill, that, since all human knowledge is fallible, the open exchange of ideas ought to be free from legal restrictions.<sup>7</sup> This is certainly a powerful argument for favouring freedom of speech, but, when applied to the matter of religious speech, its persuasive power is limited in two respects. Firstly, it provides no reason for people who sincerely and zealously believe that they have acquired access to the "truth" through religious revelation (or who, at least, believe that they have better access to the "truth" than their fellow citizens) to affirm the notion of freedom of speech in religious matters. Furthermore, it appears to contradict the conviction of Aristotelians and Christian scholastics that there is 'a basic knowable human nature'.<sup>8</sup> All of these people are entitled to ask why a sceptical attitude as to the ability of people to know the truth ought to be privileged over an attitude that one may encounter the truth directly through religious revelation. Secondly, the argument based upon fallibility of human knowledge does not contain within itself a basis for establishing the boundaries of freedom of speech. One can certainly recognise limits upon freedom by referring to the concept of harm, but harm is an unstable and, possibly, open-ended category. An Australian academic commentator, Jeremy Shearmur, has suggested that speech on religious matters should be subject to legal restraints 'when there is good reason to suppose that its publication would reasonably lead to a breach of the peace'.<sup>9</sup> This argument seems to lead us down a very slippery slope to the point where we would restrict speech is a reasonable person would anticipate that *someone* might be offended by the speech and would react violently. The category of conduct which is envisaged here is broader than actual incitement to violence against people of a particular religious persuasion. Another Australian commentator, Steve Edwards, has said that this is a 'doctrine for unscientific, irrational bullies'.<sup>10</sup> The possibilities for somebody somewhere to be offended may be so numerous as to place severe restrictions upon freedom of speech in matters of religion.

Once we concede that our community includes people who believe so passionately in the truth of their religious creed that they would breach the peace in response to any offence given to that creed, we can no longer rely solely upon the fallibility of human knowledge argument in order to uphold freedom of speech on religious matters. The presence of different beliefs within a community about what counts as truth and how we can know the truth demands a multiple-

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<sup>6</sup> *Racial and Religious Tolerance Act 2001* (Vic), s 8; *Anti-Discrimination Act 1991* (Qld), s 124A(1); *Anti-Discrimination Act 1998* (Tas), s 19

<sup>7</sup> '[T]he opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course, deny its truth; but they are not infallible. They have no authority to decide the question for all mankind and exclude every other person from the means of judging.' (John Stuart Mill *On Liberty* (ed Gertrude Himmelfarb: 1974), p 77)

<sup>8</sup> Isaiah Berlin, 'John Stuart Mill and the Ends of Life' in Henry Hardy (ed), *Liberty* (2002), 233-234

<sup>9</sup> Jeremy Shearmur, 'Free Speech, Offence and Religion' (2006) 22(2) *Policy* 21, p 24

<sup>10</sup> Steve Edwards, 'On the Right to Give Offence' (2006) 22(3) *Policy* 32, p 33

stranded justification of freedom of speech. The total justification of that freedom must include a justification which provides people who believe that they possess a hold on the truth which is not possessed by others with a reason for refraining from coercing others. An appealing form of justification arises from the idea of basic equality between human beings.

### 3. BASIC EQUALITY

The fallibility of human knowledge assumption has not always been an explicit feature of the English-speaking liberal tradition and it is arguable that, in the scientific, sceptical atmosphere of the late nineteenth century, it became emphasised at the expense of another idea which is fundamental to the tradition, namely the idea of basic equality. Equality lies at the heart of the work of the most influential pre-nineteenth century English-speaking liberal thinker, John Locke. Locke's *A Letter Concerning Toleration* is of particular interest in the context of the current discussion because its central concern is the limitations upon the state's power to coerce people in matters of religious belief and worship.

What is striking about Locke's *Letter* is its confidence in the existence of God and the truth of Christianity. Locke did not say that coercion in matters of religion is wrong because nobody could know for sure which religion, if any, is the true one. Coercion in religion is wrong because 'the life and power of true religion consist in the inward and full persuasion of the mind'.<sup>11</sup> The care of one's own salvation could belong only to oneself. Moreover, since the eternal happiness of a person's soul depended upon that person doing the things which were necessary for the obtaining of God's favour, the doing of those things was 'the highest obligation that lies upon mankind'.<sup>12</sup>

