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AUSTRIA'S LAW AGAINST DEFAMATION OF RELIGION: A CASE STUDY

GREG TAYLOR

Professor (hon.), Marburg University, Germany; Graduate School of Business and Law, R.M.I.T. University, Melbourne, Australia

ABSTRACT

Recently there have been calls from Islamic nations for the creation of a crime of "defamation of religion." Austria already has such an offense: section 188 of the Criminal Code of 1974 prohibits giving "justified offense" (*berechtigtes Ärgernis*) by "publicly disparag[ing] or ridicul[ing] a person who, or an object which, is the subject of veneration of a domestically established church or religious community, or a dogma, a lawful custom or a lawful institution of such a church or religious community." This has recently been applied to secure the conviction of an activist of the right-wing Freedom Party of Austria, who announced at a semi-public seminar attended by about thirty people, including one undercover journalist, that Mohammed was a pedophile. Drawing on the law of comparable jurisdictions, this article traces the history of the provision and considers how it is applied by the courts. In this article it is contended that this provision, while rarely used, unduly restricts public discussion. At the least, the provision needs both reinterpretation and amendment; international human rights sources suggest that repeal should be seriously considered given that the existing offense of sedition is available for serious cases.

KEYWORDS: Austria, religious defamation, religious vilification

INTRODUCTION

Μὴ πλανᾶσθε, θεὸς οὐ μυκτηρίζεται, Saint Paul assures us: "do not be deceived, God is not mocked."[1] Many of the Deity's acolytes, however, presume to think otherwise and are inclined to go to law to prevent mockery of God or of lesser but still sacred people or objects. When they do, a variety of answers await them, depending on what country they happen to be in.

If they happen to be in Austria, such persons will rejoice—not at being insulted, persecuted, or lied about in the first place,[2] but rather because the Austrian Criminal Code of 1974 provides for a particularly strong protection of religious feelings against insult. Section 188 provides as follows:

> Whoever, in circumstances where his behavior is apt to arouse justified offense, publicly disparages or ridicules a person who, or an object which, is the subject of veneration of a domestically established church or

1 Galatians 6:7 (New Revised Standard Version).

2 Cf. Mark 5:11; Leonard W. Levy, *Blasphemy: Verbal Offense against the Sacred, from Moses to Salman Rushdie* (Chapel Hill: University of North Carolina Press, 1995), 565–66. Given that the founder of Christianity, thought to be of the Deity himself, was tortured to death as a criminal, a blasphemer no less, it is easy to see why Christians should not be worried about any other, necessarily lesser insults offered to him or their faith.

> religious community, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily units.[3]

This provision makes Austria a jurisdiction of some interest: its anti-blasphemy law deviates from the model often found in English-speaking countries by focusing not on incitement to hatred or violence among nonbelievers, but rather on protecting the feelings of believers from "justified offense"; as I demonstrate, this makes the Austrian law one against defamation of religion, such as some Islamic countries have recently advocated.[4]

Furthermore, the topic has also come to prominence recently in Austria following the conviction of an activist in the Freedom Party of Austria, Elisabeth Sabaditsch-Wolff, under section 188, for proclaiming that Mohammed was a pedophile. In that case, the Court was, it appears, straining not so much the law but the facts in order to reach its conclusion. The law itself, however, must also be subjected to critical analysis.

HISTORY

The modern history of blasphemy in Austrian criminal law begins with section 61 of Part II of the Criminal Code of 13 January 1787, enacted under the enlightened despot Joseph II:

> If anyone should be destitute of reason to such an extent as sacrilegiously to blaspheme the Almighty in public places or in the presence of other people, in speech, writing or actions, he is to be treated as insane, and to be confined as a prisoner in the lunatic asylum until his recovery is assured.

While somewhat droll from today's perspective, this provision marked a significant reform and a clean break from earlier legislation against blasphemy; for only nineteen years earlier, the Criminal Code of Empress Maria Theresia had continued the availability, at least on paper, of the death penalty by burning alive—preceded by cutting out the tongue or chopping off the hand—for severe cases of blasphemy.[5] A related provision of Maria Theresia's Criminal Code threatened the death penalty for those who "abandon Christianity and accept the Jewish, Mahometan or heathen faith."[6] Part II of Joseph II's Criminal Code of 1787 also continued to provide for punishments of imprisonment, in section 61, for causing the apostasy of Christians or spreading heresy, as well as less exceptionable offenses related to disturbing divine worship.

The background to provisions such as those found in Maria Theresia's Criminal Code, and earlier provisions that it is not necessary to trace here, is the fear that the Almighty might take out his displeasure on the state if it did not see to it that proper respect was shown to him, coupled with the

3 The reference to "daily units" refers to the system by which a person's income, reckoned by the day, is the basis for the calculation of fines. This is meant to ensure that the economic circumstances of offenders are taken into account in setting fines, which might otherwise be too steep for the poor or derisory for the wealthy. The translation is adapted from that to be found in the European Court of Human Rights (ECHR) Case, *Otto-Preminger-Institut* v. *Austria*, 1994 series A no. 295-A, p. 12. (The Court omitted the word "publicly" in its translation.) Unless otherwise noted, all translations from German are the author's.

4 Austin Dacey, *The Future of Blasphemy: Speaking of the Sacred in an Age of Human Rights* (London: Continuum, 2012), chapter 1.

5 Of 31 December 1768; Article 56.

6 Art. 57, section 2.

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idea that religion was a useful means of ensuring obedience to the laws and that it should therefore be an offense against the law to undermine its very foundation.[7]

After Joseph II's death in 1790, however, there was some backsliding—for example, the death penalty, which he had abolished, was reintroduced for some offenses. The first sign of reaction as related to blasphemy may be seen in the Criminal Code for West Galicia of 17 June 1796, after the Third Partition of Poland, which restored the offense of blasphemy and provided, in a phrase that recalls the "justified offense" of the present section 188, for an enhanced penalty in cases where "public offense" was given.[8]

The Criminal Code of 1803 restored a full suite of penalties for blasphemy in Austria: it was again forbidden to blaspheme against God, to show disrespect to religious activities or objects, and to evince contempt for religion, as well as to cause a Christian to apostatize or to spread atheism or heresy.[9] But the death penalty was not restored for these crimes, as it had been for others: the punishment was, if the crime was aggravated by the giving of "public offense" or other matters, one to ten years' imprisonment; otherwise, six months to a year.

These offenses were incorporated almost without change into the successor Criminal Code of 1852,[10] which further added a provision prohibiting the offering of insult in public to the dogmas, usages, or institutions of a legally recognized church or religious community; it also criminalized conduct during a public religious event that was indecent and caused "offense to others." In the reform era of the late 1860s, the prohibitions against causing the apostasy of a Christian and spreading heresy were repealed,[11] leaving, however, the provision against spreading atheism on the books.[12] After the annexation of Bosnia, a law was passed in 1912 adding Islam to the list of legally recognized religious communities that thus enjoyed the protection of the criminal law.[13]

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7 Hartl, „Strafrecht und Religion: Gedanken zur Säkularisierung des österreichischen Strafrechts" ÖJZ 1976, 426, 427; Klecatsky, „Religionsfreiheit und Religionsdelikte" öArchKirchenR 1970, 34, 34f; Küpper, „Zu Notwendigkeit und Umfang strafrechtlichen Schutzes gegen die Beschimpfung von religiösen Bekenntnissen" in Klein (ed.), *Meinungsäußerungsfreiheit* versus *Religions- und Glaubensfreiheit* (Berlin: Berliner Wissenschaftsverlag, 2007), 15; cf. *The King* v. *Taylor* (1676) 1 Vent 293; 86 ER 189; 3 Keb 607; 621; 84 ER 906; 914; Helen Pringle, "Regulating Offence to the Godly: Blasphemy and the Future of Religious Vilification Laws," *University of New South Wales Law Journal* 34, no. 1 (2011): 316, 327.

8 Sections 91–94.

9 Sections 107–08.

10 RGBl 1852/117 (27 May 1852), sections 122–24, 303.

11 RGBl 1868/49 (law of 25 May 1868), Art. 7.

12 Various scholars suggested that the prohibition might have been repealed by desuetude: for references see Hartl, ÖJZ 1976, 426, 427. This suggestion, obviously somewhat heterodox in a codified system, was clearly also inconsistent with the republication of the provision in the official collection of Austrian law in 1945, after the end of the occupation or annexation by Germany. *Amtliche Sammlung wiederverlautbarter österreichischer Rechtsvorschriften: Österreichisches Strafgesetz*, 4th ed. (Vienna: Austrian State Printer, 1947), 51f; Klecatsky, öArchKirchenR 1970, 34, 36f. Furthermore, it was rejected by the Supreme Court of Austria in SSt XLI/34 (judgment of 19 June 1970). See also Austrian Parliamentary Papers, Thirteenth Legislature, no. 30, 327. In its judgment of 19 June 1970, the Court even denied that the provision was in conflict with the European Convention on Human Rights, citing the exception in Article 10(2).

13 RGBl 1912/159 (law of 15 July 1912), Art. 1. This law originally protected only Islam practiced according to the Hanafite rite (the most common in Bosnia). This restriction was declared constitutionally invalid by the Constitutional Court on 10 December 1987. ErkSlg 11 574/1987; BGBl 1988/164 (24 March 1988). By this time, however, the Criminal Code of 1974 had been passed, and it refers not to legal recognition (as its predecessors had) but to existence in fact. Austrian Parliamentary Papers, Thirteenth Legislature, no. 30, 328; Mayer/Tipold in Triffterer (ed.), *StGB Kommentar: System und Praxis [Salzburger Kommentar]* (27th update, Lexis Nexis, s.l. 2012), preliminary remarks on sections 188ff, no. 1; annotations to section 188, no. 2. Thus, this ruling

This was where matters stood until after the Second World War, when criminal law reform was at last undertaken. Early proposals for reform of the law on blasphemy, which had remained essentially unchanged since 1803, except for the removal of the prohibitions on causing the apostasy of Christians and spreading heresy, retained the offense of blaspheming against God,[14] but this was soon dropped. While little would be gained here by a detailed examination of the various proposals in the earlier stages of the process of reform,[15] it is, however, worth noting that the criminalization of attacks on people and things venerated by religions, the provision under which Frau Sabaditsch-Wolff was to be convicted, was not part of the pre-1974 law. Liability was extended in this respect beyond the previous law very early on in the drafting of what was to become the reformed Code of 1974 because the lack of such protection was thought to be a gap in the law.[16]

The final government Bill for the new Criminal Code of 1974 contained a clause virtually identical to the present section 188, with the important exception that the test for the punishability of an outrage on religious feelings was not, as in the present section 188, being "apt to arouse justified offense," but rather "apt to disturb religious peace." However, the explanatory notes stated that the rationale for the offense was not confined to protecting religious peace but included also the honor of religious societies and the protection of the religious feelings of the individual.[17]

Parliament's Justice Committee, however, objected to what it called (no doubt as a result of a mere slip) the Bill's proposal for "protection against religious peace" and stated as follows:

> [T]he fear was expressed [in the Justice Committee] that the Courts could read a threat to religious peace as meaning more than merely a threat to peaceful co-existence, but rather a type of *Kulturkampf* [the historical term for Prince Bismarck's persecution of the Roman Catholic Church in Germany in the 1870s]. This would mean that the criminal provisions of clauses 188 and 189 would hardly ever be applicable. The Justice Committee therefore thought it advisable to select the element "arousing justified offense" as it also appears in the same division [of the Criminal Code] on the disturbance of funerals. Thus, these provisions . . . are assimilated to the criminal provision, related in this respect, against committing indecent actions in public.[18]

The sections mentioned by the Justice Committee do not really make good analogies. Section 189 protects, in the main, public religious services against disturbance, and the opportunities for showing disrespect and giving offense in such circumstances are legion; the occasions in question are particularly vulnerable, sacred, and worthy of protection. The same may be said, with even greater emphasis, of the crime of disturbing a funeral.

