The Right to Protection of Religious Feelings

Rex Tauati Ahdar*

Introduction

Do religious people have a legal right to have their feelings protected? When publications, films, radio and television broadcasts, artwork and so on, deeply offend and upset the religious sensibilities of devout citizens, should the state intervene? Should insulting religious material be banned? This question was, of course, acutely raised, but not necessarily answered, on the world stage with the furore over the Danish newspaper editorial cartoons depicting the Prophet Muhammad in a highly unflattering light.[1] In New Zealand, a controversy over a satirical television programme generated similar feelings of outrage and indignation on the part of certain believers – fortunately without any violence erupting – and this event provides the impetus for this article.

In February 2006, CanWest TV Works Ltd screened "Bloody Mary", an episode in the American *South Park* satirical cartoon series, on one of its television channels. In brief, the episode featured a statue of the Virgin Mary spraying menstrual blood on a cardinal and the Pope. Many complaints ensued, including one from the New Zealand Catholic Bishops Conference that charged that the show was deeply insulting and that it demeaned icons and practices venerated by Catholics. It said great pain and offence had been caused not only to the Catholic community, but also to members of other Christian denominations, Muslims and many non-Christians. In that last respect it is interesting that none other than the Prime Minister, Helen Clark, a self-confessed agnostic, said that, as a woman, she was offended: "I personally find it quite revolting."[2] The numerous complaints to CanWest did not lead it to change its mind and, indeed, it brought forward the scheduled date of screening by three months. The Broadcasting Standards Authority[3] upheld the station's right to broadcast the show, finding no breach of the Free-to Air Television Code of Broadcasting Practice and, in July 2007, the High Court[4] affirmed that decision. The Catholic Church was "surprised, shocked and disappointed" it lost its appeal in the High Court, but the television company was unrepentant: "It's a victory for free speech and we'll be claiming against the Catholic Church for costs."[5]

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* Professor, Faculty of Law, University of Otago. My thanks to Andrew Geddis for comments on an earlier draft.

1 See Anver M Emon, "On the Pope, Cartoons, and Apostates: Shari'a 2006" (2006) 22 J Law & Religion 303; Symposium issue entitled, "The Danish Cartoon Controversy" in (2006) 55 UNBLJ 177; Sune Laegaard, "The Cartoon Controversy: Offence, Identity, Oppression?" (2007) 55 Political Studies 481.

2 Audrey Young, "South Park's 'Mary' episode revolting, says PM", *New Zealand Herald*, 21 February 2006.

3 Broadcasting Standards Authority Decision No 2006–022 (26 June 2006) ("*Bloody Mary*").

4 *Browne v CanWest TV Works Ltd*, High Court Wellington, CIV 2006–485–1611, 31 July 2007, Wild J.

5 "Catholic Church loses appeal over South Park episode", *New Zealand Herald*, 2

I will explore the *South Park* case in detail, but before doing so, in Part I I will briefly consider the case for and against intervention to protect religious feelings in a liberal state. In Part II I turn to the work of the European Court of Human Rights. The Court has been regularly called upon to grapple with questions on the prohibition of religiously offensive material and echoes of its reasoning can be heard in the New Zealand jurisprudence. In Part III New Zealand's experience with blasphemy law is examined. The *South Park* case will then be closely analyzed in Part IV and in Part V I endeavour to distil some lessons learned from that case and similar decisions on broadcast programmes that offend the devout.

My conclusion is that the case for a legal right to protect religious feelings is weak. The legal protection that has been afforded religious sensibilities to date is very limited, and that is how it should be.

I. Is it a Good Idea to Restrict Expression so as to Protect Religious Feelings?

First, I need to acknowledge that, when it comes to questions of anti-religious publications, I am a supporter of free speech. Ian Leigh and I recently stated that:

> We believe that [free speech] is the best defence for a tolerant open society in which diversity of religious expression flourishes.... Generally, we do not support the case for protection *from* religious offence as an aspect of religious liberty. Our concern is that to do so might merely be the pretext for loss of religious free speech. Exposure to offensive speech or images falls a long way short of the persecution suffered by the early Christians and the beatings, torture, rape, murder and institutionalized slavery and discrimination which millions of Christians face around the world today. Rather than extending the offence of blasphemy, we favour its abolition.... In a liberal society it is healthy and essential that religious practice and the doctrine and behaviour of religious groups should be open to free discussion as well as public exposure and criticism. A culture of civility in which everyone is protected from any affront to their religious sensibilities would be a bland macrocosm of the proverbial advice that religion is a topic of conversation best avoided in polite society.[6]

Dealing first with the case for suppression, there can be no doubt that some believers do experience genuine and deep offence when figures or beliefs central to their faith are trenchantly criticized, satirized or ridiculed. Some Muslims were clearly affronted by the publication of Salman Rushdie's, *The Satanic Verses*, as were those upset at the decision of the Danish newspaper, *Jyllands-Posten*, in September 2005 to publish cartoons depicting the Prophet Muhammad. There were many Catholic complainants deeply aggrieved by the broadcasting of the "Bloody Mary" *South Park* episode: "a vile insult to the Mother of Our Lord Jesus Christ"[7] was a typical such response to the show.

But people also experience hurt feelings when material portrays race, sexuality, political beliefs, physical or mental disability, appearance (obesity, for example)

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6 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005) at 395–396.

7 *Bloody Mary*, Decision No 2006–022 (26 June 2006) at [12].

in a strongly negative light. Unless we want to make the whole gamut of bases upon which one ought not to be offended subject to legal proscription, there is no reason to single out religious feelings as especially deserving of protection.[8] If, in reply, one says religion is special, in that it is a matter that goes to the very core of someone's identity, the same objections arise. Does not one's race or sexuality go to one's core too? It might be contended that religion is an especially volatile subject and that religious feelings, when inflamed, may lead to civil disorder or violence by the incensed believers. But the answer here is that there are already criminal laws to prohibit speech that incites violence.[9]

The reasons against suppression of material that offends the devout are, I suggest, much more compelling.

First, there is an argument from democratic theory. For citizens to accept the government as their own, as representing them, the state must, to some extent, be responsive to their values and conceptions of the good.[10] Even if the final decision of the state is not in accord with their views, at least their views have been heard. To silence those who criticize or mock religion to protect the feelings of the devout is to cut off a contribution to public debate that democratic societies can ill afford to do. Those who deny the sacred, or wish to critique it, are entitled to a voice, and to the extent they are denied it, the state loses legitimacy in *their* eyes. Writing in the aftermath of the Danish cartoon controversy, Robert Post explains: "If the state prevents citizens from participating in public discourse when they would otherwise desire to do so, the state loses democratic legitimacy with respect to those citizens, for it prevents them from attempting to make public opinion responsive to their views."[11] Ronald Dworkin, in a much-publicized article entitled "The Right to Ridicule" (also written in response to the Danish cartoon furore) contends:

> Freedom of speech is not just a special and distinctive emblem of Western culture.... Free speech is a condition of legitimate government. Laws and policies are not legitimate unless they have been adopted through a democratic process, and a process is not democratic if government has prevented anyone from expressing his convictions about what those laws and policies should be. Ridicule is a distinct kind of expression; its substance cannot be repackaged in a less offensive rhetorical form without expressing something very different from what was intended. That is why cartoons and other forms of ridicule have for centuries, even when illegal, been among the most important weapons of both noble and wicked political movements. So in a democracy no one, however powerful or impotent, can have

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8 I have addressed this point in an essay arguing against the proposed extension of existing incitement to racial hatred laws to include religious hatred: see Ahdar, "Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law" (2008) 27 U Qld LJ (forthcoming).

9 In New Zealand, see s 311(2) of the Crimes Act 1961, which makes it an offence to incite any person to commit any offence which is not in fact committed. If an offence is committed, the person who incites, counsels or procures the commission of an offence is liable as a secondary party under s 66(1)(d). See Andrew Simester and Warren Brookbanks, *Principles of Criminal Law*, 3rd ed (Wellington: Brookers, 2007) at 270.