Columbia University law professor, Jeremy Waldron, has emphasised the place of equality in Locke's argument for religious toleration. Turning to Locke's major epistemological work, *The Essay Concerning Human Understanding*, Waldron suggested that Locke held to a notion of basic human equality which is grounded in the capacity of human beings for abstraction in matters of morality.<sup>13</sup> This conception of equality and the argument for toleration are related in so far a religious believer who recognises that she or he is responsible for the proper ordering of her or his life in accordance with the commandments of God can recognise that all other people have the same responsibility. Waldron explained the relationship in the following terms: -

When I catch a rabbit, I know that I am not dealing with a creature that has the capacity to abstract, and so I know that there is no question of this being one of God's special servants, sent into the world about his business. But if I catch a human in full possession of his faculties, I know that I should be careful how I deal with him. Because creatures capable of abstraction can be conceived as "all the servants of one Sovereign Master, sent into the World by his order, and about his business," we must treat them as "his Property,

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<sup>11</sup> John Locke, *A Letter Concerning Toleration* (ed Charles L Sherman: 1965), p 173

<sup>12</sup> Locke, n 9, p 206

<sup>13</sup> Jeremy Waldron, *God, Locke and Equality: Christian Foundations in Locke's Political Thought* (2002), p 79

whose Workmanship they are, made to last during his, not one another's Pleasure" and refrain from destroying or harming or exploiting them.<sup>14</sup>

Locke's conception of equality is grounded in every individual's responsibility to find the truth for him or herself and order his or her life accordingly. Notwithstanding that a person may believe that she or he has discovered the true religion, a plurality of religious beliefs is a fact which that person has to confront. For as much as one may believe ardently (on the basis of what one considers to be good grounds) that one's religion is the true faith and other religions are false, one can observe that others possess a similar level of ardour in relation to their own religious beliefs. This observation provides a person who is convinced of the unassailability of one's own religious beliefs with a good reason to be tolerant of those who hold to other beliefs. It is right to be tolerant because one cannot resist a claim by others to force one to abandon what one sincerely believes to be the true religion without simultaneously disclaiming one's own claim to coerce those others in matters of religion. Locke said that he did not mean to condemn 'charitable admonitions' or 'affectionate endeavours to reduce men from errors'.<sup>15</sup> He was concerned merely to rule out coercion in matters of religion.

Locke's account of equality and his argument for toleration are unapologetically theistic. Waldron observed that Lockean equality is 'not fit to be taught as secular doctrine' and makes 'no sense except in the light of a particular account of the relation between man and God'.<sup>16</sup> Nevertheless, for the purposes of the present discussion, this is a strength rather than a weakness. We are concerned with the correlative rights and obligations of people who disagree about matters of religion. The argument in favour of freedom of speech in religious matters must be capable of appealing to those who are sufficiently confident of their own religious belief so as to desire the imposition of restrictions upon the speech of others. These people will not necessarily be won over by the suggestion that, since they have no objective evidence that, for example, there is one God and Mohammed is his prophet or, alternatively, that Jesus Christ rose again from the dead, they must accept the possibility that they might be wrong. To argue in this way is to insist upon one very narrow view as to what counts as truth.<sup>17</sup> For the religious devotee, tolerating other people's expression of their religion needs to be grounded in a recognition that all people have the same responsibility to order their lives according to what they believe to be the truth. They may be led to the truth by persuasive argument, but they cannot be coerced.

It is significant that, almost three hundred years after Locke set down his argument for religious freedom, the Roman Catholic Church affirmed its commitment to religious toleration by reasoning which bears striking similarities to Locke's reasoning. A document from the

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<sup>14</sup> Ibid, pp 80-81

<sup>15</sup> Locke, n 9, p 206.

<sup>16</sup> Waldron, n 11, p 82

<sup>17</sup> This was an important element of the much misunderstood address of Pope Benedict XVI at the University of Regensburg on 12 September 2006. The Holy Father said -

'In the Western world it is widely held that only positivistic reason and the forms of philosophy based on it are universally valid. Yet the world's profoundly religious cultures see this exclusion of the divine from the universality of reason as an attack on their most profound convictions' (Benedict XVI, *Faith, Reason and the University: Memories and Reflections*

[www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2006/september/documents/](http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/))

Second Vatican Council, *Dignitatis Humanae* (also known as the Declaration on Religious Freedom), contains this statement: -

It is in accordance with their dignity as persons—that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility—that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth. However, men cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom.<sup>18</sup>

