

BLASPHEMY: RELIGION CHALLENGES FREEDOM OF SPEECH

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Introduction

The right to freedom of thought, conscience, religion or belief protects the individual conscience of every human being. At the global level, the right was first recognised in 1948 by the Universal Declaration of Human Rights in Article 18. This was given the power of International law by Article 18 of the International Covenant on Civil and Political Rights in 1976.

As place and time changes, human expectations of what is right changes also. In the Europe of the 21st century people have become habituated to the idea that there is no one system of values that is right for every person in every situation. In itself, this idea, as an encapsulation of relativism in liberal thought, has aspects of unassailability that in their absolute nature reflect an almost religious belief. The concept of the mutability of beliefs means that everything is up for discussion, that no one law or set of laws is sacred. Hence, in order for consensus to emerge as to how society is to be ordered, freedom of speech is essential. Tyranny demands the totality of our lives: that we should act, think and speak as the despot demands. From the societies that predated the revolution in France in 1789, to the suffocating spying by citizen on citizen in aid of total knowledge and total control that characterised the Soviet Bloc up to 1989, the lesson of history is obvious

This form of government is odious. Freedom of speech is thus not only a bulwark against totalitarianism but its absence is a litmus test that lights up fundamental defects in the entire organisation of society. Where people organise themselves by setting apart ideas as beyond discussion they are submitting to the erosion of every right that modern liberal societies see as the essence of what they are.

Religion and its adherents say: we object to you insulting us, to making our beliefs an object of satire, we have rights as well, in this case the right to privacy of belief without being cut off from the society of which we are a valuable part through ridicule. They go so far as to argue that attacks on what faith holds most sacred should be a criminal wrong. The very idea seems anathema; that freedom to speak should be curtailed by criminal sanction. Yet, for thousands of years it was so. Little by little, however, in the Christian world blasphemy has retreated. Increment by increment, the consciousness of Islam has become part of Europe. With it has come the need for mutual respect as between our liberal post-Christian societies and citizens who hold as absolute and sacred that religion is beyond satire.

Should European societies adjust to a different model? And if so, how? And should that adjustment involve the protection of religion as a space into which mockery must not intrude? These are the questions posed by this article.

A brief history of blasphemy in Britain and Ireland

Blasphemy consists of the attribution to God of that which is not of God, such as malice or deceit¹. Claiming that there is no God or that religion is pointless is not blasphemy. Canon 2323² of the Catholic Church, in discussing blasphemy holds that blasphemy shall be punished by the local bishop. Irish practitioners have defined blasphemy as “*spoken or written words of insult to God or His Saints or sacred things.*”³ The earliest and most famous eyewitness account of condemnation for alleged blasphemy is recorded in the Gospel of Matthew⁴; the ‘blasphemous’ statement, a positive answer to the question, “are you the Christ?” The very last person given a jail sentence in England for blasphemy, and the last person officially prosecuted, was the ironically named John Gott⁵. A freethinker, atheist and socialist, his 1921 offence was indeed mild by today’s standards; as emerges from the judgment of Lord Trevethin upholding the sentence of four months⁶:

It does not require a person of strong religious feelings to be outraged by a description of Jesus Christ entering Jerusalem "like a circus clown on the back of two donkeys". There are other passages in the pamphlets equally offensive to anyone in sympathy with the Christian religion, whether he be a strong Christian, or a lukewarm Christian, or merely a person sympathizing with their ideals. Such a person might be provoked to a breach of the peace.

In reality, whatever the definition, the crime of blasphemy has been treated as the mockery of the Christian religion.

The earliest recorded case is that of John Taylor from Surrey⁷. He proclaimed in 1676 that he was “A King’s son” and “younger brother to Christ” and that religion was “a cheat”. He was thought to be mad but the overseers of Bedlam proclaimed him sane. Hale J presided over his trial and proclaimed that Christianity was “parcel of the laws of England” and that to reproach that religion “is to speak in subversion of the law.” The convict was pilloried in three different places holding a warrant stating that his punishment was for “blasphemous words tending to the subversion of all government.”

¹ A precise definition of blasphemy is difficult to come by. Although we may know it when it is seen, it is nonetheless difficult to describe. Interestingly, Canon Law does not define the offence of blasphemy but it does state the punishment in Canon 1369 P.A. Ó’Síocháin SC defines blasphemy as “*To speak or write offensively about God or religion, as to deny the existence of God, or to bring God or religion into contempt, ridicule, or to bring God or religion into contempt, ridicule, or disbelief, is blasphemy.*” The Criminal Law of Ireland, at page 215, 3rd ed 1952. This definition was not updated in any of the subsequent five editions.

² This is pre-Vatican 2. Since Vatican 2, the canon law does not define what is meant by the term ‘blasphemy’. The only reference to blasphemy is in Canon 1369 which states that, “*A person is to be punished with a just penalty, who, at a public event or assembly, or in a published writing, or by otherwise using the means of social communication, utters blasphemy, or gravely harms public morals, or rails at or excites hatred of or contempt for religion or the Church*”.

³ O’Higgins, P. Blasphemy in Irish Law, 23 Mod. Law Rev. 166 (1960) fn. 82 at p. 166. Canon 2323 did not specifically define the concept of blasphemy, describing instead as “*Persons who commit blasphemy or perjure themselves outside of court, are to be punished at the discretion of the Ordinary, especially if they are clerics.*” The quotation itself is taken from P. O’Higgins who wrote on the topic of blasphemy.

⁴ Matthew 26:61-26:68

⁵ *R v Gott* (1922) 16 Cr. App. R. 87

⁶ *Ibid.*

⁷ Taylor’s Case, (1676) 1 Vent 293.

