ELLIOTT VISCONSI

The Invention of Criminal Blasphemy: *Rex v. Taylor* (1676)

On April 26, 1675, in the village of Guildford in Surrey, yeoman John Taylor got himself in trouble with the law. His crime was blasphemy, and he was to be haled into court at Westminster for making and repeating the following inflammatory statements, taken from the text of his indictment:

> Christ is a whore-master, and religion is a cheat, and profession is a cloak, and they are both cheats, and all the earth is mine, and I am a king's son, my father sent me hither, and made me a fisherman to take vipers and I neither fear God, devil, nor man, and I am a younger brother to Christ, an angel of God and no man fears God but an hypocrite, Christ is a bastard, God damn and confound all your Gods, Christ is the whore's master.[1]

To be sure, these are wild and upsetting words to a practicing Christian. Taylor's utterances, moreover, seem to be deliberate blasphemies, words of "contumelious reproach" intended to revile the Christian religion and cast aspersions upon God, Jesus Christ, and the doctrine of the Trinity. According to one later (unsympathetic) commentator, Taylor had long been a religious troublemaker, having formed his own wicked and gleefully carnal sect of pseudo-Ranters called the Sweet Singers of Israel during the Interregnum.[2] His case was brought to the House of Lords on May 11, where it was presented in the wake of a broader discussion of antiblasphemy legislation.[3] Since the Restoration, the Lords had had a long tradition of failed legislation touching atheism, profaneness, and impiety—immediately before notice of Taylor's indictment, they had formed a special committee to draft a stand-alone bill "for the suppression of the horrid sins of atheism, prophaneness, and blasphemy, with such severe punishments as may make the Bill effectual."[4] The juxtaposition of these pieces of business cannot have been an accident, and it seems likely that Taylor was brought forward

ABSTRACT This article provides an account of the emergence of the common law jurisdiction over blasphemy, arguing that the blasphemy laws first developed in *Rex v. Taylor* had an explicitly secular purpose. Instead of understanding this crucial decision as an emblem of the early modern fusion of church and state, this article reads Sir Matthew Hale's axiom that "Christianity is parcel of the laws of England" as a step toward the emergence of an English civil religion. / Representations 103. Summer 2008 © The Regents of the University of California. ISSN 0734–6018, electronic ISSN 1533–855X, pages 30–52. All rights reserved. Direct requests for permission to photocopy or reproduce article content to the University of California Press at http://www.ucpressjournals.com/reprintinfo.asp.
DOI: 10.1525/rep.2008.103.1.30.

as an exemplary case, perhaps at the instigation of John Morley, Bishop of Winchester.[5]

In the company of witnesses from Guildford, on May 14 Taylor "was brought to the Bar . . . for blasphemous words uttered by him, [whereupon] he owned the said words (being read)." To ensure that Taylor was not a lunatic (and thus eligible for a different sanction), the lords send him to Bedlam to be examined. He was to be

> kept there with bread and water, and such due bodily correction as may conduct to his recovery from the madness wherewith at present he seems to be possessed. And if the said John Taylor shall not prove to be mad, but persist in the said blasphemies it is further ORDERED that the said keeper of Bedlam . . . do cause the said John Taylor to be delivered to be proceeded against according to the Law that Case made and provided.[6]

There was no provision in this charge for the potentially therapeutic comfort and advice of clergy. On Thursday May 20, the Lords received information that Taylor was indeed sane and hard-hearted: they were informed, presumably by the keeper of Bedlam, that "John Taylor is not mad, and yet persisteth in his blasphemies." And so the Lords bound him over for criminal prosecution at King's Bench, crown side, where he would come before, among others, Lord Chief Justice Matthew Hale.[7]

There are no extended accounts of Taylor's trial at King's Bench early in 1676; what remains are fragmentary recollections and two short reports by Sir Peyton Ventris and Joseph Keble.[8] There must have been little doubt of the verdict, since Taylor had professed his blasphemy proudly before the Lords, although Ventris records Taylor trying to wriggle out of culpability by pleading context:

> Being upon his trial, he acknowledged speaking the words, except the word bastard; and for the rest, he pretended to mean them in another sense than they ordinarily bear (viz.) whoremaster. i. e. that Christ was master of the whore of Babylon, and such kinds of evasion for the rest. But all the words being proved by several witnesses, he was found guilty.

