

A MARGIN OF APPRECIATION FOR MUSLIMS?  
VIEWING THE DEFAMATION OF RELIGIONS  
DEBATE THROUGH *OTTO-PREMIINGER-  
INSTITUT V. AUSTRIA*

*Robert A. Kahn\**

**Abstract:** Critics of the global standard outlawing defamation of religions often view the proposal as an effort by radical Muslims to deprive the liberal West of long-held liberties. What if, however, the supporters of the proposal are surprisingly moderate in what they ask for? What if the liberal West itself has a history of banning blasphemy? To explore these questions, the defamation of religions debate is viewed from the vantage point of *Otto-Preminger-Institut v. Austria*, in which the European Court of Human Rights upheld an Austrian prosecution of a film potentially offensive to Catholics. *Otto-Preminger* unsettles the critics' arguments in two ways. First, the majority suggests one could ban some blasphemy without stifling religious debate. Second, the dissent, while opposing the prosecution, would have allowed Austria to ban violent and abusive attacks on religious groups. This suggests a compromise where defamation of religions proposal is read as calling for a ban on the incitement of religious hatred. Finally, *Otto-Preminger* shows how to conduct a civil discussion about if and when to ban religiously offensive speech. There is a lesson for defamation of religion critics here as well.

As in the case of "morals" it is not possible to discern throughout Europe a uniform conception of the significance of religion in society . . . ; even within a single country such

---

\* Associate Professor, University of St. Thomas School of Law in Minnesota. I owe an enormous debt to Jacqueline Baronian and Douglas Dow both of whom listened to repeated formulations of the thesis and main arguments of this Article. I would also like to thank Mitchell Gordon, Thomas Berg, Mike Paulsen, Rob Vischer and Joel Nichols of the University of St. Thomas School of Law. Louis Wahl IV provided valuable research assistance. This Article was supported by a University of St. Thomas Summer Research Grant.

conceptions may vary. For that reason it is not possible to [define] . . . what constitutes a permissible interference with . . . freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities . . . .<sup>1</sup>

I.	INTRODUCTION: TOWARD A THIRD WAY .....	403
II.	DEFAMATION OF RELIGIONS AND ITS CRITICS .....	406
	A. Defamation of Religion and the Clash of Civilizations.....	406
	B. Meeting Muslims in the Middle: <i>Otto-Preminger</i> as a Guide.....	415
III.	DOUBLE STANDARD OR MODEL? THE <i>OTTO- PREMINGER</i> CASE.....	418
	A. The Film, Its Seizure, and Legal Proceedings in Austria .....	419
	B. The European Commission Proceedings.....	423
	C. The Ruling of the European Court for Human Rights.....	426
	D. The Reception of the <i>Otto-Preminger</i> Case .....	431
IV.	(NARROW) BLASPHEMY LAWS FOR ALL? THE IMPLICATIONS OF THE <i>OTTO-PREMINGER</i> MAJORITY.....	433
	A. <i>Otto-Preminger</i> as Unsettling the Arguments of Defamation of Religions Critics.....	433
	B. <i>Otto-Preminger</i> as a Marking the Limits of Anti- Blasphemy Laws .....	440
V.	DEFAMATION OF RELIGIONS AS INCITEMENT TO RELIGIOUS HATRED: ONE READING OF THE <i>OTTO-PREMINGER</i> DISSENT .....	441
	A. The <i>Otto-Preminger</i> Dissent and Blasphemy Prosecutions.....	441
	B. The <i>Otto-Preminger</i> Dissent and Incitement to Religious Hatred.....	443
	C. Are Defamation of Religions and Incitement Separate Issues?.....	445

---

1. *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) ¶ 50 (1994) (citations omitted).

D. Does Incitement Cover Enough Speech to Satisfy Muslims?.....	448
VI. CONCLUSION: <i>OTTO-PREMIINGER</i> AS AN EXAMPLE OF CIVIL DISCOURSE.....	454

### I. INTRODUCTION: TOWARD A THIRD WAY

For slightly more than a decade, Muslim majority nations and the Organization of Islamic Countries (OIC) have pushed for a norm against “defamation of religions” as a means to respond to anti-Muslim attacks and stereotyping.<sup>2</sup> Too many critics of the proposal, especially in the West, tend to view it in black and white terms. The radical Muslim stands ready to deprive the West of age-old liberties. What if, however, Muslim demands are—at least as presented—considerably more moderate? And what if Western liberties, in Europe at least, are qualified by a number of concerns, including protecting the religious sensibilities of others?

To explore these questions, the defamation of religions debate is viewed through the lens of *Otto-Preminger-Institut v. Austria*,<sup>3</sup> in which the European Court for Human Rights upheld an Austrian blasphemy prosecution of a film some Austrian Catholics found offensive.<sup>4</sup> The case is noteworthy in two respects. First, the *Otto-Preminger* majority opinion, while upholding the prosecution, placed restrictions on blasphemy laws. These restrictions could form the basis for a Western response to Muslim demands that would allow for a very narrow category of anti-blasphemy laws.<sup>5</sup>

Second, the *Otto-Preminger* dissent, while finding fault with the Austrian prosecution, suggested that legal action might be

---

2. For an overview of the debate, see Lorenz Langer, *The Rise (and Fall?) of Defamation of Religions*, 35 YALE J. INT’L L. 257, 258 (2010).

3. 295-A Eur. Ct. H.R. (ser. A) (1994).

4. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) (1994).

5. This assumes the defamation of religions proposal is, in fact, a call for a global anti-blasphemy norm. Despite the extensive debate, the term “defamation of religions” is not well defined. As discussed later, one can interpret the term as calling for something less than full-fledged blasphemy laws. See *infra* Part V.

justifiable to prevent “violent and abusive attacks on the reputation of a religious group.”<sup>6</sup> The dissent suggests the possibility of speech restrictions that combine a Western reluctance to ban blasphemy with a willingness to use other, less broad, laws to respond to concerns about attacks on Muslims and Islam.

This Article seeks a middle ground, one that responds to the defamation of religions proposal by taking Muslim concerns seriously while protecting the core value of freedom of speech. To put it another way, the *Otto-Preminger* majority spoke of extending a “margin of appreciation” to Austrian Catholics in recognition of their greater religious sensitivity.<sup>7</sup> Is it possible to extend that same margin of appreciation to Muslims (especially those in Europe) who, in response to anti-Muslim speech and acts, have called for laws punishing the defamation of religions?

The rest of this Article explores this argument. Part II examines the debate over the defamation of religions proposal. Defamation of religions critics see the concept as restricting debate on religious issues, confusing the difference between race and religion, and—for some critics—giving into an “enemy” who seeks to undermine Western values. The European experience with blasphemy prosecutions, however, suggests the possibility of establishing a middle ground.

Part III describes one such prosecution, the *Otto-Preminger* case. It details the origins of the prosecution, the two rounds of litigation before Europe-wide courts, and the reception of the opinion. While the outcome of the case has been subject to strong critique, critics have not questioned the broader interpretive framework shared by both the majority and dissent.

Part IV uses the *Otto-Preminger* majority to assess the claim of defamation of religion critics that blasphemy laws are incompatible with liberal Western freedoms because they stifle religious debate. The majority, while upholding Austrian authorities’ seizure and confiscation of the film, placed a number of restrictions on blasphemy prosecutions. Similar restrictions

---

6. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 6 (Palm, Pekkanen, & Makarczyk, JJ., dissenting).

7. *Id.* ¶ 40 (majority opinion).

could be applied in the defamation of religions context.

Part V uses the *Otto-Preminger* dissent to examine a response to defamation of religions that would ban religiously based hate speech but not blasphemy. By expressing a willingness to uphold bans on “violent and abusive attacks on the reputation of a religious group,”<sup>8</sup> the dissenters open the door to this possibility, especially if one sees the problems facing Muslims in the West as stemming primarily from anti-Muslim hatred rather than contempt for Islam as a religion.

The Conclusion returns to the defamation of religions debate, this time through the prism of *Otto-Preminger*. By showing the same tensions posed by the OIC also exist within the West itself, the case helps undermine the frames of culture clash, appeasement, and slippery slopes that dominate the debate—in part by showing the same tensions posed by the OIC also exist within the West itself. Instead, the majority and dissent provide some starting points for a discussion of what speech a liberal society can ban in the name of protecting the religious sensitivities and dignity of its citizens.

Before going on, however, some caveats: First, this Article concentrates on how Europe, where many countries have laws banning hate speech,<sup>9</sup> should respond to defamation of religion. The situation in the United States—where the First Amendment rules out most forms of hate speech regulation—will be much different.<sup>10</sup> Second, the Article focuses narrowly on objections to the defamation of religions proposal based on its incompatibility with the liberal West. Critics have raised other concerns about the proposal, including the fear that the norm may give added international credibility to the strict anti-blasphemy laws

---

8. *Id.* ¶ 6 (Palm, Pekkanen, & Makarczyk, JJ., dissenting).

9. For a comparison of American and European attitudes to hate speech regulation, see Sionaidh Douglass-Scott, *The Hatefulness of Protected Speech: A Comparison of American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305 (1999).

10. In particular, one could imagine an “American” response to defamation of religion that would reject the proposal on the ground that no ban on offensive speech is justifiable. To be consistent, such an argument would have to call for an end to hate speech regulation in Europe as well.

present in many Muslim majority states.<sup>11</sup> Finally, the Article by necessity paints with a broad brush. While most defamation of religion critics fail to engage the supporters' specific claims about the harm speech that defames Islam poses to Muslims, some critics make a concerted effort to seek out a middle ground. For example, blogger Jehanzeb Dar, while conceding that the "the UN anti-blasphemy resolution [is] flawed," views the proposal as "an important opportunity for Muslim and non-Muslim communities to achieve a richer and empathetic understanding about issues related to vilification of Islam in mainstream media, pop culture, and newspapers."<sup>12</sup>

## II. DEFAMATION OF RELIGIONS AND ITS CRITICS

### A. Defamation of Religion and the Clash of Civilizations

Since 1999, United Nations bodies have considered proposals by the Organization for Islamic Countries (OIC) calling for the outlawing of religious defamation.<sup>13</sup> Although the language is

---

11. See, e.g., Aaron J. Leichman, *Muslim States Press U.N. Council to Condemn Anti-Islam Actions, Speech*, CHRISTIAN POST (Sept. 24, 2010, 04:39 PM), <http://www.christianpost.com/article/20100924/muslim-states-press-un-council-to-condemn-anti-islam-actions-speech>. Another concern is that autocratic states will use the defamation of religions proposal to curb dissent; Press Release, Freedom House, Nigerian and Indonesian Activists Challenge Repressive Measures in "Defamation of Religions" Debate (May 10, 2010), <http://www.freedomhouse.org/template.cfm?page=70&release=1152> (using failure of domestic defamation of religion laws in Muslim majority states as reason to oppose proposal).

12. Jehanzeb Dar, *Critics of U.N. Anti-Blasphemy Resolution Overlook Opportunities for Global Dialogue*, ISLAM ON MY SIDE (Mar. 14, 2009, 11:18 PM), <http://islamonymyside.com/wordpress/?p=399>. For another example, see Vaughn E. James, *Defamation of Religions Versus Freedom of Expression: Finding a Balance*, 2008–2009 FIDES ET LIBERTAS 43. James's article is noteworthy in several respects. First, he discusses the specific concerns about anti-Muslim speech listed in the preamble to many defamation of religions documents, something the critics rarely do. *Id.* at 45–46. Second, while confessing his dislike for "defamation of religions"—both as a term and as a reason to punish speech—he admits to an analytical distinction between "the discussion of theological issues and disagreements" and "the making of negative statements about the people who subscribe to one theological viewpoint or another." *Id.* at 55.

13. See Langer, *supra* note 2, at 258.

general, the preamble and text of the proposals repeatedly mention attacks on Muslims, especially those living in the West. For example, the 2009 proposal before the U.N. General Assembly refers to “the ethnic and religious profiling of Muslim minorities in the aftermath of the tragic events of 11 September 2001” and regrets the use of “laws or administrative measures specifically designed to control and monitor Muslim minorities.”<sup>14</sup> Other documents are more specific. Likewise, in an October 2009 letter calling for passage of the defamation of religions proposal, Zamir Akram, a Pakistani diplomat, referred to the comments of Nick Griffin, British National Party leader, who called Islam “a vicious and wicked religion,” the then proposed Swiss ban on minaret construction, and acts in Denmark and the Netherlands where “the personality of Prophet Mohammad (PBUH) has been deliberately ridiculed with the intention to violate the sentiments of Muslims.”<sup>15</sup>

Each year the proposals pass, although recently the margin has narrowed.<sup>16</sup> The regularity of the debate has sustained a “clash of civilizations”<sup>17</sup> ritual in which U.N. debates and votes become occasions for dire predictions about the danger radical Islam poses to the liberal West. For example, Hillel Neuer of UN Watch referred to “an intensifying campaign of U.N. resolutions that dangerously seek to import Islamic anti-blasphemy

---

14. Human Rights Council Res. 10/22, Combating Defamation of Religions, 10th Sess., Mar. 2–27, 2009, U.N. GAOR, 64th Sess., A/HRC/10/22, ¶ 5, 7 (Mar. 26, 2009). Other resolutions use quite similar language. *E.g.*, Human Rights Council Res. 7/19, Combating Defamation of Religions, 7th Sess., Mar. 3–28, 2008, U.N. GAOR, 62nd Sess., A/HRC/7/19, ¶ 3, 6 (Mar. 27, 2008); Combating Defamation of Religions, GA Res. 62/154, ¶ 6, U.N. Doc. A/RES/62/154 (Dec. 18, 2007).

15. Letter from Zamir Akram, Ambassador & Perm. Rep., Coordinator of the OIC Grp. on Human Rights & Humanitarian Issues, to H.E. Mr. Idriss Jazairy, Chairperson-Rapporteur of the Adhoc Comm. on the Elaboration of Complementary Standards, Office of High Comm’r for Human Rights (Oct. 29, 2009), <http://www.unwatch.org/atf/cf/%7B6deb65da-be5b-4cae-8056-8bf0bedf4d17%7D/OIC%20DOCUMENT%20TO%20AD%20HOC%20COMMITTEE%2029%20OCTOBER%202009.PDF>.

16. See Patrick Goodenough, *Waning Support for Defamation of Religion Resolution Undermines Defense of Islam*, OIC Chief Says, CNS NEWS (Apr. 16, 2010), <http://www.cnsnews.com/node/64248>.