As the Enlightenment took hold, intellectuals in England questioned more and more the literal truths of the New Testament. Thomas Woolston of Sidney College Cambridge essayed his ‘Six Discussions on the Miracles of our Saviour’, claiming that what was written was allegorical. In jailing him, the courts through Raymond CJ ostensibly allowed a degree of freedom of speech stating that “we do not meddle with any difference of opinion ... we interfere only where the very root of Christianity is struck at.”⁸ The 1840’s saw convictions for the publication of Thomas Paine’s ‘Age of Reason’.⁹ By this time, the law was shifting from the treason foundation laid down in Taylor’s case, to the protection of society against public insults that could lead to violence; in other words, a social order justification to prevent a breach of the peace. Lord Macaulay opined that all “ought to be at liberty to discuss the evidences of religion” but also said that no one should “be at liberty to force upon unwilling ears and eyes words and sights that cause irritation”.¹⁰

The notion that the British state was constitutionally based on Christianity as interpreted in the Anglican Communion resurfaced in 1838, when a controversialist called Michael Augustus Gathercole, a convert from Presbyterianism to Anglicanism was angered when two convents of nuns were established in Darlington near where he was now resident vicar.¹¹ His language was both intemperate and inaccurate. He declaimed the cloisters “brothels for the priests of the Popish religion”. In his view, the convents “ought to be burnt to the ground.” He was careful to say that he would rescue the “deluded” religious sisters beforehand. His three months in jail from Baron Alderson he regarded as conferring the crown of martyrdom. Nonetheless, this bizarre case is important because in summing the law up for the jury, Alderson B proclaimed it lawful to “attack Judaism or Mahomedanism or ... any sect ... save the established religion of the country ... because it is ... part of the constitution ...” More and more thereafter, the question of “tone and style and spirit” of the criticism of religion, as Lord Denman put it, became central to the law.¹²

What was required was an intention “to wound the feelings of mankind or to excite contempt or hatred against the church by law established” or, and this is a surprising twist that went nowhere, “to promote immorality.” In John Gott’s case from 1921, it was the evidence of passers-by calling him disgusting that was central to the prosecution case. In other words – proof that a breach of the peace might be occasioned, meaning that people might attack him. However, when, in 1976, ‘Gay News’ published a verse, fantasising about homosexual acts on Christ’s body after crucifixion, people were upset, but no prosecution was publicly initiated, merely a private prosecution leading to a suspended jail sentence.¹³ Public readings of this verse intended to provoke prosecution resulted in nothing except disgust and turning away.

Religion holds a particular place in Irish society, with the right to freedom of religion enshrined in the Constitution. However, laws against blasphemy are in place. Article 44.1 acknowledges, “*the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion*”. Declarations by incoming members of the judiciary as well as the President of Ireland are made “*In the presence of Almighty God*”.

⁸ R v Woolston 94 Eng. Rep. 112, 1 Barn. K.B. 162

⁹ Among these were Richard Carlile (1819) 106 E.R. 621 and his wife Mary Carlile (1819) 106 E.R. 621. Richard and Mary Carlile were found guilty of blasphemy and seditious libel with Richard being sentenced to 3 years in Dorchester Gaol and a fine of £1,500.

¹⁰ Speech to the House of Commons on Jewish Emancipation, April 7th, 1833.

¹¹ Gathercole’s Case (1838) 168 E.R. 1140

¹² R v Hetherington (1841) 4 St Tr (NS) 563

¹³ R v Lemon, R v Gay News (1979) 143 JP 315

The exact nature of these oaths are perhaps questionable since *Buscarini v San Marino*¹⁴, where several members of the San Marinense parliament took their office in writing but omitted references to the Gospels required under their Elections Act. The European Court of Human Rights held that to require a person swear allegiance to a particular faith was a violation of Article 9(2). The United Nations Human Rights Commission has expressed concern over Ireland's blasphemy laws.¹⁵ With regards to direct blasphemy, the Committee was concerned "that blasphemy continues to be an offence under Article 40.6.1(i) of the Constitution and section 36 of the Defamation Act 2009".

In Ireland, the last attempt at prosecution occurred in the context of a campaign to liberalise the Constitution of 1937 and to allow married couples to divorce and remarry. In *Corway v Independent Newspapers (Ireland) Ltd*¹⁶ a newspaper published a cartoon showing three male politicians refusing Holy Communion: "Hello Progress – Bye Bye Father?" was the caption. A private prosecution for blasphemous libel failed in the High Court. Geoghegan J stated "it is of the essence of blasphemy ... that the words or pictures complained of constitute an attack on some tenet of the Christian religion."¹⁷ The essence of the offence was not merely "shockability." The cartoon was offensive but not blasphemous. Mr Corway's appeal to the Supreme Court also failed.¹⁸ Barrington J, faced with a plethora of contradictory authorities said that "it is impossible to say of what the offence of blasphemy consists." The task under the Constitution of defining the offence was "for the legislature not for the courts." As we will see, since that time there have been worse provocations, but no more prosecutions.

The Constitutional Convention, formed in December 2012 by the government was convened to examine various elements to the constitution including references to religion and blasphemy. The Convention received submissions in favour of removing the sections from secular groups – atheism being the second largest faith in the country according to 2011 census – and from organizations representing religion such as The Knights of Saint Columbanus and the Islamic Cultural Centre of Ireland. The Convention voted in favour of removing the clause but also replacing the prohibition with the words "incitement to religious hatred".

Shifts in attitude

It would be hubris to consider that freedom of speech is beyond discussion. Equally, we should not imagine that we have got everything right. History shows us that fundamental shifts hollow out the assumptions of society and replace them with something else. Attitudes change. Our attitudes may be contrasted to what has gone before. What was once sacred becomes desecrated and new aspects of common consciousness become accepted in place of what went before. But what era would we prefer to be in, what law against freedom of expression would we be prepared to tolerate?

When the First World War effectively destroyed the common assumptions of the Europe at that time, the Bolshevik usurpation of power laid the agenda for the destruction of the Orthodox Church, which had been under the patronage of the Emperor. The Church reinstated the office of patriarch, suppressed under Peter I in order to monopolise royal

¹⁴ *Buscarini v San Marino* (24645/94) [1999] ECHR 7 (18 February 1999)

¹⁵ United Nations Human Rights Committee, *Concluding observations on the fourth periodic report of Ireland*, CCPR/C/IRL/4.

¹⁶ [1999] 4 IR 484

¹⁷ *Ibid* at 485

¹⁸ *Ibid* at 16

power. In 1922, with famine raging due to the destruction of effective farming practices in favour of common ownership, Patriarch Tikhon was accused of sabotage. The penalty was the confiscation of Church property. For Orthodox Christians the communion vessels used in the Divine Liturgy are the same as the Holy Grail of Christ but, being made of gold, these were confiscated as valuables that could be sold in supposed relief of the famine; thus smashing the power of the Church and establishing atheism as the unquestionable state religion.

