BLASPHEMY, THE FIRST AMENDMENT AND THE CONCEPT OF INTRINSIC HARM

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For many years First Amendment jurisprudence was dominated by the “clear and present danger” test. The test was forged in the justly famous dissenting opinions of Justices Oliver Wendell Holmes and Louis Brandeis as an attempt to determine when the First Amendment would permit speech advocating serious illegal conduct to be penalized.¹ Constitutional doctrine during the 1920’s allowed speech to be prohibited if the speech had a “tendency”² to cause harms that could themselves be regulated. The point of the clear and present test was to tighten the causal nexus between speech and such consequent harms, and so to enhance the scope of public discussion by significantly narrowing the range of speech that could constitutionally be suppressed. For this reason Holmes and Brandeis contended that the Constitution prohibited the regulation of speech unless there was “reasonable ground to believe that the danger apprehended was imminent.”³

The clear and present danger test assumed that the purpose of regulating speech was to prevent the empirical causation of certain harmful consequences. This assumption nicely fitted the pattern of the criminal advocacy cases in which the test was developed. But the Court soon began to confront circumstances in which the assumption became disorientingly inappropriate. In 1942, for example, the Court in Chaplinski v. New Hampshire addressed the question of whether a state could prohibit “fighting words,” which it defined as those words “which by their very utterance inflict injury or tend to incite an immediate breach of the

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peace." The notion that words could be prohibited because they caused violence was of course comfortably compatible with the intellectual framework of the clear and present danger test, which is no doubt why the Court stressed that fighting words were those that caused "an immediate breach of the peace."

But the notion that words could "by their very utterance inflict injury" is incomprehensible within that framework, for the harm postulated is not contingently caused by the speech, but is rather inherent in the speech itself. As Alexander Bickel has observed, there is "a kind of cursing, assaultive speech that amounts to almost physical aggression, bullying that is no less punishing because it is simulated." One cannot coherently conceptualize the "punishment" caused by such speech in terms of contingent empirical consequences; the reason that such speech is "assaultive" is rather that it is intrinsically offensive. Thus the inquiry framed by the clear and present danger test, oriented as it is toward the measurement of the causal connection between two observable events — the speech and its consequences — is radically inappropriate. If that inquiry evaluates the likelihood of "contingent" harm, the inherent injury inflicted by fighting words concerns instead the assessment of "intrinsic" harm.

The question of intrinsic harm appears in many of the traditionally most problematic areas of First Amendment jurisprudence. For example, the question underlies the justification for proposed regulations of obscenity, defamation, "offensive" speech, speech impinging on privacy, and so-called "pornographic"

5. It is evident that this notion captures the real thrust of the regulation at issue in Chaplinsky. In that case the defendant had called a City Marshall a "damned Fascist" and a "God damned racketeer." Since the addressee of the communication was a law enforcement officer, and since the words were relatively innocuous, the likelihood that the words would cause "an immediate breach of the peace" was very small.
7. The traditional grounds for regulating obscenity is not that it will cause contingent harms, such as rape or sexual violence, but rather that obscenity is itself intrinsically injurious to the moral tone of society. See Henkin, "Morals and the Constitution: The Sin of Obscenity," 63 Col. L. Rev. 391 (1963). For this reason the Court has explicitly rejected the application of the clear and present danger test to the regulation of obscenity. Roth v. United States, 354 U.S. 476, 486–87 (1957).
8. In my judgment the regulation of defamatory speech does not depend merely upon the likelihood of its causing certain contingent effects like damage to reputation, but rather on the intrinsic affront of such speech to the dignity of individuals. See Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," 74 Calif. L. Rev. 691, 707–19, 731–39, (1986). It is no accident, therefore, that the Court has explicitly rejected the application of the clear and present danger test to the regulation of defamation. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).
9. See, e.g., Cohen v. California, 403 U.S. 15 (1971), in which the state attempted to justify the regulation of vile and opprobrious speech on the grounds of its intrinsic offence.
10. See, e.g., Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 489 (1974), in which the state attempted
speech, which has been defined as sexually explicit speech inherently demeaning to women.\textsuperscript{11} Issues of intrinsic harm have proved to be extraordinarily difficult to conceptualize in any way that seems compatible with basic First Amendment principles. To prohibit speech because it seems inherently harmful appears equivalent to prohibiting it simply because we find it undesirable, and nothing could be more inconsistent with the fundamental thrust of the Constitution.

In this paper I shall examine the concept of intrinsic harm as it has appeared in the history of the common law crime of blasphemy in England and America. For centuries the crime was used to censor speech felt to be inherently repugnant to the sensibilities of Christians. By closely examining the history of the crime, I hope to be able to offer some general hypotheses about the relationship between intrinsic harm and the legal protection of speech.

\textit{I.}

To claim that speech is intrinsically harmful is to assert that it is deeply offensive to our sensibilities. The claim is not that the speech causes untoward consequences, but rather that the speech is so inappropriate that persons experience its very utterance as hurtful. The only possible determinants of the "inappropriateness" of such speech are the social norms that define the proprieties of communicative acts. This suggests that the problem of intrinsic harm may be formulated as a question of which social norms the law will enforce.

In analyzing this question we can roughly sketch out three distinct possibilities. The law can place the authority of legal sanctions behind the cultural norms of a dominant group; or it can foster a regime in which diverse groups can escape from such domination and maintain their distinctive norms; or it can ignore group perspectives altogether and recognize only the claims of individuals as against all social norms. I shall call these three options, respectively, assimilationism, pluralism, and individualism. Most legal orders, and certainly the American one, contain elements of each of these three options, and are, for example, individualist with respect to one issue, but assimilationist with respect to another.

Assimilationist law places the force of the state behind the cultural perspective of a particular, dominant group. If a society is relatively homogeneous, so that the values of this group are representative of the society as a whole, assimilationist

to justify the regulation of speech invading privacy on the grounds that such speech was intrinsically "embarrassing or otherwise painful to an individual."

law can be said to be expressive of common community conventions or norms. But if the society is heterogeneous, assimilationist law can instead be understood as an attempt, which may be more or less hegemonic in character, to extend the conventionalist of a dominant group to the larger society.\textsuperscript{12} An example of an assimilationist law is the federal anti-bigamy statute, which was upheld in \textit{Reynolds v. United States}\textsuperscript{13} upon the grounds, \textit{inter alia}, that “[p]olygamy has always been odious among the northern and western nations of Europe.”\textsuperscript{14} Another example is the requirement that school children salute the flag; this was upheld in \textit{Minerville School District v. Gobitis}\textsuperscript{15} upon the grounds that a state can enforce “the traditions of a people” and hence “create that continuity of a treasured common life which constitutes a civilization.”\textsuperscript{16}

In each of these examples, law was used to support the norms of a dominant culture, notwithstanding the dissenting customs of marginal or subordinate groups. From the perspective of these latter groups, assimilationist law can often appear based in “cultural chauvinism, social hypocrisy, and disdain for diversity.”\textsuperscript{17} Assimilationist values, however, have deep roots in American history.\textsuperscript{18} With respect to newly arrived immigrants, for example, the “most prevalent ideology” in the United States has been the concept of “Anglo-conformity,” which “demanded the complete renunciation of the immigrant’s ancestral culture in favour of the behaviour and values of the Anglo-Saxon core group.”\textsuperscript{19} Assimilationist values in the United States are probably best exemplified by the “Americanization” movement which flourished during the early years of the twentieth century.\textsuperscript{20}

Opposed to assimilationist values are those of pluralism, which embrace, rather than reject, group heterogeneity. The concept of pluralism is now in rather bad repute among many legal scholars, for it has come to be associated

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\item For an example of the interplay between expressive and hegemonic functions of assimilationist law in the area of defamation, see Post, \textit{supra} note 8 at 702–3.
\item 98 U.S. 145 (1878).
\item 310 U.S. 586 (1940).
\item \textit{Ibid.} at 597. Three years later the requirement was struck down in \textit{West Virginia State Board of Education v. Barnette}, 319 U.S. 624 (1943).
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with a vision of politics as a “struggle among self-interested groups for scarce resources” in which any concept of the “common good” is “incoherent, potentially totalitarian, or both.” But pluralism has a prior and deeper meaning, one in which the affirmative value of diversity is explicitly acknowledged and celebrated. In 1909, for example, William James used the term in this sense in his Hibbert Lectures, entitled A Pluralistic Universe. Fifteen years later James' literary executor, Horace Kallen, coined the term “cultural pluralism” to express the importance of “manyness, variety, differentiation,” as opposed to what Kallen viewed as the dead uniformity of Americanization. For Kallen:

Democracy involves, not the elimination of differences, but the perfection and conservation of differences. It aims, through Union, not at uniformity, but at variety ... It involves a give and take between radically different types, and a mutual respect and mutual cooperation based on mutual understanding.