17. For the origin of the term, see Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22 (1993).

prohibitions into the discourse of international human rights law.”<sup>18</sup> Likewise, a 2009 blog post criticizing a proposal to alter the International Covenant on the Elimination of Racial Discrimination by including a religions incitement provision warns that the proposal would mark “the first time in history that one of the world’s core human rights treaties were rewritten according to the Islamic states’ decade-long U.N. campaign against free speech, a move that would have dramatic consequences for the legal systems of countries across the world.”<sup>19</sup>

At first glance, the fears of liberal critics (which include Freedom House, Article 19, and the Becket Fund for Religious Liberty, among others) make sense. Many Muslim majority countries have laws against that punish blasphemy with lengthy prison sentences, if not worse.<sup>20</sup> And in theory at least, a ban on religious defamation, broadly defined, could make spirited discussion of religious debate impossible.<sup>21</sup> Thus, Freedom House is probably correct when it warns that given the “overly vague”

---

18. Patrick Goodenough, *‘Defamation’ of Islam Resolution Set to Pass, but Losing Ground*, CNSNEWS.COM (Nov. 25, 2008), <http://www.cnsnews.com/node/39915>.

19. *The Islamic-Sponsored Protocol to Ban Criticism of Religion Under the International Racism Convention*, UN WATCH (Mar. 21, 2009), <http://blog.unwatch.org/index.php/2009/03/21/the-islamic-sponsored-protocol-to-ban-criticism-of-religion-under-the-international-racism-convention/>. Interestingly, a good deal of the support for the defamation of religions proposal comes from Christian countries outside the West. See Liaquat Ali Khan, *Combating Defamation of Religions*, AM. MUSLIM (Jan. 1, 2007), [http://www.theamericanmuslim.org/tam.php/features/articles/combating\\_defamation\\_of\\_religions](http://www.theamericanmuslim.org/tam.php/features/articles/combating_defamation_of_religions).

20. For an overview, see Submission from the European Ctr. for Law & Justice to the UN Office of the High Comm’r of Human Rights (June 2008), [http://www.eclj.org/PDF/080626\\_ECLJ\\_submission\\_to\\_OHCHR\\_on\\_Combating\\_Defamation\\_of\\_Religions\\_June2008.pdf](http://www.eclj.org/PDF/080626_ECLJ_submission_to_OHCHR_on_Combating_Defamation_of_Religions_June2008.pdf) (describing death sentences in Afghanistan and Iran and lengthy prison sentences in Pakistan—all for blasphemy).

21. For example, an Article 19 press release states that “the concept of defamation of religions has been abusively relied upon to stifle religious dissent and criticism of religious adherents and non-believers in a number of countries around the world.” Press Release, Article 19, UN/Ireland: Article 19 Expresses Concern at New Attempts to Legitimise Religious Defamation Using Principles of Blasphemy (Nov. 20, 2009), <http://www.article19.org/pdfs/press/un-ireland-article-19-expresses-concern-at-new-attempts-to-legitimise-religi.pdf>.



nature of “defamation of religions” there is a risk that the proposed norm will, in practice, violate freedom of religion and conscience “by designating certain ideas as off-limits for debate and discussion by believers and non-believers alike.”<sup>22</sup>

There is also a concern that, by “attempt[ing] to provide rights to a belief or idea, rather than an individual or group of individuals,” defamation of religions risks “fundamentally contradict[ing] the standards set by existing international law.”<sup>23</sup> The threat is not simply banning otherwise protected speech but also undermining the global consensus behind the enforcement of human rights.<sup>24</sup> This argument is popular with representatives of Western states seeking a bright line reason to reject defamation of religion. For example, at a 2009 meeting of the U.N. Human Rights Council, the Canadian representative stated plainly: “It is individuals who have rights, not religions.”<sup>25</sup> A French delegate made a similar argument in 2008.<sup>26</sup>

The concern about standards is linked to fear that adopting the defamation of religions norm will complicate the fight against racism. For example, the Becket Fund has warned of “the conflation of racist hate speech and the suppression of peaceful, but controversial, discussions of truth claims about and within religions.”<sup>27</sup> States have picked up on this argument as well.

---

22. *Fact Sheet: Defamation of Religions*, FREEDOM HOUSE, <http://www.freedomhouse.org/uploads/FactSheetDefamationOfRel.pdf> (last visited Feb. 12, 2011).

23. *Id.*

24. For example, L. Bennett Graham of the Becket Institute praises human rights groups for their growing awareness of the “danger” defamation of religions poses “to the human rights structure.” L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 EMORY INT’L L. REV. 69, 72 (2009). Likewise, a statement submitted to the General Assembly warned that defamation of religion threatens “the inter-cultural consensus on which the human rights instruments are based.” Joint Written Statement from the Int’l Humanist & Ethical Union, the Ass’n for World Educ., & the Ass’n of World Citizens, to the UN General Assembly (Aug. 12, 2008), [http://www.iheu.org/files/A\\_HRC9\\_NGO\\_02.pdf](http://www.iheu.org/files/A_HRC9_NGO_02.pdf).

25. Laura MacInnis, *U.N. Body Adopts Resolution on Religious Defamation*, REUTERS (Mar. 26, 2009, 2:37 PM), <http://www.reuters.com/article/2009/03/26/us-religion-defamation-idUSTRE52P60220090326>.

26. Goodenough, *supra* note 16.

27. *Id.* (statement of spokesman for Becket Fund for Religious Liberty).

Germany, speaking on behalf of the European Union, acknowledged that anti-Semitism, Islamophobia, and Christianophobia were serious issues but added that it was “problematic to reconcile the notion of defamation (of religion[s]) with the concept of discrimination.”<sup>28</sup> As a result, the defamation of religion concept was not “a valid one in human rights discourse.”<sup>29</sup>

But defamation of religion critics goes too far. Eager to separate out criticism of religion from racist hate speech, they minimize the hatred and discrimination facing Muslims in Western Europe. This is true, even for groups that, in other contexts, stand up to anti-Muslim racism.<sup>30</sup> For example, Human Rights First commissioned a lengthy report on Islamophobia in Europe but the same group’s report on defamation of religions scarcely mentions the subject.<sup>31</sup>

L. Bennett Graham, a program officer for the Becket Fund for Religious Liberty, at first looks like an exception. In an article criticizing the defamation of religions concept, he notes how “[i]n the wake of September 11, 2001, concern about the

---

28. MacInnis, *supra* note 25 (statement of Germany “on behalf of the European Union”).

29. *Id.*

30. For example, a 2010 press release from Article 19 concedes that minaret bans “may violate the rights of observant Muslims to manifest their religion in public,” but argues that bans on speech critical of religion will not assist in responding to them. Press Release, Article 19, UN Human Rights Council: Article 19 Calls on HRC Members to Vote Against Proposed Resolution on “Combating Defamation of Religions” (Mar. 22, 2010), <http://www.article19.org/pdfs/press/un-human-rights-council-article-19-calls-on-hrc-members-to-vote-against-prop.pdf>. This may be true, but it does not address the narrower question of whether state bans are an appropriate response to hate speech directed at Muslims because of their religion.

31. See *Islamophobia: 2007 Hate Crime Survey*, HUMAN RIGHTS FIRST (2007), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/07601-discrim-hc-islamophobia-web.pdf>; *Focus Paper on Defamation of Religion*, HUMAN RIGHTS FIRST (2010), <http://www.scribd.com/doc/37383270/3-2010-Focus-Paper-Defamation-of-Religions>. The defamation of religions paper does highlight the organization’s work “to combat violence motivated by bias on the basis of religion, as well as race,” but never takes up the argument of the OIC and its supporters that the prevalence of attacks on Muslims and Islam is a reason to limit religious defamation by law. *Focus Paper on Defamation of Religion*, *supra*.

treatment of Islam increased around the world as Islam became the scapegoat of all acts of terrorism, not just those involving Muslim extremists.”<sup>32</sup> But Graham never takes up the supporters’ argument that anti-Muslim attacks require some type of protection against anti-Islamic speech. Rather, like many other liberal opponents of defamation of religions, he calls for “political” rather than “legal” solutions, including more education.<sup>33</sup>

A related practice is to argue that religion differs from race in legally significant ways. In the words of Graham:

Race is something I simply can’t change. My skin is white and that is not something I chose or am able to alter. Religion on the other hand, even as it has communal expression and purpose, is something that exists in the forum internum and calls to choices of the conscience. Moreover, my *understanding* of belief and ultimate truth will probably continue to change, evolve, and mature, although I believe that the truth itself does not. Thus, the law must treat race and religion differently.<sup>34</sup>

Or to use the more succinct phrasing of the Freedom House fact sheet: “Criticizing a race automatically infers criticism of individuals of that race. Not so with religion.”<sup>35</sup>

This line of argument ignores the possibility of speech that attacks religious identity in a racial way. In particular, it downplays what Burak Erdenir describes as the “new racism” of “Muslimophobia,” which “targets cultures, lifestyles, and physical appearances of Muslims.”<sup>36</sup> One of the key features of the new,

32. Graham, *supra* note 24, at 70. Elsewhere in his article, he complains about “the full body pat down of any Middle Eastern man at the airport” and concedes that “unreasonable hatred based on religion” is a “serious problem.” *Id.* at 73.

33. *Id.* at 82–83. Graham, however, concedes that the law can be a solution for other forms of hate speech. *Id.* at 81.

34. L. Bennett Graham, *Racism and Religious Discrimination: Is the Concept of “Defamation of Religions” Productive?*, BECKET FUND, 1 (Mar. 24, 2009), <http://www.becketfund.org/files/5f29c.pdf>.

35. *Fact Sheet: Defamation of Religions*, *supra* note 22.

36. Burak Erdenir, *Islamophobia qua Racial Discrimination: Muslimophobia*, in *MUSLIMS IN 21ST CENTURY EUROPE: STRUCTURAL AND CULTURAL PERSPECTIVES* 27, 29 (Anna Triandafyllidou ed., 2010). He contrasts this to Islamophobia, which he describes as “being afraid of Islam as a faith.” *Id.*

cultural racism is that because “identity, to a great extent, is about perceptions, the view of the dominant group is determinant and thus one cannot simply disengage from one’s faith group by renouncing the religion.”<sup>37</sup> He compares it to anti-Semitism in the way “prejudice and discrimination against an outside group” rests on “a combination of religious and ethnic terms.”<sup>38</sup>

Worse still, some critics treat anything less than a complete defense of freedom of speech as appeasement. For example, Graham equated a 2009 proposal by Egypt to introduce language into a freedom of speech resolution expressing concern about the potential for its abuse with “moving down the road of incorporating anti-blasphemy laws into freedom of expression protection” even though the Egyptian proposal fell well short of this.<sup>39</sup> Around the same time, Jonathan Turley complained that “free speech is being sacrificed on the altar of religion” and chided the United States (which, with some reservations, backed the Egyptian measure) for “supporting efforts to balance freedom of speech against the protecting of religious groups.”<sup>40</sup>

Perhaps the oddest example of this rhetoric arose in July 2009 when the Republic of Ireland—for reasons completely unrelated to its small Muslim population—enacted a law against

---

at 29. According to Erdenir, Islamophobia, thus defined, is less of a problem in Europe because “there is no threat or pressure on the Europeans to be converted to Islam.” *Id.* It should be noted that some scholars interpret the term Islamophobia more broadly to cover all attacks directed at Islam or Muslims. See Kate Zebiri, *The Redeployment of Orientalist Themes in Contemporary Islamophobia*, 10 *STUDIES IN CONTEMPORARY ISLAM* 1, 12 (noting that “Islamophobia” is “increasingly used to refer to religiously-motivated hostility directed at Muslims”).

37. Erdenir, *supra* note 36, at 35.

38. *Id.* at 36. Erdenir gives Hindus and Muslims in India, and Protestants and Catholics in Ireland as other examples of groups that fall into this category. *Id.* at 35.

39. See Steven Edwards, *Egypt Pushes for ‘Free-Speech’ Resolution at UN*, UN WATCH (Mar. 14, 2009), <http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1319279&ct=6824517>.

40. See Jonathan Turley, *Just Say No to Blasphemy: U.S. Supports Egypt in Limiting Anti-Religious Speech*, JONATHAN TURLEY (October 19, 2009), <http://jonathanturley.org/2009/10/19/just-say-no-to-blasphemy-u-s-supports-egypt-in-limiting-anti-religious-speech>. According to Turley, the proposal would have created “exceptions to free speech for any ‘negative racial or religious stereotyping.’” *Id.*

religious blasphemy.<sup>41</sup> For some defamation of religions opponents, however, it was as if the small Western European republic had committed an act of treason, all the more after Pakistan submitted a proposal to the U.N. Ad Hoc Committee on the Elaboration of Contemporary Standards that tracked the Irish blasphemy law word for word.<sup>42</sup> According to Article 19, the Irish law represented a “dangerous trend towards the [standardization] of blasphemous libel internationally” and called on Ireland to “set an important example to other states” by amending its blasphemy laws.<sup>43</sup>

Finally, the debate is sometimes structured in a way that casts supporters of the defamation of religions concept as “the enemy.” For example, in an article appearing in the *Chicago-Kent Law Review*, Guy Haarscher speaks of an “enemy” who will

---

41. According to the then-Irish Minister of Justice, Dermot Ahern, the Irish Constitution requires that the country criminalize blasphemy. Dermot Ahern, Irish Minister for Justice, Equal. & Law Reform, Amending the Law on Blasphemous Libel, Address Before the Dail Comm. on Justice, Equality Defence and Women’s Rights (May 20, 2009), <http://www.inis.gov.ie/en/JELR/Pages/Home> (search “Quick Search” for “Amending the Law on Blasphemous Libel”) [hereinafter Ahern speech].

The 2008 repeal of Ireland’s 1961 blasphemy statute put Ahern in a situation where his two choices were (1) passing a replacement law with lesser penalties or (2) holding an expensive referendum at a time of fiscal crisis. Andras Gergely, *Ireland to Reform but Not Drop Blasphemy Libel Law*, REUTERS (May 1, 2009, 2:45 PM), <http://uk.reuters.com/article/2009/05/01/uk-ireland-blasphemy-idUKTRE5403QB20090501>. The 2009 statute, which replaced prison terms with fines of up to €25,000, has been vigorously opposed by secular campaigners, including the singer Bjork, who in a protest against the law used an expletive to refer to Buddhist characterization of animals as “lesser beings.” Henry McDonald, *Irish Atheists Challenge New Blasphemy Laws*, GUARDIAN (Jan. 1, 2010, 4:49 PM), <http://www.guardian.co.uk/world/2010/jan/01/irish-atheists-challenge-blasphemy-law>. More recently, Ahern changed his tune and proposed a referendum on the blasphemy provision in the Irish Constitution for fall 2010. See Ahern Proposes Autumn Referendum on Blasphemy, ATHEIST IR. (Mar. 17, 2010), <http://www.atheist.ie/2010/03/ahern-proposes-referendum-on-blasphemy-this-autumn>.