With the fall of communism from 1989, the Orthodox Church was again drawn towards the centre of Russian power. But even against this newfound closeness, blasphemy has not been made a criminal offence in Russia and nor have sanctions against those who insult religion been extreme. Hooliganism is an offence under Russian law which has a broad ambit, from misbehaviour and drunkenness on the street to the Punk prayer to the Mother of God “to drive Putin away” chanted in February 2012 in the Cathedral of Christ the Saviour by a feminist music group.¹⁹ Although two members of the group were sentenced to two years imprisonment, for “hooliganism motivated by religious hatred”, this form of blasphemy was not specifically provided for. It was simple hooliganism. Nor did everyone agree with the sentence.²⁰ Many believers felt that arrest followed by a warning would have been enough. Perhaps as a result of the incident, a kind of a blasphemy law was introduced in Russia in 2013 making it an offence to offend religious sensibilities.

Article 148 of the Criminal Code as amended, provides that it is an offence, carrying up to three months in jail or a heavy fine, to perpetrate public acts expressing manifest disrespect of society and carried out with the goal of insulting religious believers.²¹ The law is not restricted to Christians and it seems it is an offence to insult Jews and Muslims. This law was not used when in April 2014 the director of Novosibirsk Opera, Boris Mezdrich, was sacked after a scandal erupted over the theatre’s take on Wagner’s opera Tannhauser. In the opera Jesus Christ was depicted as living in the Venusberg and having an affair with the goddess, where everyone at her court was naked. The opera was advertised by a poster which depicted a crucifix nestling in a woman’s crotch. While Russia is often perceived as less protective towards freedom of expression, the director was not prosecuted. Perhaps Russians are used to, and respect, artistic expression.

In Mauritania, a blogger named Mohamed Cheikh Ould Mkheiter was sentenced to death, a sentence that was upheld by the Supreme Court of Mauritania as of April 2016, for criticising the caste-based slavery in that country²². Clerics and government officials called him a

¹⁹ Three of the five members of the band Pussy Riot were charged with “hooliganism motivated by religious hatred”. They claimed their protest was directed at the Orthodox Church leader’s support of Putin during the election.

²⁰ Many international leaders did not agree with the sentence. Myanmar’s pro-democracy leader and Noble Peace Prize winner Aung San Suu Kyi called for the release of the members. 21 September 2012, *What links Aung San Suu Kyi and Pussy Riot?*, Link: <https://www.amnesty.org.uk/blogs/press-release-me-let-me-go/what-links-aung-san-suu-kyi-and-pussy-riot> accessed on ???

²¹ Article 148 of The Criminal Code of the Russian Federation, “*Illegal obstruction of the activity of religious organisations or of the performance of religious rites - Shall be punishable with a fine in an amount of up to 80 thousand roubles, or in the amount of the wage or salary, or any other income of the convicted person for the period of up to six months, compulsory works for a term of up to one year, or arrest for a term of up to three months.*” English translation provided by the WIPO at link: <http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru006en.pdf>

²² Ordonnance 83-162 du 9 juillet 1983 portant institution d’un Code Pénal (Ordonnance 83-162 of July 9, 1983, Establishing a Criminal Code) (July 9, 1983), Art. 306, Journal Officiel de la République Islamique de Mauritanie [Official Gazette of the Islamic Republic of Mauritania], Feb. 29, 1984, available at <http://www.droit-afrique.com/images/textes/Mauritanie/Mauritanie%20-%20Code%20penal.pdf>.

blasphemer. In December 2014 he was sentenced to death for apostasy in a trial that lasted a day. This pattern of behaviour is also true of Saudi Arabia. With the introduction of an anti-terrorism law, entitled “Penal Law for Terrorism Crimes and Financing of Terrorism”, atheists can be sentenced to death for their beliefs²³.

In the Ireland of the 1960s, attacks on the mysteries of the Christian faith caused uproar. Hence, they were rare. People deplored mocking treatments of the New Testament such as the ‘Life of Brian’ film in 1979. In fact it was banned in both Ireland and in Norway. In Britain, 39 local authorities banned showings of the film and others insisted on an over 18 certificate or cuts. Ireland lifted the ban in 1987 albeit with an over 18 certificate²⁴ and Norway lifted the ban only in 2008. Since the makers believed in the integrity of their creation, they refused to show the film at all if cuts were made or if the original British certificate of 14-years was altered. Richard Webster in “A Brief History of Blasphemy: Liberalism, Censorship and The Satanic Verses”²⁵ commented that despite the blasphemy being what he called mild, public broadcasters shunned the film not because of the law on blasphemy but because of fear of causing offence to Christians. Thus, the true dynamic was not “the force of law but ... the internalisation of this law.”

In 1968 an attack on television by Gay Byrne, the host of the ‘Late Late Show’, that was more a simple expression of opinion, on the Catholic Archbishop of Dublin for spending money on churches rather than on housing for the poor, resulted in hundreds of letters of protest to the national broadcaster RTÉ, many very angry. Thirty years later, in 1997, a comedian called Tommy Tiernan appeared on that talk show and in a seven minute routine, pretended to be a celebrant at mass, poked fun at the crucifixion of Christ and at the idea of the Lamb of God. By the end of the show, over three hundred phone calls of protest had been received, with some people in Dublin driving to RTÉ headquarters because the phone lines were blocked. The comedian waited in his dressing room well into the early hours of the morning to avoid the anger outside. RTÉ did not repeat the programme during the week as it would normally have done. . On an attempt being made to raise the matter in the Senate, one senator mocked attempts to “protect ... the omnipotent”.²⁶

In 2009 the son of a former Minister of Government, under the stage name David McSavage, initiated a satirical television programme which attacked every aspect of Irish society. Literally nothing was sacred over the four series of the ‘Savage Eye’ programme. As well as attacking politics, the Irish language, nationalism, the English, the President of Ireland, the police, medical consultants, Belfast people and old-fashioned attitudes, McSavage trained his guns in a particular way on the Catholic Church. In one episode, the face of a bishop giving a press conference concerning the sexual abuse of children was distorted as he speaks, into a demon. In another, a mother forced to rush to hospital with her baby and left with the choice of leaving her young lad in the temporary care of a drug addict or a trendy priest, chooses the junkie. Even the sacrament of Communion was mocked and one sketch effectively likened the reception of the sacrament to an addiction to heroin or crack cocaine. Many were upset but the continuity to the earlier outrage expressed in 1997 had been severed.