With Taylor's criminal guilt established, Lord Chief Justice Hale provided a brief judicial opinion on the case, which was to become one of the most influential pieces of common-law jurisprudence to emerge from the later Stuart period:

> And Hale said, 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 in this court. For, to say religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.[9]

Keble's account is similar, although less easy to follow—and hence somewhat less popular with later judges building upon these foundations:

> Hale Ch.J These words though of ecclesiastical cognizance, yet that religion is a cheat, tends to dissolution of all government, and therefore punishable here, and so of contumelious reproaches of God, or the religion establisht; which the court agreed and adjudged. An indictment lay for saying the Protestant religion was a fiction for taking away religion, all obligation to government by oaths &c ceaseth, and Christian religion is a part of the law itself, therefore injuries to God are as punishable as to the King.[10]

In both reports we can see Hale inventing the jurisdiction of King's Bench on the fly, asserting the by no means uncontroversial view that blasphemy is a "crime against the laws, State and Government, and therefore punishable in this court." Keble notes a specific mention of the ecclesiastical courts, although High Commission had been abolished in 1640 and never reinstated; the prerogative court of Star Chamber was likewise a thing of the past. The local ecclesiastical courts, restored with the Church of England in 1660, were overburdened, ineffective, and not suited to the kind of public test case that the bishops and Lords sought, in their rearguard effort against "atheism, blasphemy, and profaneness." The obvious claim to make is that Hale's decision arrogates to King's Bench the jurisdiction over crimes of expression that once rested chiefly with Star Chamber and High Commission. On their faces, these reports imply Hale's view of a tight, seamless relation between religion and government; since "Christianity is parcel of the laws of England," then to reproach and subvert Christianity is to undermine the moral foundation of government. It would seem at first glance that blasphemy is sedition, and Hale a puritan bent on theocracy. This overreaching and puritanical Hale is a fictional caricature we encounter later in the writings of Thomas Jefferson, who in an 1807 letter to Thomas Cooper reported his youthful condemnation of Hale as an example of the "pious disposition of the English judges, to connive at the frauds of the clergy." Jefferson blasted Hale for inventing what he saw as this spurious bond between the common law and Christianity: "He quotes no authority, resting it on his own, which was good in all cases in which his mind received no bias from his bigotry, his superstitions, his visions above sorceries, demons, &c. The power of these over him is exemplified in his hanging of the witches."[11]

Although the capital sentence Hale had given to two alleged witches in Suffolk was not available in a misdemeanor action, the court had a range of possible sanctions available.[12] But Taylor was given a relatively light sentence by the standards of the day. In addition to a fine of one thousand marks, he was imprisoned until he could find sureties for his good behavior and also pilloried:

> He shall stand in the pillory in the court yard of the palace of Westminster, for the space of one hour, with a paper affixed upon his head, with these words in writing in large letters, to wit, "*For blasphemous words, tending to the subversion of all government.*" And that said J. T. shall stand in the pillory of Guildford, in the county of Surrey, in the open market place, at the time of market, for the space of one hour, with the like paper affixed upon his head.[13]

Apparently these punishments were executed, although Taylor seems to have remained in prison since he could not locate sureties for good behavior. The next notice of the said John Taylor comes in a 1678 pamphlet offering *A Full and True Account of the Notorious Wicked Life of that Grand Impostor John Taylor; one of the sweet-singers of Israel, who was committed to King's Bench for speaking blasphemy; and on Monday last, was confined close prisoner to the common-side for uttering treason against his majesty.*[14] The author of this account describes Taylor as an unreformed blasphemer, the bellwether of a "company of debaucht viciated atheists," and a wretch whose "horrid and irreverent expressions" traumatize his fellow prisoners, "those poor confin'd creatures, who were by force obliged to be his auditors" (*A Full and True Account,* 4).[15] The occasion for the tract seems to be a new prosecution of Taylor, this time for treason, but the rhetorical aim is clear—Taylor is linked directly to "his brother Muggleton" who had just been tried for blasphemy, and the two of these "grand impostors" are presented as illustrations of impiety and irreligion so wicked that they "ought not only to be excommunicated out of the conversation of all good Christians, but indeed to be excluded the benefits of a civilized commonwealth" (1). That's a strong sanction, certainly more severe than a fine and a few hours in the pillory with a paper on the forehead. The anonymous author does not call for a capital sentence (although that may be one clear implication), and his tone is savage and unrelenting. The pamphlet does illustrate a few new facts about Taylor's case; the author goes to pains to introduce Taylor and his blasphemous history to his readers, suggesting that the trial itself attracted relatively little public notice. Moreover, the notion that Taylor's blasphemies "tended to the subversion of all government"—Hale's judgment—is entirely absent. Indeed, the author suggests that only in prison, after his conviction, did Taylor supplement his blasphemy with treason. There is no further record of the life, trial, or any more horrid blasphemies of John Taylor.