42. See Press Release, Article 19, UN/Ireland: Article 19 Expresses Concern at New Attempts to Legitimise Religious Defamation Using Principles of Blasphemy, (Nov. 20, 2009), <http://www.article19.org/pdfs/press/un-ireland-article-19-expresses-concern-at-new-attempts-to-legitimise-religi.pdf>.

43. *Id.* Article 19 added that it was “ironic that the text to which the European Union is opposed is extracted directly from the law of a Member State and consolidated democracy.” *Id.*

either engage in a “frontal attack” or use “*the language of liberal values*” which he refers to as the “Trojan Horse” or “wolf in sheep’s clothing” strategies.<sup>44</sup> Nor is he alone; a blogger for *Islam Exposed: Online Petition for the Exposure of Islam*, warned readers that: “Our enemies out number us in the U.N. We [cannot] win the crucial votes. We must [counterattack], using their own weapon against them.”<sup>45</sup>

This language comes with a tendency to attribute maximalist aims to defamation of religions supporters. For example, although the defamation of religion proposals nowhere mention blasphemy, Becket fund spokesperson Tom Carter referred to the 2008 proposal as “an anti-blasphemy resolution designed to curtail *any* criticism of Islam.”<sup>46</sup> Likewise, Graham uses anti-conversion laws in India that interpret theological debate as forced conversion to criticize defamation of religions as “a tool of oppression without religious or national borders.”<sup>47</sup>

Granted, few of the documents at hand address specifically what “defamation of religions” should cover. But supporters, such as Pakistani diplomat Zamir Akram, have stressed the OIC’s “commitment to the freedom of opinion and expression” as well as the recognition that religious criticism “is important for introspection, dialogue and better understanding.”<sup>48</sup> Moreover, most of the anti-Muslim incidents in the West mentioned by the OIC cannot fairly be described as forming part of a spirited debate between religious groups. For example, the Third Observatory Report on Islamophobia highlights the case of Marwa al-Sherbini, who was called an “Islamist” and a “terrorist” just before being murdered in a German courtroom.<sup>49</sup>

---

44. Guy Haarscher, *Rhetoric and Its Abuses: How to Oppose Liberal Democracy While Speaking Its Language*, 83 CHI.-KENT L. REV. 1225, 1231 (2008).

45. *Why the Defamation of Religions Resolution Is Unacceptable*, ISLAM EXPOSED (Mar. 27 2010, 1:58 AM), <http://islamexposed.blogspot.com/2010/03/why-defamation-of-religions-resolution.html>.

46. Goodenough, *supra* note 16 (emphasis added).

47. Graham, *supra* note 24, at 81.

48. Letter from Zamir Akram to Idriss Jazairy, *supra* note 15, at 2.

49. ORG. OF THE ISLAMIC CONFERENCE, THIRD OIC OBSERVATORY REPORT ON ISLAMOPHOBIA 14 (2010) [hereinafter THIRD OIC REPORT]. To be sure, there are other more controversial OIC positions, including opposition to republication of

Instead of taking the OIC's commitment to free speech and concern about anti-Muslim incidents as a starting point for further discussion, critics paint the OIC and its allies as radical Muslims who intend to impose the draconian anti-blasphemy laws present in some Muslim countries on the rest of the world. This approach is counterproductive and prevents real dialogue.

#### B. Meeting Muslims in the Middle: *Otto-Preminger* as a Guide

There is, however, another way to think about the issue. Instead of viewing the defamation of religions opening the door to medieval style anti-blasphemy laws with harsh punishments (or as a justification of similar laws in place in some Muslim countries), why not take the proposals at face value, i.e., as a response to a rising tide of attacks on Muslims (and Islam)? And to go further, why not treat defamation of religions not as a threat to the global system of human rights, but as an effort to engage in a dialogue about its scope? The question then becomes where individual states should draw the line in determining which religiously offensive speech to protect.

There are good reasons to seek common ground. First, as Maurits Berger points out, however much one might object to the defamation of religions idea itself, the OIC, in seeking its enactment has followed international norms.<sup>50</sup> This stands out at a time when Muslims and Islam are associated with violence and terrorism.<sup>51</sup> Moreover, even if one were suspicious of the

---

the Danish cartoons. *Id.* at 19–20. But the general tenor is quite different. For example, Ekmeleddin Ihsanoglu's Foreword makes note of the murder of an Egyptian woman in a German courtroom, desecration of graves of Senegalese war veterans in France, victories of far right parties in Europe, and the Swiss minaret ban. *Id.* at 1.

50. Maurits Berger, *Religion and Islam in Contemporary International Relations*, 27 CLINGENDAEL DIPL. PAPERS 1, 20 (2010), [http://www.clingendael.nl/publications/2010/20100400\\_cdsp\\_book\\_mberger.pdf](http://www.clingendael.nl/publications/2010/20100400_cdsp_book_mberger.pdf).

51. *See, e.g.*, Peter Gottshalk & Gabriel Greenberg, ISLAMOPHOBIA: MAKING MUSLIMS THE ENEMY 3 (2008) (arguing that Americans associate the words "Muslim" and "Islam" with violence). By contrast, the OIC report on Islamophobia is noteworthy for its moderate language. Instead of engaging in name calling, the report notes that the "Western group" has "impeded engagement" on the defamations of religion issue because it is concerned about the new concept's "lack of legal persona" (probably a reference to the defamation

OIC's motives, good global politics requires an attempt to meet those demands that are compatible with the international human rights regime as it currently stands.

Second, close examination of how Europe handles blasphemy and other offensive speech complicates the effort to frame the defamation of religions debate as a battle between censorious Muslims and libertarian Westerners. A few European countries have blasphemy laws; many more have laws banning hate speech. So, while Americans like Graham can point to the First Amendment when counseling Muslims that more education—and not law—is the solution to the discrimination they face, Europeans have greater difficulties. Indeed, the Salmon Rushdie and Danish Cartoon affairs show how the presence of laws protecting Christian religious beliefs can embarrass Europeans standing up for freedom of speech against a supposedly intolerant Islam.

But blasphemy and hate speech laws are not just an embarrassment; they are an opportunity. From a modern American perspective, in which blasphemy has been seen as beyond the pale,<sup>52</sup> defamation of religions poses a major challenge to the primacy of freedom of speech (although, even in the United States, that primacy is incomplete). By contrast, European experience with blasphemy and hate speech laws gives Europe a language with which to engage defamation of religions supporters. For instance, a position paper from European Centre

---

of religion's critics argument that human rights protects individuals not ideas). THIRD OIC REPORT, *supra* note 49, at 5.

52. Thus Harry Kalven Jr., in a chapter entitled *The Consensus on Untouchable Content*, concludes that “[i]n America there can be no heresy or blasphemy.” See HARRY KALVEN JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 7 (Jamie Kavlen ed., 1988). There were blasphemy laws in the United States in the nineteenth century, although fewer than in Great Britain. See LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMON RUSHDIE 506 (1993). A key turning point came in *Joseph Burstyn, Inc. v. Wilson*, in which Justice Frankfurter, concurring in a decision that New York's ban on “sacrilegious” was overly vague, described blasphemy as a “chameleon phrase” which covered “criticism of whatever the ruling authority of the moment established as orthodox religious doctrine.” 343 U.S. 495, 528–29 (1952) (Frankfurter, J., concurring). There have been no blasphemy prosecutions in the United States since 1971. See LEVY, *supra*, at 530.



for Law and Justice spoke of drawing a line “between valid criticism of religion or religious practices and speech that does not serve any purpose except to offend the sacred beliefs of individuals or religions.”<sup>53</sup> The language, although not cited, closely parallels the majority opinion in *Otto-Preminger*, which upheld the banning and seizure of a film offensive to Catholics under an Austrian blasphemy law.<sup>54</sup>

In what follows, this Article uses *Otto-Premingeris* to carve out a middle ground in the defamation of religions debate. The argument proceeds in two steps: First, the majority ruling is analyzed; then the dissent. While the majority upheld a blasphemy prosecution, the underlying context of the case combined with additional restrictions added by the court reveal an understanding of blasphemy quite different from the draconian anti-blasphemy laws found in some Muslim majority states that defamation of religions critics use to make their case. Interpreting defamation of religions against the backdrop of the *Otto-Preminger* majority lets one imagine a narrower approach to blasphemy, one that accommodates much of what Muslim majority countries and OIC seek without necessarily changing the current liberal-democratic character of European society.<sup>55</sup>

However, critics might respond that the *Otto-Preminger* case was wrongly decided and that, Austria and Ireland notwithstanding, blasphemy laws are—and should be—on the way out in Europe. Before ruling out defamation of religions, however, critics should take note of the *Otto-Preminger* dissenters who, while rejecting the Austrian blasphemy prosecution, opened the door to punishing speech that targets believers to such an extent they become unable to practice their beliefs.<sup>56</sup> While this narrows the range of punishable speech, some conduct complained of by the OIC falls in this category. The dissenters’ approach is consistent with those who see the

---

53. ECLJ SUBMISSION, *supra* note 20, at 2.

54. *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) (1994).

55. To be sure, such an approach would require extensive line drawing, about which Muslims and Westerners might disagree.

56. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 7 (1994) (Palm, Pekkanen, & Markarczyk, JJ., dissenting).

defamation of religions as a question of incitement to religious hatred rather than blasphemy and view the problem facing Muslims in the West as Muslimophobia (hatred of Muslims) over Islamophobia (hatred of Islam).<sup>57</sup>

This Article does not seek a precise test. Instead, the true power of the *Otto-Preminger* case is how it undermines the rhetoric of fear deployed by defamation of religions critics. If Muslim supporters of the proposal favor “medieval” blasphemy laws, so did a majority of European Court of Human Rights justices less than 20 years ago. If the defamation of religions critic worries about stifling religious debate, the *Otto-Preminger* majority suggests one can draw lines to prevent this. If extending protection to ideas is a concern, the *Otto-Preminger* dissent shows how one might fashion a religious incitement test that focuses on believers rather than beliefs.

### III. DOUBLE STANDARD OR MODEL? THE *OTTO- PREMINGER* CASE

At first glance, the *Otto-Preminger* case is easy to dismiss as an outlier. The European Court of Human Rights upheld Austria’s ban of the *Otto-Preminger-Institut* (OPI) showing of the movie *Liebeskonzil* in its Innsbruck theater even though the play on which it was based was generally available, there were restrictions on the time and place of the screening, and screenings of the film elsewhere in Germany and Austria proved uneventful.<sup>58</sup> Moreover, the ruling itself was unexpected and subject to harsh criticism at the time.<sup>59</sup>

On the other hand, the ECHR ruling did command a majority of the court and has since then provided the basis for other rulings, including *Wingrove v. United Kingdom*, in which the

---

57. For an overview of the debate, see Zebiri, *supra* note 36, at 8–14, and Erdenir, *supra* note 36, at 28–31.

58. For a brief overview of Panizza, the play, and the 1895 trial, see Peter D.G. Brown, *The Continuing Trials of Oskar Panizza: A Century of Artistic Censorship in Germany, Austria, and Beyond*, 24 GERMAN STUD. REV. 533 (2001).

59. *Id.* at 547, 549–50. Brown describes the ruling as sending “shockwaves . . . ‘round the world.” *Id.* at 548.

Court, by a 7–2 vote, upheld the refusal of a British film board, because of concerns about blasphemy, to issue a certificate for a video entitled “Visions of Ecstasy,” an erotic film about St. Teresa of Avila.<sup>60</sup> So, despite facing stiff criticism, the *Otto-Preminger* case has played a role in shaping a distinctly European understanding of when blasphemy laws are justifiable.

#### A. The Film, Its Seizure, and Legal Proceedings in Austria

The roots of the *Otto-Preminger* case go back to the late nineteenth century, a time when a number of European states, including Germany, had an active tradition of theater censorship.<sup>61</sup> In 1894, modernist German author Oskar Panizza wrote a play called *Das Liebeskonzil* (The Love Council). The play told the story of how God, the Virgin Mary, and the Devil, looking for away to punish humanity while still rendering it capable of salvation, decided to spread syphilis in the court of the Renaissance Pope, Alexander VI.<sup>62</sup> As described by the *Otto-Preminger* majority, the play “portrays God the Father as old, infirm, and ineffective, Jesus Christ as a ‘mummy’s boy’ of low intelligence and the Virgin Mary, who is obviously in charge,” as “unprincipled.”<sup>63</sup>

For his trouble, Panizza was tried and sentenced to a year in prison for blasphemy after a trial in Munich, Germany.<sup>64</sup> The court reasoned that “the content” of the play “was calculated to harm in the deepest manner the religious and moral feelings of

---

60. For a brief summary, see Fiona Boyle, *Wingrove v the United Kingdom*, 2 J. CIV. LIBERTIES 142 (1997).

61. The acts of censorship were quite frequent. According to one author, between 1891 and 1900, “157 works were banned in the city of Berlin alone.” Gary D. Stark, *Trials and Tribulations: Authors’ Responses to Censorship in Imperial Germany, 1885–1914*, 12 GERMAN STUD. REV. 447, 449 (1989).

62. *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) ¶ 21 (1994). The court’s description comes from the movie; the play may have been slightly different.

63. *Id.*

64. For a brief overview of Panizza, the play and the 1895 trial, see Brown, *supra* note 58, at 533–34. Interestingly, Panizza was prosecuted in Germany even though he wrote the play while in Switzerland. *Id.* at 534.

others” and thus fell beyond the protection of literary freedom.<sup>65</sup> The trial was a *cause célèbre* at the time.<sup>66</sup> It took until the 1960s for a major press to publish the book and the play debuted in Paris in 1969.<sup>67</sup> It was shown in London the following year and later, in 1981 at the *Teatro Belli* in Rome, where it created a scandal within the theater community.<sup>68</sup> A German film producer saw the play and decided to make a movie based on the version of the play staged at the *Teatro Belli*.<sup>69</sup> The film, which framed the play with opening and closing scenes depicting Panizza’s trial, was directed by Werner Schroeter, and premiered at the 1982 Berlin film festival.<sup>70</sup>

The film played to mixed reviews in a number of markets in Germany and Austria, including Munich, where the play had led to a blasphemy prosecution.<sup>71</sup> According to Peter Brown, the movie was criticized as boring, “too theatrical,” too “German,” “dated” and was generally regarded as a flop.<sup>72</sup> There was some criticism of the film on religious grounds—Catholics in both Germany and Austria complained that the film ridiculed the Holy Family and an official publication of the Austrian Ministry of Education gave the film a negative appraisal.<sup>73</sup>

The specific facts that lead to the European Court of Human Rights case began when the OPI scheduled a public screening of the film in its Innsbruck cinema on May 13, 1985, at 10:00 p.m.<sup>74</sup>

---

65. *Id.* (author’s translation from the German text).