10 Robert Post, "Religion and Freedom of Speech: Portraits of Muhammad" (2007) 14 Constellations 72 at 75.

11 Ibid at 76.

a right not to be insulted or offended.[12]

Secondly, the price of the state protecting the right of religious freedom is that all shades of religious opinion are to be recognized and afforded protection. Religious people deservedly claim the right to bear witness to the truth. Yet much evangelism and proselytism – involving as it does the affirmation of contentious creeds ("the only way to salvation is through *x*") – involves explicit or implicit attacks upon or denials of other faiths. If we protect the positive assertion of religious truth in the public sphere in the name of religious freedom, we ought to equally protect those who refute, deny or scoff at the validity of that asserted truth. The same right that safeguards *pro*-religious speech protects *anti*-religious speech. Again, to quote Dworkin, "we cannot make an exception for religious insult if we want to use the law to protect the free exercise of religion in *other ways*."[13] There is another quid pro quo at work here also. The same liberal state that protects the right of religious freedom also protects the right to freedom of expression. If religious citizens want to secure the protection of one freedom they must accept the presence of other freedoms equally integral to a liberal democratic polity.[14]

Thirdly, the task of protecting religious feelings, if we were to take the issue seriously, is daunting. Religion covers the whole of life and there is thus much that may need be treated with circumspection lest one upset the sensibilities of the devout. As Jeremy Waldron observed: "it is fatuous to think that there is a way of running a multicultural society without disturbance or offence."[15] It may just be possible for the state to police expression so that only the most polite, bland or innocuous things on matters religious may be uttered or depicted. Or, to put it in slightly different terms, the law could insist that any denial or criticism be undertaken in a moderate tone and respectful manner. This is, in essence, how the English law on blasphemous libel has evolved in its "long and at times inglorious history in the common law."[16] The criminal offence of blasphemy does not protect religion as such, but rather is concerned with attacks upon religious beliefs, practices or institutions expressed in highly offensive *ways*.[17] Views openly hostile to religion, or more accurately, Christianity,[18] may be expressed in "decent and temperate language."[19] The line is crossed, however, when the speech is "contemptuous, reviling, scurrilous, or ludicrous."[20] Applying such a distinction raises all kinds of difficult interpretive and line-drawing issues: when is a work a robust criticism and when is it a "scurrilous" attack upon

12 Dworkin, "The Right to Ridicule", 53(5) *New York Review of Books*, 23 March 2006. <http://www.nybooks.com/articles/article-preview?article_id=18811>

13 Ibid (italics added).

14 Randall Hansen, "The Danish Cartoon Controversy: A Defence of Liberal Freedom" (2006) 44 International Migration 7 at 16.

15 Jeremy Waldron, "Rushdie and Religion" in his *Liberal Rights* (Cambridge: Cambridge University Press, 1993) ch 6 at 139.

16 Lord Diplock in *Whitehouse v Gay News Ltd and Lemon* [1979] AC 671 at 633.

17 See eg Ahdar and Leigh, *Religious Freedom*, at 366–374.

18 See *R v Chief Metropolitan Magistrate, ex p Choudhury* [1991] 1 QB 429.

19 *Gay News*, at 665 per Lord Scarman (quoting from *Stephen's Digest of the Criminal Law* (9th ed, 1950) article 214).

20 Ibid.

religion? When do we know that the feelings of "ordinary" believers, and not just the ultra-devout or thin-skinned, have been "shocked and outraged"?[21] If the law were to be extended to protect the feelings of non-Christians, would it have to take into account differing thresholds of offence for different religions? These and other difficulties have been amply covered in the literature and I shall not rehearse them here.[22] It is enough I think to follow Waldron's lead and ask why the views of the pious should clinch the issue of how others are to treat religious themes and questions.[23] If religious questions are important ones, then it is surely important to foreclose neither the methods of dealing with them (including the full panoply of irony, satire, ridicule, absurdity) nor the persons wishing to address them.[24] Respect for the sensitivities of some seems a weak basis for denying others the widest opportunity to address issues – Is there any God out there? Why is there evil? Are there miraculous cures? – that are important to everyone.

In the end we have to decide whether we wish to live in a liberal democratic society and, if we do, we have to accept that we will see and hear things that will offend us, sometimes deeply.[25] And arguably there are resources within certain religious traditions to enable believers to accept such offence with quiet dignity.[26]

II. The European Approach

The principles developed in Strasbourg on the meaning and scope of rights and freedoms under the European Convention on Human Rights have been regularly drawn upon by the New Zealand courts when dealing with claims under the New Zealand Bill of Rights Act 1990 ("NZBORA").

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21 Ibid at 657 per Lord Russell of Killowen.

22 See Ahdar and Leigh, *Religious Freedom*, at 366-374; House of Lords Select Committee on *Religious Offences in England and Wales*, First Report for 2002–2003 (10 April 2003) vol 1, chs 3–4 and Appendix 3; Clive Unsworth, "Blasphemy, Cultural Divergence and Legal Relativism" (1995) 58 MLR 658; Lawrence McNamara, "Blasphemy" in Peter Radan et al (eds), *Law and Religion: God, the State and the Common Law* (London: Routledge, 2005) ch 8; Javier Garcia Oliva, "The Legal Protection of Believers and Beliefs in the United Kingdom" (2007) 9 Eccles LJ 66 at 67–74.

23 Waldron, "Rushdie", at 140–142.

24 Ibid.

25 Hansen, "Danish Cartoon Controversy", at 16.

26 For example, in terms of the proper Christian attitude to incurring insult or vitriol from others, Jesus Christ taught: "Blessed are you when men hate you, when they exclude you and insult you and your name as evil, because of the Son of Man. Rejoice in that day and leap for joy because great is your reward in heaven." (Luke 6: 22–23) As for the offence to God himself, the creator and sustainer of the universe is surely more than able to withstand such criticism. According to Christian teaching, God does not desire his honour to be vindicated and expressly cautions that vengeance is his, not his followers', concern (Romans 12:19). As Ian Leigh and I noted, *Religious Freedom*, at 370: "Punishment of blasphemy cannot literally protect Christ or his reputation, an objective which is either presumptuous or futile. When people claim to be doing so they are best understood as expressing the strong nature of the offence which *they* have suffered."

One such case is *Mendelssohn v Attorney-General*.[27] This is a particularly relevant case for the present discussion because it concerned the claim that the government had not done enough to protect the freedom of religion of members of a small and highly controversial religious community. The plaintiff, Mr Mendelssohn, a member of the Centrepoint religion, argued that the Attorney-General had been negligent in failing to protect the religious liberty of the Centrepoint community. The Centrepoint religion had been structured in the form of the Centrepoint Community Growth Trust, a trust created by the guru and founder of the religious community, Herbert (Bert) Potter.[28] The community experienced much controversy and disruption following the criminal prosecution of Potter and other community members. Potter was sentenced to seven and a half years in prison in 1992 for indecently assaulting minors. It was against this turbulent background that Mendelssohn wrote in 1995 to the Attorney General seeking action to restore the operation of the Trust to its proper purposes. The Attorney General declined to do so. Rather, in 1996, he ordered an independent inquiry into the affairs of the Trust, an inquiry that was severely critical of the Trust's operation. In the wake of this damning report the High Court later appointed the Public Trustee as trustee in substitution for the existing trustees.[29] Mendelssohn viewed the actions of the Attorney-General as in breach of what Mendelssohn asserted was a positive duty to take steps to protect his, and other Centrepoint followers', religious freedom. The Court of Appeal rejected his claim. The plaintiff had misunderstood the nature of the right to religious freedom contained in various provisions of the NZBORA:

> The short answer to [Mr Mendelssohn's] submission is that in their essence those provisions do not impose positive duties on the state, at least in any sense relevant to this case. Rather they affirm freedoms of the individual which the state is not to breach. The very nature of these rights and freedoms means that they are freedoms *from* state interference. These rights and freedoms are affirmed by s 2 *against* acts of the various branches of the state (referred to in s 3) including the Executive branch. The freedoms in issue are in general within the category often referred to as negative freedoms, to use one part of Isaiah Berlin's famous categorisation ...[30]

Legislation that currently recognized the status of churches or the role of religion in fostering civic life (and which gave religion some modest preference) had a long history, but these statutes "simply [did] not support a general positive duty to protect freedom of religion."[31] Nonetheless, the Court of Appeal did not rule out the possibility that, in some unenumerated circumstances, a positive obligation to protect religious freedom might be warranted: "We do not, of course, suggest

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27 [1999] 2 NZLR 268.

28 See generally Douglas Pratt, "Private Opinion or Public Religion? The Case of Centrepoint" (1999) 7 Stimulus 39.

29 The Court of Appeal dismissed a challenge by Mendelssohn to this appointment: *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88.

30 [1999] 2 NZLR 268 at [14] (italics in original).