²³ <http://www.hrw.org/news/2014/03/20/saudi-arabia-new-terrorism-regulations-assault-rights>

²⁴ Rockett, Kevin (2004), *Irish Film Censorship: A Cultural Journey from Silent Cinema to Internet Pornography*, Four Courts Press.

²⁵ Webster, Richard (1990), *A Brief History of Blasphemy: Liberalism, Censorship and 'The Satanic Verses'*. Southwold: The Orwell Press. p. 27

²⁶ Senator David Norris, Seanad Éireann Debate Vol.152 No.15, Wednesday 26 November 1997

Where attitudes have continuity

Islam regards the Holy Qur'an as the sanctuary of the Almighty. The human person who originally recited it to his followers, the Holy Prophet of Islam, is the final word of all the prophets travelling back through the Old and New Testaments. Thus the word of the Prophet is final and, as God's word, is unchangeable and unassailable. It's not to be contradicted by statements in those other books or by any other means. As the Messenger of God, the person of the Prophet is inviolable. Whereas, much current speculation refers to images of him being possible within Islam, for the past several centuries any image of him is an affront of a most serious kind²⁷. Mockery of the Prophet, of what he said, of the tenets of divine law and of what is contained in Islamic Revelation is regarded as a direct and unholy affront. During the time when the Prophet was alive on this earth, enthusiasts executed a poet in Medina who wrote satirical verses deriding his Mission.²⁸

Today there is often a simplistic view that an image of itself cannot be a violation. Yet, increasingly many countries are implementing stronger privacy laws. Images taken in private circumstances without permission may attract damages, for example the image of a member of the British royal family sunbathing privately. Images on our television screens are now altered to distort the faces of by-standers who are captured by cameras at important events. The same applies to their car registration numbers. In Europe, it was once common for people to believe that the image of a person constituted the presence of that person so that capturing it constitutes a form of theft of personality. Those without acquaintance with the Orthodox Church will be puzzled at the reverence shown to icons, literally images, of the saints. It is the same idea: through the image the saint is present.

It is interesting to note what Ayaan Hirsi Ali writes in 'Heretic: Why Islam Needs a Reformation Now' about what she sees as the faults of Islam.²⁹ Her position is more than difficult. She is living under protection following threats received because of her documentary that included words from the Qur'an, projected on a living person. Her collaborator on that project was murdered.³⁰ The most famous recent death sentence for blasphemy is perhaps more widely known. Briefly, in 1988 a British-Indian author published a novel ascribing a satanic name to the Messenger of Islam and portraying him as false and manipulative who fabricated the message rather than receiving it from God through an angel. That author was Salman Rushdie and the book was called 'The Satanic Verses'. Other aspects of the book are even more insulting, ascribing names in a brothel to the wives of the Prophet, revered as the 'Mothers of Islam'. Grand Ayatollah Khomeini of the Islamic Republic of Iran proclaimed "In the name of God Almighty" that "the author of the book ... as well as those publishers who were aware of its contents have been sentenced to death." The Ayatollah called on "all intrepid Muslims to execute them quickly ... so that no one will dare to insult the Islamic sanctions."³¹ An attempt at a blasphemy prosecution by Muslims failed before the High Court in London, on the basis that the law protected only Christianity. *R v Gethercole* was cited as precedent.³² The law was thus exposed as unfit for purpose in a society that claims the allegiance of all citizens.

²⁷ Recent controversies include the Charlie Hebdo depiction of Muhammed and depictions of the Prophet in South Park.

²⁸ The poet was named Asma Bint Marwan, 624.

²⁹ Hirsi Ayaan (2004), *Heretic: Why Islam Needs a Reformation Now*, Harper 1st edition.

³⁰ Theodor van Gogh, a Dutch film director and producer who worked with Ayaan Hirsi Ali on the film 'Submission' (2004). He was murdered on 2 November 2004 by a Dutch-Moroccan Muslim.

³¹ Verdict issued on 14 February 1989 by Iranian Islamic leader Khomeini.

³² [1838] 168 ER 1140

Most recently, Zainub Priya Dala has, like John Taylor in 1676, apparently been confined for a time to a mental asylum in South Africa for expressing admiration of that author. In Lahore, Pakistan, the tomb of Ilm-Deen is covered with flowers on a daily basis, a tribute to a man executed for murder perpetrated to uphold the honour of Islam.³³ At his grave, a framed copy of the charge takes pride of place.³⁴ On 6th April 1929, he killed a publisher who had put out a book with an offensive commentary on the Prophet of Islam. Today, a security officer called Mumtaz Qadri is under death sentence for murdering the person he had been charged with protecting Salmaan Taseer, the governor of the Punjab. He turned his machine gun on the governor. The motivation was that the murdered politician had spoken out against his country's blasphemy laws, shocked by an allegation against a Christian woman. Aasiya Noreen, in the course of a row with a neighbour while doing farm work, was accused of insulting the Prophet of Islam.³⁵ With the weight of Christian testimony only half that of Muslim evidence, her defence that her neighbour was being malicious was discounted and she was sentenced to death. At her sentencing, according to a journalist who wrote her memoirs, "a euphoric hoard" invaded the courthouse crying "kill her" when the sentence was pronounced.

Every law can go wrong. Laws without balance or moderation are unwelcome. But, there are many laws that restrict freedom of speech. Otherwise, we would not have laws against injurious falsehood, passing off and defamation. We do not have in Europe either a universal constitution or a principle against the punishment as a crime against hateful immoderate speech. The United States of America has the First Amendment to the Constitution which requires that attacks on religion be ignored: *Joseph Burstyn Incorporated v Wilson*.³⁶ Some believe that such totemic protection of free speech has unintended consequences, such as the right to make limitless contributions to political funds. Yet freedom of speech is far from absolute. Rather, the reality is that such restrictions are increasing. To propose and to frame a new law is the task of the legislators and not the judiciary..