66. According to Brown, the trial and sentence were described by a number of leading late nineteenth century literary figures including Thomas Mann and Walter Benjamin. *Id.*

67. *Id.* at 535. A small collector’s edition was released in 1913. *Id.* at 534. Because of fears of censorship, each copy had the name of the intended recipient printed on it. *Id.*

68. *Id.* at 535–36; see also *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, 69 Eur. Comm’n H.R. Dec. & Rep. 173, ¶ 20 (1993) (describing the theater scandal).

69. Brown, *supra* note 58, at 536.

70. *Id.*

71. *Id.* at 537–39.

72. *Id.* at 537–38. Brown suggests the lack of excitement was due in part to the decision of the director of the Rome play, and hence the movie, to cut out the raciest parts of the original play. *Id.* at 536.

73. *Id.*

74. *Id.* at 539. The Institut planned a total of six evening screenings. *Id.*

As with the other showings, the screening was late at night and excluded children.<sup>75</sup> The advertisement made note of Panizza's trial and conviction for blasphemy, and added that the film starts "from the assumption that syphilis was God's punishment for man's fornication and sinfulness at the time of the Renaissance, especially at the court of Borgia Pope Alexander VI."<sup>76</sup> The announcement warned that "[t]rivial imagery and absurdities of the Christian creed are targeted in a caricatural mode."<sup>77</sup>

Three days before the screening, the public prosecutor, acting at the behest of the local Roman Catholic Church, instituted proceedings under § 188 of the Austrian Penal Code which outlaws blasphemy.<sup>78</sup> After an emergency screening of the film on Sunday May 12th, a presiding judge banned the screening and ordered the seizure of the film.<sup>79</sup> According to the court, the film had the sole purpose of "blaspheming God the Father, Mary[,] and the Trinity."<sup>80</sup>

The ban was appealed to the Innsbruck Appeals Court and dismissed.<sup>81</sup> The court relied on §188 of the Austrian Penal Code, which covers behavior "likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, lawful custom or a lawful institution of such a church or religious community."<sup>82</sup> The Appeals Court interpreted § 188 narrowly to apply only to situations where the behavior was intended "to offend the religious feelings of an average person with normal religious

75. *Id.* The OPI announcement limited attendance to those seventeen years or older, a bit more restrictive than the sixteen or older age limit used by German cinemas. *Id.* at 538.

76. *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) ¶ 10 (1994) (quoting announcement).

77. *Id.*

78. Brown, *supra* note 58, at 539–40.

79. *Id.* at 540; *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 12. Instead, the film's screenplay was read to those who attended the theater that night and a discussion ensued. *Id.*

80. Brown, *supra* note 58, at 540 (author's translation).

81. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 13.

82. *Id.* ¶ 25 (citing Austrian Penal Code § 188). The law calls for penalties "of up to six months" in prison "or a fine of up to 360 daily rates." *Id.*

sensitivity.”<sup>83</sup> It concluded that the “derision of religions feeling” outweighed all competing interests.<sup>84</sup>

While criminal proceedings were dropped, the court launched an “objective proceeding” against the film under the Austrian Media Act.<sup>85</sup> After a trial, which saw another screening of the film, the Innsbruck Regional Court “ordered the forfeiture of the film.”<sup>86</sup> In defending its position, the court described the film as presenting “God the Father . . . as a senile, impotent idiot, Christ as a cretin, and Mary Mother of God as a wanton lady.”<sup>87</sup> This portrayal of the Holy Family, “central figures in Roman Catholic religious doctrine,” “objectively fulfilled” the requirements of §188, especially given “the general character of the film as an attack on Christian religions.”<sup>88</sup> This “multiple and sustained violation of [a] legally protected interest,” in “a film primarily intended to be provocative and aimed at the Church,” outweighed the protection of artistic freedom guaranteed under Article 17A of the Austrian Basic Law.<sup>89</sup>

After the Innsbruck Appeals Court rejected an appeal by the film’s distributor and the prosecutor refused to enter a “plea of nullity” (essentially an agreement not to prosecute the case), the OPI filed a claim with the European Commission of Human Rights in Strasbourg, challenging the seizure and forfeiture of the film.<sup>90</sup> At the time, the OPI was optimistic about its chances,<sup>91</sup> and initially their hopes were justified.

---

83. *Id.* ¶ 13 (describing 1985 ruling of the Innsbruck Appeals Court).

84. *Id.*

85. *Id.* ¶ 14. An “objective proceeding” is brought against the film itself, its purpose is to enact a general ban on the film or book in question. *Id.* ¶ 28. Criminal charges were not pursued against Dietmar Zingl of the OPI because the film was never shown. Brown, *supra* note 58, at 542.

86. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶¶ 15–16.

87. *Id.* ¶ 16 (describing the 1986 ruling of the Innsbruck Regional Court). The court also found that the film “ridiculed” the Eucharist. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* ¶¶ 18, 32. In refusing to enter a plea of nullity, the prosecutor noted that Austria had a long tradition of balancing artistic freedom against other rights. *Id.* ¶ 18.

91. Brown, *supra* note 58, at 544.

## B. The European Commission Proceedings

The vindication of human rights under the European Convention of Human Rights is a two-step process. Complaints are first heard by the European Commission for Human Rights; if the Commission concludes there is a valid claim, the case is then heard by the European Court of Human Rights. Defenders of *Liebeskonzil* had little trouble with the first hurdle; although, there were several animated dissents.

It was not until 1991 that the case came before the Commission. Like its Austrian predecessors, the Commission screened the film and then, in a 9–5 decision, held that the seizure of the film and its forfeiture violated Article 10 of the European Convention of Human Rights.<sup>92</sup> Article 10 guarantees the right of “freedom of expression . . . without interference by public authority.”<sup>93</sup> However, restrictions on this right are justifiable when “prescribed by law” and “necessary in a democratic society” to satisfy a number of aims including “the prevention of disorder or crime . . . the protection of health or morals . . . [or] the protection of the reputation or rights of others.”<sup>94</sup>

In approaching the case, the Commission majority found that the seizure and the forfeiture violated the OPT’s freedom of expression and that they were “prescribed by law” with the legitimate aim of “the protection of the rights of others” and “the protection of . . . morals.”<sup>95</sup> Therefore, the Commission had to determine whether the prosecution was “necessary in a

---

92. *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, 69 Eur. Comm’n H.R. Dec. & Rep. 173, ¶ 47 (1993).

93. Convention for the Protection of Human Rights and Fundamental Freedoms art.10(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Human Rights Convention].

94. Human Rights Convention, art.10(2). The “necessary in a democratic society” clause distinguishes Article 10 from the First Amendment, and may explain why Americans are less willing to restrict speech. For an alternative view, see SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY*, 14–16 (1994) (tracing the absence of hate speech laws in the United States to the Civil Rights and Anti-Vietnam War movements).

95. *Otto-Preminger-Institut*, 69 Eur. Comm’n H.R. Dec. & Rep. ¶¶ 57–63.

democratic society.”<sup>96</sup>

In applying this test, the Commission relied on *Handyside v. United Kingdom*, in which the European Court of Human Rights, overturning a British seizure of an allegedly obscene book,<sup>97</sup> stated that Article 10 applies “not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”<sup>98</sup> Therefore, any restriction on speech “must be proportionate to the legitimate aim pursued.”<sup>99</sup>

Turning to the film itself, the Commission concluded that the framing scenes about Panizza’s trial were clearly protected speech.<sup>100</sup> The Commission noted that the text of the play is readily available and that the play had recently been staged in Vienna without incident.<sup>101</sup> In a critical passage, the Commission described the film as having “a strong satirical undertone” which featured the use of caricature as a stylistic device.<sup>102</sup> While conceding that “many believing Christians could be shocked or otherwise offended” by the depictions of God, Jesus, and Mary the film, the Commission, relying on its own screening of the film, concluded that the “satirical element” was “clearly predominant.”<sup>103</sup>

The Commission then held that, given the late evening showing time, the advertisement warning about the contents of the film, and the OPI’s reputation as a “cinema of art,” the seizure of the film was not justified.<sup>104</sup> This was because “satirical texts or films can normally not be completely prohibited” since this “excludes any chance to discuss the

---

96. *Id.* ¶¶ 61, 62–63.

97. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶¶ 9–23 (1976) (describing facts of the case).

98. *Otto-Preminger-Institut*, 69 Eur. Comm’n H.R. Dec. & Rep. ¶ 66 (quoting *Handyside*, 24 Eur. Ct. H.R. (ser.A) ¶ 49).

99. *Id.*

100. *Id.* ¶ 68.

101. *Id.* ¶ 69.

102. *Id.* ¶ 71.

103. *Id.* ¶ 73.

104. *Id.* ¶ 75. The Commission put special weight on the advertisement. *Id.*



message of the film.”<sup>105</sup> The Commission then found that the forfeiture of the film also violated Article 10.<sup>106</sup>

There were three dissents. The narrowest one, penned by Florian Ermacora and joined by A. Weitzel and L. Loucaides, took issue with the majority’s characterization of the play, which he saw as a “vehement” attack on God the Father, Christ and Mary, one that “could seriously offend the feelings of believing Christians both by the language used and the pictorial illustration.”<sup>107</sup> He argued that portraying “Jesus Christ as a mentally deficient and voluptuous young man who approaches Mary in a sexual way” is “out of any proportion as an attack against religious feelings and the common understanding of the image of Jesus Christ prevailing in the countries where the majority of peoples belong, at least formally, to the Christian religion.”<sup>108</sup> In sum, the dissent believed that the film “violated the rights of others who believed in Jesus Christ.”<sup>109</sup>

Ermacora also took issue with the majority’s use of the margin of appreciation doctrine, which requires that the Commission give member states leeway in balancing rights.<sup>110</sup> After asserting that the “requirements of morals” vary across time and place, Ermacora urged deference to the Austrian authorities.<sup>111</sup> In reaching this conclusion, he was supported by a separate dissent by H.G. Schermers, who conceded that the film “has a strong satirical undertone.”<sup>112</sup> In explaining why, despite the film’s satirical undertone, Austria could ban it, Schermers argued that societies differ not only in the role played by religion, but also in their “reception of satirical art.”<sup>113</sup> Therefore, instead of “accept[ing] a general European notion of blasphemy” each case “should be read in the context of the cultural tradition of the

---

105. *Id.* ¶ 77. The Commission did open the door to restricting the access of young children to the film. *Id.*

106. *Id.* ¶ 79.

107. *Id.* (Ermacora, J., dissenting).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (Schermers, J., dissenting).

113. *Id.*

community concerned.”<sup>114</sup> Therefore, he would uphold both the seizure and forfeiture.<sup>115</sup>

The majority European Commission ruling envisioned a very narrow role at best for blasphemy prosecutions. Such prosecutions were not justifiable if the film or other offending object had “a strong satirical overtone.”<sup>116</sup> What was “satirical” would be for the Commission to decide. Even the largest dissent differed more in its characterization of the film than with the majority’s logic. But the dissent of Mr. Schermers suggested a much broader approach to blasphemy, one that would shift the focus from the film to the audience. The 1994 European Court of Human Rights took a similar approach.

### C. The Ruling of the European Court for Human Rights

After the European Commission ruling, the attorneys for the OPI spoke hopefully of a new “Europe-wide . . . freedom of art.”<sup>117</sup> Meanwhile, a number of human rights groups—including Article 19—prepared a brief, which surveyed the current state of blasphemy law in the United States and a number of European countries to show that in all of the countries in question, “the crime of blasphemy has either been entirely abolished or substantially narrowed.”<sup>118</sup> The expectation was that the *Otto-Preminger* case would be the next step in this process, if not a *coup de grace*. Yet this was not to be. In a 6–3 ruling the European Court of Human Rights upheld both the seizure and forfeiture of the film.<sup>119</sup> How did this come to pass?

---

114. *Id.* As for the film itself, Schermers criticized it as “either an effort to deny, or to ridicule, other people’s belief or is at least belief as a theme.” *Id.*

115. *Id.* In addition, Mrs. J. Liddy dissented on the grounds that the seizure was a justifiable step taken for “the ‘prevention of disorder’” given the potential for “outraged protests, demonstration, or other disturbances,” had the film been shown. *Id.* (Liddy, J., dissenting).

116. *Id.* ¶ 71 (majority opinion).

117. Brown, *supra* note 58, at 547 (author’s translation).

118. Written Comments Submitted by Article 19, The International Centre Against Censorship, & Interights, the International Centre for the Legal Protection of Human Rights at 3, *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (1994) (No. 11/1993/406/485) [hereinafter Article 19 Brief].

119. *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) ¶¶ 56–

After concluding that the seizure and forfeiture were violations of the OPI's freedom of expression that were "prescribed by law,"<sup>120</sup> the majority settled down to the difficult question of determining whether actions taken against the film had a "legitimate" aim that was "necessary in a democratic society."<sup>121</sup> On the first point, the majority considered two potentially legitimate aims: "protection of the rights of others" and "the prevention of disorder."<sup>122</sup>

The majority began its examination from the proposition that "freedom of thought, conscience and religion" is "one of the most vital elements that . . . make up the identity of believers and their conception of life."<sup>123</sup> On the other hand, those who exercise their freedom of religion, whether a "majority or a minority, cannot reasonably expect to be exempt from all criticism."<sup>124</sup> To the contrary, they must "tolerate" the "denial by others of their religious beliefs" and "even the propagation. . .of doctrines hostile to their faith."<sup>125</sup>

Instead, the state only comes in when assessing "the manner in which religious beliefs . . . are opposed or denied."<sup>126</sup> The majority noted that, "in extreme cases. . .particular methods of opposing or denying religious beliefs" could "inhibit those who hold such beliefs" from expressing them at all.<sup>127</sup> Moreover,

---

57 (1994).

120. *Id.* ¶¶ 43–45. In particular, the court found no evidence "that Austrian law was wrongly applied." *Id.* ¶ 45.

121. *Id.* ¶ 43.