31 Ibid at [21]. See further Paul Rishworth et al, *The New Zealand Bill of Rights* (Melbourne: Oxford University Press, 2002) at 307 and Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (Wellington: LexisNexis, 2005) at 435.

there are no circumstances in which the state would not be obliged or not consider it desirable, under international law or on a more general basis, to intervene to protect religious freedom against private oppression or coercion."[32] It noted, for example, that the state had always made it an offence to disturb congregations in public places or assembled for public worship.[33] The Court was referred to the *Otto-Preminger Institut* decision as an instance of positive state intervention. I shall analyze that shortly, but what is interesting here is the Court of Appeal's characterization of the case. While *Otto-Preminger* illustrates that a state *could* legitimately see it as necessary to suppress the imparting of ideas or information to safeguard the religious feelings of others, it was not *obliged* to do so: "What the case is about in other words is the *power* of the state to limit expression in favour of religious freedom, not a *duty* to do so."[34]

Turning then to the decisions of the European Court of Human Rights in Strasbourg, we see an ongoing attempt to flesh out the nature and limits of a right to respect for, and protection of, religious feelings. Such a right must be teased out of the Convention since neither the religious freedom article (Article 9) nor the freedom of expression guarantee (Article 10) *explicitly* mention a right to protection of religious sensibilities.

We begin with *Otto-Preminger Institut v Austria*.[35] This case concerned a challenge to the confiscation of a satirical film by the Austrian authorities prior to its first screening. The film, *Das Liebeskonzil* (*Council in Heaven*), was held by the Innsbruck Court of Appeal to have contravened the Austrian Penal Code, specifically s 188 which makes it a criminal offence to disparage religious objects and doctrines. In the film, "God the Father is presented both in image and in text as a senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression and in which the Eucharist is ridiculed."[36] The European Court held, by a majority of six votes to three, that there had been no violation of Article 10 as regards either the seizure or the forfeiture of the film. In reaching this conclusion, the Court gave considerable weight to the fact that "the overwhelming majority"[37] of the potential viewers in the Tyrolean region of the country, where it was to be screened, were Roman Catholics. The margin of appreciation accorded national authorities had not been overstepped here: "the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner."[38]

In terms of the interests at stake, the Court saw the issue as involving "the weighing up of the conflicting interests of the exercise of two fundamental freedoms": the right of the applicant to convey to the public controversial views (and, by implication, the right of interested citizens to receive these) versus "the right of other persons to proper respect for their freedom of thought, conscience

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32 [1999] 2 NZLR 268 at [20].

33 Ibid at [18] (citing the Summary Offences Act 1981, s 37).

34 Ibid at [20] (italics in original).

35 (1995) 19 EHRR 34.

36 Ibid at 38–39 (this is the Innsbruck Regional Court's summary).

37 Ibid at [56].

38 Ibid.

and religion."[39]

What is the legal basis of any right to protection of religious feelings? First, the majority of the Court did refer in passing to "[t]he respect for the religious feelings of believers as guaranteed by Article 9."[40] However, despite this apparent location of the right squarely within Article 9, the better view is that this is something of an unfortunate and ill-considered statement.[41] It is most unlikely that the Court was propounding a general right to respect for religious feelings derived from the broad right of religious freedom. The dissenting opinion gives a cogent explanation why this is so:

> The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.[42]

In *Wingrove v United Kingdom*[43] the majority sought to avoid equating respect for the feelings of religionists with the guarantee in Article 9. This case involved the refusal of the British Board of Film Classification certificate required for the lawful showing of a film entitled, *Visions of Ecstasy*. The film featured erotic imagery involving St Teresa of Avila, a sixteenth-century Carmelite nun, and the body of the crucified Christ. The certificate was denied by the Board because of its blasphemous content and the Court, by seven votes to two, held there had been no violation of Article 10. Judge Pettiti, in a concurring opinion, was emphatic that the correct approach was to focus on the right of freedom of expression and its justified limits: "Article 9 is not in issue in the instant case and cannot be invoked."[44] The Court in the present case had "rightly based its analysis under Article 10 on the rights of others and did not, as it had done in the *Otto-Preminger Institut* judgment combine Articles 9 and 10, morals and the rights of others, for which it had been criticized by legal writers."[45]

To return to *Otto-Preminger*, the clear thrust of the majority's reasoning locates the respect for religious feelings within the limitations upon the right to freedom of expression. Freedom of expression receives priority and is the starting premise:

> freedom of expression constitutes one of the essential foundations of a democratic society... it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[46]

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39 Ibid at [55].

40 Ibid at [47].

41 See the excellent analysis by Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005) at 84–102.

42 Ibid at [6] per Judges Palm, Pekkanen and Makarczyk.

43 (1997) 24 EHRR 1.

44 Ibid at 34.

45 Ibid.

46 *Otto-Preminger* at [49].

Part and parcel of having the right to religious liberty is acceptance of the fact that not everyone will appreciate one's religion and some may criticize one's most cherished religious beliefs. Believers must do their best to overlook these slights. We see the quid pro quo reasoning I referred to earlier in this article at work here:

> Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.[47]

In *Murphy v Ireland*, the Court added that Article 10 "does not, as such, envisage that an individual is to be protected from exposure to a religious view simply because it is not his or her own."[48] Broad notions of "pluralism, tolerance and broadmindedness" that underpin democracy mean exposure of this sort ought to be expected.[49]

Although freedom of expression has primacy and believers must, in a democracy, be expected to have thick skins when it comes to criticism, even hostile criticism, of their faith, there is a limit. Here, the Court in *Otto-Preminger* express the boundary in a variety of ways, but the limits take two quite different forms.

First, there may be situations where the religious criticism is sufficiently severe to thwart the believers from even exercising their faith:

> the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, *in extreme cases* the effect of particular methods of opposing or denying religious beliefs can be such as to *inhibit those who hold such beliefs from exercising their freedom* to hold and express them.[50]

It is not easy to envisage circumstances where religious ridicule or criticism would be sufficient to prevent someone from holding or practising their faith. The sort of "extreme case" that the Court in *Otto-Preminger* probably had in mind is the noisy demonstration outside a church or mosque that effectively disrupts the worship within[51] or a blockade of a place of worship.[52] Laws preventing the disturbance of congregations are, as the New Zealand Court of Appeal noted in *Mendelssohn*, one of the exceptional instances where the state currently does positively act to protect the peaceful enjoyment of religious freedom.

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47 Ibid at [47].

48 (2004) 38 EHRR 13 at [72].

49 Ibid.

50 *Otto-Preminger* (1995) 19 EHRR at [47] (italics added).

51 See Sir Patrick Elias and Jason Coppel, "Freedom of Expression and Freedom of Religion: Some Thoughts on the Glenn Hoddle Case" in Jack Beatson and Yvonne Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford: Oxford University Press, 2001) ch 3, at 54.

52 See Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001) at 70.

The second limit upon freedom of expression is not directly connected to religious freedom or its exercise. There may be no suggestion that the right to practise one's faith is being impeded by religious criticism, yet the speech may still cross the line. Here the European Court has adopted a number of different formulations. In *Otto-Preminger* the majority stated:

> However, as is borne out by the wording itself of Article 10(2), whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes "duties and responsibilities". Amongst them – in the context of religious opinions and beliefs – may legitimately be included 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*. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration ...[53]

The dissenting opinion in that case observed that "tolerance works both ways" and so "the democratic character of a society will be affected if *violent and abusive attacks* on the reputation of a religious group are allowed."[54] In *Wingrove* the Court reiterated the views expressed in *Otto-Preminger*, adding that the duty extended to expressions that were "profanatory"[55] as well as gratuitously offensive to others.

These attempts at a precise verbal formulation of the threshold of democratic tolerance have their limitations. The Court in *Otto-Preminger* conceded that it was "not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others."[56] This was due to the fact that there was no "uniform conception" of religion's significance across Europe, indeed, "even within a single country such conceptions may vary."[57] In *Murphy*, the Court likewise acknowledged that the question of when expressions will cause "substantial offence" to particular religionists "will vary from time to time and from place to place, especially in an era characterized by an ever-growing array of faith and denominations."[58]

To summarize, the European courts have on several occasions found no violation of the Convention when national authorities have censored material that was likely to seriously offend the religious sensitivities of the relevant nation's citizens. While protection of religious feelings has occurred in fact, it has not been pursuant to a general right of protection of such feelings derived from the overall right of religious freedom in Article 9. Quite the opposite. In general, believers in democratic societies are expected to cultivate tolerance and broadmindedness and thus they have no right to expect that their religion will be immune from criticism.