The law in Ireland protecting religion/constricting free speech

The 1937 Constitution of Ireland guarantees under Article 40.6.1.i that citizens should be able "to express freely their convictions and opinions", subject to "public order or morality".³⁷ It further makes it imperative that Ireland should have laws making it an offence to publish "blasphemous, seditious, or indecent matter", the punishment for which is a matter for the legislature. In an attempt to clarify matters on the constitutional implications of Article 40, the legislature introduced Section 36 of the Defamation Act 2009. From a constitutional perspective, laws on blasphemy are not a necessity. Though they are specifically mentioned in the Constitution, there is no obligation on the Oireachtas to introduce laws on blasphemy.

³³ Ilm-ud-din was a Muslim who murdered a book publisher for publishing a book which offended the religious sentiments of Muslims.

³⁴ Boone J, "At killer's shrine, praise for modern murder", *The Guardian*, 12 March 2015.

³⁵ A Muslim neighbour with whom there was a dispute claimed that it was forbidden for a Christian to drink water from the same utensil as Muslims. Noreen responded "I believe in my religion and in Jesus Christ who died on the cross for the sins of mankind. What did your Prophet Mohammed ever do to save mankind?". The governor of Punjab, Salmaan Taseer was assassinated by a member of his own security team for his defence of Noreen and opposition to blasphemy laws. The Minority Affairs Minister Bhatti was threatened with beheading if he attempted to change the blasphemy laws. On 2 March 2011 he was shot dead.

³⁶ *Joseph Burstyn Incorporated v Wilson* 343 US 495 (1952)

³⁷ Bunreacht na hÉireann, Article 40.6.1 i

This is highlighted by the constitutional references to felony crimes in the Constitution; crimes which Ireland no longer have.³⁸

Section 36 of the Defamation Act 2009 makes it an offence punishable only by a fine of up to €25,000 to “publish or utter blasphemous matter”. The offence is complete where the accused “publishes or utters matter which is grossly abusive or insulting in relation to matters held sacred by any religion” with the effect that it causes “outrage among a substantial number of the adherents of that religion”. To be guilty, the accused has to intend, in other words to have as his or her purpose, “to cause such outrage.” It is a defence, however, that “a reasonable person would find genuine literary, artistic, political, scientific or academic value in the matter to which the offence relates.” While a religion is not defined, “an organisation or cult” which has “making a profit” as its “principal object” or which “employs oppressive psychological manipulation of its followers, or for the purpose of gaining new followers”, is excluded.³⁹ Unlike the old blasphemy law, however, the law is available for the protection of all faiths.

Certainly, the section is quite demanding. Firstly, the prosecution would have to prove grossly insulting words or images about sacred matters. This would require expert evidence that the matter referred to was ‘sacred’ in the religion and that the reference was ‘grossly’ abusive or insulting. Secondly, that the words produced outrage among a substantial number of adherents. Again, evidence in support of this ‘outrage’ would have to be produced including proof of ‘substantial’ impact. Third, that it was the intention of the accused to so cause this outrage. Causal issues can be notoriously difficult to prove, particularly intent based causation. Finally the accused could raise the defence that while the matter was outrageous, a reasonable person would find a recognised value in the matter. Thus the Russian opera referred to earlier might escape the provisions of s36. It is not dissimilar to the difference in the depiction of sex as art or pornography. There have been no prosecutions under the legislation so far.

The United Nations has expressed concern over the inclusion of blasphemy in both the Defamation Act 1961 and the newly introduced section 36 of the Defamation Act 2009.⁴⁰ This report was produced in 2014, at the same time the national Constitutional Convention was also discussing the issues. The Convention recommended that the reference to blasphemy be removed from the constitution.⁴¹ The United Nations believes that Ireland is not in line with international treaties on the issue and is not compatible with the UN Covenant except for Article 20 paragraph 2 of the Covenant.

Like many countries in Europe, Ireland makes it an offence to incite hatred. This has to go beyond bullying and has to have an exclusionary component. Section 1 of the Prohibition of Incitement to Hatred Act, 1989 provides that “hatred” under the Act is to be interpreted to mean hatred directed “against a group ... on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.” Under section 2 it is an offence to intentionally, that is purposefully, “publish or distribute written material” or “to use words, behave or display written material” outside a private residence which “are threatening, abusive or insulting and are intended or, having regard to all

³⁸ Article 15.2 refers to crimes that are felonies. Ireland no longer has such crimes as a result of the Criminal Law Act 1997.

³⁹ Defamation Act 2009, section 36(4).

⁴⁰ United Nations Human Rights Committee, *Concluding observations on the fourth periodic reports of Ireland*, CCPR/C/IRL/CO/4, 24 July 2014.

⁴¹ Constitutional Convention, *Sixth Report of the Convention on the Constitution, The removal of the offence of blasphemy from the Constitution*, January 2014.

the circumstances, are likely to stir up hatred.” The accused has a defence, where he or she did not intend “to stir up hatred,” of unawareness of the nature of the material. Broadcasts are specifically provided for. On conviction, a sentence of two years imprisonment may be imposed and there can be a hefty fine.

In Ireland it is also an offence to disrupt a religious service. On the wording of the Ecclesiastical Courts Jurisdiction Act 1860 this applies, it seems, only to Christian services. As applied by Schedule I of the Statute Law Revision Act 2007, it is an offence that carries a fine or two months in prison to act in a “riotous, violent or indecent” manner but only in any “cathedral” or “church” or in “any place of religious worship duly certified”.⁴² Synagogues and mosques are not registered or certified. If they are registered, then it is possible to argue that under the Places of Worship Registration Act 1855, to “molest, let, disturb, vex or trouble, or by any other unlawful mean disquiet or misuse” any “preacher duly authorised to preach therein” or “any clergyman in holy orders ministering or celebrating any sacrament or any divine service, rite or office” in such places, including a “burial ground” is an offence. But, that is doubtful. The wording seems entirely Christian. An example is standing up during a service and shouting at the priest. There have been some convictions under this section.⁴³ It stands to reason there should be such an offence. If you don’t like a church or a synagogue or a mosque, you don’t have to go there. If you attend in order to disrupt the meditations of others in a nasty way, as the Act describes, then surely this is a crime?

Defining the elements of a crime is easy. Defining when society ought to be allowed to punish behaviour, as a crime is very difficult, especially where rights to privacy or to freedom to speak are involved.