Taylor's notorious life is interesting in its own right as an example of radical religion in the wake of the controversies over toleration in the mid-1670s, but as I have suggested, *Rex v. Taylor* had a much more profound role in the history of Anglo-American jurisprudence than any of the principals could have imagined. In a narrow sense, the case helps us understand the strained relation between church and state in the later Stuart period, but in broader terms, tracking *Rex v. Taylor*'s career in jurisprudence illustrates how

struggles in the 1670s over religious speech and the limits of toleration decisively influenced the history of the relation of church and state in England and especially the United States. The key to all this mythology lies in the famous phrase that many subsequent commentators extracted from Ventris's report, namely Hale's baseless assertion that "Christianity is parcel of the laws of England." Virtually all subsequent blasphemy prosecutions at King's/Queen's Bench, from important eighteenth-century blasphemous libel cases like *Rex v. Woolston* (1729) to the sensational trials of Victorian freethinkers in *Reg v. Ramsey and Foote* (1889), and on up into the most recent blasphemy conviction, the 1979 case *Whitehouse v. Lemon*, have cited Hale's maxim as the basis of common law jurisdiction over supposedly irreligious speech.[16]

In U.S. constitutional law, the influence of Hale's opinion in *Rex v. Taylor* has had an equal significance.[17] The notion that the fundamental laws of the United States are rooted in (or authorized by) Christianity is a perennial claim of the religious right; advocates for this position defend, for instance, the proselytizing display of the Decalogue in courthouses and public schools by arguing that "the Ten Commandments [are] the fundamental legal code of Western Civilization and the Common Law of the United States."[18] But as extreme (and false) as this claim may be, there is a long history of antiblasphemy jurisprudence beginning with the 1811 case *People v. Ruggles*, in which Hale's maxim had been mobilized to describe the fundamentally Christian character of the common law in the United States. In *People v. Ruggles*, Chancellor James Kent asserted the state of New York's criminal jurisdiction over blasphemous speech by citing Hale's opinion in *Rex v. Taylor*, and then continued to suggest that the real danger of blasphemy lay in its tendency to "strike at the root of moral obligation and weaken the security of the social ties."[19] Kent, directly following Hale, proposes what Robert Post has described as an "assimilationist" view of antiblasphemy law, or a law designed to protect the religious feeling of the overwhelming majority from the reproaches and subversive designs of a vocal, dissenting minority. For Kent, since "the morality of the country is deeply ingrafted upon Christianity," it is an abuse of religious freedom "to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community." Gordon Wood has described Kent's decision as informed entirely by an intense fear of social discord, for in his account, the chancellor "despised religious enthusiasm and in private called Christianity a barbaric superstition."[20] From Kent's Hale-reinforced position, blasphemy is not a doctrinal crime but an incitement, a malicious bomb thrown against the foundations of right social order; it may be regulated in such terms, as a political threat and a potential catalyst of violence rather than a crime of belief. Kent's claim that "we are a Christian people" in *Ruggles*, the U.S. version of "Christianity is parcel of the

common law of England," continues to be mobilized by challengers of the separation of church and state as evidence of the national endorsement of Christianity as the basis of fundamental law. But Kent was following Hale explicitly, and, like his later Stuart predecessor, Kent established criminal jurisdiction over blasphemy with a chiefly secular purpose in mind, as a common law remedy for "words and actions, dangerous to the public welfare."

Rex v. Taylor has been long misread, and this misreading has had a significant effect on the history of church-state jurisprudence in England and America. In my account, Hale's assertion of common law jurisdiction over blasphemy had an explicitly secular purpose: were it appropriate, *Rex v. Taylor* would pass the so-called *Lemon* Test laid down by the Supreme Court in 1971.[21] I argue that Hale was far more secular than theocratic, more interested in individual rights than in the sweeping regulation of religious speech, more ameliorationist than retaliatory. In the pages that follow, I focus on how Hale arrived at his oft-quoted opinion and how he imagined the social, political, and legal implications of Taylor's blasphemy. I suggest that Hale sought King's Bench jurisdiction over blasphemy in order to pursue a course of moderation rather than severity, preferring the pillory and the later judgment of God to the scaffold and the capital sentence of men. Tutored by the recent history of blasphemy trials like James Nayler's and the seeming ubiquity of legal retaliations since the Restoration, Hale sought to wrest the punishment of blasphemy away from irregular courts of justice where Leviticus might usurp the place of English law. As such, in Lord Chief Justice Hale we discover neither an accessory to priestcraft nor a pious judge who was, in his opinion, merely expressing the common wisdom of seventeenth-century political and legal thought.[22] Instead, we can see Hale as a key protagonist in the development of a later Stuart form of "civil religion," Jean-Jacques Rousseau's useful term for the collective, nonsectarian (and gently secularized) religious rituals, practices, and symbols of a polity.[23] This new civil religion, which emerges fitfully in later Stuart England, is a blandly secularized form of Protestantism; in it, the state retains the right to distinguish religion from irreligion but withdraws from the specific doctrinal control over individual belief.[24] By describing the secular purpose at the heart of *Rex v. Taylor*, moreover, I argue that Hale's opinion is an early and influential example of the constitutional view that the disentanglement of religion and government is most conductive to peaceful social order.