122. *Id.* ¶ 46.

123. *Id.* ¶ 47 (citing *Kokkinakis v. Greece*, 260 Eur. Comm'n H.R. Dec. & Rep. #, ¶ 31 (1993)). In *Kokkinakis*, the European Commission held that a Greek restriction on proselytizing violated Article 9 of the European Convention of Human Rights, which protects religions freedom. *Kokkinakis*, 260 Eur. Comm'n H.R. Dec. & Rep. ¶¶ 31–32, 50. The case was later affirmed by the European Court of Human Rights. *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) (1993).

124. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 47.

125. *Id.* In other words, the Court—even as it upholds the Austrian blasphemy law—rejects the idea that the state can ban all criticism of religion, a major fear opponents raise about defamation of religions. See *supra* notes 21–22 and accompanying text.

126. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 47.

127. *Id.*

“provocative portrayals of objects of religious veneration” can result in a “malicious violation of the spirit of tolerance,” the latter also “a feature of democratic society.”<sup>128</sup> Accordingly, §188 of the Austrian Penal Code, which had as its goal the suppression of “[behavior] directed against objects of religious veneration that is likely to cause ‘justified indignation,’” served the “legitimate aim” of protecting others.<sup>129</sup>

While the Commission had also found §188 to serve legitimate aims, the language of the majority opinion was much more sweeping. In one fell swoop, the European Court for Human Rights sanctioned a state blasphemy law with language about protecting the “spirit of tolerance”<sup>130</sup> that resonates with the arguments made by the OIC and its allies on behalf of defamation of religions.<sup>131</sup> In effect, the majority was saying that some restrictions on blasphemy were legitimate. What category would the ban on *Liebeskonzil* fall into?

Like the Commission, the majority opinion began with the broad language in *Handyside* to the effect that freedom of expression also covers ideas that “shock, offend[,] or disturb.”<sup>132</sup> These were, according to the majority, “the demands of that pluralism, tolerance, and broadmindedness without which there is no ‘democratic society.’”<sup>133</sup> However, the majority then spoke of obligations including “an obligation to avoid . . . expressions that are gratuitously offensive to others” and “do not contribute to any form of public debate capable of furthering progress in human affairs.”<sup>134</sup> Therefore, certain democratic societies could legitimately sanction, or even prevent, what the court termed “improper attacks on objects of religious veneration” provided that the penalties were proportionate.<sup>135</sup>

---

128. *Id.*

129. *Id.* ¶ 48.

130. *Id.* ¶ 47.

131. *Id.* ¶ 49.

132. *Id.*

133. *Id.* (quoting *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser.A) ¶ 49 (1976)).

134. *Id.*

135. *Id.*

The majority turned next to the specific circumstances of the seizure and forfeiture of the film. Because conceptions of religion vary not only across Europe but also within countries, and no “comprehensive definition” of when freedom of expression must give way to freedom of religion is possible, national authorities are given a margin of appreciation in drawing their own boundaries.<sup>136</sup> The Austrian government saw the film as “a violent and abusive denunciation of . . . Catholic morality” made worse by the inclusion of scenes of Panizza’s 1895 trial and the high proportion of Roman Catholics in the population of Tyrol, where the film was shown.<sup>137</sup> The government claimed that this created a “pressing social need for the preservation of religious peace.”<sup>138</sup>

The majority agreed in substance with the Austrian government. It noted that Roman Catholicism is the religion of “the overwhelming majority of Tyroleans.”<sup>139</sup> The court also credited the conclusion of the Austrian courts that the film contained a “provocative portrayal of God the Father, the Virgin Mary[,] and Jesus Christ.”<sup>140</sup> Therefore, the Austrian authorities—who were in the best position to act—did not overstep their margin of appreciation when they “acted to ensure religious peace in that region” and to prevent “some people” from “feel[ing] the object of attacks on their religious beliefs in an unwarranted and offensive manner.”<sup>141</sup> Having found no problem with the seizure of the film, the majority then upheld its forfeiture.<sup>142</sup>

---

136. *Id.* ¶ 50.

137. *Id.* ¶ 52. The Court repeated Austria’s claim that as much as 87% of the population of Tyrol is Catholic. *Id.*

138. *Id.*

139. *Id.* ¶ 56.

140. *Id.*

141. *Id.* The majority also rejected the OPI’s claim that it had, by restricting the time and age of the audience, acted to ensure that no one was “exposed to objectionable material against their wishes.” *Id.* ¶ 53 (paraphrasing the OPI’s argument). According to the majority, the wide advertisements of the film made it “sufficiently ‘public’ to cause offence.” *Id.* ¶ 54.

142. *Id.* ¶ 57.

There was a single dissent joined by Judges Palm, Pekkanen, and Markarczyk.<sup>143</sup> The dissent agreed that the case involved balancing freedom of expression against freedom of religion—the point of dispute was limited to how the majority interpreted the “necessary in a democratic society” language.<sup>144</sup> Like the majority, the dissent relied on *Handyside*, but interpreted the case rather differently—since freedom of expression is “a fundamental feature of a ‘democratic society’” that includes the right to “shock, offend or disturb,” any margin of appreciation “cannot be a wide one.”<sup>145</sup>

In particular, the dissent did not like the discretion the majority’s requirement that protected speech be “capable of furthering progress” language gave to state authorities, who would be allowed to determine what constituted “progress.”<sup>146</sup> This danger was especially grave since the seizure was an act of “prior restraint.”<sup>147</sup> Finally, while the dissent accepted that artists who make their work available to the public are not “exempt from their attendant ‘duties and responsibilities,’” the European Convention on Human Rights does “not . . . guarantee a right to protection of religious feelings.”<sup>148</sup>

So far, the dissent would appear to offer little for supporters of the defamation of religions proposal, even if it fell short of the European Commission’s near blanket support for satire.<sup>149</sup> But the dissent made a series of concessions to the majority that, while falling short of saving the Austrian blasphemy prosecution of the film, opened the door for the prosecution of at least some religiously offensive speech. First, the dissent granted that it “may” be permissible under Article 10 “to protect the religious feelings of certain members of society against criticism and abuse to some extent.”<sup>150</sup> The dissent noted that “tolerance works both

---

143. *Id.* ¶ 1 (Palm, Pekkanen, & Makarczyk, JJ., dissenting).

144. *Id.* ¶ 2.

145. *Id.* ¶ 3.

146. *Id.*

147. *Id.* ¶ 4.

148. *Id.* ¶¶ 5–6.

149. *See supra* notes 105–06 and accompanying text.

150. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 6 (Palm, Pekkanen, & Makarczyk, JJ., dissenting).

ways,” adding that “the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed.”<sup>151</sup> Later, when discussing proportionality, the dissent suggested that even the “complete prevention of the exercise of freedom of expression” is acceptable “if the [behavior] reaches so high a level of abuse, and comes so close to a denial of” the religious freedom “of others, as to forfeit for itself the right to be tolerated by society.”<sup>152</sup>

The dissent also addressed the specific facts of the case. The film was shown “to a paying audience in an ‘art cinema’” whose audience consisted of “a relatively small public with a taste for experimental films.”<sup>153</sup> Its advertising, which let the public know about the critical way it dealt with Roman Catholicism, would “enable the religiously sensitive to make an informed decision to stay away.”<sup>154</sup> The age restriction further limited the ability of the film to cause harm.<sup>155</sup> The dissent’s emphasis on specific factors that minimized the risk the film would offend the religiously sensitive, distinguished it from the much more sweeping position of the European Commission majority that the film, as a work of satire, was protected expression.<sup>156</sup>

#### D. The Reception of the Otto-Preminger Case

As noted above, the decision was not well received.<sup>157</sup> Some critics likened the European Court of Human Rights to the Catholic Church, and spoke of the return of the Inquisition.<sup>158</sup> David Pannick, writing in the *London Times*, agreed with the dissenters that judges have no business assessing whether a film contributes to “furthering progress in human affairs.”<sup>159</sup> He took

---

151. *Id.*

152. *Id.* ¶ 7.

153. *Id.* ¶ 9.

154. *Id.*

155. *Id.* ¶ 10.

156. *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, 69 Eur. Comm’n H.R. Dec. & Rep. 173, ¶¶ 71–73 (1993) (stating it was illegal under Tyrolean law for persons under seventeen years of age to see the film).

157. *See supra* note 59 and accompanying text.

158. Brown, *supra* note 58, at 549 (author’s translation).

159. *Id.* (statement of David Pannick).

the court to task for failing to recognize that “social development. . . has often proceeded from the assertion of ideas that cause [offense], sometimes outrage, to established thought.”<sup>160</sup> Finally, in a very modern way that resonates with current fears about Muslims, Pannick spoke of the dangers of letting judges assess art “in the context of established religion, which demands uncritical devotion from many of its followers.”<sup>161</sup>

As the previous paragraph indicates, much of the criticism of the *Otto-Preminger* majority ruling came from the specific facts of the case. An art film about the Holy Family censored at the insistence of the local Roman Catholic prelate was likely to cause controversy. But the analytical framework of the case came in for less criticism, although Brian Walsh, writing a comment in the *St. John’s Law Review*, expressed concerns about the margin of appreciation doctrine, which meant that some European states would have significantly different levels of speech protection than others.<sup>162</sup> Nor, for that matter, was the *Otto-Preminger* dissent criticized for going too far in protecting religious sensitivities.

Instead, the case became part of the jurisprudence of the European Court of Human Rights. For example, in *Wingrove v. United Kingdom*,<sup>163</sup> the case was cited for the proposition that “in regard to objects of [religious] veneration” there is a duty to avoid expression that is “gratuitously offensive to others.”<sup>164</sup> This same language worked itself into the European Centre for Law and Justice Report on defamation of religions.<sup>165</sup> When viewed in light of the considerable number of European states that still have blasphemy laws, one must accept, as stated in *Wingrove*, that at the present time, “there is . . . not sufficient common

---

160. *Id.*

161. *Id.* Pannick then listed Galileo, Copernicus, and Spinoza as examples of people who aroused religious feelings in their day. *Id.*

162. Brown, *supra* note 58, at 550 (quoting Brian Walsh, *International Human Rights Before Domestic Courts: Remarks*, 70 ST. JOHN’S L. REV. 77, 91 (1996)).

163. 24 Eur. Ct. H.R., ¶ 52 (1996).

164. *Wingrove v. United Kingdom*, 24 Eur. Ct. H.R., ¶ 52 (1996) (citing *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) ¶¶ 46–47, 49 (1994)).

165. *See supra* notes 55–56 and accompanying text.



ground. . . [among] the member states of the Council of Europe to conclude that a system whereby a State can . . . [restrict] . . . material on the basis that it is blasphemous is . . . unnecessary in a democratic society and thus incompatible with the Convention.”<sup>166</sup>

Given that blasphemy laws are part of the European legal landscape, what does this mean for defamation of religions? In what follows, this Article looks at two potential answers to this question: one based on the majority holding in *Otto-Preminger*, and the other on the dissent.

#### IV. (NARROW) BLASPHEMY LAWS FOR ALL? THE IMPLICATIONS OF THE *OTTO-PREMIINGER* MAJORITY

Under the *Otto-Preminger* majority, at least some blasphemy laws and prosecutions are “necessary in a democratic society.” Where, then, does this leave the arguments of defamation of religion opponents that (i) individuals not ideas deserve rights and (ii) adoption of the defamation of religions proposal will necessarily stifle religious debate or (iii) lead to the type of punishments typical of the anti-blasphemy laws found in Muslim majority countries? After taking up these questions, Part IV will briefly sketch out what a defamation of religions norm guided by the spirit of the *Otto-Preminger* majority would look like.

##### A. *Otto-Preminger* as Unsettling the Arguments of Defamation of Religions Critics

A common rejoinder by defamation of religions opponents concerns its novelty. According to the critics, protection against insults applies to individuals or possibly groups. To punish speech that criticizes a religion violates this principle and, according to at least some critics, represents an “Islamic” intervention into human rights law.<sup>167</sup> But as *Otto-Preminger* shows, the punishment of ideas is not uniquely Islamic. To the

---

166. *Wingrove*, 24 Eur. Ct. H.R. ¶ 57.

167. As noted previously, this was the position of Hillel Neuer of UN Watch. See Goodenough, *supra* note 16.

contrary, the case shows that modern Europe has laws, like Austrian Penal Code §188, that ban insults directed at “an object of veneration” or “dogma” when they are “likely to arouse justified indignation.”<sup>168</sup>

Nor is Austria alone. In addition to Ireland—which critics view as an unfortunate (and perhaps treasonable) exception to the trend against bans on blasphemy<sup>169</sup>—anti-blasphemy laws are found in the Netherlands, Germany, Denmark, Norway, Sweden, Finland, Italy, and Greece.<sup>170</sup> Not only that, the majority opinion in the *Otto-Preminger* case held that such laws could serve the legitimate aim of protecting others.<sup>171</sup>

The critics may counter by distinguishing defamation law as a whole (where restrictions on ideas are not new) from human rights law which, arguably should be held to a higher standard. Indeed, critics generally frame the issue in terms of human rights.<sup>172</sup> While this argument has some superficial plausibility, it runs into trouble with the thoroughly modern way the European Court for Human Rights defended Austrian Penal Code §188 as serving the legitimate aim of protecting others.<sup>173</sup> In particular, the Court saw the law as guarding against the “malicious violation of the spirit of tolerance” which it saw as a “feature of democratic society.”<sup>174</sup> Even if one disagrees with the Court’s assessment of § 188, it is an assessment based on tolerance and democracy, two concepts at the center of modern human rights discourse.

---

168. See *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) ¶ 25 (1994).

169. See *supra* notes 41–43 and accompanying text.

170. See *Blasphemy and Sacrilege: European Law and Cases*, CASLON ANALYTICS, <http://www.caslon.com.au/blasphemyprofile9.htm> (last visited Mar. 15, 2011).

171. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 48.

172. See, e.g., Graham, *supra* note 24, at 72 (warning of “danger to the human rights structure”); Matt Cherry & Roy Brown, *Speaking Freely About Religion: Religious Freedom, Defamation and Blasphemy*, International Humanist and Ethical Union Policy Paper 10 (2009) (asserting that “[r]eligions . . . are not protected by international human rights law”).

173. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 48.

174. *Id.* ¶ 47.