Furthermore—and this is a consideration that applies particularly to the final analogy drawn, with public indecent acts, but applies also to funerals and divine services—there is no consideration here of the need, in crafting a definition of the offense of blasphemy, to ensure that freedom of speech is properly maintained. It is one thing for someone to wish to stand up during a funeral or a Mass and give a political speech, or to start a dispute about religious dogma, or to carry on an indecent exhibition in public; it is another thing altogether to select a non-sacred occasion and place, such as a film theatre or a public lecture, to make statements that a religious believer might find offensive.

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had no effect on the application of section 188 of the Criminal Code. On 22 May 2013, the Islamic Alevite Community was added to the list: BGBl 2013/133.

14 Austrian Parliamentary Papers, Eleventh Legislature, no. 706, 33.

15 These are documented quite thoroughly by Klecatsky, öArchKirchenR 1970, 34.

16 Ibid., 34, 45.

17 Austrian Parliamentary Papers, Thirteenth Legislature, no. 30, clause 195 and p. 327.

18 Austrian Parliamentary Papers, Thirteenth Legislature, no. 959, 30.

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It remains only to add to this historical overview that section 188 has not been amended since it was enacted in 1974 as part of the major criminal law reform of that year.[19] This is despite the significant changes in the religious makeup of Austria over the last three to four decades and, in particular, the rise in atheism and the rapidly increasing numbers of Muslims. Since the loss of the empire in 1918, Austria had been an overwhelmingly Roman Catholic society (as was Cisleithania, the Austrian half of the Austro-Hungarian Empire, before 1918); in recent years, that has ceased to be the case.[20] What counted as "justified offense" to religious feelings in the society of 1974 may well have been easier to determine, less varied, and less of a restriction on freedom of speech than it is today.

FURTHER AND BETTER PARTICULARS OF THIS OFFENSE

Various background doctrines or general provisions of the Criminal Code affect the operation of section 188 in important ways. Some of its terms also require further explanation, and then there is the question of the rationales for its existence and whether they are permitted to limit its interpretation.

Interpretation of Section 188

Under sections 5 and 7(1) of the Criminal Code, the offense created by section 188 can be committed only intentionally. The definition of intention in Austrian criminal law mirrors that adopted in Germany, which I have analyzed in detail elsewhere.[21] A major difference, however, is that the Austrians have actually managed to have the definition incorporated into their Criminal Code rather than leaving it to case law. For the purposes of this article, then, it is sufficient to refer readers desiring more detail to my study, cited above, and to quote section 5(1):

> A person acts intentionally if he wishes to realize a state of affairs that corresponds to one described in the statute; for this purpose it is sufficient if the actor considers the realization seriously possible and reconciles himself to it.

A person who realized the possibility of giving offense but was not perturbed about doing so and was indifferent to it if it happened has reconciled himself to giving offense and would commit the offense intentionally. On the other hand, a person who made statements that he thought might arouse justified offense if members of a religion heard or read them but who hoped and trusted that they would not be offended would not be acting intentionally and would not commit an offense under section 188.

Section 188 also requires statements to have been made in public. Section 69 of the Criminal Code and case law unite to declare that this means a group of more than ten people.[22]

19 Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, preliminary remarks on sections 188ff, no. 1.

20 For a handy overview of the statistics from 1951 to 2001 see Statistik Austria, *Bevölkerung nach dem Religionsbekenntnis und Bundesländern 1951 bis 2001* (June 1, 2007), available at http://www.statistik.at/web_de/static/bevoelkerung_nach_dem_religionsbekenntnis_und_bundeslaendern_1951_bis_2001_022885.pdf.

21 Greg Taylor, "Concepts of Intention in German Criminal Law," *Oxford Journal of Legal Studies* 24, no. 1 (2004): 99–127.

22 Bachner/Foregger in Höpfel/Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch* (online; Vienna: Manz, 2012), annotations to section 188, no. 20; Hinterhofer, *Strafrecht Besonderer Teil II*, 4th ed. (Vienna: W.U.V.

Examples of the lawful customs referred to in the section include the rosary and liturgical processions.[23]

The word in section 188 that has been translated above as "disparages" (*herabwürdigt*, literally "downworthies") is often explained, in accordance with case law under the pre-1974 ancestors of section 188,[24] the drafting history,[25] and other uses of similar words in the present Criminal Code,[26] by reference to two further words which may be rendered as "abuse" (*beschimpfen*) and "make worthy of contempt" or "slur" (*verächtlich machen*).[27] It will be a matter of judgment in each case whether these criteria are satisfied, but they are reasonably stringent; an old case from 1933,[28] a period in Austrian history when there was certainly less tolerance for insults to religion than there is now, holds that a youth who smokes a cigarette in a church neither abuses nor slurs religion.[29]

To date no difficulties have been encountered with claims by fringe groups or new sects to be religions. It is not difficult to imagine the definitional problems that might be encountered in this regard,[30] but so far consideration of this topic has been confined to rather general statements in books[31] and has not reached the courts. It would be interesting to know, for example, what the position of Scientology would be under section 188.[32]

Perhaps the most important concept in section 188 is that of "justified offense." There is a disagreement in the literature about the definition of this concept: some commentators consider the word used (*Ärgernis*) to be the equivalent of strong words such as "outrage" or "indignation,"[33] while others, probably a minority, would allow the substitution of the word *Anstoß*, a slightly weaker word.[34] It is difficult to render fine shades of meaning between languages, but *Anstoß*

Universitätsverlag, 2005), 56; Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, annotations to section 188, nos. 17f; Platzgummer, „Herabwürdigung religiöser Lehren, Meinungsfreiheit und Freiheit der Kunst" JBl 1995, 137, 137.

23 Foregger/Fabrizy, *Strafgesetzbuch: Kommentar*, 10th ed. (Vienna: Manz, 2010), 594.

24 OGH, SSt XIII/45, 142. See also *Protokoll über die 10. Arbeitssitzung der Kommission zur Ausarbeitung eines Strafgesetzentwurfes im Jahre 1962 – 30. August 1962* (typescript held at the Max Planck Institute for Foreign and International Criminal Law, Freiburg/Br., Germany), 1189, 1192f, where *herabwürdigt* is chosen as a more modern and understandable alternative to the traditional but rather antique *verunglimpft*.

25 Austrian Parliamentary Papers, Eleventh Legislature, no. 706, 343; Austrian Parliamentary Papers, Thirteenth Legislature, no. 30, 329.

26 Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, annotations to section 188, no. 14 (referring also to sections 248 (2) and 317 of the Criminal Code, where the two glosses found in my text are used together and then followed by otherwise (*herabwürdigt*)).

27 The case OLG Graz, MR 1985 (2), A10, A11, uses *verächtlich machen* as a synonym for *herabwürdigt*.

28 As well as general changes in Western societies since that date, it should be mentioned that this decision was handed down on 22 May 1933, only a couple of months after the authoritarian regime of the Patriotic Front (1933–1938) had replaced Austrian democracy. It is not my task to review here the precise relationship between that regime and religion, but it can be said without fear of exaggeration that the regime was friendly to the Roman Catholic inheritance of Austria.

29 OGH, SSt XIII/45, p. 142.

30 Eric Barendt, *Freedom of Speech*, 2nd ed. (Oxford: Oxford University Press, 2005), 191.

31 For example, Bachner/Foregger in Höpfel/Ratz (eds.), *Wiener Kommentar*, annotations to section 188, no. 7; Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, annotations to section 188, nos. 6–8.

32 Liebscher, „Religiöses Gefühl und Strafgesetz" JBl 1971, 114, 116f, bases part of his (obviously unsuccessful) argument for an end to the protection of religions against insult in the lead-up to the reform of 1974 on the question whether extreme adherents of the cult of Wotan should receive protection; they, too, have not troubled the Courts.

33 Foregger/Fabrizy, *Strafgesetzbuch*, 594f

34 Kienapfel/Schmoller, *Studienbuch Strafrecht: Besonderer Teil*, vol. 3, 2nd ed. (Vienna: Manz, 2009), 91; Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, annotations to section 188, no. 18.

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can mean "umbrage" rather than "indignation." It would be putting the bar too low, however, to translate *Ärgernis* (as it might be translated in other contexts) merely as "annoyance"; case law emphasizes that the feeling of outrage must be "profound" (*tiefgreifend*).[35] In the absence of any precise way of measuring offense, the utility of such word games, even in the original language, is limited; nevertheless, something does depend on whether one requires "indignation" or mere "umbrage" or even just "annoyance."

All commentators are agreed that the concept of justified offense imports something like an objective "reasonable person" test, but does not refer to any random person: a common formulation is that the average believer, not merely an uncommonly sensitive one, must take offense;[36] or—perhaps slightly more demanding—that every believer would feel offended or at least understand the offense given.[37] In accordance with the words of the statute, commentators[38] also rightly point out that it is not necessary to show that anyone actually was offended; it is sufficient to show that the behavior was apt to arouse offense.

An interesting point that is often made is that one cannot claim to have been justifiably offended if one exposed oneself knowingly to the possibility of offense; believers who think that there is something that will offend them in a particular place cannot complain if they voluntarily seek out that place.[39] Thus a group of unbelievers can exclude the possibility of causing "justified offense" by giving a warning, in itself inoffensive, of the possibility of causing outrage to religious feelings. Some commentators[40] suggest, therefore, that this principle and the definition of "publicly" mentioned earlier mean there must be more than ten *believers* present in order for the offense to occur, but this seems to be a gloss on the word "publicly," and this suggestion is rejected by one of the most influential commentaries.[41]

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35 OLG Graz, MR 1985 (2), A10. The bar was set fairly high as early as 1885 by the case reported in Plenarbeschlüsse und Entscheidungen des k.k. obersten Gerichts- und Cassationshofes 8, 812, p. 130. In this case a parish priest attacked spiritualism in the presence of persons inclined towards it, one of whom protested; it was held that mere muttering on the part of the audience as a reaction to the protest did not show that *Ärgernis* existed, and the protester was found not guilty for that and other reasons.