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53 (1995) 19 EHRR at [49] (emphasis supplied).

54 Judges Palm, Pekkanen and Makarczyk, ibid, at [6] (emphasis added).

55 (1997) 24 EHRR 1 at [52]. The Court add (ibid at [60]) that a "high degree of profanation" is required.

56 (1995) 19 EHRR at [50].

57 Ibid.

58 (2004) 38 EHRR 13 at [67].

There are, however, two exceptional circumstances where religious criticism, ridicule and the like *may* be prohibited. These qualify as justified limitations upon freedom of expression. First, the expression may be so extreme as to prevent believers from practising their faith. Such situations are likely to be a rare occurrence. Secondly, the expression may be so "gratuitously offensive", "profanatory" or "violent and abusive" in nature that it cannot be said to "contribute to any form of public debate capable of furthering progress in human affairs." Being contrary to the democratic spirit of tolerance required of speaker and listener alike, it may be restricted.

There appears to be no legal *right* to protection of religious feelings in the sense that a state has been held to be under a *duty* and thus *required* to positively protect a believer's feelings. States have the *power* to protect religious feelings and they *may*, in suitable instances, do so and capitulate to complaints by outraged citizens by intervening to curtail the offensive material. But they are not under an enforceable *duty* to do so. In the cases to come before the Court, the state authorities had taken action to restrict certain material and the complainant was the party arguing there had been an unjustified interference with its right to free expression.[59] As it transpired, the complainants in *Otto-Preminger* and *Wingrove* lost and the religious feelings at issue were protected. However, if the complainant had been a group of believers complaining that the state had taken insufficient steps to safeguard their religious rights, then it is by no means certain that Strasbourg would have reprimanded that state for failing to intervene.[60] There are two decisions of the European Commission that support this view.

In *Choudhury v United Kingdom*[61] it was argued that the United Kingdom had failed to protect the religious sensibilities of Muslims insofar as the English courts ruled that the blasphemy law did not extend beyond Christianity to the protection of Islam. The victim, Mr Abdul Choudhury, along with certain other British Muslims, had been outraged at the publication of Salman Rushdie's, *The Satanic Verses*, and unsuccessfully sought to bring a criminal prosecution against Rushdie and Viking Penguin, the book's publishers, on the ground that the book blasphemed against Allah and the religion of Islam.[62] Mr Choudhury argued before the European Commission that, under Article 9, the United Kingdom had not given the Muslim religion protection against "abuse or scurrilous attacks" and "that without that protection there will inevitably be a limited enjoyment of the right to freedom of religion provided for by that Article." The Commission characterized the issue before it as "whether the freedom of Article 9 ... may extend to guarantee a right to bring any specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or a group of individuals." It noted that Choudhury had not claimed "and it [was] clearly not the case" that the state authorities had directly interfered with his freedom to manifest his religion. That being so, it could see no link between Article 9 and the applicant's complaint at all, and it declared the complaint to be

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59 A point made by Elias and Coppel, "Freedom of Expression", at 57.

60 Ibid.

61 Application No 17439/90 (5 March 1991): noted in (1991) 12 Human Rights LJ 173.

62 *R v Chief Metropolitan Magistrate, ex p Choudhury* [1991] 1 QB 429.

inadmissible.[63] If there was a general right to protection of *all* religious feelings (Muslim, Hindu and so on, as well as Christian), and a consequent duty on the state to positively respond, then the *Choudhury* case would seem to have been the prime opportunity to have done so. *Choudhury* predates *Otto-Preminger* but a later case comes to a similar conclusion.

In *Dubowska v Poland*[64] it was argued that the Polish Government should have intervened and brought criminal charges against a national weekly Polish magazine, *Wprost*, that published a picture of the Czestochowa Madonna and Child with their faces replaced by gas masks. The Polish authorities had commenced proceedings against the magazine under a section of the Polish Criminal Code that makes it an offence to publicly insult religious feelings, but later discontinued their investigations. The authorities concluded that images had not been deliberately aimed at insulting or debasing an unquestionable object of devotion for Polish Catholics (the so-called Black Madonna) but were aimed at informing the public about the dangers of environmental pollution. The applicants complained to the Commission that under Article 9 of the Convention the Polish authorities had not provided them with sufficient protection against a violation of their religious freedom "as they failed to protect them against the distorted publication of sacred images of their worship and that the criminal proceedings against the persons who had insulted the objects of their worship were discontinued." The Commission cited the various passages from *Otto-Preminger* quoted earlier in this article: that religious communities have to expect criticism of their beliefs and, citing *Choudhury*, that the right to freedom of religion "does not necessarily and in all circumstances imply a right to bring any specific form of proceedings against those who... offend the sensitivities" of others. There may, it continued, be some situations where the manner of criticism may violate the Convention and which may, in turn, require a state to take positive action to protect religious feelings, but this instance was not one of them. The present case was not one where the applicants were impeded from exercising their freedom to hold and express their beliefs. Furthermore, the complaint was misguided as the Polish authorities *had* acted positively here. Upon the applicants' request, they had instituted criminal action against the magazine but later, after careful assessment, discontinued prosecution. The Commission observed curtly that "the fact that the authorities eventually found no offence had been committed does not in itself amount to a failure to protect the applicants' rights guaranteed under Article 9." It dismissed the complaint as "being manifestly ill-founded".

Dubowska again illustrates the point that victims of religious criticism have no general right to protection of their feelings. The only conceivable situation where a right could be said to exist is the rare instance where the religious attacks (of the non-violent kind) effectively prevent the believer from practising his or her religion. Aside from this unusual and extreme circumstance, the only other

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63 It also ruled as inadmissible the complaint that Article 14 had been violated insofar as the blasphemy law protected Christianity but no other religions.

64 Application No 33490/96. The Dubowska complaint was joined with another complaint regarding the same subject: *Skup v Poland*, Application No 34055/96. See further Evans, *Freedom of Religion*, at 70.

situation where a suggestion of a right could be plausibly advanced is where the religious criticism or satire goes beyond an acceptable level of severity so as to be gratuitously offensive. It would be misleading to say a right to protection existed here. In such situations, the state *may*, but not *must*, intervene. And if the state does act and reach a conclusion that no restriction upon freedom of expression is warranted in the instant case, that is the end of the matter. Offended believers cannot expect that the outcome will be the one that they (the victims) had hoped for. The Strasbourg jurisprudence gives member states a wide margin of appreciation in matters of religion and the courts are most reluctant to gainsay states' decisions.

III. The Protection of Religious Feelings in New Zealand

Blasphemous libel is a criminal offence in New Zealand. Section 123(1) of the Crimes Act 1961 provides that persons who publish any blasphemous libel may be liable to up to one year's imprisonment. The leave of the Attorney-General is required before any prosecution may commence.[65] Whether any publication is blasphemous is "a question of fact."[66] There is a defence where the opinions on any religious subject are expressed "in good faith and in decent language."[67]

Although blasphemous libel remains on the New Zealand statute books, its continued presence today is probably something of an embarrassment. There has only ever been one reported case on the subject and that was an unsuccessful prosecution shortly after World War I.