The second argument, because it involves a subjective judgment (when do restrictions on potentially offensive religious speech stifle religious debate?) is harder to rebut as conclusively. Still the critics seem to have overstated their case in two ways. First, they exaggerate the amount of speech subject to a defamation of religions norm. For example, an unnamed blogger at *UN Watch* views the concept as covering “any expression that questions Islamic dogma, diverges from state-sponsored Islamic orthodoxy, or. . .offends Islamic sensibilities.”<sup>175</sup>

Yet the *Otto-Preminger* majority, in upholding the ban on *Liebeskonzil*, affirmed the *Handyside* holding that freedom of expression includes the right to “shock, offend[,] or disturb.”<sup>176</sup> The Court also spoke of the demands of “pluralism” which included “broadmindedness” of the potential audience.<sup>177</sup> Expression only becomes subject to censorship when it is “gratuitously offensive.”<sup>178</sup> While one can argue about whether this characterization aptly characterizes the OPI film, it states a test that should allow a large amount of speech critical of religion.

Such a reading is consistent with how supporters of the defamation of religions norm describe it. For example, the OIC calls for “Western countries” to ban only that speech which “grossly” abuses or “insult[s] matters held sacred by any religion.”<sup>179</sup> Likewise, Zamir Akram, in defending the defamation of religions proposal, affirmed the OIC’s repeated commitment to “freedom of opinion and expression,” adding that critique “is important for introspection, dialogue and better understanding.”<sup>180</sup> To be sure, Akram qualified this commitment by arguing that expression is not “an absolute right” and that “deliberate and premeditated insults and ridiculing” harms

---

175. *The Islamic-Sponsored Protocol to Ban Criticism of Religion Under the International Racism Convention*, UN WATCH (Mar. 21, 2009), <http://blog.unwatch.org/index.php/2009/03/21/the-islamic-sponsored-protocol-to-ban-criticism-of-religion-under-the-international-racism-convention>.

176. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 49.

177. *Id.*

178. *Id.*

179. THIRD OIC REPORT, *supra* note 49, at 6.

180. Letter from Zamir Akram to Idriss Jazairy, *supra* note 15, at 2.

rather than helps understanding.<sup>181</sup> But for Akram this leads to a “delicate balance,”<sup>182</sup> not a wholesale ban on discussions about religion.

Second, critics argue that the defamation of religions norm is impractical because it will involve courts in assessing competing truth claims of religions.<sup>183</sup> Assessing “the ‘truth’ or ‘falsity’ of a statement made in relation to a particular religion is problematic, because religions often promote belief in a divine authority whose teachings constitute the absolute and whole ‘truth.’”<sup>184</sup> Moreover, courts that interpret truth claims risk infringing on the right of adherents to “deviate from or reinterpret” their chosen religion.<sup>185</sup>

However, these problems only emerge if one interprets “defamation” broadly to mean “falsity.” While critics argue that this is how “defamation” is used in the private law context,<sup>186</sup> the term has a different meaning in the context of hate speech and blasphemy laws, where the term also conveys a sense of insult.<sup>187</sup> To return to the *Otto-Preminger* case, the argument by the Austrian authorities was not that the film made false claims about the Holy Family—i.e., that God the Father was an idiot—it was that the film expressed this view in a way that outraged Catholics.

Or, to use the language of the *Otto-Preminger* majority, while believers “must tolerate and accept the denial by others of their religious beliefs. . . . [t]he *manner* in which religious beliefs . . . are opposed or denied” may be subject to regulation.<sup>188</sup> This

---

181. *Id.*

182. *Id.*

183. Cherry & Brown, *supra* note 172, at 10 (noting that “judicial standards of truth are notoriously difficult to apply to questions of faith”).

184. Human Rights First, Human Rights First Working Paper on Incitement Laws and Religious Defamation Laws 8 (2008) (unpublished paper), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-FD-hrf-working-defam-relig.pdf>.

185. Cherry & Brown, *supra* note 172, at 10.

186. *See* Graham, *supra* note 24, at 75.

187. For an overview, see Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596 (2010).

188. *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) ¶ 47 (emphasis added).

is why the Court upheld the seizure and forfeiture of the film even though the play was staged in Vienna and Innsbruck in the early 1990s.<sup>189</sup> So while Bennett Graham may worry about a court having to “take sides in a theological debate” to pass judgment on a statement from a Muslim that “Jesus was only a prophet,”<sup>190</sup> under the “gratuitously offensive” language of *Otto-Preminger*, such a case should not even make it to court.<sup>191</sup>

The third place where *Otto-Preminger* unsettles the position of defamation of religions critics relates to how such a norm would be enforced in practice. In particular, defamation of religion critics point to the very harsh penalties that accompany many anti-blasphemy laws in the Muslim world as a reason to oppose the new norm.<sup>192</sup> As noted above, to the extent the defamation of religions norm is used to justify such laws, opponents raise a valid criticism.<sup>193</sup>

But the existence of draconian penalties for blasphemy in Muslim majority countries does not mean, as a logical matter, that all laws banning religious defamation must carry similar penalties. To the contrary, the maximum penalty under § 188 is a fine and up to six months in prison.<sup>194</sup> While this penalty will, no doubt, strike Americans as quite harsh, it is in line with penalties in European countries for hate speech. For example, when Ewald Althans was convicted in Germany for racial incitement for denying the Holocaust in a film about Auschwitz, he was sentenced to three and one-half years of hard labor.<sup>195</sup>

Moreover, because the film was never shown, there was no criminal prosecution or prison sentence in the *Otto-Preminger*

189. *Id.* ¶ 19 (describing showings).

190. See Graham, *supra* note 24, at 76.

191. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 49. Because the “gratuitously offensive” test would allow religious debate, it tends to undercut the argument that the defamation of religions proposal will privilege theists over atheists. See Human Rights First, *supra* note 184, at 5–6.

192. See, e.g., Graham, *supra* note 24, at 80 (citing Pakistan Penal Code § 295 which makes blasphemy punishable by death); Cherry & Brown, *supra* note 170, at 11 (describing death sentence in Pakistani blasphemy case).

193. See *supra* note 12 and accompanying text.

194. See *supra* note 83 and accompanying text.

195. See ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY 81 (2004).

case. This raises another area where defamation of religions opponents overstates their case. For example, the issue brief of the European Centre for Law and Justice has an appendix that gathers incidents where “persons were . . . charged with an offense based on their speech or opinion.”<sup>196</sup> The Appendix mixes incidents from the Muslim world and the West with little appreciation of the legal rationale for restricting speech, the severity of penalties, or even whether the person in question was successfully prosecuted.<sup>197</sup>

For example, in addition to describing cases from Afghanistan, Pakistan, Iran, and Saudi Arabia, where blasphemy was punished with lengthy prison sentences, the Appendix includes supposedly comparable cases from Italy, Denmark, Canada, the United Kingdom, and the United States. These include a series of failed proceedings brought against Mark Steyn under a variety of human rights laws in Canada,<sup>198</sup> none of which allow for criminal penalties, plans of police in the United Kingdom to arrest a blogger for anti-Muslim sentiments, as well as unsuccessful attempts of Danish Muslims to prosecute the *Jyllands-Posten* for distributing cartoons of the Prophet Mohammed.<sup>199</sup>

Should, however, an *unsuccessful* blasphemy prosecution be a concern in a liberal society? To focus on the Danish cartoons, in 2006, the Danish Public Prosecutor rejected a complaint against the cartoons brought by Danish Muslims under the country’s laws banning blasphemy and hate speech. The public prosecutor, who by law is required to justify his or her refusal to prosecute,<sup>200</sup> concluded that the cartoons were neither blasphemous nor an

---

196. ECLJ SUBMISSION, *supra* note 20, 8 (describing the appendix).

197. *Id.* at app.

198. *Id.* Cases were brought under Ontario, British Columbia and Canadian human rights laws. None were successful. For an overview, see Jacob Weinrib, Comment, *What is the Purpose of Freedom of Expression*, 67 U. TORONTO FAC. L. REV. 165 (2009). For a discussion of Canadian Human Rights proceedings, see Richard Moon, *The Attack on Human Rights Commissions and the Corruption of Public Discourse*, 73 SASK. L. REV. 93 (2010).

199. ECLJ SUBMISSION, *supra* note 20, app.

200. See Stéphanie Lagoutte, *The Cartoon Controversy in Context: Analyzing the Decision Not to Prosecute Under Danish Law*, 33 BROOK. J. INT’L L. 379, 388–89 (2007).

example of hate speech.<sup>201</sup> They reached this conclusion despite the presence of laws banning blasphemy. Why would this result be any different under a defamation of religions norm?

The focus on the presence of a blasphemy law—rather than the frequency of its use—ignores the role enacted law can play in stating shared norms. For example, a major purpose of hate speech laws (and hate crime laws in the United States) is to send the message that the society as a whole values the victim group.<sup>202</sup> Bans on religiously offensive speech, meanwhile, send a message about what society opposes.<sup>203</sup> These messages can be sent even if the laws themselves are rarely enforced.

Moreover, to assume such a law necessarily has a chilling effect magnifies the danger posed by speech laws. However, the European Commission ruling was later reversed by the European Court for Human Rights. The Commission found an unjustifiable violation of the OPI's freedom of expression, largely because the film was satirical in nature.<sup>204</sup> Nevertheless, the Commission also found Austrian Penal Code § 188 to have a legitimate aim.<sup>205</sup> Had the European Court of Human Rights affirmed on these grounds, would critics of defamation of religions have *Otto-Preminger* case as an example of the danger of restrictions on religion?<sup>206</sup> But, at the time, the European Commission decision was received as a great victory for artistic freedom. Appearances can be deceiving.

---

201. The Director of Public Prosecutions, *Decision on Possible Criminal Proceedings in the Case of Jyllands-Posten's Article "The Face of Muhammad,"* Mar. 15, 2006, [http://www.rigsadvokaten.dk/media/bilag/afgorelse\\_engelsk.pdf](http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf). For more, see Robert A. Kahn, *Flemming Rose, The Danish Cartoon Controversy, and the New European Freedom of Speech*, 40 CAL. W. INT'L. L. J. 253, 260–63 (2010).

202. See WALKER, *supra* note 94, at 133–36 (describing politics behind campus speech codes in 1980s).

203. This is true for criminal law as a whole. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 80 (G. Simpson trans. 1933).

204. *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, 69 Eur. Comm'n Dec. & Rep. 173, ¶¶ 72–73 (1993).

205. *Id.* at ¶¶ 62–63.

206. Brown, *supra* note 58, at 547.

B. *Otto-Preminger* as a Marking the Limits of Anti-Blasphemy Laws

Then what would a defamation of religions proposal guided by the *Otto-Preminger* majority opinion look like? While it is possible to only sketch the briefest outline here, a few things are clear. First, the Court is likely to be far more critical of *prosecutions* of blasphemy laws, than of the laws themselves. To put it another way, the majority was not sufficiently concerned about the potential chilling effect of blasphemy laws to ban them. However, as penalties increase, one would imagine the proportionality analysis used by both the majority and dissent would come into play. So, one could use the *Otto-Preminger* majority to limit the penalties that could be imposed under a defamation of religions norm.

Second, the *Otto-Preminger* majority left a large amount of speech critical of religion beyond the scope of state censorship. Citizens must tolerate speech that denies their core religions belief, as well as speech that offends or disturbs them.<sup>207</sup> The line is only crossed when the speech is “gratuitously offensive” and “does not contribute to any form of public debate capable of furthering progress in human affairs.”<sup>208</sup> As noted above, this language would allow robust debate about religion, even denial of the “truth” of a competing religion, as long as there was not a deliberate intent to give insult. Even then, an offensive play, novel, or newspaper cartoon might still be protected speech provided it contributed to a public debate about religion.

One might object that this test, as David Pannick points out, does place a large amount of discretion in the hands of judges.<sup>209</sup> However, the test is not that different from the “utterly without redeeming social importance” test used with some success by American courts in obscenity cases to expand the scope of protected speech.<sup>210</sup> The same could apply in the defamation of

---

207. See *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) ¶ 47 (1994).

208. *Id.* ¶ 49.

209. See *supra* note 160–63 and accompanying text.

210. See *Roth v. United States*, 354 U.S. 476, 484–85 (1957).



religions context: the “furthering progress” language would let a speaker of otherwise punishable speech to avoid censorship by showing the speech in question has some redeeming qualities.

Third, the acceptability of a blasphemy prosecution depends on the context. In heavily Roman Catholic Tyrol, showing a film depicting the Holy Family in a “deliberately provocative” way sufficed to support a blasphemy prosecution. While the Court left the decision about when to censor would be left to the national authorities, this came with an obligation to balance the harm of the speaker against the societal value attached to freedom of expression. While the added layer of discretion—this time in the hands of the state—will not reassure civil libertarians, the visceral, graphic way *Liebeskonzil* describes God the Father, Jesus, and Mary suggests a way to limit the *Otto-Preminger* majority holding—and, by extension, the defamation of religions concept—to extreme cases.

The goal of Part IV, however, is not to argue that Europe or the West as a whole should embrace the *Otto-Preminger* majority as a model for an international defamation of religions standard. Perhaps the best response to the defamation of religions proposal is to call for narrower laws that focus solely on speech that directly harms believers. One could, from an American perspective, go even further and call for no restrictions on offensive speech at all. My point merely is that the adoption of a blasphemy model in response to the defamation of religions proposal would not necessarily mean the end of Western liberties, as some defamation of religions critics are prone to suggest.

## V. DEFAMATION OF RELIGIONS AS INCITEMENT TO RELIGIOUS HATRED: ONE READING OF THE *OTTO-PREMIINGER* DISSENT

### A. The *Otto-Preminger* Dissent and Blasphemy Prosecutions

The *Otto-Preminger* majority offers a plausible way to think about the defamation of religions norm, but it is not the only one. To bypass concerns about blasphemy laws, or the discretion the majority gives to courts and national authorities to censor, one

could craft a narrower response to the defamation of religions proposal. Here, the *Otto-Preminger* dissent proves helpful. The dissent limits bans on speech “violent and abusive attacks on the reputation of a religious group.”<sup>211</sup> It also states that the “need for repressive action” arises only when the speech in question is so abusive as to “come[] so close to a denial of the freedom of religion of others . . . .”<sup>212</sup>

One must add to this dissent’s view of the film itself. According to the dissent, the ban on *Liebeskonzil* was unjustifiable even though it contained explicit negative depictions of the Holy Family.<sup>213</sup> While the dissent paid some attention to the specific circumstances of the film’s showing—including the advertisements warning of the film’s contents, the late night showing of the film, and the reputation of the OPI as an “art cinema,”<sup>214</sup> which meant a more sophisticated audience—the dissent did not appear to view the film as a violent attack on Catholics, even given the heavily Catholic nature of Tyrol.<sup>215</sup>

One can apply *Otto-Preminger* dissent to the defamation of religions context in two ways. At its most basic, the case sharply restricts, but does not eliminate, the potential scope of blasphemy prosecutions.<sup>216</sup> Such prosecutions would only arise when the attack was so severe as to deny the religious freedom of the target group.<sup>217</sup> While this ought to be rare, it is not inconceivable.<sup>218</sup> However, under these circumstances, the speech in question will likely be actionable under hate speech

---

211. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶¶ 6–7 (Palm, Pekkanen, & Makarczyk, JJ., dissenting).