Law in the United Kingdom protecting religion/constricting free speech

Blasphemy was abolished in the UK by s.79 of the Criminal Justice and Immigration Act 2008. It was no longer considered necessary in a secular society and the anomalies in the law meant that it was no longer serviceable. That does not mean, however, that there is no law that might be used against those who want to stir up hatred. Part III of the Public Order Act 1986 makes the promotion of racial hatred an offence.⁴⁴ Race, under this law, embraces “a group of persons ... defined by reference to colour, race, nationality or ethnic or national origins”.⁴⁵ So, whether you want to stir up trouble by insulting Greek people or make insulting remarks about the Irish or Australian aborigines, this may be an offence. You can, however, say whatever you want in private. Section 18 provides that it is a defence to speak inside your own or another person’s “dwelling” where you don’t believe that you can be heard out on the street or next door. This kind of offence requires “threatening, abusive or insulting words or behaviour” or the display of written material to the same effect, where the accused “intends to stir up racial hatred” or where racial hatred is “likely to be stirred up” by that kind of conduct.

Section 19 provides for the offence of publishing or distributing written material which is intended, or likely to stir up, racial hatred. The public performance of a play which is intended, or likely to stir up, racial hatred is provided for under section 20. Section 21 provides for the

⁴² Ecclesiastical Courts Jurisdiction Act 1860, section 2.

⁴³ Peter Tatchell, a human rights campaigner, was charged with this offence in 1988, in the United Kingdom after he climbed into the pulpit of Canterbury Church during a service in order to protest the Church’s support of discrimination against LGBT people.

⁴⁴ Public Order Act 1986, Part III section 18.

⁴⁵ *Ibid* at section 17.

offence of the distribution, showing or playing of a recording which is intended, or likely to, stir up racial hatred. Section 22 provides for the offence of broadcasting of “threatening, abusive or insulting images or sounds” which are intended, or likely to, stir racial hatred. The Act also provides for powers of entry and search of a property where it is suspected such material or recordings are situated.

The omission of protection from religious hatred in the 1986 Act was remedied with the insertion of the Part 3A of the Public Order Act, 1986 through the Racial and Religious Hatred Act 2006. It provides for the offence of hatred against persons on religious grounds. The definition is slightly different to racial hatred. “Religious hatred” means “hatred against a group of persons defined by reference to religious belief or lack of religious belief”⁴⁶. In a similar way to the law against racial hatred, section 29B makes it a criminal offence to use words, behaviour or display of written material that is intended to stir up religious hatred. But, the words or behaviour have in themselves to be “threatening”⁴⁷. That is not as was originally intended by the government. They proposed “threatening, insulting or abusive” as applies to racial hatred. So, it seems weaker than racial hatred; perhaps reflecting the opposition of many civil libertarians such as the comedian Rowan Atkinson who claimed: “To criticise a person for their race is manifestly irrational and ridiculous but to criticise their religion; that is a right. That is a freedom.”⁴⁸ So the British legislation could cover threatening abuse against a religion but it could not cover arguments that a religion got everything wrong, or made no sense. It could not cover the reproduction of religious images or their inappropriate use, such as decorating a pub with Orthodox icons. If moderation characterises the approach and if debate is the motive, then free speech is unlikely to trespass against the law.

Such questions as to whether legislation includes hatred of religion under anti-hate laws and whether to make the mode of expression of criticism of religion or of adherents violent and not merely disrespectful are ones which either make a law work or not. In reality, laws may be shibboleths.

Anti-free speech laws generally

Laws against stirring up ethnic or group hatred are commonplace in modern Europe. There is such a law in France and Jean Marie le Pen was prosecuted under it a number of times⁴⁹. Under the Gayssot legislation of July 1990 it is also a crime to contest the crimes against humanity as found by the Nuremberg Tribunal of 1945-1946⁵⁰. While some may say that there have been many genocides⁵¹, the attempted murder of the Jewish people by the Nazi occupiers of much of Europe between 1933 and 1945 was the most organised, methodical and poisonously ideological, admitting of no exceptions and utterly conscience-less. It was

⁴⁶ Racial and Religious Hatred Act 2006, Schedule 3A, section 29A.

⁴⁷ Ibid at section 29B(1).

⁴⁸ Speech delivered on 6 December 2004 by Mr Rowan Atkinson to Members of Parliament in the United Kingdom in opposition to the Serious Organised Crime and Police Bill.

⁴⁹ He was prosecuted for comments made in 1987 and was later fined 1.2million francs. In 1997 the European Parliament removed his parliamentary immunity so that he could be tried in Germany for comments made. He was convicted and fined by the German court.

⁵⁰ The Gayssot Act (Loi Gayssot) enacted on 13 July 1990 makes it an offence to question the existence or size of crimes against humanity as defined in the London Charter of 1945 on the basis of which Nazi leaders were convicted at Nuremberg.

⁵¹ The Cambodian genocide (1975-79), Rwandan genocide (1994), Massacres of the Hutus in Burundi (1972), Bangladesh genocide (1971), Massacres of Maya people in Guatemala (1962-96) and Persecution of Yazidis by ISIL (2011-present) to name but a few.

accompanied by murder against political opponents, gay people, Gypsies among others. Jean Marie le Pen's offence was to trivialise the gas chambers used for the systemised mass murder of European citizens of Jewish faith:

Je suis passionné par l'histoire de la Deuxième Guerre mondiale, je me pose un certain nombre de questions. Et je ne dis pas que les chambres à gaz n'ont pas existé. Je n'ai pas pu moi-même en voir. Je n'ai pas étudié spécialement la question. Mais je crois que c'est un point de détail de l'histoire de la Deuxième Guerre mondiale⁵².

Ten years later, he repeated his "point de detail" remark and was fined again. Other events in history, such as the deliberate deprivation of the Ukrainian people of the produce of their land under Soviet occupation in 1932-1933, the Holodomor⁵³, the murder of the Armenian people in Ottoman Turkey starting in 1915 are either disputed as to their facts or how they should be classified⁵⁴. There is no European country making denial of the Armenian genocide a crime, nor the Rwanda genocide. Central to the danger of repetition of any crime, however, is that the perpetrators deny it. Central to the healing of any psychosis is that the sufferer turn and face his or her own shadow. So, there is a point to such law. Many of those who oppose Holocaust denial laws, as any sweep of the World Wide Web will show, foster peculiar views. In Europe we have Holocaust denial laws in Switzerland⁵⁵, Austria⁵⁶, Hungary⁵⁷, Belgium⁵⁸, the Czech Republic⁵⁹, the Netherlands⁶⁰, Poland⁶¹, Portugal⁶² and Romania⁶³. In countries such as Spain⁶⁴, such laws have met with constitutional difficulties based on free speech and other countries, such as Ireland, have yet to adopt similar legislation, in our case perhaps because of government priorities and because of the difficulty of drafting. In the words of Professor de Smet of the Université Libre de Belge:

⁵² Translation: "I am passionate about the history of World War II, I ask myself a number of questions. And I'm not saying that the gas chambers did not exist. I could not see myself. I have not specifically studied the question. But I think it is a point of detail in the history of World War II".