In *R v Glover*,[68] the publisher of a leading labour magazine, John Glover, was tried for publishing a war poem on the front cover of the October 1921 issue of the *Maoriland Worker*. The poem, "Stand To: Good Friday Morning", by British poet Siegfried Sassoon, contained three lines that the Crown alleged fell within the definition of blasphemous libel. The unhappy soldier in the muddy trenches exclaims, at the conclusion of the poem, "O Jesus, send me a wound today, And I'll believe in Your bread and wine, And get my bloody old sins washed white!"[69] Hosking J in the Supreme Court instructed the jury that there was "no question of the truth or otherwise of any religious doctrine"[70] for them to consider. Rather, "[t]he whole point is whether the language that was used was that which could be described as decent, or whether it crosses over into the region of what is insulting or contemptuous."[71] The rationale for blasphemy law, in the Judge's view, was prevention of community disorder and hence "there being such large numbers of the community who have reverence and respect

65 Section 123(4) of the Crimes Act 1961.
66 Section 123(2).
67 Section 123(3).
68 [1922] Gazette L R 185.
69 The poem is reproduced in an excellent detailed historical analysis of the case by Geoffrey Troughton: "*The Maoriland Worker* and Blasphemy in New Zealand" (2006) 91 Labour History 113. The *Gazette Law Report* account of the case is sparse in the extreme: it does not even mention the name of the poem or the poet's name, let alone the offending words.
70 [1922] Gazette LR 185 at 187.
71 Ibid.

for certain religious and sacred subjects, it is desirable that provocation of any outrage of those feelings should be prevented."[72] The jury returned after some 45 minutes with the verdict of not guilty, but with the addition of the rider: "That similar publications of such literature be discouraged."[73] It seems hard not to agree with historian Geoffrey Troughton's assessment of the Glover prosecution as little more than "a storm in a teacup."[74]

Blasphemy law made a brief reappearance again more recently. In March 1998, the Museum of New Zealand, *Te Papa*, ran a controversial touring British exhibition, *Pictura Britannica*, which contained two artworks highly offensive to Christians and others.[75] The "Virgin in a Condom" statue (a 7.5 cm statue of the Virgin Mary clad in a contraceptive) by a British artist, Tania Kovats, and a contemporary version of Leonardo da Vinci's, *The Last Supper*, entitled "Wrecked", by Sam Taylor Woods (featuring a topless woman at the centre of the table in place of Christ) raised the ire of many members of the public. Despite some 400 Catholics, Muslims and other religious groups rallying and praying outside the Museum in protest,[76] officials refused to withdraw the exhibits. The Chief Executive of the Museum, Cheryll Sotheran, responded: "I believe the people of New Zealand would want the museum to take a strong position on this, not to succumb to intimidation as some other museums have."[77] The Museum acted as "a forum within a varied social and cultural mix, in which the chances of one cultural or social group expressing ideas and values that offend others, generally without intending to offend, is a daily risk."[78] The Museum Curator, Ian Wedde, endorsed this: "We have to be, as far as possible, clear of censorship issues of that sort and while this is an extremely sensitive and emotional subject, the museum has to be available for the expression of divergent and controversial views."[79]

Unfortunately, the response of some outraged citizens went beyond quiet protest: Museum staff received threats and the statue itself was repeatedly attacked, but not destroyed, over the ensuing weeks, leading to arrests of three protesters on three separate occasions.[80] The Catholic Church condemned the use of threats and violence and Bishop Denis Browne urged Christians to engage in peaceful dialogue with Museum officials to change exhibition policies that permitted "desecrated religious images to be put on display."[81] An application by a National Party MP, John Banks, and a Catholic priest, Fr Denzil Meuli, to commence a criminal prosecution against the Museum for blasphemous libel

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72 Ibid.

73 Ibid at 188.

74 Troughton, "*Maoriland Worker*", at 123.

75 See Reid Mortensen, "Art, Expression and the Offended Believer" in Rex Ahdar (ed), *Law and Religion* (Aldershot: Ashgate, 2000) ch 9.

76 Sarah Catherall, "Virgin statue stays – Protesters ignored", *Sunday Star-Times*, 15 March 1998, at A1.

77 Ibid.

78 "Virgin statue on show despite attack", *Sunday Star-Times*, 8 March 1998, at A2.

79 Ibid.

80 "Violent and personal threats to museum staff over 'Virgin'", *Otago Daily Times*, 10 March 1998, at 2; Sarah Catherall, "Te Papa's fingers burnt in outrage over condom art", *Sunday Star-Times*, 15 March 1998, at A5.

81 "Church condemns threats, force", *Otago Daily Times*, 14 March 1998, at 2.

under s 123 was rejected by the Solicitor General, John McGrath QC. The main factor against prosecution, he said, would be that it would be inconsistent with the New Zealand Bill of Rights Act's protection of freedom of expression.[82] He added: "The items are displayed in a museum which is a place for artistic expression. They are part of an exhibition for which a charge is made, so viewing the exhibits is a matter of considered personal choice rather than unavoidable for the public."[83]

The Crimes Act prohibition captures only blasphemous *libels* and thus broadcast blasphemies would seem to be exempt.[84] Potentially, some blasphemous matter depicted in film and video format could be caught by the prohibition on "objectionable" publications under the Film, Videos and Publications Classification Act 1993.[85] Challenges to religiously offensive material broadcast on television and radio can be made pursuant to the complaints mechanism set out under the Broadcasting Act 1989. This leads us to the *South Park* case.

IV. The *South Park* Case

A. *Background*

CanWest TV Works Ltd announced in early 2006 that it would broadcast the controversial "Bloody Mary" episode of the adult cartoon satirical series, *South Park*, in May that year. This same episode had sparked an outcry from Catholic leaders in the United States when shown in that country[86] and New Zealand Catholics responded with equal indignation. The communications manager for the New Zealand Catholic Church, Lyndsay Freer, said that CanWest would be overstepping the mark if it aired the episode on its youth-oriented channel, C4, and that the Church and other religious groups (including Jewish and Muslim organizations) had already written a letter on 24 January 2006 to C4 warning that they would lodge a complaint with the Broadcasting Standards Authority (the

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82 "No prosecution over exhibits," *Otago Daily Times*, 28 March 1998, at 35. Similarly, the House of Lord Select Committee on *Religious Offences*, at 10, noted that no blasphemy case had been prosecuted since the enactment of the Human Rights Act 1998 (incorporating the European Convention articles on freedom of religion and expression) and added that it would be "a reasonable speculation" that any blasphemy prosecution today – even if it met all the necessary criteria – would be likely to fail on the ground of, inter alia, denial of the right to freedom of speech. In November 2007, a UK evangelical Christian group launched a High Court action seeking the right to bring a private prosecution for blasphemous libel against the Director-General of the BBC and a theatre producer over the showing of *Jerry Spinger – The Opera*. See "Law: Blasphemy from hell or plain satire?" *Daily Telegraph*, 22 November 2007 < http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/11/22/nlaw122.xm>

83 "No prosecution over exhibits".

84 John Burrows and Ursula Cheer, *Media Law in New Zealand*, 5th ed (Melbourne: Oxford University Press, 2005) at 440.

85 Ibid.

86 The US cable channel, Comedy Central, had banned a second screening of the episode in the wake of a public outcry: see Emma Page, "First Mohammed, now Mary," *Sunday Star-Times*, 5 February 2006.

"BSA") if the episode was screened.[87] Catholic bishops wrote a letter to be read at all masses decrying *South Park's* "ugly and tasteless" depiction of Mary and suggesting congregations might protest by boycotting TV3 (a sister channel's) news and products advertised on TV3 and C4.[88] CanWest was unmoved, responding that it "absolutely expect[ed]" segments of society to be offended by the episode and that if Catholics were affronted they should simply switch their television off.[89] Buoyed by the controversy generated over the episode, CanWest brought the screening of the programme forward by three months and it aired on 22 February 2006. On the evening of the broadcast, some 350 people staged a quiet protest outside the television headquarters, the predominantly Catholic protesters clutching Bibles and crosses as they recited the Rosary whilst grouped behind a statue of the Virgin Mary.[90] Six times the usual number of viewers who watched *South Park* tuned in for the controversial Bloody Mary episode.[91]

On 17 March 2006, the Catholic Bishops Conference wrote to CanWest complaining that "great offence"[92] to the Catholic community in particular, but also other Christians and the Muslim community, had been caused. CanWest's Standards Committee declined to uphold the complaint, although it did reply that it was "very sorry" that the Bishops had been offended by the programme and that it would not replay the episode.[93]

Before turning to the decision of the BSA it is important to set out a brief description of the Bloody Mary episode so the reader may better understand the indignant reaction of the complainants. This is the BSA's summary:

> [2] In this episode, one of the characters, Randy, is arrested for driving while drunk, and is made to attend Alcoholics Anonymous meetings. There, Randy is told that alcoholism is a disease, that he is powerless to control his drinking, and that only submitting to a higher power (God) can help him stop.
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> [3] Following the meeting, Randy succumbs to his disease and drinks more heavily than ever, until he sees a news story on television about a statue of the Virgin Mary which is apparently bleeding, as the reporter puts it, "out her ass". A cardinal visits the statue, is showered in blood (accompanied by a "farting" sound), and declares the bleeding to be a miracle. Randy rushes to see the statue, hoping that he will be cured. When Randy approaches the statue, he too is showered in blood, and he declares himself "cured".
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> [4] Later, when Randy is attending an AA meeting, having been sober for five days, another news report is broadcast, showing footage of the Pope visiting the statue. The Pope is shown peering at the statue from close range, whereupon he too is showered in blood, again with the same sound effects. The news item then reports that the Pope had declared the statue not to be a miracle. The reporter said:

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87 Ibid.