The values of pluralism, like those of assimilationism, also have deep roots in American history. They reach back beyond Walt Whitman’s chants in praise of the United States as “the modern composite nation,” the “Nation of many nations,” to the very structure of our federalism, which seeks to the extent possible to preserve the heterogeneity inherent in local and regional differentiation.


23. W. James, Essays in Radical Empiricism and A Pluralistic Universe (1971). James noted that “The pluralistic world is thus more like a federal republic than like an empire or a kingdom.” Ibid. at 274. Harold Laski would later cite this observation as a part of his attempt to define a “pluralist,” as distinct from a “monist,” theory of state sovereignty. H. Laski, Studies in the Problem of Sovereignty (1971) 10, 23–25.

24. H. Kallen, Culture and Democracy in the United States (1924) 43. See Gleason, supra note 20 at 96–97.

25. Kallen, ibid. at 61.

26. W. Whitman, Leaves of Grass and Selected Prose (1950) 37, 518. Whitman also noted, however, that “the fear of conflicting and irreconcilable interiors, and the lack of a common skeleton, knitting all close, continually haunts me.” Ibid. at 466. His fear, one might say, is realized in the conception of value-free pluralism advanced by contemporary political scientists and legal academics. See note 21 supra.

27. Harold Laski, for example, viewed American federalism as exemplifying pluralist values by effecting a “wide distribution of ... sovereign powers” so as to protect a “variety of ... group life.” Laski, supra note 23 at 275. See Rapaczynski, “From Sovereignty to Process: The Jurisprudence of Federalism after Garcia,” 1985 Sup. Ct. Rev. 341, 404–5. Kallen was aware of the analogy between his views and the principles of federalism, noting that “in effect the
If assimilationist law attempts to unify society around the cultural conventions of a single dominant group, pluralist law attempts to create ground rules by which diverse and potentially competitive groups can retain their distinct identities and yet continue to coexist.\textsuperscript{28} These ground rules can range from the requirement of state neutrality respecting conflicting religions, to the enforcement of norms of mutual respect, as exemplified by the group libel statute upheld in \textit{Beauharnais v. Illinois}.\textsuperscript{29} That statute imposed criminal penalties upon any expression that exposed "citizens of any race, color, creed or religion to contempt, derision, or obloquy."\textsuperscript{30} In \textit{Beauharnais} the Court stressed that the need to foster "the manifold adjustments required for free, ordered life in a metropolitan, polyglot community" justified the legal provision of "such group-protection on behalf of the individual."\textsuperscript{31}

Pluralist law rests on two premises: that diversity is to be safeguarded, and that diversity inheres in the various perspectives of differing groups. "In a multi-ethnic society," the historian John Higham has written, "the assimilationist stresses a unifying ideology, whereas the pluralist guards a distinctive memory."\textsuperscript{32} The pluralist guards that memory because for him "individuals can realize themselves, and become whole, only through the group that nourishes their being."\textsuperscript{33} Hence pluralism "stresses the rights of the ethnic group over the rights of the individual."\textsuperscript{34} Thus in \textit{Beauharnais}, as Justice Black dryly noted in dissent, the Court in effect held that the value of providing group protection overrode that of safeguarding an "individual's choice" to speak.\textsuperscript{35}

This focus on group rights, which is intrinsic to pluralist law, has always been controversial in America because it appears "to predetermine the individual's fate by his ethnic group membership."\textsuperscript{36} Americans have traditionally attached

United States is in the process of becoming a federal state not merely as a union of geographical and administrative unities, but also as a cooperation of cultural diversities, as a federation or commonwealth of national culture." \textit{Culture and Democracy in the United States, supra} note 24 at 116.

28. Pluralism has been defined as aspiring toward "a plurality of cultures with their members seeking to live together in amity and mutual understanding and mutual cooperation, but maintaining separate cultures." R. Havighurst, \textit{Anthropology and Cultural Pluralism: Three Case Studies, Australia, New Zealand and USA} (1974) 23.

29. 343 U.S. 250 (1952).


35. 343 U.S. at 270 (Black, J., dissenting).

great importance to the image of the independent individual capable of transcending his particular social or ethnic background; "we strongly assert the value of our self-reliance and autonomy." Thus if pluralist law protects the ability of groups to maintain their distinctive identities, law based upon the value of individualism focuses instead on the protection of individuals vis-à-vis groups. If pluralism celebrates the diversity of cultures, individualism acclaims instead the diversity of persons.

The distinction between the two forms of law is illustrated by the case of *Wisconsin v. Yoder,* where the Supreme Court held that the Free Exercise Clause of the First Amendment prohibited the State of Wisconsin from requiring that Amish Children attend public or private schools until the age of 16. In his opinion for the Court, Chief Justice Burger noted that such a requirement would pose the "very real threat of undermining the Amish community and religious practice as they exist today," and would require the Amish to "either abandon belief and be assimilated into society at large, or ... to migrate to some other and more tolerant region." Burger thus construed the First Amendment as protecting the conventions of the Amish community and as shielding that community from forced assimilation into the dominant culture.

Justice Douglas argued in dissent, however, that the Constitution safeguarded instead the rights of individual Amish children to choose whether or not to become part of the Amish community. Douglas viewed religion as "an individual experience," and hence interpreted the First Amendment as guaranteeing the rights of children "to break from the Amish tradition."

It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.

39. The Amish refused to permit their children to attend school after they had completed the eighth grade. *Ibid.* at 207.
42. *Ibid.*
For Burger the "amazing world of diversity" to be protected inhered in the continuing traditions of the Amish community; for Douglas that diversity was constituted instead by the decisions of individuals to embrace or reject those traditions. Burger's opinion rests on the values of pluralism; Douglas's on the values of individualism.\footnote{Of course there are many situations where the values of individualism and pluralism do not conflict. This was the case, for example, in the years immediately following \textit{Brown v. Board of Education}, 347 U.S. 483 (1954), when the goal of desegregated education was consistent with both individualist and pluralist values. In later years, however, the question of affirmative action has separated those who view the antidiscrimination principle as grounded in the protection of individuals, from those who view it as founded in the protection of groups. \textit{Compare}, e.g., \textit{Wygant v. Jackson Board of Education}, 106 S.Ct. 1842, 1859 n.8 (1986) (Opinion of Powell, J.), with \textit{ibid.} at 1860 (Marshall, J., dissenting).}

The contrast between individualism and assimilationism can appear equally stark. The latter upholds the cultural values of the dominant group; the former protects the rights of individuals to dissent from those values. In \textit{Gobitis} the Supreme Court supported the values of assimilationism by upholding the right of a majority to require dissenters to swear allegiance to the flag, and to the cultural perspective for which it stood. But three years later the Court dramatically reversed itself, and in \textit{West Virginia State Board of Education v. Barnette}\footnote{319 U.S. 624 (1943).} issued the classic defense of "intellectual individualism": "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion..."\footnote{\textit{Ibid.} at 641–42.} \textit{Barnette} rested squarely on the individual's autonomous "right to differ as to things that touch the heart of the existing order,"\footnote{\textit{Ibid.}} a right that seems deeply incompatible with assimilationist law.

We are thus in a position to draw rough distinctions between three different kinds of law: assimilationist, pluralist, and individualist. Each postulates a different kind of relationship between social norms and the legal order. Assimilationist law strives toward social uniformity by imposing the customs of a dominant cultural group; pluralist law safeguards diversity by enabling competing groups to maintain their distinct norms; individualist law rejects group values altogether in favour of the autonomous choices of individuals.

It is tempting to view these three kinds of law as sharply distinct and mutually exclusive. But this is not the case. There are in fact subtle and fascinating connections between them. Moreover, as I hope to demonstrate in the next section on the history of the crime of blasphemy, each kind of law leads to a very different concept of intrinsic harm.
II.

In England, blasphemy was a common law crime. It was one of the four branches of criminal libel, the other three being obscenity, sedition, and defamation. All four branches of libel sought to ensure that speech did not violate established conventions of respect and propriety. The particular province of blasphemy was to protect the respect due to God, which according to Blackstone could be breached "by denying his being or providence; or by contumelious reproaches of our Saviour Christ."