⁵³ 1932-1933 resulting in the death of 2.4 to 7.5 million people. The exact number of deaths is unknown due to a lack of records. It was widely believed that this was part of a long-term plan by Stalin to eliminate the Ukrainian independence movement.

⁵⁴ This was the Ottoman government's extermination of the Armenian minority inside their homeland which is now in present day Turkey. The reported deaths are 1.5 million. This was carried out in 2 phases: first the killing of able-bodied men through massacre and forced subjection of army conscripts to forced labour, secondly: by the deportation of women, children, the infirm and elderly on death marche, into the Syrian Desert.

⁵⁵ Article 261bis, Swiss Criminal Code, from December 21, 1937.

⁵⁶ National Socialism Prohibition Law 1947 (amended 1992), s3g, s3h.

⁵⁷ Criminal Code of the Republic of Hungary, s333.

⁵⁸ Negationism Law (1995, amendments of 1999) Articles 1-4.

⁵⁹ Law Against Support and Dissemination of Movement Oppressing Human Rights and Freedoms (2001), s260, s261.

⁶⁰ Dutch Penal Code, Article 137c and 137d.

⁶¹ Commission for the Prosecution of Crimes against the Polish Nation, Article 1.

⁶² Criminal Code of Portugal, Article 240.

⁶³ Emergency Ordinance no 31 of March 13, 2002, Articles 3-6.

⁶⁴ *Varela Geiss v Spain* (application no 61005/09) ECHR 067 (2013). A bookshop owner and Holocaust denier sold materials denying the Holocaust. The ECHR held in favour of Mr Geiss and he received damages of €8,000.

Le négationnisme est l'une des pires formes de racisme. Elle en est aussi sa version la plus « respectable », se parant des oripeaux de la science. C'est pour cela qu'il faut continuer à le sanctionner; La Libre Belgique, April 28, 2006⁶⁵.

In addition, anti racial hatred laws are a commonplace in Europe; most follow a model similar to that in Ireland.

These are based on international obligations. Article 20 of the International Covenant on Civil and Political Rights of 16 December 1966, requires that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". It is hard to quarrel with that.

European Court of Human Rights

Article 8 the European Convention on Human Rights guarantees to everyone, "the right to respect for his private and family life, his home and his correspondence." Of course, this is not absolute, there may be interference, "in accordance with the law as is necessary in a democratic society", where, "interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" is involved. There have been a few cases, none in favour of the pro-blasphemy side of this debate.

In an appeal from the 'Gay News' poem conviction, resulting in a suspended sentence, the European Commission on Human Rights ruled that the protection of the religious feelings of citizens was a legitimate aim. Of course, elsewhere the decisions on the Convention establish that there should be minimal interference and only to the extent posed by the necessity of intervention: *Gay News & Lemon v U.K.*⁶⁶. In Austria a court stated that protection from gratuitous insult to religious feelings was a necessary aim in a democratic society. This case was as a result of the film 'Council in Heaven': *Otto Preminger Institut v Austria*⁶⁷. There is apparently an entitlement not to be offended. A short film about Saint Teresa of Avila called 'Visions of Ecstasy', again insulting the crucifixion, was banned in Britain⁶⁸. This according to the Court, served a legitimate purpose, that of protecting Christians against serious offence in their beliefs; *Wingrove v UK*⁶⁹. In *Tatlav v Turkey*⁷⁰, a journalist published a book, the thrust of which can be seen from the indictment under that country's blasphemy law:

*l'islam est une ideologie qui manque tellement de confiance en elle-meme, que ceci se revele dans la cruante de ses sanctions. (...) elle (...) conditionne [les enfants] des leur plus jeune age, avec des histoires de paradis et d'enfer*⁷¹.

⁶⁵ Translation: "Holocaust denial is one of the worst forms of racism. It is also its most "respectable" version, allied to the trappings of science. That is why we must continue to punish" ; La Libre Belgique , April 28, 2006

⁶⁶ (1983) 5 EHRR 123

⁶⁷ (1995) 19 EHRR 35

⁶⁸ This film was scheduled for release in 1989 by director Nigel Wingrove. The film was banned as it featured sexualised scenes of Saint Teresa Ávila with the body of Jesus on the cross. In 2008 the blasphemy laws in the United Kingdom were repealed and in January 2012, the British Board of Film Classification granted the film an 18 Certificate with no cuts or alterations to the original film's content.

⁶⁹ (1997) 24 EHRR 1

⁷⁰ (App. No. 50692/99) (Unreported, European Court of Human Rights, 2nd May, 2006)

⁷¹ Translation: "Islam is an ideology that is so lacking in confidence in itself, as this is revealed in the cruelty of its sanctions. (...) It (...) conditions [children] from their young age , with stories of heaven and hell".

and;

*il n'aura plus besoin d'histoires de Dieu a partir de cet age-la (...) la politique de l'Islam envers l'enfant aussi, n'est faite que d'une violence barbare (...)*⁷²

and;

*les religions manifestent leur manque de confiance en elles-memes, par leur tendance a reprimer la pensee libre, et en particulier toute analyse et critique a leur regard*⁷³.

and;

*toutes ces verites concretisent le fait que Dieu n'existe pas, que c'est la conscience de l'analphabete qui l'a cree (...) ce Dieu qui se mele a tout, y compris a la question de savoir combien de coup de batons seront infliges a l'adultere, quelle partie du corps du voleur sera amputee*⁷⁴.

and;

certain criticisms of the personality of the Prophet of Islam that will not be repeated here. The Holy Book of Islam is described as “*plus primitive que la plupart des livres plus anciens ecrits par les homes.*”⁷⁵

Differentiating its prior decision in *LA v Turkey*⁷⁶, the Court distinguished the tone of a vicious criticism and held that the expression of views was protected by the Convention but not gratuitous insult. That brought the law pretty close to the English model of the 19th century on blasphemy as to what was not permissible: vulgar insult and abuse.