88 "Bishops offended by TV 'Insult'", *Otago Daily Times*, 20 February 2006, p 1.

89 Ibid.

90 Martin Johnston and Stuart Dye, "Hundreds in TV3 prayer protest against controversial cartoon", *New Zealand Herald*, 23 February 2006.

91 "South Park attracts six times usual audience", *New Zealand Herald*, 23 February 2006.

92 *Browne v CanWest TV Works*, at [14].

93 Ibid at [16].

> Having investigated closely, the Pope determined that the blood was not coming from the Virgin Mary's ass, but rather, from her vagina. And the Pope said, quote, "A chick bleeding out her vagina is no miracle. Chicks bleed out their vaginas all the time."
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> [5] At this point, Randy realizes he could not have been miraculously cured. He reverts to drinking heavily, along with the other AA members, before his son points out that if there was no miraculous intervention, it must have been his own willpower that had kept him sober for five days.[94]

B. *The BSA Decision*

The 35 complaints to the BSA alleged a raft of standards in the Free-to-Air Television Code of Broadcasting Practice had been infringed. The BSA held, however, that of the nine (out of a maximum of 11) standards said to be breached, only two were of direct relevance to the present case: the good taste and decency standard and the denigration standard.[95]

Standard 1 stipulates that "broadcasters are responsible for maintaining standards which are consistent with the observance of good taste and decency." Complaints alleging violation of this standard fell into two groups. First, the episode's crass depiction of menstruation, and especially the squirting of blood onto some characters' faces, offended many complainants. However, the BSA concluded that the crude animation and highly unrealistic nature of the images significantly mitigated the offensiveness that a more realistic portrayal might have produced.[96] Furthermore, there were important contextual factors that indicated that the show's target audience would not have been offended:

> Those outside the demographic at which South Park is aimed would have been sufficiently well-informed by the 9:30 pm timeslot, the AO [Adults Only] classification, the pre-broadcast warning, and the well-known nature of this series, to enable then to make an *informed choice* about whether or not to watch.[97]

Some complainants argued these contextual factors relied upon by the station could not be a "disinfectant" for the programme, and that offensive material could not be excused simply because a station signalled in advance its intention to broadcast the material.[98] If the target audience's expectations or sensibilities were the touchstone, then "bowing to such expectations could justify the broadcast of child pornography if there was a willing audience."[99] The BSA countered that there were still situations where a broadcaster could cross the line *irrespective* of the context in which material was provided or the programme's target audience.[100] The present case was not one however: "the material was of

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94 *Bloody Mary*, at [2]–[5]; *Browne v CanWest TV Works*, at [10].

95 Complaints, for example, that the episode inaccurately portrayed religious practices (Standard 5) or was contrary to children's interests (Standard 9) were dismissed: see *Bloody Mary*, at [26] and [92]–[102].

96 Ibid at [106].

97 Ibid at [107] (emphasis added).

98 Ibid at [55].

99 Ibid.

100 Ibid at [109]. The limit was reached in Decision No 2005–137 (21 March 2006) where the mitigating contextual factors (10 pm time of broadcast, adults-only

An interesting argument raised by some complainants was whether the *South Park* episode was even satirical. In the complainants' opinion, satire had to expose "vice or folly" whereas the Bloody Mary episode "simply ridiculed ideas worthy of reverence."[118] The BSA disagreed: this argument ignored the possibility that some may see religious miracles as themselves instances of "folly".[119] The Authority reminded complainants that "[s]atire is seldom respectful or reverential and while the satire was not to the complainants' liking"[120] that did not provide a basis for its banning. *South Park* was clearly satirical and the real question for the BSA was whether it had crossed the threshold and "amounted to a vicious or vitriolic attack upon Catholics and their beliefs."[121] The Authority believed it did not. The episode intended to satirize belief in the miraculous power of religious icons and had been "deliberately provocative"[122] in the manner it did so. But the "disrespectful and cavalier fashion"[123] it went about doing so did not constitute the sort of vicious or vitriolic attack that the denigration standard envisages. A broadcaster could not be compelled to respect a religious figure that particular citizens held dear. To reiterate, "penalising a broadcaster simply because it has caused religious offence would, in the Authority's view, be an unreasonable limitation on the broadcaster's right to free expression, as such a sanction could severely limit its ability to satirise religious matters."[124] The observation in *Popetown* was recalled: "satirical treatment of society's institutions – whether they be religious, political or cultural – is simply part and parcel of living in a Western democracy which values freedom of expression."[125]

Finally, the argument that the episode denigrated alcoholics or Alcoholics Anonymous was rejected: satire was present, but the attitudes and beliefs of the former had not been treated with vitriol or abuse.[126]

C. *The High Court Appeal*

The Catholic Bishops Conference was disappointed with the BSA's decision and appealed. A little over a year later, the High Court delivered its judgment but the outcome was no different.

The High Court repeatedly emphasized the difficult task appellants faced in seeking to overturn the decisions of an expert tribunal such as the BSA. Section 18(4) of the Broadcasting Act 1989, which sets out the right of appeal, requires the Court to hear and determine an appeal "as if the decision or order appealed against had been made in the exercise of a discretion." Wild J explained that the appellate court's role is not to re-exercise, afresh, the discretion that was vested in the Authority. It could not engage in a re-weighting of the relevant considerations[127] – in this case, the weight placed upon freedom of expression

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118 *Bloody Mary*, at [128].
119 Ibid at [130].
120 Ibid.
121 Ibid at [132].
122 Ibid at [133].
123 Ibid.
124 Ibid at [136].
125 Ibid (quoting *Popetown* at [125]).
126 Ibid at [139].
127 *Browne v CanWest TV Works Ltd*, at [20].

versus the weight accorded respect for religious sensibilities. That task was the BSA's alone. Rather, "the appellant must show that the decision-maker acted on the wrong principle, failed to take into account some relevant matter, took into account some irrelevant matter, or was plainly wrong."[128] The Court could not simply interfere with the BSA's determination because it disagreed with the result.[129] The appellant had to show the Authority was "plainly wrong", which meant, here, it was up to "the Conference to persuade me that, although the Authority's discretion may permit of more than one tenable answer, the decision it made was not such an answer."[130] Wild J noted that this was "no small task"[131] and that the threshold for success on appeal set by the legislation was "a tough one."[132] Parliament had established the Authority as the prime arbiter of acceptable expression in broadcasting.[133] For the Court to second-guess it and interfere with its evaluation (merely on the basis the Court would come to a different result) would ignore the fact that the BSA was "an expert body making judgmental assessments."[134]

The "nub of the appeal", as Wild J termed it, was that the Authority could not tenably have found no breach of the two standards at issue: "The programme was so crassly tasteless, offensive and denigratory that it could not on any balanced and sensible view be said to observe the requisite standards of good taste and decency, and of fairness."[135]

In its decision, the BSA had spent some time considering the scope of the right to freedom of expression set out in s 14 of the NZBORA and whether the decision to uphold a complaint would be a reasonable and demonstrably justified limit in a free and democratic society (in terms of s 5 of the NZBORA). The appellant argued that this assessment of free speech and its proper limits ought not be engaged in when the BSA dealt with *individual* complaints. The only relevance of the NZBORA was whether the censorship standards *generally*, authorized by s 4 of the Broadcasting Act 1989, were a valid limitation upon free speech.[136] Wild J rejected this argument. Even if the censorship standards in the Code *in abstracto* were unassailable, it might be possible for them to be misconstrued in a *particular* case so as to produce a result that infringed free speech.[137] Thus, "[t]o guard against this danger – and to ensure that the s 14 right is not mere window dressing – the meaning of the standard adopted, ie the particular interpretation or application, ought to be justifiable in terms of s 5 of BORA".[138]

The appellants argued that in determining the question of whether the standard of good taste and decency had been breached, the Authority had been wrong

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128 Ibid.
129 Ibid at [40].
130 Ibid at [23].
131 Ibid at [101].
132 Ibid at [98].
133 Ibid at [98].
134 Ibid at [40].
135 Ibid at [25].
136 Ibid at [30].
137 Ibid at [32].
138 Ibid.