Sadly, actual events suggest that many religious believers do not see why they should respect the freedom of others in religious matters. Locke was certainly aware of some, in his own day, who claimed a freedom for themselves that they would not allow to others - that is, who would 'arrogate to themselves, and to those of their own sect, some peculiar prerogative covered over with a specious show of deceitful words, but in effect opposite to the civil right of the community'<sup>19</sup>. This was, without a doubt, a reference to Roman Catholics, or, at least, some elements within the Roman Catholic community in seventeenth century England. Locke's solution was to refuse to extend the benefits of toleration to those who would not be tolerant. A difficult question in our day - for which the present author is not qualified to give an answer - is whether the Islamic tradition allows Moslems to affirm freedom of speech in religious matters *from an Islamic perspective*. Where Islam (or any other religion) is a minority religion, it is likely that toleration will be pursued on pragmatic grounds. The same pragmatic attitude may lead to the abandonment of toleration as soon as the religion has an opportunity to become the dominant religion. Furthermore, the Lockean argument for toleration does not give adequate attention to the possibility that people whose initial outward conformity to 'the true religion' is coerced may ultimately come to a genuine acceptance of the beliefs of that religion.<sup>20</sup> Where this is a possibility, coercion is not entirely irrational from the perspective of a religious believer.

Notwithstanding these limitations, a justification of freedom of speech in religious matters which includes an appeal to the idea of basic human equality remains a better justification than one based solely upon the fallibility of human knowledge. It is addressed to and is open to affirmation by those who believe that they know the truth but who can observe that there are others who are similarly convinced of the validity of another version of the truth.

#### 4. THE TERMS OF DISCUSSION

The proposition which I have sought to defend by reference to the idea of basic equality is that one cannot assert a freedom to order one's life according to the truth and to encourage others

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<sup>18</sup> Declaration on Religious Freedom *Dignitatis Humanae* (1965), [www.vatican.va/achive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/achive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html)

<sup>19</sup> Locke, n 7, pp 210-211

<sup>20</sup> See Jeremy Waldron, 'Locke, toleration, and the rationality of persecution' in Jeremy Waldron, *Liberal Rights: Collected Papers, 1981-1991* (1993), pp 111-112

to do likewise (which may, incidentally, require criticising other people's idea of the truth) without allowing a like freedom to people who have a different idea of truth. Freedom of speech in religious matters, so grounded and understood, is a freedom *for* human beings to seek the truth and order their lives according to the truth so found. A freedom, so understood, does not necessarily encompass a freedom to engage in conduct for the purpose of ridiculing other people's conceptions of the sacred, causing offence to other people or vilifying those other people. To do any of those things is to treat other people as less than one's equals. Incidental and unintended offence or denigration which is caused in the course of asserting one's own idea of the truth or in criticising someone else's idea of the truth or conception of the sacred, on the other hand, ought to fall within the freedom. The problem with trying to legislate to prohibit the former, while permitting the latter, is a problem of finding the right verbal formula. There is a risk of banning more than what really ought to be banned on liberal grounds. Furthermore, since it is often the popular understanding of the law - that is, the 'folk law' - which affects the behaviour of people, laws which seek to define limits upon the freedom of speech in religious matters may have a 'chilling effect' upon public discussion of religious affairs.<sup>21</sup>

The legislation in the State of Victoria gives rise to particular concern on this front. Section 8 of the *Racial and Religious Tolerance Act 2001* prohibits conduct that 'incites hatred against, serious contempt for, or revulsion or severe ridicule of' a person or group of people on the ground of their religion. Section 9 of the Act states that a person's motive for engaging in the conduct is irrelevant to the question of whether the person has contravened section 8. Therefore, engaging in the prohibited conduct need not involve having an intention to incite hatred, serious contempt, revulsion or ridicule. Section 11 of the Act provides that a person does not contravene section 8 if certain conditions are satisfied. Section 11 says -

A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith -

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for -
  - (i) any genuine academic, artistic, religious or scientific purpose; or
  - (ii) any purpose that is in the public interest: or
- (c) in making or publishing a fair and accurate report of any event or matter of public interest.

The Victorian legislation differs from the Queensland and Tasmanian legislation in an important respect. Conduct is not excused under the Victorian legislation unless it is engaged in 'reasonably and in good faith'. In Queensland, it is only conduct of the type mentioned in

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<sup>21</sup> Patrick Parkinson, 'Enforcing Tolerance: Vilification Laws and Religious Freedom in Australia', presented at the Eleventh Annual International Law and Religion Symposium: "Religion in the Public Sphere: Challenges and Opportunities", Provo, Utah, 3-6 October, 2004, <[www.sydneyanglicans.net/images/uploads/indepth/Article\\_-\\_Enforcing\\_Tolerance.pdf](http://www.sydneyanglicans.net/images/uploads/indepth/Article_-_Enforcing_Tolerance.pdf)>, p 10

paragraph (b) which has to satisfy both the reasonableness and good faith requirements.<sup>22</sup> In Tasmania, it is sufficient that acts done for academic, artistic, scientific or research purposes are done in good faith.<sup>23</sup>