To discover how Hale imagined and framed his famous dictum in *Rex v. Taylor*, we must look back briefly at the mid-seventeenth-century history of prosecutions for blasphemy and related irreligious crimes. The last execution for heresy, under the 1401 statute *de haeretico comburendo*, had occurred in 1612. Blasphemy was prosecuted irregularly and normally fell under the

jurisdiction of the prerogative courts of Star Chamber and High Commission, which, as we have seen, were abolished in 1640. Between 1640 and 1660, as has been well documented, there was an explosion of religious diversity—the multiplication of radical sects and identity groups such as the Diggers, Ranters, Familists, Muggletonians, and Quakers was ample evidence, to many traditionalists, of impiety run amok and blasphemy at large in the land. In May of 1648, to combat such ubiquitous irreligion without the assistance of prerogative courts, the Long Parliament had passed *An Ordinance for the punishing of Blasphemies and Heresies*, which enumerated a very long list of errors of belief, expression, and personal conduct; to avoid a sentence of "death without benefit of clergy," offenders were permitted to abjure their errors, suffer imprisonment until sureties were found, and suffer other sanctions as appropriate. A second blasphemy would earn the scofflaw a capital sentence without the possibility of recantation.[25] As harsh as this code may seem, it was nearly identical to the sanctions under *de haeretico comburendo* and is relatively forgiving by seventeenth-century standards; English observers might have looked across the seas to the New Haven colony, which had promulgated a series of fundamental laws drawn directly from Leviticus and Deuteronomy. In seventeenth-century New Haven, the following offences were punished with death: murder, sodomy, blasphemy, idolatry, witchcraft, adultery, rape, man-stealing, false witness with felonious intent, insurrection. Children over sixteen who cursed or smote or disobeyed their parents were also to be put to death.[26]

By 1650, back in England, there seemed to be a crying need for a more assertive piece of legislation than the 1648 ordinance: the result was the fire-breathing *Act against Several Atheistical, Blasphemous, and Execrable Opinions, derogatory to the honor of God and destructive to humane Society*. The act fiercely reviles the "divers men and women who have lately discovered themselves to be most monstrous in their opinions and loose in all wicked and abominable Practices," especially insofar as they in words or writing affirm themselves

> or any other meer creature, to be very God, or to be Infinite or Almighty, or in Honor, excellency, Majesty, and Power to be equal, and the same with the true God, or that the true God, or the Eternal Majesty dwells in the Creature, and no where else. [And they] profess that Unrighteousness in persons, or the acts of Uncleanness, Prophane Swearing, Drunkenness, and the like Filthiness and Brutishness are not unholy and forbidden in the Word of God [but] these acts in any person . . . are approved of by God.[27]

As the itemized errors indicate, this act was directed principally at the Ranters and their horrid blasphemies and profane ways of living, but ironically it is a bit less severe than the 1648 ordinance.[28] A criminal convicted under this act would be jailed for six months, after which s/he would need to seek the usual sureties for good behavior; a relapse of atheistical or execrable conduct would

earn the recidivist a sentence of banishment. Only by flouting this banishment would the criminal be "adjudged a Felon and suffer as in case of Felony, without benefit of clergy." The anti-Ranter act of 1650, which mooted the 1648 ordinance, with its narrow definitions of blasphemy and relatively mild sanctions, had the effect of reducing successful blasphemy prosecutions, and it seems not to have fazed those radicals who saw the laws of God and man as happily dispensable.