to take into account the contextual factors such as the time of screening and pre-broadcast warning. Wild J disagreed: "[g]ood taste and decency cannot be assessed in a vacuum, without regard for time, place, audience and so on."[139]

Next, it was argued that the Authority had failed to take into account the complainants' religious rights, specifically the right of the Conference and other complainants to respect for their religious opinions and beliefs. Wild J noted that, although the Authority had not *explicitly* referred to the religious freedom provisions of the NZBORA, it did clearly acknowledge the offensiveness of the programme to the Catholic community.[140] Most importantly, the Authority had implicitly balanced respect for religious beliefs with the right to freedom of expression and found that the s 14 right was a weightier consideration.[141] As noted earlier, this weighing of competing interests was something for the BSA, and it alone, to do.[142]

Wild J hinted that he personally might have found the Bloody Mary episode had breached the standard of good taste and decency, but he was not prepared to say the BSA's decision was wrong.[143] The BSA had the competence and expertise to strike the balance between the two fundamental freedoms in the same way the majority of the European Court of Human Rights had done so in *Otto-Preminger.* Wild J quoted approvingly several paragraphs from *Otto-Preminger.* As we saw earlier, just as the Court in *Otto-Preminger* had made a passing reference to the right to respect for religious feelings, so in the *South Park* case, Wild J made several passing references to "the *right* to respect for religious beliefs."[144] Again, however, it is, I submit, equally unlikely that the High Court was asserting a general "right" to respect for religious feelings. That was not the point of the remarks. In the context they were made, Wild J was simply alluding to the conflicting *interests* or *considerations* that the Authority took into account in its ultimate decision to uphold a controversial programme.

Turning to the BSA's finding that the contextual factors, combined with the farcical, unrealistic portrayal of religious figures in Bloody Mary, meant that the good taste and decency standard had not been breached, the Conference argued

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139 Ibid at [45].

140 Ibid at [48].

141 Ibid at [49].

142 Wild J, ibid at [51]–[52], observed: "I am not prepared to second-guess the weight that the Authority accorded to the right of freedom of expression, relative to the right to respect for religious beliefs.... [The appellant] is effectively asking me to carry out my own balancing exercise of the rights to religious freedom and the right to seek and to impart information and ideas. But this is not a legitimate exercise for the Court, which lacks any expertise to undertake it. In particular, the Court is not in a position to determine what are generally accepted standards of good taste and decency. On the other hand, it is a task for which the Authority is specially qualified."

143 Wild J, ibid at [53], cites *Attorney-General, ex rel McWhirter v Independent Broadcasting Authority* [1973] 1 QB 629 at 655. In this case, Cairns LJ expressed surprise that the members of the expert tribunal had unanimously held the material to not offend against good taste and decency, whereas the judge thought it did. Nevertheless, he observed, "[t]he authority are the censors; I am not."

144 Ibid at [48], [50] and [51].

neither reason was sound.[145]

As to the first reason, the appellants argued that there were universal, objective standards of good taste and decency that must be upheld irrespective of the context of the matter in question.[146] Wild J disagreed. The very fact that the Conference's view of what constituted good taste differed from that of the BSA underscored the point that there was no such universal standard.[147] Faced with two different views "each expressed by a reputable institution after careful, if not anxious, consideration", Wild J was not able to find any obvious basis for declaring one to be correct and the other, more importantly, the Authority's, to be plainly wrong.[148]

Further arguments by the appellants also failed. The furore over the episode, combined with the bringing forward of its screening, meant that a much larger and broader audience now saw the programme. It was harder to say this group could not be offended, whereas the more usual narrow target "demographic" would not.[149] Wild J, however, concluded that the contextual warnings were still sufficient to guard against offence. He posed an interesting hypothetical.[150] Imagine, he mused, an adults-only programme, such as Bloody Mary, was shown at 9.30 pm and was preceded by warnings and contrast that with a 6 pm television news item which showed footage of soldiers raping women. A complaint by a parent that her ten-year-old child had seen the news item would, he suggested, have far more validity than a complaint about a telegraphed adults-only show.[151] The element of surprise and the inability to exercise a choice not to view potentially offensive material make all the difference in the television news hypothetical.

The Prime Minister's comments, that she personally found the episode disgusting, were entitled to respect but were not a relevant consideration, especially given the fact that the BSA must act independently in discharging its statutory responsibilities.[152] CanWest's apology to the Bishop's Conference for any offence caused (and the promise not to repeat the episode) was not a consideration incorrectly overlooked by the BSA either. The broadcaster's own view of the nature of the programme could not detract from the Authority's task of making up its own mind on the violation of the standards.[153]

The argument that the crude animation and its farcical, unrealistic nature heightened rather than minimized the offence caused was rejected. Wild J commented that had the portrayal of the Pope, the Virgin Mary and so on been "lifelike", the finding of a violation of the standards would have been "much much stronger, perhaps irrefutable."[154] But here, the crude animation "made

145 *Browne v CanWest*, at [63]–[64].
146 Ibid at [73].
147 Ibid at [66].
148 Ibid.
149 Ibid at [71]–[73].
150 Ibid at [72].
151 Ibid at [73].
152 Ibid at [76].
153 Ibid at [79].
154 Ibid at [84].

unmistakable the satirical aim and message of the episode."[155]

The appellant contended that the BSA had adopted a too strict and narrow threshold for a breach of Standard 1 (good taste and decency) insofar as it emphasized the need for the programme to have attacked revered religious figures or beliefs in a "vicious or vitriolic" manner.[156] Wild J held that although the Authority may have expressed itself in a confusing and potentially erroneous manner, he did not believe the Authority had erred in principle.[157] The Court noted that, in determining good taste and decency, the BSA ought to be guided by "notional community standards"[158] and given that the latest census figures indicated that a sizeable percentage of New Zealanders apparently did have a religion, this dimension of the community's expectations ought not be ignored – and nor had it been here.

In conclusion, Wild J found no grounds for overturning the BSA's decision. The four members of the Authority, chosen by the Government to discern and reflect community views and standards, had unanimously dismissed the complaint.[159] Wild J acknowledged the appellant's "deep and real sense of outrage at the Authority's decision", but the obstacle it confronted was that "the Conference's sense of outrage is not shared by the wider community."[160]

V. The Emergent Picture

New Zealand law adopts a similar approach to European human rights law on the question of whether, and to what extent, a nation's citizens can expect their religious feelings to be protected by the state from material that insults and offends them. The main points can be summarized as follows.

First, the primary and strongest policy consideration is the right to freedom of expression. In a democratic society, believers of whatever stripe (including atheists and non-believers) must accept that their most cherished and sacred beliefs, practices or figures will not be immune from criticism and ridicule. Attempts to censor or restrict publications must be demonstrated to be justified limits upon the fundamental right of free speech. The burden here is on the offended believers, and it is a heavy one.

Secondly, the right to mock or satirize religious beliefs and practices is part of the right of free expression. Religious institutions are entitled to no special protection vis-à-vis other institutions (cultural, political, educational, medical, sporting etc) in society.

Thirdly, the prime responsibility for protecting religious feelings lies with the individual and not the state. "As a democratic society", reminded a recent BSA

155 Ibid.

156 Ibid at [85].

157 Ibid at [87]–[92].

158 Ibid at [89].

159 Ibid at [99].

160 Ibid at [100]. This last comment is really speculation, as the wider public's actual views on the programme were never canvassed. But even if they were, the decision whether the standard is breached is for the BSA to determine.

study, "New Zealanders place great value on individuals' right to choose."[161] The assumption is "that adult viewers will take reasonable measures to inform themselves about what they are watching and accept responsibility for protecting their own sensibilities."[162] On most occasions where potential insult or offence could be suffered, the believers can readily avoid experiencing such distress by making an informed choice to not visit the cinema, theatre or museum, rent the DVD, buy the magazine or newspaper, or to not switch to the particular television or radio channel broadcasting the item.

Fourthly, contextual safeguards play a critical part in ensuring the individual has an informed choice and can thus take responsibility for safeguarding his or her own feelings. There are well-developed methods of informing the individual. In the case of broadcasting, these include the time of the broadcast, the programme's classification, the use of a pre-broadcast warning, the well-known satirical or provocative nature of the series, and so on. To be forewarned is to be forearmed.

Fifthly, just as the presence of contextual safeguards may avert potential offence, their absence may prevent the individual from making an informed choice. If the offending material appears unexpectedly, in a context in which such material would not be reasonably anticipated to be shown, choice is nullified. In these "ambush" situations, the individual may truly be caught by surprise and suffer genuine, unavoidable distress. A complaint in such situations has greater validity, although that is still not to say it ought to be upheld.