36 OLG Graz, MR 1985 (2), A10, A11 (case); Bachner/Foregger in Höpfel/Ratz (eds.), *Wiener Kommentar*, annotations to section 188, no. 13; Hinterhofer, *Strafrecht*, 56; Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, annotations to section 188, no. 19. But compare the cases referred to in Rex Tauati Ahdar, "Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law," *University of Queensland Law Journal* 26, no. 2 (2007), 293, 308.

37 Foregger/Fabrizy, *Strafgesetzbuch*, 595; Kienapfel/Schmoller, *Studienbuch Strafrecht*, 91f; Platzgummer, JBl 1995, 137, 137.

38 For example, Hinterhofer, *Strafrecht*, 56; Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, annotations to section 188, nos. 3, 18; Platzgummer, JBl 1995, 137, 137.

39 Kienapfel/Schmoller, *Studienbuch Strafrecht*, 92; Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, annotations to section 188, no. 19; Triffterer/Schmoller, „Die Freiheit der Kunst und die Grenzen des Strafrechts: Auswirkungen des Art. 17a StGG auf die strafrechtliche Verantwortlichkeit bei künstlerischer oder vermeintlich künstlerischer Betätigung" ÖJZ 1993, 547, 579. Cf. also Joel Feinberg, *Offense to Others* (New York: Oxford University Press, 1985), 26, 32f, 45.

The position must be as stated in the text: even within the one religion (or perhaps especially within the one religion), a person of strong protestant convictions, say a strict Calvinist, might find the mere invocation of saints in a Roman Catholic Mass blasphemous and heretical, but can avoid the offense easily by not attending Mass; or a Sunni Muslim might find various aspect of Shia Islam equally offensive, but should apply the equivalent remedy.

40 Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, annotations to section 188, no. 19.

41 Bachner/Foregger in Höpfel/Ratz (eds.), *Wiener Kommentar*, annotations to section 188, no. 14.

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"Justified Offense"

The offense of blasphemy has an obvious possible effect upon freedom of expression. Whether, and if so how, the Austrian offense can be reconciled with the human rights instruments to which Austria is a party, most notably the European Convention on Human Rights, with other human rights instruments, and with Austrian domestic constitutional provisions will be examined later. For now, I point out that section 188 contains an immanent means of ensuring that regard is had not merely to the feelings of believers but to the need of society to discuss religious topics and indeed to the religiously plural nature of Austrian society—of which, however, little use is made either in the case law or the commentaries.[42]

The means in question consists of the word "justified" that qualifies the word "offense" in section 188. As discussed above, this concept came into the law at the last minute, as a result of a poorly reasoned report of a parliamentary committee;[43] but it is possible to make a silk's purse out of this sow's ear. It takes little interpretive skill to conclude that what counts as justified offense may need to be adjusted to the demands of living in a plural society that promotes freedom of expression and the discussion of religious affairs.

If Austria were a theocracy—the Islamic Republic of Austria, for example—it would surely be the case that there would be less room for "justified offense" at criticism of the state religion than is the case in a secular Western European state. At the very least, the value of freedom of expression and the need for religious people to have a thicker skin than do those in a theocracy should be incorporated into a consideration of what constitutes "justified" offense. Yet no commentator or case has, as far as I know, ever pointed this out.

It is also not as if Austrian law were without any inspiration for such an interpretative maneuver. Perhaps the most famous judgment of the German Federal Constitutional Court is *Lüth*,[44] in which that Court held that the constitutional value of freedom of expression should be imported into a consideration of what counts as *contra bonos mores* for the purposes of the German Civil Code and set aside a judgment of the civil courts which had failed to take this constitutional value into account in interpreting that phrase. This is roughly equivalent to the command of section 3(1) of the United Kingdom's *Human Rights Act* to read legislation, as far as it is possible to do so, in a way that is compatible with human rights.[45]

The famous judgment of the German Federal Constitutional Court is well known in Austrian legal circles. But one of the major differences between Austria and Germany is that the Austrian state was reconstituted rather than all but destroyed in 1945. The Austrian constitutional text was no new start, but a restoration. This in turn means that the domestic Austrian provisions on basic rights are less modern and systematic than the German ones: the principal source of basic

42 A similar approach to avoiding criminal punishment for the offense of animal cruelty committed for religious ritual reasons is suggested by Lewisch, „Schächten als strafbare Tierquälerei? Religionsfreiheit und strafrechtliche Beteiligungslehre am Beispiel 15 Os 27, 28/96" JBl 1998, 137.

43 The drafting materials on the provision against disturbing funerals reveal that "justified" was inserted there on the run also, in case anyone claimed to be offended by, for example, someone's failure to pray at the graveside: *Protokoll über die 10. Arbeitssitzung der Kommission zur Ausarbeitung eines Strafgesetzentwurfes im Jahre 1962 – 30. August 1962* (typescript held at the Max Planck Institute for Foreign and International Criminal Law, Freiburg/Br., Germany), 1221f.

44 BVerfGE 7, 198. For a translation of the judgment, see Basil S. Markesinis and Hannes Unberath, *German Law of Torts: A Comparative Treatise*, 4th ed. (Oxford: Hart Publishing, 2002), 392–97.

45 Human Rights Act, 1998, ch. 42, section 3(1). For cases from the United Kingdom close to the area presently under discussion that do just this, see *Hammond* v. *Director of Public Prosecutions* (2004) 168 JP 601; [2004] EWHC 69; *Connolly* v. *Director of Public Prosecutions* [2008] 1 WLR 276, [18].

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rights in Austrian domestic law remains a law of 21 December 1867.[46] While Austrians sometimes seem almost apologetic for this fact, the document of 1867 is not a bad piece of work in an area in which values are, moreover, supposed to be next to ageless. It should also be mentioned that in Austria the European Convention on Human Rights is directly applicable to constitutional law thanks to a domestic law of 1964 to that effect.[47] Nevertheless it is probably still true to say, with one of Austria's foremost modern experts on constitutional guarantees of basic rights, that Austria's rights guarantees are, because of their age and their lesser degree of detail, more difficult to extract a coherent system of values from than the German.[48] This makes the *Lüth* argument a bit harder to run in Austria. *Lüth* concerned a civil claim between two private parties, and it was therefore necessary to postulate that the basic rights, directly applicable (in the usual case) only against the state, were applicable horizontally as a system of values pervading the whole legal order. But the obstacle to importing constitutional values *via* the word "justified" disappears on analysis, for when section 188 is to be applied, one of the parties to the criminal litigation must necessarily be the state,[49] against which human rights are directly applicable.[50]

The same expert just mentioned has, moreover, allowed himself to sing the following aria:

> The basic rights pervade the whole legal order into which they shine their light, and what is meant by the idea of general pervasive effect is doctrinally expressed by the concept of interpreting [laws] in accordance with the Constitution: courts must apply the law, and they must do so in accordance with the Constitution and in agreement with the values of the basic rights, when necessary to avoid applying the law in a way that contravenes the basic rights.[51]

But it is not necessary to go even as far as that in order to pour some rights content into "justified"; the context of a free society in which free expression is vital is immanent in the word, just as one would naturally not exclude a consideration of changes in societal norms between 1803, or even 1974, the year of the section's enactment, and today, which have, in turn, affected what would be seen as justified offense taken at criticism of religions.[52]

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46 RGBl 142/1867 (law of 21 December 1867) continued in force by Article 149 (1) of the present Constitution. For a brief reference to the background, see Manfred Stelzer, *Constitution of the Republic of Austria* (Oxford: Hart Publishing, 2011), 5, 9.

47 BGBI 1964/59 (Law of 4 March 1964, Art. II (7)).

48 Berka, „Die Freiheit der Kunst (Art. 17a StGG) und ihre Grenzen im System der Grundrechte" JBl 1983, 281, 289f; Platzgummer, „Herabwürdigung religiöser Lehren, Meinungsfreiheit und Freiheit der Kunst" JBl 1995, 137, 140.

49 In theory it might be possible, under section 72 of the Code of Criminal Procedure, BGBl. Nr. 631/1975, for a private person to continue a prosecution that the state has abandoned, but this will be a rare case indeed. Section 2(1) of that Code requires the Public Prosecutor to begin criminal proceedings if sufficient grounds exist—there is usually no discretion not to prosecute.

50 Article 13 of the catalogue of basic rights of 1867 admittedly protects freedom of opinion and expression "within statutory limits." To avoid delaying the flow of my argument, I add in this footnote that section 188 should not be interpreted as if Article 13 said nothing more than "within statutory limits," thus essentially permitting itself to be negated by any statute, but also read restrictively with due regard to the substantive guarantee in the rest of Article 13 and the value embodied in the right protected. This, the *Wechselwirkungslehre*, is also a well-known interpretative tool from the *Lüth* judgment.

51 Berka, „RichterInnen als GrundrechtswahrerInnen: Grundrechte und Rechtsprechung der ersten Instanz" öRZ 2008, 114. For a similar, if more cautious treatment, see Adamovich/Funk/Holzinger, *Österreichisches Staatsrecht: Band 3 – Grundrechte* (Vienna: Springer, 2003), 29; Stelzer, *Constitution of Austria*, 190f, 218.

52 Bachner/Foregger in Höpfel/Ratz (eds.), *Wiener Kommentar*, annotations to section 188, no. 13.

That does not, of course, mean that Austria must go as far as the United States of America, throw the baby out with the bathwater, and (to mix metaphors) put all its eggs in the one basket of freedom of expression. Rather, it means that the important constitutional value of free expression deserves a prominent place, which it does not yet have in the interpretation and application of section 188. As things stand, though, the word "justified" is interpreted to refer only to the average believer's view, and thus merely continues the questionable emphasis (later the subject of more detailed examination) on the perceptions of believers alone.

The Purpose of Section 188

Another curiously unresolved problem in relation to section 188 is what value or values it is meant to protect. Austria, like Germany, reserves an important place in its criminal law theory and (to a lesser but still significant extent) in its case law for what is known as the *Rechtsgutstheorie*,[53] the theory of legal values or goods. This idea means in essence that a criminal prohibition can be justified only for the protection of some legally valuable interest, such as human life, property, or sexual self-determination; knowing which interest is protected by one of its provisions is an important aid in the interpretation of the Criminal Code.[54] At the level of interpretation only, there is a similar, although not identical idea in English-speaking countries: purposive interpretation can be used in cases of doubt, and it is therefore important to know what purpose a statute was meant to serve. In German and Austrian criminal law, the purpose will include the protection of some legally recognized, valuable interest. It is not possible to explain this concept further here; what has just been said will suffice for present purposes, and the *Rechtsgutstheorie* has recently been the subject of a detailed work in English.[55] Balancing freedom of expression against the value protected by section 188 also requires us to know what the latter is.

Finally, it is worth knowing as part of this broader comparative-law mission whether this law is a law for the protection of the honor of religions, for protecting the public peace and order, or for sparing the religious feelings of individuals from unnecessary offense—or for more than one of these purposes, or perhaps for yet some other purpose. For all these reasons, then, the question needs to be asked what value is protected by section 188.