Model for pure freedom

Americans find the entire idea of anti-expression laws puzzling. The First Amendment of the Constitution of the United States of America passed in 1791, was the law allowing the showing of the obnoxious film that was at the heart of the Supreme Court decision in *Joseph Burstyn Incorporated v Wilson*⁷⁷. The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances⁷⁸.

The application of this has developed, some would say, in not so sensible ways. In the United States there are no pure incitement to hatred laws. Instead, crimes can be aggravated by reason of a racial hatred or religious motivation. It is a crime to assault someone but a worse one to

⁷² Translation: “he will no longer need stories of God from this age - the (...) Islam from politics to the child too, is a barbaric violence (...)”.

⁷³ Translation: “religions express their lack of confidence in themselves, in their tendency to suppress free thought, especially any analysis and criticism in their opinion”.

⁷⁴ Translation: “all these truths embody the fact that God does not exist, it is the consciousness of the illiterate who has created (...) that God mingles everything, including the question of how many blows of a stick will be inflicted to the adulterer, which body part of a thief will be amputated”.

⁷⁵ Translation: “more primitive than most older books written by man”

⁷⁶ *I.A. v Turkey*, (App. No. 42571/98) (Unreported, European Court of Human Rights, 13th September, 2005)

⁷⁷ Note 38.

⁷⁸ First Amendment to the Constitution of the United States of America, Adopted on 15 December 1791.

assault a person because they are Catholic or African-American⁷⁹. Looking back to 1942, Justice Murphy summarised the case law to read that Constitutional problems were not raised by "the lewd and obscene, the profane, the libellous" or by what he called "fighting words ... which by their very utterances inflict injury or tend to incite an immediate breach of the peace."⁸⁰ A similar approach can be seen in the British anti-religious hatred law. There has to be a threat in the words, threatening to another person or perhaps so threatening that the religious person would be infuriated. In *Brandenburg v Ohio*⁸¹, the Supreme Court of the United States ruled that their "constitutional guarantee of free speech and free press" exclude the states from limiting statements except "where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action." Thus, statements that pose an immediate danger of a breach of the peace can be forbidden and, even there, the proponent of hate speech has to have this as his or her intention.

Concluding comments

Hatred is an integral potential of the human personality. Hatred is the driving engine of crimes of violence. It is irrational, immune to argument, easy to conjure up in the right conditions and contagious. In Europe, remembering the dreadful crimes perpetrated against vulnerable minorities, it makes sense to outlaw hate speech.⁸²

In Europe, we are far from the approach advocated by Lord Devlin that a private breach of morality is to be treated as a form of treason on society and thus outlawed. Rather, minimal interference in the liberties of citizens, as advocated by Paine and Mill, is the order of the day. Society should be based on freedom, because sound policies and fair decision making can only be achieved where every action of government is subject to discussion and to criticism⁸³. This argument is a variant of John Philpot Curran's statement in Green Street Courthouse in Dublin: that the price of liberty is eternal vigilance; a quality that cannot be achieved in the darkness of ignorance.

However, the origin of principles informs their application, just as the background to an agreement illuminates the meaning of the text in which it is expressed. Liberty in Europe is founded upon freedom to enquire and to discuss and to criticise. The object of such freedom is to function as the fundamental bulwark against tyranny. Just as violence and hatred are bedfellows, so are the protection of tyrants and the suppression of speech. That is where it is reasonable to argue that the protection of religion from calculated hatred can be a legitimate aim of the law. Religion, arguably, now has nothing to do with the law. The most deeply held beliefs of believers as to what is sacred do not impact upon discussions as to how economic policy is to be run or as to how good administration is to be achieved or as to how proper standards among politicians may be enforced. That is what our political discourse is about nowadays precisely because we have complete freedom of discussion.

⁷⁹ The Civil Rights Act 1968 proved to be a landmark piece of legislation, making it a federal crime to discriminate or assault someone "by reason of their race color, religion or national origin". This was against the backdrop of the Civil Rights Movement and was initially concerned with equal housing rights.

⁸⁰ *Chaplinsky v New Hampshire* 315 US 568 (1942)

⁸¹ *Brandenburg v Ohio* 395 US 444 (1969)

⁸² Charleton P, (2006) *Lies in a Mirror: An Essay on Evil and Deceit*, Blackrock, Co.Dublin, Ireland: Blackhall Publishing.

⁸³ Cox N, (2000), *Blasphemy and the Law in Ireland*, Queenston, Canada: The Edwin Mellen Press.

As lawyers, more than most, we are aware of the temptation of Ἡρόστρατος, (Herostratos) who burned down the Temple of Artemis in Ephesus in the 4th century BC for no better reason than that he wished to achieve notoriety⁸⁴. Mischief, the desire to cause trouble, is recognised by the compilers of folktales from the Grimms to Perrault to Yeats as a key temptation in human nature. Recent examples include the killers of John Lennon and John Hinckley Junior who attempted to assassinate President Reagan in order to gain attention. One suspects as well that those ‘clergy’ who gained notoriety by threatening the burning of the Holy Book of Islam in America were similarly motivated. Why leave them with a free ride, the result of which may be the inflaming of serious trouble in our society? On May 5th 2015 a plot was foiled to attack a group that were planning to have a ‘draw in’ of the Messenger of Islam⁸⁵. The result was two deaths.

By the state having a clearly defined and proportionate remedy, which is respectful of divergence, the law may be seen to be above sectional interests and the protector of the most sacred trust of society. Is this a question of the careful drafting of an appropriate legal instrument or is it the re-creation of the offence of blasphemy by the back door?

⁸⁴ He successfully burned the Temple in 365 BC. Such was the notoriety of his actions; the government passed a law forbidding anyone from speaking his name. To this day, that legacy lives on in the concept of Herostratic fame- fame acquired by deliberately destructive means.

⁸⁵ This was originally started by the blog “*Atlas Shrugs*” which declared that there was a war on free speech. Two men with rifles attempted to attack the police outside of the event.