212. *Id.*

213. *Id.* ¶ 11.

214. *Id.* ¶ 9.

215. *Id.* ¶ 11.

216. Thus the dissent agreed with the majority that Austrian Penal Code § 188 had a legitimate aim. *Id.* ¶ 6.

217. *Id.* ¶¶ 6–7.

218. One would require the type of statement that raises doubts about whether the target group is part of the larger shared community. One type of speech that might fit here are accusations that Jews use the blood of Christian boys for Passover Rituals. For an overview, see *THE BLOOD LIBEL LEGEND: A CASEBOOK IN ANTI-SEMITIC FOLKLORE* (Alan Dundes ed., 1991).

laws.<sup>219</sup> Therefore, viewing the *Otto-Preminger* dissent as allowing very limited blasphemy prosecutions at best adds slightly to the argument in Part IV that bans on blasphemy are not necessarily incompatible with a liberal Western democracy.<sup>220</sup>

### B. The *Otto-Preminger* Dissent and Incitement to Religious Hatred

However, there is a second option. The dissent's focus on "violent and abusive attacks" opens the door to viewing the defamation of religions proposal through the lens of incitement to religious hatred. This approach has several advantages. First, as even the most hardened defamation of religions critics concede, laws banning incitement to religious hatred fall well within mainstream human rights discourse.<sup>221</sup> Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) requires that states ban incitement to religious hatred.<sup>222</sup> Meanwhile, several countries have adopted bans on incitement to religious hatred, including the United Kingdom, France, as well as the Australian state of Victoria.<sup>223</sup>

---

219. For example, accusations of ritual murder should fall under incitement to religious hatred.

220. *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) ¶¶ 6, 7 (1994).

221. See, e.g., Cherry & Brown, *supra* note 172, at 8 (describing limits on freedom of expression in international human rights documents).

222. International Covenant on Civil and Political Rights, art. 20(2), Dec. 16, 1966, 999 U.N.T.S. 171 (calling for bans on "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility[,] or violence").

223. France has had a ban on religious incitement since 1972. See Susannah C. Vance, *The Permissibility of Incitement to Religious Hatred Offenses Under European Convention Principles*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 201, 222 n.137 (2004). The Racial and Religious Hatred Act, adopted by the United Kingdom in 2006, amends § 29J of the Public Order Act to ban the use of "threatening" words or behavior to intentionally "stir up religious hatred." Racial and Religious Hatred Act, 2006, c.1 (U.K.) (amending § 29 of the Public Order Act, 1986, c.4). For a brief overview, see Polly Botsford, *Silencing Hatred*, LAW SOC. GAZETTE, June 7, 2007. The Victoria law punishes acts that incite hatred or ridicule against a person because of their "religious belief or activity." See Puja Kapai & Anne S. Y. Cheung, *Hanging in a Balance: Freedom of Expression and Religion*, 15 BUFF. HUM. RTS. L. REV. 41, 71–75 (describing litigation under § 8 of the Victoria Racial and Religious Tolerance Act).

Second, viewing the defamation of religions through the lens of religious incitement avoids punishing ideas, and beliefs, a major criticism raised by critics of the norm.<sup>224</sup> Indeed, the incitement laws often include safeguards that should appeal to civil libertarians. Take, for example, the United Kingdom's Racial and Religious Hatred Act. This law requires that the speech or behavior be "threatening," a term that dovetails with the concern of the *Otto-Preminger* dissent with "violent and abusive" attacks.<sup>225</sup> The law also requires that the behavior was *intended* to stir up religious animosity.<sup>226</sup> This standard differs from Austrian blasphemy law, which is silent on intent,<sup>227</sup> or the *Otto-Preminger* majority decision, which focused whether the film would offend "some people"<sup>228</sup> a circumstance which led the majority to discount the OPI's argument that circumstances of the planned screening minimized the potential harm posed by the film.<sup>229</sup> Under the Racial and Religious Hatred Act, the OPI could use these circumstances to show a lack of intent to spread hatred.<sup>230</sup>

Finally, the Racial and Religious Hatred Act contains a disclaimer that nothing in the new Act should be read to limit "discussion, criticism, or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions" or speech that proselytizes.<sup>231</sup> This language, which tracks the *Handyside* ECHR case that protects expression that disturbs, shocks or offends,<sup>232</sup> further restricts the scope of any ban on religiously

---

224. See *supra* notes 24–27 and accompanying text.

225. Racial and Religious Hatred Act, c.1, § 29B(1) (U.K.); *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 6 (Palm, Pekkanen, & Makarczyk, JJ., dissenting).

226. Racial and Religious Hatred Act, c.1, § 29B(1) (U.K.) (emphasis added).

227. Austrian Penal Code § 188 assesses penalties when the behavior "is likely to arouse justified indignation." See *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 25.

228. *Id.* ¶ 56.

229. *Id.* ¶¶ 53–54.

230. These were factors the dissent found convincing. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶¶ 8–9 (Palm, Pekkanen, & Makarczyk, JJ., dissenting).

231. Racial and Religious Hatred Act, 2006, c.1, § 29J (U.K.).

232. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 49 (1976).

directed hate speech. Although the *Otto-Preminger* majority had little difficulty concluding that the depiction of the Holy Family in *Liebeskonzil* passed this test,<sup>233</sup> the language offers another hurdle for prosecutions against speech acts.

While the narrower religious incitement standard is an appealing, there are two potential objections. First, given that religious incitement is already banned by national and international laws, why is a new norm necessary? Or, to put the claim more starkly, if defamation of religions adds nothing new, is it simply a stalking horse for more stringent restrictions on speech? Second, would interpreting a defamation of religions through the lens of religious incitement offer enough to satisfy Muslim supporters of defamation of religions? To put it another way, is there anything to be gained analytically by arguing that, in some circumstances at least, speech that incites hatred against Muslims can take the form of defamation against Islam?

### C. Are Defamation of Religions and Incitement Separate Issues?

The first objection rests on the open-ended nature of the term “defamation of religions.” This open-ended quality leads critics to assume that defamation of religions supporters by necessity seek something more than the current anti-incitement laws currently in place. As a result, critics interpret defamation of religions as falling short of the high standard provided by ICCPR Article 20.<sup>234</sup> For example, in a 2010 position paper calling for a vote against defamation of religions, Article 19 argues that however one defines defamation, it applies to speech that falls short of the incitement to hostility, discrimination or violence required by ICCPR Article 20.<sup>235</sup>

Likewise, Matt Cherry and Roy Brown, writing for the International Humanist and Ethical Union (IHEU), speak of the “high threshold” established by Article 20.<sup>236</sup> In reaching this

---

233. *Otto-Preminger-Institut*, 295-A Eur. Ct. H.R. (ser. A) ¶ 49.

234. See Press Release, Article 19, *supra* note 30.

235. *Id.*

236. Cherry & Brown, *supra* note 172, at 7.

conclusion, the IHEU referred to the conclusion of Special Rapporteur on Religious Freedom Asma Jahangir who, noting that “Article 20 was drafted against the historical background of the horrors committed by the Nazi regime during the Second World War,”<sup>237</sup> would restrict Article 20 to situations where the speech act in question would “constitute incitement to imminent acts of violence or discrimination.”<sup>238</sup>

Now to the extent one accepts Special Rapporteur Jahangir’s description of Article 20, the scope for the prosecution of religiously offensive speech will be quite narrow. This is especially true if one interprets Jahangir’s reference to “incitement to immediate acts of violence” in light of the United States Supreme Court ruling in *Brandenburg v. Ohio*,<sup>239</sup> which has widely seen as upholding most, if not all forms of hate speech.<sup>240</sup> But this formulation would do more than rule out defamation of religions, it would also invalidate most European hate speech laws, since these laws do not generally require that the threat in question be immediate.<sup>241</sup> Nor does the text of Article 20 require immediacy—it is enough that that the speech incite hatred, violence, or discrimination.<sup>242</sup>

---

237. *Id.* (citing Report of Special Rapporteur on freedom of religion or belief, U.N. Doc. A/HRC/2/3 (Sept 20, 2006)).

238. *Id.* (citing Report of Special Rapporteur on freedom of religion or belief, U.N. Doc. A/HRC/6/5 (July 20, 2007)).

239. 395 U.S. 444 (1969) (per curiam).

240. *See* STONE ET AL., CONSTITUTIONAL LAW 1042 (4th ed. 2001) (“*Brandenburg* appears by implication to accord absolute protection to the speaker so long as he does not use express words of incitement.”).

241. This is most notable in the context of Holocaust denial, where it is hard to make out an immediate threat. For more, see Robert A. Kahn, *Holocaust Denial and Hate Speech*, in GENOCIDE DENIALS AND THE LAW (Ludovic Hennebel & Thomas Hochmann eds., 2011).

242. International Covenant on Civil and Political Rights, *supra* note 222. Moreover, in the years since *Brandenburg*, American First Amendment discourse has recognized an exception to speech protection when the speech in question involves a “true threat”—a formulation that covers threats to the president, *Watts v. United States*, 394 U.S. 705, 708 (1968), as well as cross burning when done with the intent to intimidate others. *Virginia v. Black*, 538 U.S. 343, 363 (2003). The “true threat” language also meshes nicely with the British Racial and Religious Hatred Act’s requirement that the behavior in question constitute a “threat.”

Asha Jahangir, however, is not the only UN Special Rapporteur who has entered into the defamation of religions debate. In a 2009 report Githu Muigai, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, spoke of trying to “shift[] away from [the sociological concept of] defamation of religions” towards the legal norm of non-incitement to national, racial or religious hatred.”<sup>243</sup> Here, religious incitement becomes part of the solution rather than as further proof of the potential of defamation of religions to undermine Western human rights discourse.

Some defamation of religions opponents has followed this course. For example, a report by the Center for Inquiry-International (CFI), while recognizing the dangers posed by the vagueness of the defamation of religions concept, responded with practical solutions based on current European case law.<sup>244</sup> After rejecting the *Otto-Preminger* majority’s solution as “problematic” because of the “highly implausible” claim “that Catholics are made less free by the existence of blasphemous movies,”<sup>245</sup> the paper draws on European human rights case law to require an “intention to encourage discrimination, hostility[,] or violence,” and an “actual risk or imminent danger of harm.”<sup>246</sup>

While one may quibble with the actual test the CFI Report derives—as noted above, the requirement of “imminent” danger of harm is not mentioned in Article 20—the key is that authors of the CFI report are engaging in a dialogue. Instead of saying that the only response to anti-Muslim acts is more education, which is basically what L. Bennett Graham does,<sup>247</sup> the CFI Report suggests to defamation of religion supporters: You can punish

---

243. Human Rights First, *supra* note 184 (quoting Muigai’s observations made at the first session of the Preparatory Committee for the Durban Review Conference).

244. See CTR. FOR INQUIRY INT’L, THE EUROPEAN COURT OF HUMAN RIGHTS AND THE INTERPRETATION OF ‘ADVOCACY OF RELIGIOUS HATRED THAT CONSTITUTES INCITEMENT TO DISCRIMINATION, HOSTILITY OR VIOLENCE’ (Mar. 2009), [http://www.centerforinquiry.net/uploads/attachments/CFI\\_statement\\_on\\_advocacy\\_of\\_religious\\_hatred.pdf](http://www.centerforinquiry.net/uploads/attachments/CFI_statement_on_advocacy_of_religious_hatred.pdf)[hereinafter CFI Report].

245. *Id.* ¶ 7.

246. *Id.* ¶ 14.

247. See Graham, *supra* note 24, at 83.

some but not all anti-Muslim speech. This type of dialogue is precisely what the OIC and other defamation of religion supporters are calling for when they seek “inclusive engagement” with the West.<sup>248</sup>

#### D. Does Incitement Cover Enough Speech to Satisfy Muslims?

However, there is a second objection. What if the best the West can offer falls short of what the OIC and Muslims seek? In other words, is there any evidence that meeting Muslims in the middle will make a difference in terms of the type of speech and behavior Muslims are concerned about? There are two ways to answer this question. The first is to look at the type of acts raised by those seeking a new norm against defamation of religions. Put simply, what is the harm defamation of religions is meant to prevent? The second is to ask what one gains, analytically, by viewing defamation of religions from the lens of religious incitement.

To take up the first point, defamation of religion critics like to paint supporters as seeking a general ban on all speech critical of Islam.<sup>249</sup> But most of the examples listed in the United Nations documents and OIC reports involve a much narrower set of phenomena—stereotyping of Muslims post 9/11, the rise of right wing anti-foreigner parties in Europe, and violent attacks on Muslims.<sup>250</sup> These incidents target members of a religious group (Muslims) but are not typically examples of a robust religious debate. This is true of the incident in Germany where a Muslim woman was violently attacked after being called an “Islamist,”<sup>251</sup> as well as the case of a pharmacist in the Netherlands who refused to serve Muslims because he felt they were “revolting,”<sup>252</sup> and a Danish teenager who was fined under hate speech laws for putting up posters saying “Yes to an Islam-

---

248. THIRD OIC REPORT, *supra* note 49, at 30. The report also calls on “a sustained effort on the part of the international community to evolve and foster a global dialogue.” *Id.* at 23.

249. *See supra* notes 18–20 and accompanying text.

250. *See supra* notes 15–16 and accompanying text.

251. THIRD OIC REPORT, *supra* note 49, at 14.

252. *Id.* at 25.



free county’ and ‘Send the Pakis home.’”<sup>253</sup>

Certainly, other OIC concerns are harder to categorize this way. For example, the report focuses at length on the continued publication of cartoons depicting the Prophet Mohammed in a negative light.<sup>254</sup> It also lists books with “Islamophobic” themes including Bruce Bawer’s *While Europe Slept: How Radical Islam Is Destroying the West from Within*,<sup>255</sup> and Christopher Caldwell’s *Reflections on the Revolution in Europe: Immigration, Islam and the West*.<sup>256</sup> Finally, the report raises examples of generalized dislike of Muslims that do not (most likely) rise to the level of prosecutable hate speech.<sup>257</sup>

But the OIC Report does not call for censoring Bawer and Caldwell’s books; it merely describes what it sees as “an emerging trend of intellectual opportunism” based on “the rise of the political right.”<sup>258</sup> While the Report condemned the publication of the cartoons and praised a taxi strike by Norwegian Muslims,<sup>259</sup> it also spoke highly of a settlement reached where the Danish newspaper *Politken* apologized for running one of the Danish cartoons,<sup>260</sup> which suggests that the OIC does not seek to resolve all anti-Muslim incidents through the law. Even, however, if one took the books and cartoons as

---

253. *Id.*

254. *Id.* at 19–20.