In Germany, the equivalent provision[56] has offered since 1969—when, incidentally, the words "gives offense" were also removed from Germany's section—an unequivocal answer to this question. The value protected by the equivalent offense is the "public peace," or, in terminology that is

53 The *Rechtsgutstheorie* goes back to the criminal law scholarship of the 1830s, well before the time when Austria and Germany were separated, and thus it is part of their common inheritance rather than an import from one country to another.

54 See, for example, Helmut Fuchs, *Österreichisches Strafrecht: Allgemeiner Teil I – Grundlagen und Lehre von der Straftat*, 7th ed. (Vienna: Springer, 2008), 1–3, 85f.

55 Carl Lauterwein, *The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorising* (Farnham: Ashgate, 2010). The comparative exercise supposedly undertaken in that work is of no scholarly value. See Greg Taylor, "The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing," *University of Queensland Law Journal* 29, no. 2 (2010): 347. Something of the flavor of the idea may also be gathered from the speech of Lord Scarman in *The Queen* v. *Lemon* [1979] AC 617, 658B (describing the offense as designed "to safeguard the internal tranquillity of the Kingdom"); but see *Lemon* [1979] AC at 662D (stating that the "true test is whether the words are calculated to outrage and insult the Christian's religious feelings"). The former appears to be the value protected, the latter is a part of the elements of the offense. See also *Director of Public Prosecutions* v. *Collins* [2006] 1 WLR 2223, [7].

56 Section 166 of the Criminal Code (in the version of Erstes Gesetz zur Reform des Strafrechts (1. StrRG) of 25 June 1969, BGBl I 645). There are, however, important differences in addition to the one about to be noted in the text.

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perhaps more familiar to English speakers, "public order"—although it is likewise necessary to show only that the act was *calculated* to disturb public order, not that it actually did.[57]

There is no such simple answer in Austria. This question was, in fact, partly behind what the drafters of section 188 and Parliament's Justice Committee were trying to decide when they were debating whether it was the religious peace or the giving of justified offense that should be the criterion for engaging the prohibition in section 188. As noted above,[58] they decided (on the basis of rather fragile reasoning) for the latter, which now appears in section 188. But this is not decisive, as not every statute expressly declares in so many words what legal value (*Rechtsgut*) it protects. Furthermore, the Eighth Division of the Special Part of the Criminal Code, in which section 188 appears, is headed "Punishable Actions against Religious Peace," even though this is not really apposite to all the provisions that appear under it: section 191, protecting funerals from disturbance, for example, embraces entirely secular funerals as well as religious ones. What then is the role of religious peace and public order in the interpretation of section 188?[59]

It is difficult to say what the answer to this question is as far as legal practice goes, because very few convictions under section 188 occur—in many years there is none, in some just one, and the highest annual number recorded in recent times is two (1991, 1998, 1999 and 2002).[60] Most of these, in turn, are not reported and do not appear even in online data banks.[61] There is, however, one case at the intermediate appellate level in which the Court held that the purpose of section 188 was not the preservation of religious peace, but rather the avoidance of giving offense to the religious. The Court referred to the undoubted fact that the reference to religious peace was removed from the text of section 188 during the drafting process.[62]

However, this is a rather unsophisticated approach to the question, and leaves out, to start with, the heading of the Eighth Division referred to; furthermore, sometimes only the most oblique hint at the legal value to be protected appears in the text of the legislation, and some analysis and thought are necessary to answer the question properly.

To begin with, a full review of the legislative materials behind the present section tells a somewhat different, more complicated but ultimately equivocal story. The drafting materials show that a number of values, both peace and order and the religious feelings of individuals, were to be protected by what was then the proposed section 188, but also state that the latter value would not alone justify a criminal prohibition.[63] The commission in charge of drafting the new Criminal Code, despite its recognition that the provision protected several interests, nevertheless originally proposed

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Thus, for example, the German provision protects only from disparagement, not from ridicule: Küpper, „Zu Notwendigkeit", 26.

57 It took, however, some time for everyone to catch on: see Küpper, „Zu Notwendigkeit", 18–21.

58 See note 18 above. For prior discussions, see Klecatsky, öArchKirchenR 1970, 34, 48f.

59 There is an interesting parallel in a recent case in what is otherwise the rather different environment of Indonesia. See Melissa Crouch, "The Indonesian Blasphemy Case: Affirming the Legality of the Blasphemy Law," *Oxford Journal of Law and Religion* 1, no. 2 (2012): 514, 516f.

60 Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, annotations to section 188, no. 5, footnote 19.

61 Thus, for example, I have been unable to find a report of the proceedings against Dr. Susanne Winter in 2009 in Graz. This article, however, is not a summary of the case law; and the utterances of Dr. Winter were somewhat more extreme than those of Frau Sabaditsch-Wolff, and also much more clearly made in public, making Dr. Winter's case a less suitable one for testing the reach of section 188.

62 OLG Graz, MR 1985 (4), A7, A8 (appeal dismissed on other grounds: MR 1986 (2), 15).

63 *Protokoll über die zweite Arbeitssitzung der Kommission zur Ausarbeitung eines Strafgesetzentwurfes im Jahre 1959 – 29. Jänner 1959* (typescript held at the Max Planck Institute for Foreign and International Criminal Law, Freiburg/Br., Germany), 159; Austrian Parliamentary Papers, Eleventh Legislature, no. 706, 340; Austrian Parliamentary Papers, Thirteenth Legislature, no. 30, 327, 329.

that the heading to the Eighth Division should refer to religion only,[64] but "religious peace" was restored by the government to the heading on that same ground that a variety of values were protected by the provision including both religion and religious peace.[65] The final decision to remove "religious peace" from the wording of section 188 itself was, as noted above, taken by the Justice Committee of Parliament, but the committee's reasons are equivocal as well as feeble and could be read either as a rejection of that idea as a whole or merely a desire not to have it interpreted with undue severity, as requiring an endangerment of religious peace at the level of the *Kulturkampf* of the 1870s.[66]

As far as the commentators are concerned, some state more or less without qualification, referring to the heading to the Eighth Division, that the value behind section 188 is the preservation of religious peace, but often also add that the honor of religious societies and the religious feelings of believers are further values which the section protects.[67] Others, however, deny that religious peace is a value protected at all and refer only to the honor of religious societies.[68]

Certainly the mention of "justified" offense in section 188 must count against the idea that the value protected by the section is religious peace or, for that matter, solely the feelings of believers. While I would not go so far as to say that the mixture of objective and subjective tests involved in the concept of "justified offense" to feelings is contradictory—if that were so, it would not be possible to claim, as I have just done, that unarguably genuine feelings of offense might be seen as unjustified—a consistent protection of either feelings alone and, to a significant extent, also of public order would require the test of whether offense is felt to be solely subjective.[69] This is not what section 188 says, nor would it seem right to punish people criminally for causing such offense without more. As Professor Eric Barendt has pointed out, "it is very doubtful"[70] whether there are good arguments to justify criminalizing the mere giving of offense to religious feelings.

If analyzed carefully, it can be seen that section 188's principal concern is with the public standing of religions as quasi-public institutions—with their honor. It is a law against defamation of religion. This conclusion can be drawn for a number of reasons.

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64 *Protokoll über die 11. Arbeitssitzung der Kommission zur Ausarbeitung eines Strafgesetzentwurfes im Jahre 1962 – 31. August 1962* (typescript held at the Max Planck Institute for Foreign and International Criminal Law, Freiburg/Br., Germany), 1245f.

65 Austrian Parliamentary Papers, Thirteenth Legislature, no. 30, 327.

66 See note 18 above.

67 Bachner/Foregger in Höpfel/Ratz (eds.), *Wiener Kommentar*, preliminary remarks on sections 188–91, nos. 2–4; Kienapfel/Schmoller, *Studienbuch Strafrecht*, 90; Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, preliminary remarks on sections 188ff, no. 2; annotations to section 188, nos. 3, 4; Platzgummer, „Herabwürdigung religiöser Lehren, Meinungsfreiheit und Freiheit der Kunst" JBl 1995, 137, 137f. A case from 1970, before the enactment of the present provision, is equally equivocal about the purpose of the prior law, stating both that a variety of values are protected by it and baldly that religious peace alone is the value protected: OGH, SSt XLI/34, 150, 152.

68 Hinterhofer, *Strafrecht*, 54.

69 Pawlik, „Der strafrechtliche Schutz des Heiligen" in Isensee (ed.), *Religionsbeschimpfung: der rechtliche Schutz des Heiligen* (Berlin: Duncker & Humblot, 2007), 76, 78. Compare the statute dealt with in *Monis* v. *The Queen* (2013) 249 CLR 92.

70 Barendt, *Freedom of Speech*, 192; see also Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012), 106; Worms, *Die Bekenntnisbeschimpfung im Sinne des § 166 Abs. 1 StGB und die Lehre vom Rechtsgut* (Peter Lang, Frankfurt/M. 1984), 126–28. Although it does not concern religious vilification, and is about civil rather than criminal liability (the latter, however, is an *a fortiori* case), see also the comments made to and by the Legal and Constitutional Affairs Legislation Committee of the Australian Senate in its report to the Senate, tabled on 21 February 2013, on the *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* at 37–43, 88f.

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First, the concept of "justified" offense is something more than mere "offense." It seems, rather, to involve claims to legal protection that can be measured against some external objective standard of justifiability (the details of which must vary considerably depending on the facts of each case) and that, through reference to this external, objective standard, also involve society's perceptions of the worth and respect due to the religion concerned.

Secondly, the text of section 188 indicates, in fact, that the primary prohibition is not of causing justified offense, but of engaging in public disparagement or ridicule. In addition to one of those things, there must in addition be circumstances that make those actions "apt to arouse justified offense." However, this is a consequence of the primary prohibition against disparaging or ridiculing: it is not the conduct on which the legislator has fastened as initially engaging the attention of the criminal law. The "justified offense" provision might, as we have seen, save cases in which people voluntarily expose themselves to experiencing disparagement or ridicule—for example, by viewing a scurrilous antireligious film while knowing its contents in advance. But this is really in the nature of an exception, not the point of creating this criminal offense.

Thirdly, public disparagement and ridicule of religions, the actions prohibited by section 188, are also obviously connected with claims to public esteem and honor. Someone who, in a scholarly work, disputes in calm terms the historicity of Mohammed or the official textual history of the Koran will not be engaging in public disparagement or ridicule, however justified any offense taken by Muslims might be.

In the prosecution of Frau Sabaditsch-Wolff, the Appeals Court pointed out[71] that one of the offenses of defamation of individuals under the Austrian Criminal Code,[72] which consists in offering insults to or ridiculing the victim, does not contain a defense of truth, unlike the principal offense of defamation (section 111), which does. By drawing this analogy, it confirms the connection with defamation.

Fourthly, by requiring that to be considered an offense the statement must go beyond mere annoyance, section 188 also goes beyond the mere protection of feelings and also requires of the statement a level of seriousness that affects the claims of religion to public esteem. Drawing a line between mere annoyance and offense will also require an assessment of the gravity of the insult offered and a value judgment about whether it substantially affects the public esteem of religions. Fifthly, the fact that section 188 creates an offense that can be committed only intentionally also suggests that some broadly understood definition of what is offensive must lie at the base of the prohibition.