A.

Although blasphemy and obscenity originally shared a common concern with regulating the profane, blasphemy was in its early years most closely allied to sedition, since attacks on God and religion were viewed as equivalent to attacks on the social order. The classic statement in this regard was by Sir Matthew Hale in Taylor's Case, in which the defendant was accused of "uttering... divers blasphemous expressions, horrible to hear, (viz) that Jesus Christ was a bastard, a whoremaster, religion was a cheat; and that he neither feared God, the devil, or man." Hale ruled:

that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable... For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that

47. See Spencer, "Criminal Libel — A Skeleton in the Cupboard (1)," 1977 Crim. L. Rev. 383. English law sometimes recognizes a technical distinction between the crime of blasphemy, which is oral, and the crime of blasphemous libel, which is written. Nothing turns on this distinction, however, and I shall ignore it in this essay.


51. 1 Vent. 293 (K.B. 1676).

52. Ibid.
Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.\textsuperscript{53}

Underlying Taylor’s Case lay “the plain principle that the public importance of the Christian religion is so great that no one is allowed to deny its truth.”\textsuperscript{54} Proceeding on this principle, the law of blasphemy was successfully used to prosecute individuals for publishing such works as Thomas Paine’s Age of Reason,\textsuperscript{55} Shelley’s poem “Queen Mab,”\textsuperscript{56} and the popular Discourses of an early Deist, a minister and Fellow of Sydney Sussex College at Cambridge, which urged that the miracles reported in the New Testament be interpreted allegorically, rather than literally.\textsuperscript{57} In 1841 the English Commissioners on Criminal Law could report “that the common law of England punishes as an offence any general denial of the truth of Christianity, without reference to the language or temper in which such denial is conveyed.”\textsuperscript{58}

Until quite recently, then, the crime of blasphemy was a paradigmatic example of assimilationist law. Christians were the dominant group in England, and blasphemy made Christian beliefs “parcel of the laws” in England. Christian beliefs rested on the asserted truth of certain theological and doctrinal propositions, and denial of those propositions was deemed intrinsically harmful as a “subversion of law.” Not only did the law of blasphemy offer no protection to subordinate or minority religions,\textsuperscript{59} but even non-Anglican Christian denominations were “protected only to the extent that their fundamental beliefs [were] held in common with the established Church.”\textsuperscript{60}

About the middle of the nineteenth century, however, the crime of blasphemy began to change. One can detect the transformation in Lord Denman’s charge to the jury in Reg. v. Hetherington:\textsuperscript{61}

Now, gentlemen, upon the question whether it is blasphemous or not I have this general observation to make... namely, that the question is not


\textsuperscript{55} Ibid. at 471–73; Rex v. Williams, (1797) 26 Howell’s St. Tr. 653 (K.B.); Rex v. Carlile (Richard), (1819) 1 St. Tr. N.S. 1387; Cf. Rex v. Carlile (Mary), (1821) 1 St. Tr. N.S. 1033.

\textsuperscript{56} Reg. v. Moxon, (1840) 4 St. Tr. N.S. 693.

\textsuperscript{57} Rex v. Woolston, (1729) 1 Barn. K.B. 162. See Bonner, supra note 53 at 34–35.

\textsuperscript{58} Commissioners on Criminal Law, Sixth Report (1841) 83. See Nokes, supra note 50 at 70–74.

\textsuperscript{59} R.v. Gathercole, (1838) 2 Lewin 237, 254.

\textsuperscript{60} Working Paper No. 79, supra note 50 at 82. This parochialism remains true even of contemporary English blasphemy law. Ibid.

\textsuperscript{61} (1841) 4 St. Tr. N.S. 563, 590–91.
altogether a matter of opinion, but that it must be, in a great degree, a question as to the tone, and style, and spirit, in which such inquiries are conducted. Because, a difference of opinion may subsist, not only between different sects of Christians, but also with regard to the great doctrines of Christianity itself; and... even discussions upon that subject may be by no means a matter of criminal prosecution, but, if they be carried on in a sober and temperate and decent style, even those discussions may be tolerated, and may take place without criminality attaching to them; but that, if the tone and spirit is that of offence, and insult, and ridicule, which leaves the judgment really not free to act, and, therefore, cannot be truly called an appeal to the judgment, but an appeal to the wild and improper feelings of the human mind, more particularly in the younger part of the community, in that case the jury will hardly feel it possible to say that such opinions, so expressed, do not deserve the character [of blasphemy] affixed to them in this indictment.

For Lord Denman the crime of blasphemy did not inhere so much in the substance of what was said, as in the style in which it was said. It was not blasphemous to deny “the great doctrines of Christianity,” so long as that denial was advanced “in a sober and temperate and decent style.” But if Christianity were attacked in a “tone and spirit... of offence, and insult, and ridicule,” then the attack was blasphemous. Attacks that were not civil were irrational; they did not leave “the judgment... free to act,” and were instead appeals “to the wild and improper feelings of the human mind.”

In 1883 Lord Coleridge made explicit this altered view of blasphemy. Whatever the “old cases” may have said, he explained, “the mere denial of the truth of Christianity is not enough to constitute the offence of blasphemy.” To be blasphemous, expression must instead be “calculated and intended to insult the feelings and the deepest religious convictions of the great majority of the persons amongst whom we live.” The point of blasphemy was thus to prevent “outrages to the general feeling of propriety among the persons amongst whom we live,” and hence “if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy.”

The crime of blasphemy in England at the present time is essentially a restatement of Coleridge’s view of the law. It is a view that has been attacked as

64. *Ibid.* at 231.
resting upon a highly vulnerable distinction between style and substance. The concept of assimilationist law, however, is helpful in casting Coleridge's view in a more sympathetic light, for the concept invites us to focus on the nature of the social group which Coleridge's view was designed to protect. Coleridge had in effect altered the group whose norms were to be implemented by blasphemy law. That group was no longer Christians holding allegiance to certain theological and doctrinal propositions; it was instead Christians holding allegiance to "the decencies of controversy." The members of this latter group, whom Coleridge explicitly understood to comprise "the great majority of the persons amongst whom we live," saw no intrinsic harm in the mere fact of religious difference, but were outraged when Christianity was not treated with the respect which they felt it deserved. They understood this respect to be coincident with the requirements of reason: blasphemy would permit attacks on Christianity if cast

67. Peter Jones, for example, has observed in a perceptive article that "Coleridge intended his ruling in 1883 to imply" the distinction "between matter and manner." Jones, "Blasphemy, Offensiveness, and Law," 10 B.J. Pol. S. 129, 141–42 (1980).

    The intention behind the distinction is plain. Granted that it is possible to distinguish manner from matter, a law restricting only forms of expression need not prevent the assertion of any substantive point of view. The usual conflict between freedom of opinion and prevention of offense is therefore largely avoided...

    The failing of the matter-manner distinction is that it supposes that statements are capable of more or less offensive formulations which are nevertheless identical in meaning. The manner of an assertion is treated as though it were so much verbal wrapping paper whose features had no bearing upon the content of the parcel. In certain cases this assumption may not be unjustified... More often, however, manner and matter are so integrally related that it is impossible to distinguish the offensive manner from the offensive matter of a statement.

    Ibid. at 142–43.

68. Writing in 1883, James Fitzjames Stephen could observe:

    [T]he present generation is the first in which an avowedly open denial of the fundamental doctrines of the Christian religion has been made by any considerable number of serious and respectable people. For many centuries the maintenance, or even the expression of opinions, suspected or supposed to involve a denial of the truth of religion in general, was regarded in the same kind of light as high treason in the temporal order of things... A man who did not believe in Christ or God put himself out of the pale of human society; and a man who on important subjects thought differently from the Church, was on the high road to disbelief in Christ and in God, for belief in each depended ultimately upon belief in the testimony of the Church. In our own days the physical sanctions of the law are so much more frequently appealed to, and are so much more effective than its moral sanctions, that it is only by an effort that we can understand the horror with which our ancestors regarded a man who held opinions which, in their view, were inconsistent with a real hearty assent to the principles on which they believed all human society, whether spiritual or temporal, to repose.

    Stephen, supra note 54 at 438.
in the form of “an appeal to the judgment,” but it would penalize such attacks if they constituted instead “an appeal to the wild and improper feelings of the human mind” which did not leave “the judgment really... free to act.”