Some of the difficulties arising from the language and structure of the Victorian legislation became apparent in the case of *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc*.<sup>24</sup> The Islamic Council of Victoria brought a complaint against two Pentecostal Christian pastors, Daniel Scot and Daniel Nalliah. Pastors Scot and Nalliah had conducted a seminar about Islam. Some members of the Islamic community in Melbourne attended the seminar and were appalled by what they heard there. The assertions made by Pastor Scot during the seminar included assertions that the Qur'an promotes violence and killing, the Qur'an teaches that women are of little value, that Allah is not merciful, that Islam allows Moslems to tell lies for the sake of Islam and that Moslems intend to take over Australia and turn it into an Islamic nation.<sup>25</sup>

At first instance, Pastors Scot and Nalliah were found to have contravened section 8. Their conduct did not fall within section 11 because, even though they engaged in that conduct for a religious purpose - perhaps best characterised as assisting Christians to understand Islam so that they are better equipped for evangelistic efforts towards Moslems - their conduct was not engaged in reasonably and in good faith. The Vice-President of the Tribunal thought the conduct of Pastors Scot and Nalliah was not reasonable because it was 'excessive' and a 'one-sided delivery of a view of the Qur'an and Muslims' beliefs, which were not representative'.<sup>26</sup> The Vice-President placed considerable emphasis upon evidence that the tone of the seminar was one of making fun of Moslem beliefs and conduct and Pastor Scot's rhetoric produced, from time to time, a response of laughter from the audience. It was, according to the Vice-President, 'designed to put Muslim people and their beliefs in a bad light'.<sup>27</sup>

The Court of Appeal overturned the finding of the Tribunal and ordered a rehearing. It did so on the basis that the Tribunal had proceeded upon an incorrect interpretation of section 8. The Court of Appeal said that whether speech could be said to incite hatred for the purposes of section 8 turned upon the *likely effect* of that speech upon the audience to whom that speech was directed.<sup>28</sup> Criticising the beliefs of a group of people does not, of itself, amount to inciting hatred of people who adhere to those beliefs, but whether it does so amount remains a question of fact in each case.<sup>29</sup> Whether section 8 is contravened in any particular case might depend upon whether the character of the audience - that is, as Nettle JA said, whether the statement was made during a talk-back radio show or a discourse delivered within a faculty of theology.<sup>30</sup> While it was not strictly necessary for the Court of Appeal to consider the scope of section 11, there was an attempt to clarify the nature of the reasonableness requirement. Nettle JA said that 'open and just multicultural society' ought to tolerate criticism of another

<sup>22</sup> *Anti-Discrimination Act 1991* (Qld), s 124A(1)

<sup>23</sup> *Anti-Discrimination Act 1998* (Tas), s 55

<sup>24</sup> [2004] VCAT 2510 (Victorian Civil and Administrative Tribunal); [2006] VSCA 284 (Court of Appeal)

<sup>25</sup> [2004] VCAT 2510, par 80

<sup>26</sup> *Ibid*, par 389

<sup>27</sup> *Ibid*

<sup>28</sup> [2006] VSCA 284, par 16-17 per Nettle JA, par 161 per Neave JA

<sup>29</sup> *Ibid*, par 80 per Nettle JA, par 177 per Neave JA

<sup>30</sup> *Ibid*, par 17 per Nettle JA

person's religion and that criticism would not fail to be reasonable simply on the basis that it 'may appear ill-informed or misconceived or ignorant or otherwise hurtful' to adherents of the religion which is criticised. The test of whether conduct is unreasonable was said to be whether the conduct was 'so ill-informed or misconceived or ignorant or so hurtful as to go beyond the bounds of what tolerance should accommodate'.<sup>31</sup>