One may usefully contrast here the German provision, which expressly requires the statement in question to have a particular consequence—or, rather, to be likely to produce a particular consequence—external to it, namely the endangerment of public order, with the Austrian provision, which does not require that, but rather asks that the statement be judged by a criterion that has no reference to its possible consequences. If a protection of public order or religious peace were to be added to the offense, or seen as its basis, it would be significantly changed.

The requirement that disparagement or ridicule must have taken place "publicly" might at first be thought to have some connection with the maintenance of public order, but it is also compatible with limiting the protection of religious bodies' honor to matters that are likely to reach the attention of the public and affect a religion's public standing, unlike, for example, jokes told in a private sphere that will have no effect on its standing.

71 In the judgment cited below in note 74, at page 14.

72 Section 115 (1).

The heading to the Eighth Division ("Punishable Actions against Religious Peace") would seem, moreover, a rather flimsy foundation on which to build a doctrine about the purpose of section 188, given that the heading clearly does not in any way fit the prohibition on disturbing a funeral, even a nonreligious one, and its usefulness in explicating the intention behind the provisions in the Eighth Division is therefore clearly limited. The fact that the idea of "religious peace" was dropped from the draft of section 188 also cannot be overlooked, even if it alone would not be decisive. On the whole, therefore, the case cited above,[73] in which it was held that religious peace is not one of the values lying behind section 188, is probably correct. But the feelings of believers, also, are not what section 188 principally aims to protect. It is, in truth, wholly or largely a law against defamation of religion—a law to protect the honor of religious beliefs, practices, and societies against public disparagement or ridicule.

THE CONVICTION OF FRAU SABADITSCH-WOLFF[74]

Frau Sabaditsch-Wolff is an activist from the Freedom Party of Austria, the party that caused some international concern when it joined the Austrian government in 2000; it will be recalled that its inclusion led to sanctions against Austria by other European nations.[75] In October and November 2009, at free seminars entitled "Basics of Islam" organized by that party and attended by about thirty people, including one undercover journalist who was to be her nemesis,[76] Frau Sabaditsch-Wolff made a large number of claims about Islam and Muslims. It suffices here to reproduce in translation the claim that led to the finding of guilt against her (as distinct from the very large number on the basis of which she was charged), namely that Mohammed "had a bit of a thing for children" and was a pedophile (in reference to his marriage to a six-year-old, supposedly consummated when she was nine). Frau Sabaditsch-Wolff was charged both under section 188, Mohammed being without doubt a "person who . . . is the subject of veneration of a domestically established church or religious community," and with the more serious offense[77] of sedition, in the sense of stirring up hatreds among various classes of citizens, under section 283.

She was acquitted of the offense under section 283 on the clearly correct ground that her comments (which are not all reproduced here) did not refer to all Muslims nor mean that they as a class were worthy of contempt or unworthy of being treated with human dignity. But she was, as previously noted, convicted under section 188. The sentence was a mild fine of €480 (120 days at €4 each), in lieu of payment sixty days' imprisonment. Two appeals—the second of which was to the Supreme Court of Austria—failed.

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73 See note 62 above.

74 In what follows I shall not repeatedly cite the judgment against Frau Sabaditsch-Wolff and the appeals brought by her, which were unreported at the time of writing but have the following file numbers:

- trial: LG Wien (State Criminal Court of Vienna), 112 E Hv 144/10g;
- intermediate appeal: OLG Wien (State Appeals Court at Vienna), 22 Bs 145/11a;
- final appeal: OG (Supreme Court of Austria), 15 Os 52/12d.

75 Heather Berit Freeman, Note, "Austria: The 1999 Parliament Elections and the European Union Members' Sanctions," *Boston College International and Comparative Law Review* 25, no. 1 (2002): 109.

76 There was not, however, any restriction on attendance at the seminar; the journalist did not identify herself as such, but it was not necessary to be a party member to attend, for example.

77 Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, annotations to section 188, no. 23.

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It should be said at once that there is no room at all for any accusation that the decisions entirely lack awareness of the need for freedom of expression in a free society or that a politically correct judiciary was hell-bent on convicting Frau Sabaditsch-Wolff, come what may. In fact, the very opposite is the case: the court of first instance, especially, repeatedly refers to the legitimacy of examining religions critically and dismissed, sometimes abruptly, the accusation that various of her other comments could possibly offend under section 188. The judgments show a high degree of thought and learning and are a credit to the Austrian judiciary.

Nevertheless there is certainly one point on which the Courts' decisions show, perhaps, too much thought and learning: they concluded that the statement that Mohammed was a pedophile was false because the medical definition of pedophilia is the *primary or exclusive* sexual interest in pre-adolescent children, a characteristic that Mohammed did not have. It is quite apparent that the accused was not attempting a medical diagnosis of the long-dead Mohammed, but rather using the term in its colloquial sense, which includes anyone who has had sexual relations with young children. Similarly, someone might call into a radio station and claim that the government's actions in some respect are "negligent" or "criminal," but it would be quite beside the point to see this as an assertion that a tort or a crime has been committed.

Less clear is the precise significance of the Courts' views on this point. There is, as we have seen, no express defense of truth under section 188, so why does it matter if the accused's statement is medically inaccurate? The most obvious way of assessing whether a true statement could be, under section 188, an offense would be to say that it cannot cause justified offense. But the Court does not say that, and indeed it cannot be said baldly that a statement can never cause justified offense simply because it is true: the offense might conceivably arise from the manner in which it is phrased, for example.[78] The Supreme Court of Austria held that truth could not be pleaded because the statement about Mohammed was not an assertion of fact but an expression of opinion. This is not easy to bring into line with the view that the accused was conveying an untrue medical diagnosis.

Be that as it may, it is clearly inadequate to find the accused guilty on the basis of a meaning she did not intend to convey, which her listeners almost certainly did not understand her to be asserting, and which most people without medical training would not even think of. Even if someone present at the seminar had initially taken the assertion to mean what the Court found it to mean, Frau Sabaditsch-Wolff made clear in her seminar the factual basis on which she attributed pedophilia to Mohammed, which would have corrected any false impression.

Aside from this rather considerable blemish on the Courts' decisions, there is some reason to be hopeful about the future of freedom of expression under section 188. All three Courts recognized that section 188 restricts freedom of expression as guaranteed in the European Convention on Human Rights, and a balancing exercise including a review of the proportionality of the restriction is required to ensure that this restriction does not become unduly large. Alone among the three Courts, the Supreme Court of Austria even concluded in its judgment[79] that "justified" was a textual basis in section 188 for accommodating freedom of expression, although on the view taken here it did not give sufficient weight to this consideration: in particular, it did not shift the focus from the believer's perspective alone by considering the need for those living in a plural society to put up with some degree of offense.

78 Feinberg, *Offence to Others*, 44.

79 15 Os 52/12d, p. 12.

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As shown above,[80] it was questionable whether the word *Ärgernis* found in section 188, which I have translated "offense," could be paraphrased with the slightly weaker word *Anstoß*, which I rendered (casting around in mild desperation for another suitable English word that might convey something like the intended meaning) as "umbrage." The Court of first instance, however, used *Anstoß* to describe the essence of the offense on at least two occasions in its judgment; but both appeals Courts, without explaining themselves, entirely avoided the use of the word.

However, the Courts unfortunately dismissed the argument that a seminar on Islam run by the Freedom Party of Austria might be expected to contain some rude remarks about that religion, and that accordingly "justified offense" could not be taken by those who attended it given that they must have been aware of the sorts of things that would be said. As previously shown,[81] it is an uncontroversial proposition of law that a warning will remove the justification for offense, but the courts say in their decisions that the Freedom Party of Austria had no control, or perhaps more accurately chose not to exercise any control, over the attendance at the seminar. The Courts also point out that the investigative journalist who publicized the statements made at the meeting was clearly not of the same mind as the speaker, Frau Sabaditsch-Wolff.

The Courts did not, however, consider the point that the reputation of the Freedom Party of Austria is such that it could hardly be expected that the seminar would be one long hymn in praise of Islam. There does seem to be something of a "bootstraps" flavor to the argument that a person who attends in order to publicize insulting statements that she expects to hear is legally capable of being a justifiably offended party in relation to those very same statements. That the journalist turned up in pursuit of news suggests that she expected newsworthy statements to be made. Nor was there any evidence that any Muslims were present at the seminar in question (the complaint to the police was made by the journalist herself). It needs to be recalled at this point that the question is not whether Frau Sabaditsch-Wolff's remarks were right or wrong, fair or unfair: the question is whether they should be the subject of criminal sanctions, however mild.

No one could possibly question the journalist's legal or moral right to attend and report on a seminar that is open to the public. In fact, it is—beyond all question—in the public interest that she should do so, given that the views espoused by any political party should be the subject of public knowledge and debate. But had she not done so, it may be safely said, those views would never have reached the public for them to take offense at if they chose. (Even further publicity for those views was produced by the prosecution.)

Is press reporting itself a possible alternative basis for conviction? Even if the seminar's organizers gave sufficient warning of its contents to those who actually attended and the attendees therefore could not take justified offense, it is still the case that people do not know what will be in their newspaper when they open it, and some people opened their newspapers one day to find the views of Frau Sabaditsch-Wolff in their full and possibly offensive splendor. But surely this would go too far. One may draw a parallel with a film or an art work that is offensive to Christians: they can avoid the offense by staying away, but what if the contents of the film or the nature of the artwork are reported upon in the public press? Surely this does not mean that the media report is to be notionally attributed to the cinema or art gallery and on that basis alone a criminal prosecution of the cinema or art gallery is to be launched or the exhibition of

80 See note 34 above.

81 See note 39 above.

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the film or art work banned.[82] People are free to make utterances before a large audience, but they cannot be, in effect, compelled to do so by others' publication of them without their consent.

It is, finally, a surprise to find that the first-instance Court refers to the necessity to penalize Frau Sabaditsch-Wolff for endangering religious peace, as if it were unaware of the discussion in the legislative materials and the commentaries about the role of that idea under section 188. Again the intermediate appeals Court, whether deliberately or not, avoided the phrase entirely. The Supreme Court of Austria, on the second appeal, held that the protection of religious peace was the (although it did not say *exclusive*) value protected by section 188, but it immediately qualified this in effect by stating that "unobjective and defamatory utterances are, solely owing to the promotion of intolerance they cause against adherents of the insulted religion,"[83] to be seen as endangering religious peace. This clearly shifts the focus again back to the honor of religions. After all, it would certainly seem strange to say that an accused had endangered religious peace by giving a seminar at which no believers, as far as we know, were present, and the message of which would not have reached the broader public at all without the intervention of an undercover journalist. The Court would draw a long bow indeed—so long that one wonders whether this can have been overlooked by the judges—if it were to conclude that religious peace was endangered by the small-scale offense of Frau Sabaditsch-Wolff, and it would hardly be rational to punish her alone—as distinct, for example, from the authors of some things that are said on the Internet—on the multiple hypotheses that she had contributed to a general climate of intolerance that in turn might lead to breaches of the peace.