To the modern eye, it is clear that the concept of reason underlying the reformulation of blasphemy law is not universal, but rather the product of the mores of a particular culture. It is perhaps more generally true that in matters of deep human meaning, like religion (or sex), what counts as reason, as an appeal to the judgment rather than to “the wild and improper feelings of the human mind,” is ultimately determined by the propieties of discourse. That is why the purported style/substance distinction proposed by Coleridge can not sustain close logical scrutiny: in the end the distinction rests not on logic at all, but instead on a specific cultural sense of “the decencies of controversy.”

The particular group whose values these “decencies” were meant to reflect is in retrospect apparent enough. In 1930, during parliamentary debates on a proposed law to abolish the common law crime of blasphemy, it was repeatedly observed that “What it really comes to is that, where opinions are strongly held by an educated man, those opinions will be expressed in a way which the law cannot touch, while those expressed by an uneducated man, simply because he is uneducated, will come under the penalties of the law.” After Coleridge, then, the crime of blasphemy reflected the conventions of educated and “respectable” Christians. Because the crime imposed these conventions on society as a whole, it remained deeply assimilationist in character and aspiration. The violation of these conventions was deemed to create the intrinsic harm of “outrage” to religious feelings and convictions.

There were no successful prosecutions for blasphemy in England between the

69. The law was never passed. See Working Paper No. 79, supra note 50 at 29.
70. 234 Parl. Deb., H.C. (5th Ser.) 535 (remarks of Mr. Kingsley Griffith). See also at 499:

We have writers today who can commit the offence of blasphemy with impunity, if the offence of blasphemy is an attack on the Christian religion. There are men like Sir Arthur Keith, Mr. H.G. Wells, Mr. Bertrand Russell, Mr. Aldous Huxley and others who are able to attack the Christian religion without any danger whatever of their being prosecuted, while poor men, expressing the same point of view more bluntly and crudely, expose themselves to fine and imprisonment. That is a thoroughly unsatisfactory state of the law. After all, if one concedes the right to attack religion... one has to concede to the people who care to do this thing the right to choose their style of doing it. Different styles are needed for different circumstances and different audiences. I do not suppose the kind of style that would go down in a select circle in the West End would be effective amongst the democracy of the East End.

(Remarks of Mr. Thurtle). See also ibid. at 558 (remarks of Mr. Lansbury).
71. Ibid. at 565 (remarks of Mr. Scrymgeour).
72. The crime continued to protect the sensibilities of Christians, but not of Jews or Moslems, or other religious minorities. Outrageous assaults on Judaism or Islam were not blasphemous.
years 1922–1977. In the 1970’s, however, interest arose in the potential use of blasphemy to check cultural manifestations that were viewed as objectionable. Ultimately this interest came to focus on a magazine entitled Gay News, which in 1976 published a poem by Professor James Kirkup entitled “The Love that Dares to Speak its Name.” The poem described in explicit detail acts of sodomy and fellatio with the body of Christ immediately after his death, and ascribed to Christ during his lifetime promiscuous homosexual practices with the Apostles and with other men. The poem was accompanied by a drawing of the Crucifixion featuring the body of Christ in the embrace of a Roman centurion. In 1977 a private prosecution for blasphemy was brought by Mrs. Mary Whitehouse, an English moral crusader, with the result that Denis Lemon, the editor of Gay News, was sentenced to nine months imprisonment (suspended for 18 months), and fined £500, and that Gay News Ltd., the publisher of the magazine, was fined £1000.

The case attracted widespread notice, and eventually wound its way up to the House of Lords. The actual grounds of the appeal were framed in terms of the rather technical question of whether the prosecution ought to have demonstrated a specific intent to blaspheme on the part of the defendants. But the real underlying issue was whether the crime of blasphemy in 1979 in England was an embarrassment that should be discouraged. In 1979 the Law Lords, by

76. *Ibid.* at 616 (per Lord Scarman).
77. For a biographical study of Mary Whitehouse, who had previously been involved in anti-obscenity campaigns, see M. Tracey & D. Morrison, *Whitehouse* (1979). Whitehouse stated that “When the [Kirkup] poem arrived on my desk, and I read it, I had one overwhelming feeling that this was the recrucifixion of Christ with 20th century weapons — with words, with obscenities, and if I sat there and did nothing I would be a traitor. It was just as simple as that.” Anderson & Rose, “Who the Hell Does She Think She Is?” 3 *Poly L. Rev.* 13, 15 (interview with Mary Whitehouse).
78. *Lemon, supra* note 75 at 660. An account of the trial may be found in N. Walter, *Blasphemy in Britain: The Practice and Punishment of Blasphemy, and the Trial of Gay News* (1977). The trial judge concluded his charge to the jury by telling the jurors “to answer the following questions about the poem: ‘Did it shock you when you first read it? What was your immediate reaction? Would you be proud or ashamed to have written it? Would you read it aloud to a Christian audience, and if you did would you blush? What reaction would you expect from an audience of fellow Christians?’” *Ibid.* at 16. After the verdict the trial judge is reported to have “expressed his hope that, as a result of the case, the pendulum of public opinion would swing back towards a more healthy climate.” Adam, “Protecting our Lord,” *New Statesman*, 15 July 1977 at 74.
80. Along the way the Court of Appeal upheld the fines but quashed the sentence on the grounds that “We do not consider this an appropriate case for a prison sentence.” [1979] Q.B. 10, 30.
a 3 to 2 vote, upheld the conviction. The decisive and to American eyes most compelling opinion was by Lord Scarman. What makes his opinion particularly pertinent for this discussion, however, is its fascinating attempt to envision a law of blasphemy based on pluralist, rather than assimilationist, foundations.

Scarman was willing to assume that Lemon could establish "that he had no intention to shock Christian believers" and had published "the poem not to offend Christians but to comfort practising homosexuals by encouraging them to feel that there was room for them in the Christian religion." But Scarman deemed Lemon's intent to be irrelevant, because the whole point of blasphemy law was "to protect religious feeling from outrage and insult." Scarman rejected the notion that blasphemy was criminal because of its tendency to cause a breach of the peace. It is "a jejunе exercise," he said, "to speculate whether an outraged Christian would feel provoked by the words and illustration in this case to commit a breach of the peace. I hope, and happen to believe, that most, true to their Christian principles, would not allow themselves to be so provoked." The issue for Scarman was thus intrinsic harm, not the possibly contingent harm of violence or social disorder. For this reason Scarman held that "[t]he character of the words published matter; but not the motive of the author or publisher." If in Kirkup's poem "the argument for acceptance and welcome of homosexuals within the loving fold of the Christian faith [had] been advanced 'in a sober and temperate... style,'... there could have been no criminal offence committed." But for Scarman "the jury (with every justification) [had] rejected this view of the poem and drawing."

Scarman's rejection of the requirement of intent flowed from his understanding of "legal policy in the society of today"; in his view that policy should strive to find a "way forward for successful plural society." Although Scarman, as a judge, was unable to change the fact that the common law crime of

83. Lemon, supra note 75 at 660.
84. Ibid. at 658.
85. Ibid. at 662.
86. Ibid. at 665.
87. Ibid. at 662.
88. Ibid. The weakness of the style/substance distinction is starkly displayed in Lemon, for, as Jones rightly points out, "when the expression of a view occurs in a literary work — as in the Gay News case — the mode of expression is essential to the enterprise. To say that Kirkup should have produced an academic speculation on Christ's attitude toward homosexuality after the manner of Bishop Montefiore would be to say that he should not have written a poem." Jones, supra note 67 at 143.
89. Lemon, supra note 75 at 664-65.
blasphemy protected the religious feelings only of Christians, he wanted to use the *Lemon* case as a platform to urge that the common law be changed by legislation to protect the sensibilities of all religious groups; his repudiation of the requirement of intent was integral to that ambition. He made this powerfully clear at the very outset of his opinion:90

My Lords, I do not subscribe to the view that the common law offence of blasphemous libel serves no useful purpose in the modern law. On the contrary, I think that there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians... In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule, and contempt... When [in the nineteenth century] Lord Macaulay protested in Parliament against the way the blasphemy laws were then administered, he added (*Speeches, p. 116*): “If I were a judge in India, I should have no scruple about punishing a Christian who should pollute a mosque”... When Macaulay became a legislator in India, he saw to it that the law protected the religious feelings of all. In those days India was a plural society: today the United Kingdom is also.