There remains, following the *Islamic Council* case, enough uncertainty about the interpretation of sections 8 and 11 to warrant caution in the making of public statements about matters of religion. Notwithstanding the comments of the Court of Appeal, there remains a legal possibility that severe criticism of other people's religious beliefs might offend the prohibition against inciting hatred against people. Whether the reasonableness requirement outlaws particular speech appears to turn upon a judgement as to the *degree* of ignorance or wrong-headedness or lack of diplomacy which the speech reflects. It seems that there is a level of ignorance or lack of decorum which is not to be tolerated. The idea of basic equality, on the other hand, requires us to allow an equal freedom of speech to all human beings on the basis that all of them possess at least a basic capacity for moral reasoning. While we might now be satisfied, in the light of the Court of Appeal's decision, that the standard to be applied is not necessarily that of the academic seminar or even the polite upper middle class dinner party, it is difficult to see whether there is any non-arbitrary line between 'reasonable' and 'unreasonable' comment about religious matters. A much clearer division is that between conduct engaged in honestly (however incompetently) for a genuine academic, artistic, religious or scientific purpose and that which is engaged in deliberately for the purpose of denigrating people or giving offence to people. Even in the latter case, the best remedy for those who recognise that speech contains misinformation is either to enter the public arena to explain the truth of the matter or simply to ignore the matter and allow the speech to have the degree of persuasiveness which it deserves. For as much as it may be a legitimate concern of a liberal state that discussion of religious matters does not descend into vitriol, abuse or violence, the current Victorian legislation would seem to be a fairly blunt instrument for achieving that purpose.

## 5. CONCLUSION - BACK TO THE CARTOONS

Liberals treat all people as equal in terms of their basic capacity to seek the truth and act upon it. A liberal state ought to be tolerant even of undiplomatic and ill-informed speech, so long as it does not deny others their equal status as beings possessed of a basic capacity to reason their way to a proper ordering of their lives. A liberal state may be justified in placing restrictions upon types of speech which fail this test - such as speech which encourages violence against people and their property or which is intended to encourage contempt for religion generally or to give offence to or to encourage hatred of other people. In doing so, the state must take care that it does not interfere with the ability of individuals to seek the truth, to order their lives according to the truth so found and encourage others to do likewise. Therefore, a minimum condition for the compatibility of religious vilification laws with a liberal polity must be the provision of an excuse for any honest attempt to engage in discussion about

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<sup>31</sup> Ibid, par 98; See also par 197 per Neave JA

and criticism of different religious beliefs. The Lockean argument for toleration is profoundly egalitarian. It accepts that all human beings whose mental capacities fall within the normal range of functioning are capable of moral reasoning and are obliged to resolve certain types of questions for themselves.<sup>32</sup> The discussion of religious beliefs and their application to everyday life is not a matter for the professional theologians and moral philosophers alone.

Different media provide means for different people to become engaged in the discussion. A newspaper cartoon, in particular, has the capacity to raise serious moral questions in the minds of a range of people whom the academic commentaries do not reach. Newspaper cartoons and other forms of popular media may lack the nuance and sophistication of more serious intellectual endeavours and may often descend into caricature of people and issues. Jens Julius Hansen's cartoon may be open to criticism on the basis that it presents a caricature of Islamic teaching about martyrdom or that it presents as the belief of all Moslems something which is really only the belief of a few on the extremist fringe of Islam. The noted Western scholar of Islam, Bernard Lewis, has noted that -

'In Islamic usage the term "martyrdom" is normally interpreted to mean death in a jihad and its reward is eternal bliss...Suicide, by contrast, is a mortal sin and earns eternal damnation...Some recent fundamentalist jurists and others have blurred or even dismissed this distinction, but their view is by no means unanimously accepted. The suicide bomber is thus taking a considerable risk on a theological nicety.'<sup>33</sup>

The fact that the cartoon does not apparently acknowledge the existence of a theological controversy within Islam is not a reason for banning its publication. Where young Moslems kill themselves in the pursuit of *jihad*, it is appropriate that the reasons for this should be the subject of public discussion. Non-Moslems are entitled to reflect upon what, if anything, this practice tells us about Islam and offer their views for the consideration of others. Moslems are entitled to defend the reputation of the Islamic faith against judgements formed on the basis of the actions of a few extremists. There is a risk that contributions may be ill-informed, that misunderstandings may take hold and that people may be offended in the process, but ill-informed, unsophisticated or undiplomatic contributions to the discussion can at least be criticised and answered by those who possess a deeper understanding. If, for the sake of creating an appearance of social harmony, we use the law to suppress or discourage popular discussion of certain types of matters, we do something far worse. We fail to treat people as equals.

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<sup>32</sup> For a detailed discussion of this point, see Waldron, n 11, pp 83-107. Waldron insisted (at p 107) that Locke's idea of basic equality is premised upon the existence of a 'democratic intellect' - that Locke did not 'fall into the trap of differentiating humans in their merit or moral or political standing by the sophistication of their intellects'.

<sup>33</sup> Bernard Lewis, *The Crisis of Islam* (2003), p 33