Sixthly, the decisions of the BSA show that there are some exceptional occasions where material may be judged to be irredeemably inappropriate (and thus curtailed) *irrespective* of the contextual safeguards. An example of this was a movie containing an eroticized and prolonged rape scene. Despite being shown at midnight on a pay television channel and having an adults-only classification and a pre-broadcast warning, the BSA upheld the complaint that the film breached the Code's standard of good taste and decency.[163]

However, this narrow category of material that is unlawful irrespective of contextual protections does not generally include blasphemous or religiously-offensive works. There is a consistent line of BSA decisions dismissing complaints against programmes containing blasphemous language.[164] A typical instance is the complaint against the presenter of a travel documentary series who used the phrase "Jesus Christ" as an exclamation during the programme. The BSA agreed

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161 Broadcasting Standards Authority, *Freedom and Fetters: Broadcasting Standards in New Zealand* (Wellington: Dunmore Publishing, 2006) at 86.

162 Ibid at 73.

163 BSA Decision No 2004–007 (26 February 2004).

164 See, for example, BSA Decision No 2003–098 (18 September 2003)("Jesus Christ" phrase uttered by a character in a promotional clip – no breach of the Code); BSA Decision No 2005–032 (30 June 2005) (panelists in a sports chat show used the words "Christ Almighty" and "Jesus" as exclamations – no breach); BSA Decision No 2005–014 (22 December 2005)("Jesus" and "Christ" uttered by character in satirical programme – no breach); Decision No 2005–014 (21 March 2006) (current affairs presenter used the phrase "Jesus Christ" in a news item debating the use of such holy words as swear words – no breach).

with the broadcaster that the phrase had been used "as a colloquial expression of distress and alarm, rather than a religious comment."[165] In the BSA's view, to find a violation of the broadcasting standards in this type of instance would be to restrict freedom of expression in a manner not justified in a democratic society.[166]

Similarly, complaints against programmes satirizing religious beliefs or institutions have been consistently dismissed. Apart from the Bloody Mary case, another recent instance was a satirical treatment of the anti-McDonald's documentary, *Super Size Me*, in which the presenter ate nothing but Middle-Eastern food for a month and ultimately became an Islamic fundamentalist terrorist.[167] The Authority acknowledged that, in the current social climate, satirizing Muslims may compound any community prejudice, but this did not militate enough so as to prohibit the broadcast of legitimate satire: "It would be a dangerous precedent to provide any single identifiable group a greater degree of protection than others against legitimate humour or satire."[168] In another decision, the BSA declined to uphold a complaint against the broadcaster of a news item exploring the limits of free speech in light of the Danish cartoon controversy. The item showed a clip of a Jesus-Christ-like figure, dressed only in a loin cloth, prancing through the streets singing a pop-song, "I will survive", and ending with the Jesus figure being hit by a bus. The satirical clip had been preceded by a warning to viewers. The Authority once more emphasized that the satirical treatment of religious institutions was "simply part of living in a Western democracy that values freedom of expression."[169]

I said before that the narrow category of material that is unlawful irrespective of contextual protections does not "generally" include blasphemous or religiously-offensive works. There is an exception and it mirrors the approach taken by the European Court of Human Rights. Recall that in *Otto-Preminger* the Court referred to the duty of those whose who express religious opinions and criticism to avoid as far as possible expression that is "gratuitously offensive" to others and which thereby does "not contribute to any form of public debate capable of furthering progress in human affairs."[170] The BSA has similarly recognized that some expression is so lacking in social or democratic virtue that it does not deserve to shelter behind the shield of free speech. Thus expression that amounts to "hate speech" or a "vitriolic or vicious" attack is not protected.[171] Castigating a small unpopular sect, the Exclusive Brethren, as "probable child abusers"[172] is the type of "extreme" circumstance envisaged.

But the obvious problem here is drawing the line between "vigorous" satire and satire that is tantamount to a "vitriolic" or "abusive" attack. For example, the BSA, by a majority, recently held that a television programme on spiritual

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165 BSA Decision No 2003–068 (24 July 2003) at [14].

166 Ibid at [17]. This point is made in the other decisions noted above at n 164.

167 Decision No 2004–152 (4 November 2004).

168 Ibid at [19].

169 Decision No 2006-012 (18 May 2006) at [50].

170 (1995) 19 EHRR at [49].

171 *Popetown*, Decision No 20005–112 (4 May 2006) at [119].

172 BSA Decision No 2004–193 (18 February 2005). See above n 113.

themes, where the presenter commented that Catholic priests got "drunk on the [communion] wine in the back room" was "an attempt at light-hearted humour" and "irreverent rather than insulting".[173] The minority, by contrast, considered it was "an inappropriate and gratuitous" comment that breached the standard of good taste and decency.[174] There is really no coherent and principled way to draw these distinctions and the exercise is inescapably unpredictable and subjective.

VI. Conclusion

Despite passing references to the right to respect for religious feelings and beliefs in both European case law and, more recently, by the New Zealand High Court in *South Park*, it is submitted there is no enforceable legal right to the protection of religious sensibilities.[175] The only possible semblance of such a legal right – and it is just a semblance – is the extreme case where the religious criticism or opposition is so severe as to prevent the believers concerned from even practising their faith.[176] In that situation the state might consider itself under a positive obligation to intervene in order to protect religious freedom.[177] Actual instances of this occurring will be rare.

Primarily, it is up to the individual to protect herself and avert – through the exercise of an informed choice – situations that might offend or distress her. The mere presence of the offensive work in the public domain, or its screening or display to a narrow target audience, may disturb and upset the believer, even if the believer herself never sees or hears the material. But that very broad notion of offence is not enough. Freedom of expression ought not to be curtailed because some citizens are disturbed at the mere prospect of their fellow citizens being exposed to material that they (the offended believers) find insulting or degrading.

There are occasions, decidedly infrequent in number, where the state has intervened to protect a religious community's feelings from offensive speech. These instances might lead one to infer that the state was vindicating a believer's right to respect for religious feelings. This is not so. Despite some rather loose language by the courts that speaks of a general "right" to protection of religious feelings there is, strictly speaking, no such thing. If, following Hohfeld,[178] we restrict the use of the word "right" to situations where the other person (here, the state) has a corresponding "duty", then it is quite clear the state is – subject to the one rare exception already mentioned[179] – under no obligation to protect religious feelings. In reality, on those occasions where the state intervened (at

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173 BSA Decision No 2003–020 (20 March 2003) at [17].

174 Ibid at [18].

175 The prospect of a successful prosecution for committing the criminal offence of blasphemy under s 123 of the Crimes Act seems remote.

176 See above n 50 and accompanying text.

177 See above n 32 and accompanying text.

178 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied to Judicial Reasoning* (New Haven: Yale University Press, 1919). See further R W M Dias, *Jurisprudence*, 4th ed (London: Butterworths, 1976) ch 2.

179 Namely, the exceptional and extreme case of speech that thwarts the actual free exercise of religion.

the initiative of the aggrieved citizens), it was exercising its *power* to protect religious feelings.[180] Furthermore, the basis for its action was that freedom of expression ought to be limited in this particular instance. The tribunal's real concern was to delineate the boundary of free speech and not to vindicate the religious rights of certain citizens. Devout believers have the opportunity or privilege (or liberty) of seeking the state's cooperation to suppress materials that offend their religious sensibilities, but that is all it is, an opportunity. The state is not obliged to respond[181] and citizens do not have a legal right to expect this. The state *may* suppress the speech, but if it does so – and a very high threshold of offence is set – it will be because the state believes that the limit of free speech has been reached and not because it views itself as under a legal duty to assuage religious sensibilities.

It is quite clear that the state is reluctant to exercise its power to suppress religiously offensive speech given the importance it places upon freedom of expression. This is, as I have argued, as it should be. If people want to live in a liberal democracy that safeguards their religious liberty, then accepting criticism and ridicule is part of life in such a society.

180 In which case, to use Hohfeld's analysis, we would say the believer was under a "liability", in the sense that she has the liability to have her legal position improved.

181 "A claim implies a correlative duty, but a liberty does not." Dias, *Jurisprudence*, at 42. Thus, a believer's liberty to seek redress for hurt feelings implies no correlative duty in anyone else to provide redress.