I have permitted myself these general observations at the outset of my opinion because, my Lords, they determine my approach to this appeal. I will not lend my voice to a view of the law relating to blasphemous libel which would render it a dead letter, or diminish its efficacy to protect religious feeling from outrage and insult. My criticism of the common law offence of blasphemy is not that it exists but that it is not sufficiently comprehensive. It is shackled by the chains of history.

*Scarman* offers a compelling vision of blasphemy law transformed by statute into an instrument of pluralism. If at common law blasphemy protected only the hegemonic status of Christianity, *Scarman* wants the law altered to ensure that distinct and competing religious groups treat each other with sensitivity. He believes it imperative “[I]n an increasingly plural society” to use the law to enforce respect for the “religious beliefs, feelings and practices of all.”91

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91. *Scarman* might have had in mind Prevention of Incitement to Hatred Act, which had been enacted in 1970 for Northern Ireland, and which provided:

A person shall be guilty of an offence under this Act if, with intent to stir up hatred against, or arouse fear of, any section of the public of Northern Ireland —

(a) he publishes or distributes written or other matter which is threatening, abusive or insulting, or
Reformulated in this way, the law of blasphemy would be part of a pluralist legal framework designed to maintain the integrity of diverse religious groups. 92

Scarman's opinion represents a major and thoroughgoing effort to re-establish blasphemy on a pluralist, rather than assimilationist basis. For our purposes it is important to note two fascinating consequences of Scarman's effort. First, the nature of the intrinsic harms recognized by the law is deeply transformed. In the common law crime of blasphemy the only intrinsic harms actionable at law were those deemed to be suffered by the dominant group of respectable Christians. Under Scarman's proposed reformulation of the crime, however, the norms reflected by the law would be altered, so that intrinsic harms deemed to be suffered by all religious persons would be legally cognizable.

Second, Scarman's ability to reformulate the law according to pluralist values has distinct and intrinsic limitations. Scarman's opinion necessarily rests on the crucial (and unobtrusive) assumption that all religious groups in a "plural society" can be measured by a common metric of "outrage and insult." As we have seen in our analysis of mid-nineteenth century blasphemy law, however, the metric used by Scarman itself reflects particular cultural values, and there is no reason whatever to assume that in modern England diverse religious groups in fact share this same sense of the "decencies of controversy." Scarman's opinion therefore implicitly presupposes that religious groups should tolerate disagreement if conducted in a temperate and sober style. The norms of the dominant group thus retain their hold on the definition of the "offense" which the law will recognize as the intrinsic harm of blasphemy. Despite the purity of Scarman's pluralist intentions, therefore, his effort paradoxically rests on a quintessentially assimilationist value.

(b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting;
being matter or words likely to stir up hatred against, or arouse fear of, any section of the public in Northern Ireland on grounds of religious belief, colour, race or ethnic or national origin.


92. As Scarman well knew, blasphemy law, reinterpreted in this fashion, would be consistent with the pluralist values of the recently enacted provisions of The Race Relations Act of 1976, 2 Pub. Gen. Acts 1723, ch. 74, 70, which Scarman was himself instrumental in proposing, and which essentially imposed criminal penalties for incitements to racial hatred. See I.A. MacDonald, Race Relations: The New Law (1977) 137. Scarman in fact explicitly drew the analogy between his vision of blasphemy and the Race Relations Act. Lemon, supra note 75 at 665.
This conclusion suggests that assimilationism and pluralism may not be mutually exclusive concepts. Efforts to establish pluralism will always shade, at one point or another, into assimilationism. The respect for diversity, upon which pluralist law is based, may well be contrary to the beliefs of some groups; pluralist attempts to create a legal framework based upon the value of toleration may well end up imposing this value upon groups who do not share it. Even if diverse groups do share some basic notions of respect and tolerance, the definitive meaning of these values will be given uniform and authoritative interpretation by legal institutions, and hence fail to reflect the various meanings that these values will have to different groups in a heterogeneous society.\textsuperscript{93} Indeed, at the most basic level, the definition and recognition of who and what will count as a group within a pluralist legal framework will necessarily rest upon assimilationist values. Should Scarman’s view of blasphemy become the law of England, for example, English judges would face the uncomfortable, assimilationist task of determining which practices and beliefs count as “religions,” and hence which “feelings” the crime of blasphemy ought to protect.

Pluralist law, then, must at some level remain anchored to assimilationist law; the distinction depends, so to speak, upon the length of the chain, upon the degree and manner in which the value of diversity penetrates the law.

\textbf{B.}

If assimilationism ultimately bears a close connection to pluralism, it bears a considerably more complex relationship to individualism, as can be illustrated by an analysis of the American First Amendment. In American constitutional law, the notion of using blasphemy to protect religious sensibilities, even if interpreted in the liberal, pluralist manner of Lord Scarman, is virtually inconceivable. Harry Kalven, for example, has written that the “religion clauses” of the First Amendment have provided the basis for “a first great principle of consensus,” which is that “\textit{In America, there is no heresy, no blasphemy.}”\textsuperscript{94} Kalven attributes the uniqueness of the American case to our constitutional language. In this paper, however, I will argue that the difference is better

\textsuperscript{93} That is why the anthropologist Paul Bohannan defines “colonial law” as law which stems from a “unicentric power system” in societies with two or more cultures. Bohannan, “The Differing Realms of Law,” 7 \textit{Am. Anth.} 33, 38–39 (1965). Bohannan’s definition implies that pluralist law will always be hegemonic in character. But this implication may or may not be true, depending upon the extent to which a heterogenous society experiences what John Rawls has called “overlapping consensus.” The presence of such a consensus may permit assimilationist ground rules for pluralist interaction to in fact serve an expressive rather than hegemonic function. See TAN at 12, supra; Rawls, “The Idea of an Overlapping Consensus,” 7 \textit{Oxf. J. Leg. St.} 1 (1987).

explained by reference to the deep individualism of contemporary American constitutional law. That individualism utterly transforms the kinds of intrinsic harms which American law can constitutionally recognize.

American law has not always been individualist in nature. In fact if one examines the fate of blasphemy laws in the individual states during the period prior to the 1920's, one finds that although blasphemy prosecutions were challenged as unconstitutional because of state guarantees of religious freedom that were strikingly similar in form to the First Amendment,95 courts uniformly interpreted these state constitutional guarantees as permitting the imposition of criminal penalties for blasphemy.96 The first and most influential case was People v. Ruggles,97 in which a defendant in New York was charged with blasphemy for having stated that "Jesus Christ was a bastard, and his mother must be a whore."98 The New York Constitution of the time had not only "discarded religious establishments,"99 but had also, in order "to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind," guaranteed "that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever hereafter be allowed within this State to all mankind."100 Nevertheless the New York Supreme Court, in an opinion by Chief Justice Kent, had no difficulty in upholding the conviction:101

The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by an expression in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of Mahomet or of the grand Lama; and for this plain reason, that the case assumes that we are a

95. During the period prior to the 1920's, of course, the First Amendment had no application to the States. By convention the first case taken to indicate a contrary conclusion is Gistow v. New York, 310 U.S. 296 (1925).
96. See Annotation, "Offense of Blasphemy," 14 A. L. R. 880, 883–85 (1921). In fact the first reported case to strike down a blasphemy statute was in 1970. See State v. West, 263 A.2d 602 (Md. App. 1970). In his work Constitutional Free Speech Defined and Defended in an Unfinished Argument in a Case of Blasphemy (1919), however, Theodore Schroeder reprints an unpublished lower court opinion issued in Kentucky in 1895 sustaining on state constitutional grounds a demurrer to an indictment for blasphemy. Ibid. at 60–64.
97. 8 Johns 290 (N.Y. 1811).
98. Ibid. at 291.
100. N.Y. Const. Art. 38 (1777).
101. Ruggles, supra note 97 at 295.
Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those imposters.

Kent distinguished between the formal establishment of religion through the compulsory power of the state, and the voluntary adoption by the “people of this state, in common with the people of this country, [of] the general doctrines of Christianity, as the rule of their faith and practice.” To “scandalize” Christ was punishable not because it defied established religion, but because it was “a gross violation of decency and good order” that struck “at the root of moral obligation, and weaken[ed] the security of the social ties.”