255. *Id.* at 17 (criticizing Bawer’s book for assuming “a Taliban-like theocracy” lurks among Western Europe’s immigrant population); see BRUCE BAWER, *WHILE EUROPE SLEPT: HOW RADICAL ISLAM IS DESTROYING THE WEST FROM WITHIN* (2006).

256. *Id.* (quoting at length a critique of Caldwell’s book by Jocelyne Cesari for relying too heavily on demographic arguments about Muslim population in Western Europe); see CHRISTOPHER CALDWELL, *REFLECTIONS ON THE REVOLUTION IN EUROPE: IMMIGRATION, ISLAM AND THE WEST* (2009).

257. For example, the OIC Report mentions the comment of a British politician who referred to the appointment of a Muslim to head the BBC department of religion and ethics as an insult to Christians. THIRD OIC REPORT, *supra* note 49, at 20. A Protestant Minister referred to the appointment of the BBC officer as “a juvenile gimmick.” *Id.* at 20–21. While these comments reveal anti-Muslim sentiment, it is hard to see prosecutions arising from them.

258. *Id.* at 16.

259. *Id.* at 19.

260. *Id.* at 19–20.

speech the OIC wants its defamation of religions proposal to cover, the proposal would still cover a good deal of anti-Muslim speech and, as such, could be seen by the OIC as a step in the right direction.

If one views the problem facing Muslims in the West as a cultural racism that uses Islam as a marker (i.e., Muslimophobia), the incitement of religious hatred model holds some promise. In particular, the defamation of religious concept should prove helpful in targeting negative statements about Islam that actually have Muslims as their intended target. Consider, for example, the abortive plan of Florida Pastor Terry Jones to hold a “burn the *Quran* day” on September 11, 2010.<sup>261</sup> Initially, Jones appeared to defend his act on theological grounds. For example, he said that “Islam is of the devil” and that is causing “billions of people to go to hell.”<sup>262</sup> One could see these statements as forming part of a religious debate. But that approach overlooks the connection between Islam and Muslims, a connection strengthened by Jones himself, who asked YouTube viewers whether anyone had ever seen “a really happy Muslim?”<sup>263</sup>

The public response to the “Burn a *Quran* Day” reveals a similar pattern. On the one hand, Jones had some supporters who upheld his right to speech on First Amendment grounds.<sup>264</sup> Likewise, Obama Administration who officials sought to prevent the burning, focused on fear of retaliation against American

---

261. See Lauren Russell, *Church Plans Quran-Burning Event*, CNN (July 30, 2010), [http://articles.cnn.com/2010-07-29/us/florida.burn.quran.day\\_1\\_quran-burning-florida-church-terry-jones-american-muslims-religion?\\_s=PM:US](http://articles.cnn.com/2010-07-29/us/florida.burn.quran.day_1_quran-burning-florida-church-terry-jones-american-muslims-religion?_s=PM:US) (internal quotation marks omitted).

262. *Id.* (internal quotation marks omitted).

263. *Id.* Jones reinforced the same point when, in response to criticism, he said that his protest was not aimed at “moderate” Muslims; see Sean Alfano & Adam Lisberg, *Bloomberg Defends Terry Jones, Pastor Planning Koran-Burning Rally Despite Warnings from the White House*, DAILY NEWS (Sept. 7, 2010), [http://articles.nydailynews.com/2010-09-07/news/27074687\\_1\\_korans-rally-florida-pastor](http://articles.nydailynews.com/2010-09-07/news/27074687_1_korans-rally-florida-pastor).

264. Alfano & Lisberg, *supra* note 263. Bloomberg agreed that the Pastor’s planned act was distasteful; he counseled that the First Amendment protects “everybody,” including those one disagrees with. *Id.*

soldiers in Iraq and Afghanistan<sup>265</sup>—an argument that does not depend on *why* burning a copy of the *Quran* is offensive. Many others, however, did take up this question. For example, a group of religious leaders described the planned protest as an “anti-Muslim frenzy.”<sup>266</sup> Likewise, Secretary of State Hilary Clinton, explaining why the planned burning was “un-American” spoke of how in 1790 George Washington, in a letter to a Newport, Rhode Island synagogue, stated that the United States would give “bigotry no sanction, to persecution no assistance.”<sup>267</sup>

The language of the religions leaders and Secretary Clinton demonstrate that the “Burn a *Quran* Day” was about more than just religion. The reference to a Newport synagogue is a reminder that Muslims are not the only group that has experienced religious based persecution. The leader of the German Jewish community, Charlotte Knobloch, reinforced this connection, warning that “where people burn books, in the end they burn people.”<sup>268</sup> One may disagree with the proper response to Jones’s protest. But it is hard to argue that the protest is solely a religious attack on Islam.

Or to take another example, consider the recent statements of Newt Gingrich. On the one hand, the American Enterprise Institute speech surfaced warning that “the Sharia is our enemy.”<sup>269</sup> By anthropomorphizing a religious doctrine, the topic makes the connection between ideas and individuals that defamation of religion opponents are eager to sever.<sup>270</sup> To be fair,

265. See Barbra Liston, *Florida Pastor Not Backing Down on Koran Burning*, REUTERS (Sept. 8, 2010, 7:58 PM), <http://www.reuters.com/article/2010/09/08/us-usa-muslims-idUSTRE68709M20100908>.

266. Paul Owen & Matthew Weaver, *Qur’an Burning Day to Go Ahead Despite Death Threats*, GUARDIAN (Sept. 8, 2010, 10:31 AM), <http://www.guardian.co.uk/world/2010/sep/08/hillary-clinton-plan-to-burn-quran-disrespectful>.

267. *Id.* (internal citations omitted).

268. *German Jews Condemn Planned Florida Koran Burning*, REUTERS (Sept. 8, 2010, 4:21 PM), <http://www.reuters.com/article/2010/09/08/us-usa-muslims-germany-idUSTRE68720M20100908>.

269. See Editors, *America at Risk: Camus, National Security, and Afghanistan*, AMERICAN (July 29, 2010), <http://www.american.com/archive/2010/july/america-at-risk-camus-national-security-and-afghanistan>.

270. See *supra* notes 24–27 and accompanying text.

Gingrich's language in his speech is a bit more specific. The "enemy" turns out to be "radical Islam" which—much like mid-20th century Communists—threatens the nation by stealth.<sup>271</sup> This arguably could refer to a religious doctrine, and as such be outside the scope of any religious incitement laws.

At other times, however, Gingrich viewed the "enemy" in broader terms. For instance, in opposing the construction of a religious center in lower Manhattan, he warned that the project's backers the Cordoba Institute would invite in Saudis who are described as "fellow Muslims,"<sup>272</sup> and that the Institute is suspect because it is named after the capital city of "Muslim conquerors."<sup>273</sup> Gingrich compared the proposed "mosque" to the Japanese putting up a cultural site next to Pearl Harbor, an indication that the enemy, has now become an ethno-racial group, rather than a religion.<sup>274</sup> Here, once more, a debate about a superficially religious issue—opposition to a mosque in lower Manhattan—begins to turn into a debate that casts Muslims as cultural, and possibly ethno-racial, outsiders.

Gingrich's video and comments were less clearly focused on Muslims than the proposed *Quran* burning planned by Terry Jones.<sup>275</sup> But both examples illustrate the difficulty in sorting out speech critical of aspects of Islam, and speech targeting

---

271. Editors, *supra* note 269. Gingrich goes so far as to warn of "creeping Sharia." *Id.* For more on Gingrich's "creeping Sharia" rhetoric, see Eugene Robinson, *Sharia as the New Red Menace*, WASH. POST, (Sept. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/20/AR2010092004257.html>.

272. *Newt Gingrich Statement on Proposed Mosque/Islamic Community Center near Ground Zero*, NEWT.ORG (July 21, 2010, 5:00 PM), <http://www.newt.org/newt-direct/newt-gingrich-statement-proposed-mosqueislamic-community-center-near-ground-zero>.

273. *Id.*

274. Mike Lupica, *Scary Fanatics like Newt Gingrich Turn the Ground Zero Mosque Debate into Ugly, Stupid Spectacle*, N.Y. DAILY NEWS (Aug. 23, 2010), [http://articles.nydailynews.com/2010-08-23/local/27073370\\_1\\_newt-gingrich-mosque-ground-zero](http://articles.nydailynews.com/2010-08-23/local/27073370_1_newt-gingrich-mosque-ground-zero).

275. Some American critics of Islam, such as blogger and lower Manhattan Islamic center opponent Sarah Geller, are more open in mixing religious and ethnic terminology. See Anne Barnard & Alan Feuer, *Outraged, and Outrageous*, N.Y. TIMES (Oct. 8, 2010), [http://www.nytimes.com/2010/10/10/nyregion/10geller.html?\\_r=1&pagewanted=1](http://www.nytimes.com/2010/10/10/nyregion/10geller.html?_r=1&pagewanted=1) (quoting Geller as describing herself as a "racist-Islamophobic-anti-Muslim bigot").

Muslims.<sup>276</sup> They show how what looks like criticism directed against a religious symbol or doctrine can target those people in the society at large who identify with the symbol in question. Because the larger society, not the individual believers, makes the connection, the target cannot escape attack by changing views, contrary to what Graham suggests is possible in cases of religious criticism.<sup>277</sup> A Muslim who rejects the Sharia, refuses to wear a headscarf, and agrees that the World Trade Center is the wrong place for a mosque is still identified by the society at large as a Muslim.

This does not necessarily mean that the United States, or any other liberal democracy, should censor all negative comments about Islam or Muslims. The *Otto-Preminger* dissent saves legal sanctions for extreme circumstances. What constitutes “extreme” will vary from society to society. For example, the Netherlands, which punishes a fair amount of hate speech, is currently prosecuting right-wing politician Geert Wilders for calling for a ban on the *Quran*.<sup>278</sup> The strong libertarian traditions in the United States, by contrast, will most likely rule out any hate speech prosecutions. In fact, if one approached the defamation of religions issue from the perspective of *Otto-Preminger* European Commission holding, the result would be blanket protection to all speech where satire is the predominant element.<sup>279</sup>

In the end, however, the defamation of religions concept highlights the potential role religious incitement statutes can

---

276. A key problem is that Gingrich never defines who is an Islamist. To the extent he defines Islamists as those to adhere to a specific set of ideas, he is closer to the debate over religious ideas that defamation of religion opponents are eager to protect. If, however, Islamists include ordinary Muslims, he comes closer to crossing over into a form of racialized hate speech based on religion. The latter possibility is reinforced by Gingrich’s concern that Islamists operate by stealth.

277. See Graham, *supra* note 24.

278. *Dutch Hate Speech Trial to Proceed*, AL JAZEERA (Feb. 3, 2010, 7:13 PM), <http://english.aljazeera.net/news/europe/2010/02/201023181713918592.html>. Wilders is also accused of likening the *Quran* to *Mein Kampf*. *Id.*

279. *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, 69 Eur. Comm’n Dec. & Rep. 173, ¶¶ 71–72 (1993).

play in liberal democracies. In a study of religious incitement laws in France and the United Kingdom, Susannah C. Vance warns about the dangers of modeling religious incitement laws too narrowly on either hate speech laws or laws against blasphemy.<sup>280</sup> Vance argues that religious incitement laws fill an important void left by traditional hate speech laws, which require some form of immediate threat, and blasphemy laws, which raise questions of church state interference and, as critics of defamation of religions assert, threaten to stifle religious debate.<sup>281</sup> Perhaps incitement laws will not target enough speech to satisfy the OIC and other defamation of religions supporters. At that point, the liberal West and the OIC will have to part ways on this issue. Will this happen? It might, it might not. But one cannot answer this question without asking it first.

## VI. CONCLUSION: *OTTO-PREMIINGER* AS AN EXAMPLE OF CIVIL DISCOURSE

This Article has used *Otto-Preminger-Institut v. Austria* to explore possible middle grounds in the defamation of religions debate. The *Otto-Preminger* majority opinion shows that Europeans as well as Muslims punish blasphemy, weakening the argument of opponents that defamation of religions violates long-standing human rights norms. Moreover, the limited nature of the Austrian blasphemy law and its narrow interpretation by the European Court of Human Rights starts to undermine the defamation of religions critics' argument that any discussion of banning blasphemy will result in punitive, broad-ranging restrictions on speech.

The *Otto-Preminger* dissent, which would limit prosecutions to "violent and abusive" attacks on the target group,<sup>282</sup> represents another more speech-friendly middle ground. Interpreting defamation of religions in this manner should remove blasphemy from the table, thus removing one of the critics' greatest concerns

---

280. Vance, *supra* note 223, at 205.

281. *Id.* at 249.

282. *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) ¶ 6 (Palm, Pekkanen & Makarczyk, JJ., dissenting).

(and arguing points). Instead, one could view defamation of religions through the lens of already existing laws targeting religious incitement. These laws provide additional speech-based protections (such as requiring that the speech be threatening), while going beyond the boundaries of traditional hate speech laws to cover statements that, while superficially based on religious critique, have the spread of hate against a religious group as their goal.

Both positions take the defamation of religion proposal seriously, rather than dismissing it as an unwelcome Islamic intrusion into the settled world of human rights law. Engaging with the OIC and other supporters will further the “inter-cultural consensus”<sup>283</sup> that supports international human rights. Here, perhaps, the *Otto-Preminger* case is most valuable. Unlike the global debate over defamation of religions, often reduced to name-calling, the European Court of Human Rights majority and dissent engaged in a civil discussion that moved from points of agreement to areas of dispute. This is how discussion should unfold over defamation of religions, as agreement about the troubling attacks against Muslims in Europe leads to debate about the best response. One might even reject all legal regulation of anti-Muslim speech while respecting the concerns behind the defamation of religions proposal. To do this convincingly, however, defamation of religion critics must do more than simply why the most expansive versions of the concept are dangerous. They must also explain why they cannot meet Muslims in the middle. By and large, they have yet to do so.

---

283. See *supra* note 25 and accompanying text.