JUSTIFICATION FOR SECTION 188: HUMAN RIGHTS AND FREEDOM OF SPEECH

There is now a considerable literature on religious vilification, defamation of religion, and their relationship to freedom of expression. Some of it, however, is written from an American perspective[84] and lacks understanding of the fact that freedom of expression does not enjoy in all countries of the world the same near-absolute status attributed to it in US law.[85] Nor is there any consideration of concepts such as that of "justified offense" found in Austria's section 188 and the rationale for restricting freedom of expression by reference to such ideas. Religious vilification laws in the English-speaking world, to the extent that they are permissible at all, tend to concentrate on the capacity of the speech in question to incite violence or hatred. In England and Wales, the legislation in question[86] was amended in the House of Lords to ensure that only threatening and not abusive and insulting words would be the subject of criminal sanctions, and then only if the speaker

82 Grabenwarter, „Filmkunst im Spannungsfeld zwischen Freiheit der Meinungsäußerung und Religionsfreiheit: Anmerkung zum Urteil des Europäischen Gerichtshofs für Menschenrechte vom 20. September 1994 im Fall *Otto-Preminger-Institut*" ZaöRV 1995, 128, 152f; cf. *Pell* v. *Council of the Trustees of the National Gallery of Victoria* [1998] 2 VR 391, 392 (rejecting a claim by a plaintiff cardinal that the mere awareness of the public exhibition of "Piss Christ" offended his flock even if they did not go and see it).

83 15 Os 52/12d, p. 16.

84 For example, the assertion by Dacey, *Future of Blasphemy*, 68, that "there is a human right to blaspheme." Even assuming that there is such a right, others need to be balanced against it.

85 As well as European countries such as the one under discussion here, see the analysis of the law of Israel in Amnon Reichman, "Criminalising Religiously Offensive Satire: Free Speech, Human Dignity, and Comparative Law," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), chapter 17.

86 Public Order Act 1986 sections 29B(1), 29J (1986).

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intended to stir up religious hatred.[87] Legislation in Canada focuses on the same concept.[88] The controversial legislation of the Australian State of Victoria[89] also is based not on the perceptions of the "victim" of the allegedly offensive speech (the religious believers), but rather on the effect it may have on the minds of the addressees.[90]

Protective Duties and Conditions Imposed by Law

The concept of protective duties under the European Convention on Human Rights is now tolerably well known. While the primary purpose of that document, like all rights instruments, is to allow private parties to assert rights against the state and prevent it from doing certain things, it is also sometimes the case that states are required, in order to assure to their citizens the enjoyment of rights under the Convention, to take positive action, usually in the form of some type of legislative guarantee that the rights will continue to be enjoyed. Such legislation, to be an effective guarantee, will usually need to apply against private parties as well as against the state itself. The Austrian Constitutional Court has adopted this jurisprudential construct as applicable to the rights protected under the European Convention[91]—which, it will be recalled, is directly applicable in Austrian constitutional law as part of the Constitution.[92]

Nevertheless, there seems to be little to no potential to use this idea as a means of justifying section 188. The reason for this is that Article 9 of the Convention, which protects freedom of religion in general and refers specifically to the individual's freedom "to manifest his religion or belief, in worship, teaching, practice and observance," does not aim at protecting religions from criticism, even hostile criticism. It protects what it says it does: namely, the freedom to believe and to manifest belief. Criticism of a person's belief does not hinder that. No one has encountered the slightest hurdle to believing in Allah or going to a mosque or otherwise performing Islamic rituals by reason of Frau Sabaditsch-Wolff's claims about Mohammed. There is also, in Article 14 of the Austrian catalogue of rights of 1867, referred to earlier, a guarantee of freedom of belief; but even assuming[93]—rather boldly—that the protective duties concept is applicable to it, it certainly cannot justify section 188 either, given that the 1867 instrument protects merely freedom of belief rather than freedom to manifest belief.[94]

87 Cf. Ivan Hare, "Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine," in *Extreme Speech and Democracy*, 295f, with Bridget Hadfield, "The Prevention of Incitement to Religious Hatred—An Article of Faith?" *Northern Ireland Legal Quarterly* 35 (1984): 231 (contrasting the law of Northern Ireland).

88 Various pieces of legislation are handily collected, expounded, and assessed in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at [41], [58], [86] (stating, inter alia, that hatred is much stronger than merely causing offense).

89 Racial and Religious Tolerance Act 2001 section 8.

90 See Ahdar, "Religious Vilification," 306, 309.

91 Adamovich/Funk/Holzinger, *Österreichisches Staatsrecht*, at 27.

92 See note 47 above.

93 See Hinterhofer, *Strafrecht*, 54.

94 European Court of Human Rights, *Church of Scientology* v. *Sweden*, 21 Decisions & Reports of the European Court of Human Rights 109, 111 (1980); Ian Cram, "The Danish Cartoons, Offensive Expression and Democratic Legitimacy," in *Extreme Speech and Democracy*, 320; Dacey, *Future of Blasphemy*, 81; European Commission for Democracy through Law, "Report on the Relationship between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred," *Human Rights Law Journal* 29, no. 6 (2008): 451, 459; Holoubek, „Meinungsfreiheit und Toleranz – von der Schwierigkeit einer Verantwortungsteilung zwischen Staat und Gesellschaft für einen

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Only if the freedom specifically protected by Article 9 were jeopardized by statements could it possibly be argued that the protective duty is engaged. This is theoretically possible: it might be that hostility to a religion becomes so intense that its would-be practitioners do not even have confidence that they will be able to practice it safely; or their doing so, or confessing their faith in word or by deed or personal appearance, might lead to severe infringements of other rights, such as insuperable difficulty in finding employment because of prejudice.[95] Paradoxically enough, there might be some Islamic countries where such extreme conditions exist, but certainly these conditions do not exist in Austria. That is not to say that Austria, alone of all countries in the world, is free of prejudice; but it has not reached anything like the level at which there could be any thought of an obligation to silence by law public criticism of Islam (or any other religion). Furthermore, the criminal prohibition on inciting religious hatred in section 283 of the Criminal Code, the section under which Frau Sabaditsch-Wolff was acquitted, provides a sufficient legislative response to extreme cases.

More promising for section 188 is the qualification in Article 10(2) itself, which permits, although of course (unlike a protective duty) it does not require,[96] a state to encumber freedom of expression by such

> conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights upheld section 188 under this provision in 1994 in *Otto-Preminger-Institut* v. *Austria*,[97] along with the seizure of a film that sent up Christianity, under the associated media laws. It is of this case that one automatically thinks when the balancing of freedom of speech and offense to religious belief is in issue in Austria.

Is that then the final answer to Frau Sabaditsch-Wolff's claims that her rights have been infringed? The answer to this question is no, for two reasons.

First, the rights require us to review not merely the legislation under which the measures in question are taken, but also the measures taken under those laws in order to determine whether they are in accordance with basic rights. The fact that the seizure of a film was approved in 1994 does not mean that the criminal penalty imposed on Frau Sabaditsch-Wolff will also pass muster. Given that the facts of every case are unique and the composition of the court is always crucial when balancing

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vernünftigen Umgang miteinander" öJRP 2006, 84, 86; Kienapfel/Schmoller, *Studienbuch Strafrecht*, 91; Pabel, „Grundrechtsbeschränkungen bei grenzüberschreitenden Konfliktlagen" öJRP 2006, 92, 96.

95 Ahdar, "Religious Vilification," 296f; Eric Barendt, "Religious Hatred Laws: Protecting Groups or Belief?" *Res Publica* 17, no. 1 (2011): 41, 50f; Grabenwarter, ZaöRV 1995, 128, 146, 161; Isensee, „Die staatliche Verantwortung für die Abgrenzung der Freiheitssphären: der Streit über die Mohammed-Karikaturen als Paradigma" in Klein (ed.), *Meinungsäußerungsfreiheit*, 69f; Stelzer, „Der Karikaturstreit: Versuch einer grundrechtlichen Entgrenzung" öJRP 2006, 98, 99; Simon Thompson, "Freedom of Expression and Hatred of Religion," *Ethnicities* 12, no. 2 (2012): 215, 226–28; cf. Waldron, *Harm of Hate Speech*, 130, 134f. On the consequences of a less rigid view on this point, see Cram, "Danish Cartoons," 320.

96 Ivan Hare, "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred," *Public Law* (Autumn 2006): 521, 529f (rejecting a third possible basis for reasons with which I wholly agree), 536; Pawlik, „Der strafrechtliche Schutz", 59, 79, 83.

97 1994 series A no. 295-A. The case is also referred to in Dacey, *Future of Blasphemy*, 64–68.

must be conducted, it is certainly not the case that the *Otto-Preminger-Institut* case concludes the matter and there is no need for any further thought.

Secondly, recent years have seen an observable change in favor of freedom of expression in the ECHR's jurisprudence on religious vilification.[98] It is not possible to review the case law in great detail in this study, but two cases stand out in the present context and may well mean that the *Otto-Preminger-Institut* case is no longer very good law. Perhaps the more far-reaching of the recent cases is *Tatlav* v. *Turkey*.[99] Mr. Tatlav was responsible for a book that made the most extreme claims about Islam, including that Mohammed considered his dreams to be reality and the Koran was complete nonsense and even more primitive than most ancient works. The ECHR upheld his complaint that his conviction under a criminal provision against insulting religion was a violation of his rights. It stated that he did not insult believers personally nor their sacred symbols—although it is hard to justify this conclusion given what he said about the Koran, which is possibly more sacred in Islam than even the person of Mohammed himself. Thus, this case certainly takes a more liberal view of offense to religion that was taken in the *Otto-Preminger-Institut* case. Very strangely, the Supreme Court of Austria distinguished this case as involving "no impermissible attacks on Muslims or holy symbols of Islam."[100]

In *Giniewski* v. *France*,[101] the statement in question was that Christianity had prepared the way for Auschwitz. While holding that it was legitimate for there to be "an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs," the ECHR very rightly held that legal sanctions could not extend to "a question of indisputable public interest in a democratic society. In such matters, restrictions on freedom of expression are to be strictly construed."[102]

It would clearly be absurd if the historical connections between anti-Semitism in Europe and certain aspects of the Christian faith could not be the subject of reasoned public debate of this sort; this is something to which no rational Christian could possibly object. But the ECHR does not confine its decision to public debate on historical matters; rather, it emphasizes matters of public concern more generally. Frau Sabaditsch-Wolff's statement about Mohammed was made in the context of arguing that Islam was an undesirable faith in the present day, because its principal exemplar, whom its adherents are called upon to imitate, was a person of low moral character. That may or may not be a correct statement of fact; it certainly fits the ECHR's statements.