Ruggles set a pattern that would continue for over 110 years. Prosecutions for blasphemy, in its full assimilationist form, were deemed permissible, notwithstanding constitutional rights of religious freedom. It was not until quite recently that legal professionals have become convinced that prosecutions for blasphemy would violate such constitutional rights. A 1968 conviction for blasphemy in Maryland, for example, was set aside two years later when a Maryland appellate court held that the state’s 1723 blasphemy statute was “contrary to the terms of the First Amendment’s prohibition of laws respecting the establishment of religion or prohibiting the free exercise thereof.” At the time of the Maryland decision, Delaware was in the process of prosecuting for blasphemy two teenagers who had called Jesus a bastard. The teenagers had been jailed and were free on bail pending trial. In light of the Maryland decision, the Delaware attorney general’s office decided to drop charges. In 1971 in Pennsylvania, two shopkeepers were charged with blasphemy for displaying a poster reading: “Jesus Christ — Wanted for sedition, criminal anarchy, vagrancy, and conspiracy to overthrow the established government. Dressed poorly; said

102. Ibid. at 294, 296.
103. Ibid.
104 See, e.g., Updograph v. Commonwealth, 11 S. & R. 394 (Pa. 1824); State v. Chandler, 2 Del. 553 (Ct. Gen. Sess. 1837); State v. Mockus, 120 Me. 84, 113 A. 39 (1921). Apart from Ruggles the most famous American blasphemy decision was Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206 (1838), in which Chief Justice Lemuel Shaw upheld a conviction for blasphemy against state constitutional challenge. The Kneeland case is discussed in Levy, ed., Blasphemy in Massachusetts: Freedom of Conscience and the Abner Kneeland Case (1973); Commanger, “The Blasphemy of Abner Kneeland,” 8 N.E.Q., March 1935, at 29. The same blasphemy statute that was at issue in Kneeland was also used in 1928 to prosecute Horace Kallen for blasphemy. N.Y. Times, Aug. 29, 1928, at 8, col. 1. In addressing a memorial meeting for Sacco and Vanzetti, Kallen “said that ‘if Sacco and Vanzetti were anarchists, so was Jesus Christ, Socrates,’ and several others.” Ibid. Two years previously, the same Massachusetts blasphemy statute had been the basis for a notorious prosecution of Anthony Bimba. See W. Wolkovich, Bay State “Blue” Laws and Bimba (1973); Z. Chafee, “The Bimba Case,” in The Inquiring Mind (1974); Note, supra note 49 at 708–9.
106. The case is discussed in Levy, supra note 49 at 337.
to be a carpenter by trade; ill-nourished; associates with common working people, unemployed and bums. Alien; said to be a Jew.” After the intervention of the American Civil Liberties Union, the county prosecutor asked that the local magistrate drop the charges.  

In each of these cases, local attempts to enforce blasphemy statutes were checked by legal professionals who believed that the statutes were contrary to the religious freedom guaranteed by the First Amendment. The literal terms of the First Amendment could not have dictated this belief, for these terms are no different than those present in state constitutions which had consistently been construed to allow the punishment of blasphemy. It is rather that the religion clauses of the First Amendment are now interpreted in the light of very different assumptions and values than those informing earlier interpretations of equivalent language in state constitutions. It is important, therefore, to explore the values that we bring to contemporary constitutional adjudication. These values are well displayed in the important case of Cantwell v. Connecticut, one of the

107. Ibid. at 337–38.
108. Indeed in 1897 the United States Supreme Court had in dicta interpreted the First Amendment in the same manner as state courts had interpreted equivalent state constitutional provisions, stating flatly that the Amendment did not extend constitutional protection to “the publication of... blasphemous or indecent articles, or other publications injurious to public morals or private reputation.” Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

The Court’s interpretation was at the time consistent with the opinion of authoritative commentators. Thomas Cooley, for example, had written in 1868 that

The constitutional liberty of speech and of the press... implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for the publication, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offence...

T. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union (1868) 422.

And Joseph Story, in interpreting the religion clauses of the First Amendment, had flatly stated that

It is impossible for those who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the special duty of government to foster and encourage it among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one’s conscience.


Story stressed that “in a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis, on which it must rest for its support and permanence.” Ibid. at 662. He concluded that “The real object of the [first] amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment...” Ibid. at 664.

first and most influential decisions to apply the the religion clauses of the First Amendment to the states.

In that case Jesse Cantwell, a Jehovah's Witness, entered a Catholic neighbourhood and played for two Catholic men a phonograph record which contained an attack on all organized religious systems as "instruments of Satan and injurious to man," and which further singled "out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows." Cantwell was charged and convicted of the common law crime of inciting breach of the peace.

Chief Justice Kent would certainly have viewed Cantwell's vitriolic attack on organized religion as "an abuse of" the right of free exercise of religion. Indeed in Ruggles he had said that to construe the guarantee of "free exercise and enjoyment of religious profession and worship" in the New York Constitution "as breaking down the common law barriers against licentious, wanton, and impious attacks upon Christianity itself, would be an enormous perversion of its meaning." And Lord Scarman would certainly have deemed Cantwell's conduct to be intolerable "for a successful plural society," for Cantwell had demonstrated a complete lack of respect for the religious sensibilities of others by gratuitously insulting and offending members of the Catholic religion.

It was open, therefore, to the United States Supreme Court to interpret the First Amendment in light of either the assimilationist values of Kent, or the pluralist values that Scarman thirty-nine years later would attempt to use to reconstruct the common law crime of blasphemy. But the Court took neither of these paths. Instead it set aside Cantwell's conviction, and offered this important gloss on what it called "the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged":

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these

110. Ibid. at 309.
111. Ibid. at 300.
112. Ruggles, supra note 97 at 290, 296.
113. 310 U.S. at 307.
liberties are, in the long view, essential to enlightened opinion and right
court on the part of the citizens of a democracy.

The essential characteristic of these liberties is, that under their shield
many types of life, character, opinion and belief can develop unmolested
and unobstructed. Nowhere is this shield more necessary than in our own
country for a people composed of many races and of many creeds.114

According to Cantwell, then, the First Amendment should be interpreted in a
manner consistent with the presence of a heterogeneous society. Kent had
brought to his construction of the New York Constitution the assumption that
the values of Christianity provided "that moral discipline, and... those principles
of virtue, which help to bind society together."115 The Court in Cantwell, on the
other hand, brought to its reading of the First Amendment the assumption that
society consists "of many creeds" and is divided by "sharp differences," in which
"the tenets of one man may seem the rankest error to his neighbor." The
presupposition of social uniformity that underlies Kent's assimilationist vision
seems to have vanished from Cantwell's account, which is much closer in spirit
to the "plural" society described by Scarman. But for Scarman social diversity
implied the enactment of pluralist values, so that the law could be used to protect
religious differences from "vilification, ridicule, and contempt." For Cantwell,
on the other hand, the fact of diversity led in exactly the opposite direction,
toward the constitutional requirement that the law tolerate "exaggeration,"
"vilification," and even "excesses and abuses."

It is not difficult to perceive the line that divides Cantwell from Ruggles; but
what distinguishes Cantwell from Scarman's pluralist vision? The key lies in the
fact that while Cantwell focuses its analysis on the religious speaker, Scarman
concentrates instead on the offence suffered by the religious audience. There is a
deply significant assymetry in these approaches: the speaker stands alone,
whereas the outrage of the audience is generic. For Scarman the law does not
respond to the outrage of offended individuals, but to the common outrage of the
members of a religion whose group identity has been attacked. Cantwell
explicitly rejects this focus on the group, choosing instead to use the law as a
"shield" so that "many types of life, character, opinion and belief can develop
unmolested and unobstructed." In essence Cantwell is prepared to require that
established religious groups, who have already developed their distinctive
caracter and beliefs, suffer offence so that new religious groups can be born.116

114. Ibid. at 310.
115. Ruggles, supra note 97 at 294.
116. In 1940, the year in which the Cantwell opinion was issued, the sect of Jehovah's Witnesses was
only 68 years old, having been founded in 1872 by Charles Taze Russell in Allegheny,
Underlying Cantwell, then, lies the classic American commitment to “voluntarism,”117 to the belief that “religion is ... a matter of individual choice.”118

The contrast between Scarman and Cantwell might thus be formulated in this manner: for Lord Scarman, religious heterogeneity presupposes a social world in which diverse religious groups already exist as part of a stable and established social fabric, whereas for Cantwell, religious diversity presupposes instead a social world in which the dynamic of individual choice causes new religious groups to continually evolve. Thus while both Scarman and Cantwell recognize the existence of groups, Scarman assumes that the function of law is to protect the integrity of established and stable groups, whereas Cantwell assumes that the function of law is to protect the capacity of individuals to form new and different groups. The individual is the locus of value for Cantwell; the group is the locus of value for Scarman. The distinction between the two, in short, is that between individualism and pluralism. Unlike the gradient that holds together pluralism and assimilationism, the distinction between Cantwell and Scarman is quite sharp, for it turns on the more or less dichotomous determination of whether the law should be used to enforce the norms of groups as against individuals, or to protect instead the prerogatives of individuals as against groups.119

Pennsylvania. E.S. Gaustad, Historical Atlas of Religion in America (1962) 115–16. In the 1930s the Jehovah’s Witnesses began actively to proselytize for new membership, and the sect experienced “sudden progress after 1940, all but eclipsing the development of the first sixty years.” Ibid. at 118.

117. See P. Miller, The Life of the Mind in America (1965) 40–43.

118. Bellah, supra note 37 at 225.


The sharp break between pluralism and individualism is somewhat surprising, especially given the consensus among social scientists that individual experience is in fact largely social and intimately shaped by group identifications. The reasons for the break can perhaps be illuminated by George Herbert Mead’s distinction between the “I” and the “me.” Mead believed that the structure of individual identity was at root social in nature. “What makes the organized self is the organization of the attitudes which are common to the group. A person is a personality because he belongs to a community, because he takes over the institutions of the community into his own conduct.” G.H. Mead, On Social Psychology (A. Strauss ed. 1964) 22. But Mead also understood that there is no such thing as a completely “institutionalized individual,” ibid. at 239, because of the inherent and irreducible capacity of persons to modify or transcend those aspects of themselves that are socially given. As a consequence Mead distinguished between the “I” and the “me”:

The “I” is the response of the organism to the attitudes of the others; the “me” is the organized set of attitudes of others which one himself assumes. The attitudes of the others constitute the organized “me,” and then one reacts toward that as an “I.”

Ibid. at 230. The “I” is spontaneous, unpredictable, and formless; the “me” is structured and
In interpreting the Constitution in light of the values and assumptions of individualism, Cantwell speaks for what unquestionably has become the great tradition of First Amendment thought. Of course there have been dissenting voices in that tradition, but it is fair to characterize cases like Beaulharas and Yoder as ripples on the surface of a deeper and more powerful current of individualist decisions. If this individualism is sharply demarcated from pluralism, it bears a considerably more complex relationship to assimilationism. Paradoxically, individualism and assimilationism are discontinuous, but mutually interdependent. As Charles Taylor has observed, the concept of “the autonomous, self-determining individual,” which lies at the heart of individualism, presupposes a particular “social matrix” and depends for its continuing vitality upon “a certain type of culture”:120

The crucial point here is this: since the free individual can only maintain his identity within a society/culture of a certain kind, he has to be concerned about the shape of this society/culture as a whole. He cannot... be concerned purely with his individual choices and the associations formed from such choices to the neglect of the matrix in which such choices can be open or closed, rich or meagre. It is important to him that certain activities and institutions flourish in society. It is even important to him what the moral tone of the whole society is — shocking as it may be to libertarians to raise this issue — because freedom and individual diversity can only flourish in a society where there is a general recognition of their worth. They are threatened by the spread of bigotry, but also by other conceptions of life — for example, those which look on originality, innovation, and diversity as luxuries which society can ill afford given the need for efficiency, productivity, or growth ...

static. Mead believed that each was a fundamental and indispensable aspect of the self. He associated the “me” with “social control,” and the “I” with “self-expression.” Ibid. at 238, 240. “Taken together,” Mead said, “they constitute a personality as it appears in social experience. The self is essentially a social process going on with these two distinguishable phases.” Ibid. at 238.

The sharp contrast between individualist and pluralist law can be understood as flowing from the distinction between these two phases of the self. Pluralist law upholds the values associated with the “me,” which is to say with group norms and attitudes that form the structure of personality; whereas individualist law safeguards the values associated with the “I,” which is to say with the potential for individual modification and transcendence of that structure. The values of the “me” and of the “I” are necessarily complementary and interdependent, but because they are also in tension the law must on occasion choose to cast the authority of the state behind one aspect of the self or the other.

Taylor's analysis suggests that at certain points the desires of autonomous individuals may very well clash with the kind of general culture necessary to support autonomous individualism, and at those points individualist law will in effect be transformed into assimilationist law.121  

This transformation is visible in Cantwell, which notes two different assimilationist justifications for the imposition of limitations on individual freedom of speech. The first justification refers to "statements likely to provoke violence and disturbance of good order."122 Cantwell states that "[w]hen clear and present danger of riot disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."123 Thus, individual expression can be prevented and punished when it functions as the cause of contingent harms that can be regulated to protect the assimilationist values of public safety and order. By its evocation of the "clear and present danger" test, Cantwell indicates that speech can be penalized only when there is a very strict causal connection between speech and subsequent action or harm. The strictness of the causal nexus is in part designed to maximize the amount of speech constitutionally exempt from the regulation of assimilationist values.

The second limitation on individual expression proposed by Cantwell refers to "profane, indecent, or abusive remarks directed to the person of the hearer."124 Cantwell states that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."125 This limitation on speech refers not to the contingent harms that form the foundation of the clear and present danger test, but rather to the intrinsic harms that can arise when speech becomes the instrument of "personal

121. Using the perspective of George Herbert Mead, see note 119 supra, we might say that while it is coherent for the law in any particular case to promote the values of the "I" as against the "me," it is incoherent for the law to attempt systematically to disable the "me." This is because the "I" and the "me" are necessarily complementary; neither could exist without the other. It is thus meaningless to speak of the potential for individual transcendence without simultaneously speaking of the structure that is to be transcended. Since the "me" is the internalization of the larger social organization within which the self is situated, laws that constitute and enforce that organization are in essence supportive of the "me." From Mead's perspective, therefore, individualist law will always transform at one point or another into either assimilationist or pluralist law. Of course law which strives to maximize individualist values will also strive to eliminate particular and unequal restraints on individuals, and hence take the form of assimilationism rather than pluralism.

123. Ibid. at 308.
124. Ibid. at 309.
125. Ibid. at 309–10.
abuse.” Cantwell expresses this concept of intrinsic harm by reference to a distinction similar to that used in mid-nineteenth century English blasphemy law. English law distinguished between “sober and temperate” expression, which was addressed to the “judgment,” and expression infected by a tone of “offence, and insult, and ridicule,” which was addressed to “the wild and improper feelings of the human mind.” Cantwell offers an analogous distinction between speech that communicates “information or opinion,” and speech that is “profane, indecent, or abusive.”

Just as the style/substance distinction in English blasphemy law did not describe inherent properties of speech, but rather reflected cultural values relating to the “decencies of controversy,” so the distinction offered by Cantwell should not be understood as describing inherent properties of language, but rather as expressing the cultural values underlying individualism.126 For Cantwell the general culture necessary to sustain autonomous individualism rests on norms of interpersonal respect, and these norms in turn function as assimilationist values that limit the autonomous speech of particular individuals. “Profane, indecent, or abusive” speech violates these norms.

Cantwell’s understanding of these assimilationist norms, however, has been strikingly influenced by Cantwell’s underlying individualism. The norms recognized by Cantwell differ fundamentally from the assimilationist norms implicit in the English cases. Individuals in the English cases have the right to take offence at communications that insult their particular status, as, say, practicing Christians.127 But the norms of respect upheld in Cantwell are quite different, for integral to that decision is the notion that the Constitution prohibits Connecticut from punishing Jesse Cantwell’s speech simply because it is outrageous to the Catholicism of his audience. Instead the law can constitutionally intervene to censor only those statements which consist of “abusive remarks directed to the person of the hearer.”128 The specific social status of an audience is immaterial to these kinds of statements, because every person has the right not to be personally abused.

Thus even when it explicitly recognizes assimilationist conventions that define intrinsic harm, Cantwell does so in a manner that follows the logic of individualism to its natural conclusion. Cantwell enforces a constitutional symmetry between speaker and audience: it allows the law to redress audience outrage only when that outrage stems from characteristics potentially shared by

126. From a strictly logical point of view, “profane, indecent, or abusive remarks” communicate opinion and information, just as do other kinds of statements.
127. Or, under Searman’s pluralist reformulation of blasphemy law, as practicing members of any religious group.
all individuals, rather than from characteristics that are constitutive of particular social or religious groups.\textsuperscript{129}

The assimilationist values underlying \textit{Cantwell} are thus real and palpable, and they do sustain the recognition of intrinsic harms. But these values, and consequently the intrinsic harms they define, are extremely thin, for there is only so much that all Americans potentially share in common. The abstract and rather bloodless nature of these harms, however, is the price Americans pay for having a First Amendment grounded in individualism, rather than pluralism.