Further recent cases in the same vein exist, such as *Klein* v. *Slovakia*[103] and *Gündüz* v. *Turkey*.[104] In the latter of those, the ECHR stated,

98 Klein, Introduction to *Meinungsäußerungsfreiheit*, 11.

99 Judgment by the European Court of Human Rights (Second Section), case of *Aydin Tatlav v. Turkey*, Application no. 50692/99, 2 May 2006. I read a German translation of the judgment in NVwZ 2007, 314, but I have not been able to find a printed report in English.

100 15 Os 52/12d, p. 15.

101 Judgment by the European Court of Human Rights (Second Section), case of *Giniewski v. France*, Application no. 64016/00, 31 April 2006, 277.

102 Ibid., 293.

103 Judgment by the European Court of Human Rights (Fourth Section), case of *Klein v. Slovakia*, Application no. 72208/01, 31 October 2006.

104 Judgment by the European Court of Human Rights (First Section), case of *Müslüm Gündüz v. Turkey*, Application no. 35071/97, 4 December 2003.

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> [E]xpressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Art. 10 of the Convention. However, the Court considers that the mere fact of defending Sharia, without calling for violence to establish it, cannot be regarded as "hate speech."[105]

If these cases represent the trend of the ECHR's jurisprudence and not an aberration, and the trend continues, it may be that the famed margin of appreciation available to states in this field—traditionally quite wide because of the extensive variety among European countries in their views on this question and their varied religious makeup[106]—has become a bit smaller, and that certain aspects of section 188, possibly even its application to Frau Sabaditsch-Wolff, no longer fall within that margin. We may well know more about this in a few years: after the dismissal of her appeal to the Supreme Court of Austria, websites associated with Frau Sabaditsch-Wolff indicated her intention to appeal to the ECHR.

Giving Offense as a Justification for Restricting Freedom of Speech

While we must not fall into the trap of imagining that there is one ideal answer to the issues raised in this field, such as the proper balance between respect for religion and freedom of expression, it is worth examining the justification for the Austrian solution, which is somewhat different from those that have been the subject of consideration in the English-language literature to date: Austria's law, as presently interpreted without a strong role for "justified," focuses not on the potential effect of the speech concerned on nonbelievers or on society as a whole, but rather its capacity to produce offense to believers, and, through that, on punishing defamation of religion.

The conclusion that the Austrian law does not require any endangerment of public order nor is it designed indirectly to protect public order removes what is perhaps the principal justification for such laws. Nevertheless, there are certainly good arguments for protecting the honor of religious societies against offense, as section 188 does, in an area such as religion, which goes to the heart of a person's self-understanding. Professor Winfried Platzgummer puts these arguments well, in a manner that does not negate, but seeks to enhance democratic freedoms: "It [section 188] requires a minimal degree of tolerance and respect for others' convictions—fairness and decency in religious argument. That is a human attitude which should go without saying in a democracy."[107] From that point of view, it may be that Frau Sabaditsch-Wolff's criticism was legitimate in itself, but merely needed to be expressed in more restrained, respectful terms, which might still have given offense but would not have constituted disparagement or ridicule and thus would not be criminal.

There are three difficulties with that idea, however. The first is that it is hard to imagine how she could make the same point nicely. Perhaps that could be done; but if it is possible, it needs to be asked, secondly, whether such a requirement would be legitimate. The right to discuss matters of public interest is usually taken to be the right to discuss them in a way that constitutes the most effective form of communicating one's ideas. This is particularly important in the present day, when so many statements compete for the attention of the public and those phrased in a polite, bland way may not receive public attention at all. Requiring statements to be phrased in inoffensive language may condemn them to oblivion and amount to the same thing as a complete negation of the right to make them. Thirdly, each way of expressing a thought in words is unique, and carries

105 Ibid., 74.

106 See, e.g., Judgment by the European Court of Human Rights (Second Section), case of *I.A.* v. *Turkey*, Application no. 42571/98, 13 September 2005.

107 Platzgummer, JBl 1995, 137.

an emotional content that paraphrases and bowdlerizations would not. For that reason, the Supreme Court of the United States is generally thought to have been right in upholding the use of the phrase "Fuck the Draft" in public: the right to make public statements does not stop at statements that would qualify for inclusion in a peer-reviewed scholarly journal (and this point does not depend upon the absolutist American approach to speech).[108]

An alternative view to that put so eloquently by Professor Platzgummer might concede that causing offense to religious feelings is indeed not something that should be encouraged in a polite and considerate society, but also ask whether it is the business of the state to protect people from this evil, even in such a sensitive area as religion. This does not mean that no protection can be offered nor that any opinions expressed are necessarily praiseworthy, merely that some further public interest should be endangered before the state is required to step in. The most obvious candidate for that role is endangerment of public order—something that Frau Sabaditsch-Wolff's remarks did not involve given the lack of any believers at her seminar. If public order is not endangered, the very democracy that Professor Platzgummer refers to might require that adherents of religions should reconcile themselves to the knowledge that people in their society will say things that are disrespectful of their religion and even occasionally brace themselves to hear things that they would rather not hear.

Perhaps there are even some religious institutions that ought to be the subject of withering and offensive criticism. One Austrian commentator claims, for example, that the Hindu caste system is a religious institution and thus enjoys the protection of section 188.[109] Possibly even suttee (if it had not been eliminated) and bride burning in cases of insufficient dowry might be included. It is not axiomatic that every religion contains only unarguably praiseworthy elements and should accordingly be protected from all criticism.

Professor Joel Feinberg has considered at length the justifications for imposing criminal liability for merely causing offense. It would be difficult to attempt here even a summary of such a tour de force, but one point that should be mentioned is that offense is a very wide-ranging and uncertain standard; offense can be taken at many things which people should have to live with, such as mixed-race couples. (The idea of *justified* offense should come in handy here, but may not be enough to save such cases if there is insufficient consideration of views beyond those held by the persons offended.) On the other hand, there is the "enormous social utility of unhampered expression."[110] For those and other reasons, Professor Feinberg rightly concludes, offense is a basis for the imposition of criminal liability that should be used only in the clearest cases. Millian liberals, also, will have difficulty with the idea of a right not to be offended, given that mere emotional distress is not usually thought of as sufficient harm within the meaning of his well-known doctrine.[111] The Human Rights Committee of the United Nations[112] is also of the view that blasphemy laws are incompatible with the International Covenant on Civil and Political Rights, except as necessary for

108 Cram, "Danish Cartoons," at 327; Hare, "Crosses, Crescents and Sacred Cows," 527; James Weinstein, "Extreme Speech, Public Order and Democracy: Lessons from the Masses," in *Extreme Speech and Democracy*, 56.

109 Mayer/Tipold in Triffterer (ed.), *StGB Kommentar*, annotations to section 188, no. 13; see also Levy, *Blasphemy*, 554.

110 Feinberg, *Offence to Others*, 26.

111 Alexander Brown, "The Racial and Religious Hatred Act 2006: A Millian Response," *Critical Review of International Social and Political Philosophy* 11, no. 1 (2008): 9.

112 UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of Opinion and Expression, 12 September 2011, CCPR/C/GC/34.

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the prevention of discrimination, hostility, or violence.[113] In the religious sphere, we might add, offense might be taken at ideas which people arguably ought to be exposed to or even to act upon, such as that their religion decrees injustice (as the caste system seems to do) or that its founder was not, despite what believers think, a good example of human behavior suitable for their and others' emulation.

This leads naturally to the question that really lies at the heart of the matter: what is so special about the label "religion" that the doctrines and practices to which it is affixed deserve, by virtue solely of their bearing that label, respect and the protection from the criminal law beyond that given to other institutions? Why is religion specially protected against defamation, as it is in Austria, and not, for example, one's favorite sporting team or choices in furniture, philosophers, or legislative drafting style?[114]

Recently a debate has occurred in the literature about this very point. The debate has helpfully focused around whether there is any difference between defamation on the basis of race and on the basis of religion.

Most people are agreed that there should be some type of prohibition on racial abuse, but the support drops away somewhat when it comes to religious abuse. The reason traditionally given for this is that religion is a choice and thus is susceptible of criticism, whereas race is not a choice.[115] More recent contributions have doubted whether this latter proposition is so: one author gives an example of a person whose mixed heritage permits of a choice among available identities as an example of the manner in which race/ethnicity can, to some extent, be chosen.[116] Such cases certainly exist and are perhaps more common than is often thought: there was a time well within living memory when Commonwealth citizens in the former settler colonies of the Second British Empire were faced with the question whether they still identified as British or had formed their own separate national identity. Austria itself was once unequivocally part of—indeed, at the head of—an equivocally defined German nation, and it is also just within living memory that the great majority of Austrians would not have hesitated for a moment to consider themselves part of the German nation and ethnic group, as the reception accorded to a formerly Austrian corporal on his triumphal entry into Vienna in March 1938 amply testified.[117] The process of differentiation which resumed after a brief but eventful interlude is still not total in the view of all Austrians, for the party program of Frau Sabaditsch-Wolff's own party states, "The language, history and culture of Austria are German. The vast majority of Austrians are part of the German people's linguistic and cultural community."[118] It may be very safely said that not all Austrians would be quite as clear about that, but that just proves the overall point.

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113 International Covenant on Civil and Political Rights, art. 20(2), Dec. 16, 1966, 999 U.N.T.S. 171.

114 Isensee, „Staatliche Verantwortung", 57 (giving the amusing example that an attack on the German Civil Code is not defamation of a professor who devotes his life to studying it).

115 Barendt, "Religious Hatred Laws," 45; But see, ibid., 47.

116 Dacey, *Future of Blasphemy*, 50; *cf. Eatock* v. *Bolt* (2011) 197 FCR 261.

117 Or, for example, the authoritarian Constitution of Austria enacted in 1934, which commenced by declaring Austria to be "a Christian, German federal state." Constitution of Austria of 1934, preamble.

118 This is taken from the unpaginated English-language version of the Freedom Party of Austria's program of 18 June 2011, available on its website at http://www.fpoe.at/fileadmin/Content/portal/PDFs/_dokumente/2011_graz_parteiprogramm_englisch_web.pdf. A small grammatical error has been corrected.

The German version, however, uses the term *Volksgemeinschaft*—a word that, along with having a most unhappy history, would justify the even more revealing translation "national, linguistic and cultural community" rather than "people's . . ."

It is logically possible, however, that the insight that ethnicity and related concepts can be chosen (something that would, I am sure, be no news at all to sociologists)[119] proves the equal and opposite proposition: namely, that racial, ethnic, or national identity, being always to some greater or lesser extent chosen, might be validly criticized, and thus race, ethnicity, and national identity should not necessarily be protected by the law against vilification either. While this seems on its face a somewhat startling conclusion, what would we say to a Lord Haw-Haw character[120] of mixed German and British ethnicity who decided to identify with the German race and nationality during the Hitler regime on the ground that he approved of the extermination of the Jews? A more current example might be someone who was ashamed of minority blood in his heritage and suppressed knowledge of its existence from his family (including his children) and friends—should that go unremarked upon?