\textit{III.}

Our brief tour through the history of blasphemy law illustrates that the concept of intrinsic harm depends upon the existence of social norms that define appropriate speech. For example, in England after the nineteenth century, blasphemy law enforced those norms defining the “decencies of controversy,” because it believed that that the violation of those norms would constitute a calculated outrage to the feelings and deep religious convictions of practicing Christians. In the United States after \textit{Cantwell} and \textit{Chaplinski}, the law, although constitutionally disabled from intervening to protect the customs that defined the religious feelings of specific groups, was nevertheless empowered to enforce those social norms establishing rules of interpersonal respect, because the “personal abuse” or “fighting words” uttered in violation of those norms were deemed “by their very utterance [to] inflict injury.”

The relationship between social norms defining appropriate speech and the concept of intrinsic “harm” has been illuminated by the American sociologist Erving Goffman. In his early article on “The Nature of Deferece and Demeanor,” Goffman theorized that social interactions were founded on rules of “deference and demeanor.”\textsuperscript{130} Rules of deference define conduct by which a person conveys appreciation “\textit{to a recipient of} this recipient, or of something of which this recipient is taken as a symbol, extension, or agent.”\textsuperscript{131} Rules of demeanor define conduct by which a person expresses “to those in his immediate presence that he is a person of certain desirable or undesirable qualities.”\textsuperscript{132} Norms of deference and demeanor constitute “rules of conduct which bind the


\textsuperscript{130} E. Goffman, \textit{Interaction Ritual} (1967) 47.

\textsuperscript{131} \textit{Ibid.} at 56.

\textsuperscript{132} \textit{Ibid.} at 77.
actor and the recipient together" and "are the bindings of society." By following these rules, individuals both confirm the social order in which they live and constitute "ritual" and "sacred" aspects of their own identity. The price of this process, however, is that each "individual must rely on others to complete the picture of him of which he himself is allowed to paint only certain parts."

Each individual is responsible for the demeanor image of himself and the deference image of others, so that for a complete man to be expressed, individuals must hold hands in a chain of ceremony, each giving deferentially with proper demeanor to the one on the right what will be received deferentially from the one on the left. While it may be true that the individual has a unique self all his own, evidence of this possession is thoroughly a product of joint ceremonial labor, the part expressed through the individual's demeanor being no more significant than the part conveyed by others through their deferential behavior toward him.

According to Goffman, then, violations of rules of deference and demeanor create two distinct kinds of harms. The first harm is individual. Because individual personality is constituted in significant aspects by the observance of rules of deference and demeanor, violation of these rules damage that personality. This damage is intrinsic because a healthy personality is defined as one constructed through the mutual observance of these rules. Breaking "the chain of ceremony" denies an individual the capacity to become "a complete man" and hence "disconfirms" his very "self." The personal shock and outrage of Mary Whitehouse exemplifies the first kind of harm.

The second harm is social. Rules of deference and demeanor define not only the personalities of individual persons, but also the substance and contours of a community. They establish the obligations and hence the content of community life. For Chief Justice Kent, for example, respect for the Christian religion was constitutive of "decency and good order." Hence blasphemy endangered that order by definition, and was regarded with "horror" as an intrinsic harm to the community.

133. Ibid. at 90.
134. Ibid. at 91.
135. Ibid. at 84–85.
136. Ibid. at 51.
137. See supra note 77.
138. J. Stephen, supra note 54 at 438.
139. In the nineteenth century Francis Holt used the style/substance distinction to identify how blasphemy could cause this different kind of intrinsic harm to the community:

[T]he law does not prohibit reasonable controversy even upon fundamental subjects, so long as it is conducted with a tone of moderation, which shews that argument is the
Goffman's analysis suggests that virtually every legal system will recognize some form of intrinsic harm. The contrary could only be true in a legal system that had abandoned any effort to uphold social norms of interpersonal respect and community definition. The history of blasphemy suggests, however, that the law will recognize very different kinds of intrinsic harm depending upon whether it is designed to implement assimilationist, pluralist, or individualist values.

Assimilationist law will be freest in its recognition of intrinsic harms to either individual personality or the corporate definition of community identity. Pluralist law, however, because it is imbued with the values of diversity and tolerance, will be much more cautious in recognizing harms to community identity. It will focus instead on redressing intrinsic harms to group identities; it will not understand such groups as constitutive of the community, but rather as comprising sub-units within a larger and more eclectic society. Individualist law will be the most constrained in its recognition of intrinsic harm. This is true for two reasons.

First, individualist law will only recognize intrinsic harms to individual personality, generically understood. It will thus ignore those social norms that establish particular group identities. Second, individualist law will strive to maximize individual freedom, and hence de-emphasize those social norms which constrain such freedom. Thus a common theme in American First American jurisprudence is that "one man's vulgarity is another's lyric."140 As a consequence individualist law will tend to suspend those ordinary norms of civility and interpersonal respect which distinguish vulgarity from civility,141 except in those cases where the enforcement of such norms is seen as absolutely

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only purpose; the writer abstaining from language and terms which are abusive and passionate, and, therein, indecorous towards the establishment, and offensive to the consciences of individuals.

What is argumentative may be very properly left to be replied to by argument; what is passionate, and therein a disturbance of the proper economy of the state, cannot be so safely passed over to a defence by similar weapons. Such a sufferance would be the endurance of brawls. When the law is moved against such writers, it is not persecution: it is a defence of the public tranquillity and decency.

F. Holt, The Law of Libel (1816) 70–71. For Holt "public tranquillity" literally subsists in the public observance of rules of "decency"; breaches in decorum are thus equivalent to "brawls." "Passionate" speech is the same as action because Holt understands the social order to inhere in decorum, and decorum to depend upon the verbal exercise of civility and dispassionate reason. Even today the Corpus Juris Secundum defines the term "breach of the peace" to include "all violations of the public peace or order, or decorum." 11 C.J.S. "Breach of the Peace" 1 (1938 & Supp. 1987).


essential for the maintenance of the kind of general culture necessary to sustain autonomous individualism. This explains why in American First Amendment jurisprudence there is almost always controversy regarding legal recognition of the intrinsic harms caused by speech like fighting words, or obscenity, or defamation, or privacy, for it can always be argued that the culture of autonomous individualism can continue to thrive even in the absence of the enforcement of the social norms that define these deviant forms of speech.

In its most extreme form, assimilationist law is incompatible with any recognizable system of freedom of expression. The two most fundamental purposes for such a system are to enable individuals to search for and to contest hypotheses about the truth, and to inform the electorate in a democratic nation about all issues pertinent for governance. If assimilationist law enshrines a particular notion of community identity, and defines all dissent from that notion as creating an intrinsic harm, these purposes are frustrated.

A system of freedom of expression is compatible, however, with either Scarman’s pluralism or Cantwell’s individualism. Both forms of law permit persons to search for truth and to discuss public issues pertaining to governance. The issue which divides the two, however, is whether a system of freedom of expression should serve an additional purpose, which is that “of assuring individual self-fulfillment.”  This purpose is central to American First Amendment jurisprudence, perhaps because group life in the United States is so fluid and unstable and permeated with notions of voluntarism. We have made a value of this insecurity, and have chosen in our First Amendment law to refuse to enforce norms defining group identities so that “many types of life, character, opinion, and belief can develop unmolested and unobstructed.” But in England, where group life is more stable and associated with status rather than choice, freedom of expression has developed along pluralist lines. This difference should not be characterized as a question of the existence or non-existence of a system of freedom of expression, but rather as a question of whether such a system should be designed to advance the values of group or of individual life.

The concept of intrinsic harm is one way in which the law operationalizes this difference. In England the law of blasphemy brands speech demeaning to particular religious sensibilities as inherently injurious. In the United States, after Cantwell, this use of intrinsic harm is constitutionally forbidden. It is not that the speech is any less hurtful in America; it is only that the law will not enforce the rules of deference and demeanor which create that hurt. This suggests that the question of intrinsic harm is always an issue of which rules of deference and demeanor the law will uphold. In making that determination, we

can expect the law to be influenced not only by considerations of policy regarding the purposes and functioning of a system of freedom of expression, considerations which have been well-canvassed by contemporary constitutional theory, but also by the underlying cultural options of assimilationism, pluralism, and individualism.