At any rate, recent scientific research, not to say common sense and indeed history, suggest that there is often some greater or lesser element of choice in relation to racial/ethnic identity just as there is with religion. Nevertheless it remains true to say (and this is also a point that has been missed in recent contributions) that people do not choose and cannot change their skin color, which is an important element in almost all cases in determining racial identity and—importantly—forms the basis for much offensive prejudice of the type which the law is aimed at combating, and also true that for most people racial/ethnic identity is largely immutable. But there is always the possibility of changing one's religion, which is adherence to an external belief system.[121]

Nevertheless, for some people, for cultural and other reasons, a change of the religion inherited from their ancestors (and thus to some extent ethnically based) might be almost inconceivable. Religious faith cannot be taken off and discarded as one might a T-shirt.[122] Does that mean that people in such a position have no choice about their religion, like most people in relation to their race? It may as a matter of practical reality, but such people still have a choice how seriously to take their religion beyond mere nominal adherence to it; and they certainly have a choice not only about how enthusiastically to practice it and advocate for it, but also about whether they take it so seriously that they will go to court or complain to the police in defense of it. There is always a great deal of choice in the area that affects the general public, even if one's religious affiliation (itself of no concern to the public) may seem immutable.

Religions also make controversial claims about the origin of life, morals, and the profoundest questions of human existence which naturally invite controversy and disagreement. It is legitimate to maintain (on what basis need not concern us here, as long as the assertion is not meaningless) that the morals or world view promoted by one religion are superior to those of another;[123]

119 I am conscious of the fact that I am partly conflating two sets of related but separate terms: race, ethnicity, and nationality; abuse, vilification, and defamation. I think the argument works despite that, and is easier to follow without such fine distinctions, although if I were writing a book on this topic, or talking about the former Yugoslavia, for example, it would be both necessary and desirable to tease these things out.

There is also the question of racial prejudice camouflaged as religious debate; in my discussion, I take this as a practical problem of proof and assume that this sort of thing can be sniffed out and correctly classified as what it is.

120 *Joyce* v. *Director of Public Prosecutions* [1946] AC 347.

121 Susannah Vance, "The Permissibility of Incitement to Religious Hatred Offences under European Convention Principles" *Transnational Law and Contemporary Problems* 14, no. 1 (2005): 244.

122 Barendt, *Freedom of Speech*, 190; Pringle, "Regulating Offence to the Godly," 330.

123 European Commission for Democracy through Law, "Report on the Relationship between Freedom of Expression and Freedom of Religion," 458.

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criticism of the caste system is an example of what is certainly legitimate, and indeed has been engaged in by reformers in the Indian world, from Buddha to Gandhi, throughout the ages. Then one might claim that Christianity or Islam, or any other religion based upon a supposed historical event or revelation arose from fraud or a mistake of fact. It is also reasonable to oppose Creationism on the grounds of its epistemological inferiority. Races and ethnicities certainly cannot be the subject of any criticisms which are remotely analogous to these.[124]

The Rabat Plan of Action rightly points out, using arguments that could not possibly be applied to races, that "blasphemy laws are counter-productive, since they may result in the *de facto* censure of all inter-religious/belief and intra-religious/belief dialogue, debate, and also criticism, most of which could be constructive, healthy, and needed."[125] Such discussions are not about the inherent dignity of all humans, but may concern creedal or other propositions of a type that may be true or false.[126] In a free non-theocratic society, not all of that discussion will be able to be carried on without causing offense by denying or asserting propositions that contradict deeply held views and call into question the public standing of religions.

We are left then with a distinction between race and religion that is not quite as clear-cut and absolute as it was once thought to be, but is nevertheless very substantial[127]: thus, there is a far better case for criminalizing racial vilification than there is for criminalizing religious defamation. Religions, by their very nature, invite discussion—race, in particular, much less so.

If the aim is also to protect the respect and honor supposedly due to religious beliefs, as is the case in Austria, the same answer applies: respect and honor are due to the inherent dignity of human beings regardless of irrelevancies such as race, but are not automatically due to everything humans choose to believe. As we have seen, there can be very limited room only for an official censorship of the manner of such discussions—of the degree of politeness with which they are carried on. This could be indistinguishable, in the end, from a censorship of content.

CONCLUSION

The Austrian provision does, then, go beyond what the state can legitimately make the subject of criminal punishment—at least as currently applied, with a meaning for "justified" that is confined to the believer's perspective on the offense given. Feinberg, Mill, and the Human Rights Committee unite in the conclusion that it is not the state's business to protect people from offense in relation to an affiliation which they have—more or less—freely chosen, and which, far from having any particular claim to deference from the public, imposes upon the public a claim, by virtue of its alleged supernatural mission, to deserve esteem and, in the case of the proselytizing religions, even adherence.

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124 Ahdar, "Religious Vilification," 301; Hare, "Crosses, Crescents and Sacred Cows," 534; Hare, "Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine," 308.

125 Office of the United Nations High Commissioner for Human Rights, *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*, 5 October 2012, http://www.ohchr.org/documents/issues/opinion/seminarrabat/rabat_draft_outcome.pdf; see also, Human Rights Council of the United Nations General Assembly, *Report of the Special Rapporteur on Freedom of Religion or Belief* (A/HRC/25/58, 26 December 2013), 59.

126 Waldron, *Harm of Hate Speech*, 120–26. It is of course a different question whether we can know the truth-status of such propositions.

127 Kay Goodall, "Incitement to Religious Hatred: All Talk and No Substance?" *Modern Law Review* 70, no. 1 (2007), 97.

That does not mean for a moment that no protection can be offered to religion at all, but it must be more narrowly drawn. Certainly, if public order is endangered by religious vilification, then the state may legitimately step in—not so much because of the religious aspect, but because the maintenance of public order is clearly a function of the state.[128] Those values feature in a recent decision of the Supreme Court of Canada, which unanimously held a prohibition—not involving criminal sanctions!—on merely ridiculing or belittling people on various grounds to be invalid, as not connected with any legitimate purpose.[129] Austrian law, as we have seen, does not presently provide for a qualification based on public order or any other legitimate purpose either, but it should do, as indeed the government's Bill did before it was amended on the recommendation of the Justice Committee.

Another option must be simply to repeal section 188, in accordance with General Comment No. 34 of the United Nations' Human Rights Committee,[130] and to leave the matter to the general criminal law, including the aforementioned law of sedition (section 283 of the Criminal Code) as it applies to stirring up hatreds among various classes of citizens. Religious vilification can also legitimately be made an aggravating element of an existing offense of causing disruption to public order—both because of the greater overall likelihood that attacks on religion may have that effect and as a reminder to the populace not to risk violence when talking about things that are very close to their fellow citizens' hearts.

Despite its defects, Austrian law does have two things to offer. As we have seen, in the case law too little use is made of the idea of *justified* offense. But if this concept received an interpretation along the lines advocated here, perhaps as a result of a clarifying amendment, the Austrian provision would focus in part on the extent to which religious feelings should be protected in a plural society, and would thus be an example of a law against defamation of religions—a law designed to protect the honor of religion—that would, at first glance anyway, be compatible with freedom of speech. That might well mean that it could be applied only in quite extreme cases, largely when more serious offenses of sedition, such as that of which Frau Sabaditsch-Wolff was acquitted, would equally apply. But some would value the express protection for and mention of religion and the honor due to it, and if the provision were applied in that manner the criticisms just leveled at it would have far less force and it could be mobilized only when some endangerment of public order was at least foreseeable.

Furthermore, the addition of "justified offense" to the discussion, and to the criminal law, may be worth considering elsewhere. This would hardly make sense in jurisdictions such as England and Wales, where the law prohibits the inciting of hatred and it is not—usually—sensible to talk of reasonable hatred. But in jurisdictions such as Germany, where the law prohibits the endangerment of public order, one criticism that is often rightly made of this state of affairs is that it puts too much of the decision about whether the offense is committed into the hands of the supposed victims of the

128 *Monis* v. *The Queen* (2013) 249 CLR 92, [199], [222] (Austl.).

129 *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, [57], [66], [82], [85]–[92], [108]–[110]; see especially Ibid., [82] ("[P]rotecting the emotions of an individual group member is not rationally connected to the overall purpose of reducing discrimination."). Reference might also be made to section 57 of the *Crime and Courts Act* 2013 (U.K.), deleting "insulting" from the criminal law of England and Wales in a comparable context. This offense could, under sections 28 and 31(1)(c) of the *Crime and Disorder Act* 1998, be an aggravated offense if motivated by religious hostility, but required the presence of someone to be harassed, alarmed, or distressed, and was thus different from the Austrian provision in a crucial respect.

130 See note 112 above.

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speech.[131] If they choose to react violently or are suspected of being likely to do so, the legal position is different from the case where they have sufficient good sense and security in their convictions to ignore the insult. It does seem true to say, in a very general way, that some religions are more sensitive to insult than others, and disturbances of public order are more likely to follow from saying unpleasant things about one religion in particular as distinct from others.[132] Such sensitivity and insecurity should not be privileged: it is not merely the law itself, but also its application in context that may result in there being "different levels of protection to different religions," a state of affairs criticized in the Rabat Plan of Action.[133]

The German provision would thus certainly be improved if it penalized not merely statements that are likely to endanger public order, but required such statements also to be far outside the realm of criticism that can be justified in a free and multi-faith society; the Austrian provision, on the other hand, needs to be supplemented both by that requirement, in a reinterpretation of the meaning of "justified" and by a requirement of endangerment of public order.

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131 Cram, "Danish Cartoons," 322; Isensee, foreword to Isensee (ed.), *Religionsbeschimpfung*, 5f; cf. Levy, *Blasphemy*, 564.

132 Barendt, "Religious Hatred Laws," 51; European Commission for Democracy through Law, "Report on the Relationship between Freedom of Expression and Freedom of Religion," 459. This phenomenon has been noticed over a long period; in his notes to the draft Indian Penal Code of the 1830s, Lord Macaulay says,

> A person who should offer a gross insult to the Mahomedan religion in the presence of a zealous professor of that religion; who should deprive some high born Rajput of his caste; who should rudely thrust his head into the covered palanquin of a woman of rank, would probably move those whom he insulted to more violent anger than if he had caused them some severe bodily hurt.

Quoted in *Macaulay's Speeches and Poems, with the Report and Notes on the Indian Penal Code*, vol. 2 (New York: Hurd & Houghton, 1867), 414f.

In an otherwise excellent article that is by no means hostile to Islam, the explanation of this phenomenon proffered by Peter Danchin, "Defaming Mohammed: Dignity, Harm and Incitement to Religious Hatred," *Duke Forum for Law & Social Change* 2 (2010), 5, 31f, leaves open more questions than it answers: granted that Muslims feel very close to Mohammed, why do most Christians not react with similar vehemence to criticism of Jesus Christ, who has an even more central role in their faith than the one he describes there as occupied by Mohammed in the Islamic faith? The point made above, see note 2, will surely not appeal to many, or perhaps most.

133 Office of the United Nations High Commissioner for Human Rights, *Rabat Plan of Action*, paragraph 19.