To be sure, there were during the interregnum many prosecutions for horrid blasphemies, outrageous profanities, and professions of heterodoxy; none captured the public imagination as would the trial, in Parliament, of the charismatic Quaker James Nayler. As reported by the participants, Nayler's sensational trial was a "constitutional crisis," a case in which the normal mechanisms of law fail to provide guidance or clarity. Nayler was a torchbearer for Quakerism, a popular preacher who had with George Fox given the movement much vitality. But after a schism with Fox and a few dodged prosecutions under the act of 1650, Nayler was indicted for blasphemy in 1656 and brought before Parliament, sitting in its judicial capacity.[29] But Nayler had neither spoken nor written blasphemous words—he was, instead, charged with assuming "the gesture, words, honour, worship, miracles . . . names, and incommunicable attributes and titles of our Blessed Saviour."[30] Nayler had flirted with the law many times before, but his entry into Bristol seemed to invite the regulatory attention of the state. Looking in the cut of his beard very much like "the picture usually drawn for our Saviour," Nayler had entered Bristol on horseback while his female followers sung hosannas of "Holy, Holy" and spread their garments before him. These same followers insisted that Nayler was the Son of God, that he had raised a woman from the dead, that his feet deserved kissing, that he was "no more to be called James but Jesus," and suchlike other venerations. Nayler himself had assumed the names and titles of the Son of God and promoted the fiction of his divinity; he caviled and hedged in his examinations before parliament and was found to be a "grand impostor and Seducer of the people" who was clearly guilty of "horrid blasphemy." Parliament debated Nayler's case for ten days, the bulk of which was devoted to resolving whether or not he might be executed for his profane and literal *imitatio Christi.*

The ordinance of 1648 was a dead letter, and the act of 1650 provided only six months imprisonment for blasphemy, but there was a vocal faction in Parliament who pursued a capital sentence for Nayler. Major-General William Goffe, for instance, sought Nayler's execution with a three-pronged appeal to the Bible, the law of nature, and the common law: "It is the law of this nation, of all nations, and written upon every man's heart, that a blasphemer should die." Goffe was mistaken about the law of England, but his chief appeal was to scriptural precedents anyway; in such terms he opined

that "the text says they shall surely be put to death. That magistrate is not worthy to bear the sword that will not bear his highest testimony against those that dishonour Christ in this blasphemous manner."[31] Like his brethren in New Haven (to which he would flee in 1660), Goffe argued that blasphemy was "against the law of God, *Levit.* xxiv, 16 and this law is moral and perpetual, and ought to be obeyed, and this man ought to suffer by it." The resort to Leviticus was a deliberate end-run around English law, which was in any event uncertain in its application to Nayler's case, but there were many adherents to Goffe's unflinching position: as Major-General Boteler put it, "I think that law made against blasphemy in *Leviticus* is as binding to us at this day, as surely as that against murder, which follows in the next verse."[32] Richard Cromwell, among others, was of like mind touching Nayler's punishment.[33]

But happily for Nayler, the Levitican camp did not win the day. Griffith Bordurda made a powerful argument against the imposition of such strict justice, rooting his claims in the Gospel and an accurate understanding of the common law: "I cannot say the text is clear in the Old Testament, for to put a blasphemer to death. However, we are under a Gospel administration, and no rule nor warrant there can be found for his punishment. I know nothing he has professed in the letter, against the law."[34] For Bordurda, Leviticus is a dubious source of legal authority, and as he would continue to claim, Parliament had no legal standing upon which to execute Nayler, who would if executed be denied the possibility of Christian reclamation and given the crown of martyrdom. Nothing good could proceed from such a legislative killing. Bulstrode Whitelock's famous speech in this debate reiterated Bordurda's position and likely kept Nayler from the gallows:

> That the law of God is so, many gentleman have urged the case of the [blasphemer] . . . in the twenty-fourth chapter of Leviticus, because God determined that he should die; and therefore, as their argument is, James Nayler must also die. By the same argument he must be stoned to death; and so must every rebellious son, and even he that gathered sticks on the Sabbath day and the like. Very learned divines are of opinion, and I think it not to be confuted, that no part of the law of the Jews doth bind any other nation, but that part of it only which is moral. The laws of the Israelites were by the wisdom of God suited to the inclinations and dispositions of that people; and others (as there is a great difference between the inclinations of peoples) must have different laws.[35]

Whitelock, following Bordurda and others opposed to execution, rejects the "law of the Jews" as a source of contemporary legal authority. There was no legal basis for Nayler's execution, and to kill him anyway by introducing an antiblasphemy law *ex post facto* would introduce a worrisome precedent and a situation in "which no man can be safe" from such acts of will: "There is no known law in force for the punishment of his offence with death, and

therefore I am not satisfied, that we should by judgment of Parliament condemn him to death; nor to make a new law for the punishment of an offence by death which law was not known nor made at the time of the offence committed."[36]

Cooler heads, and English law rather than Leviticus, prevailed: Nayler was given the "lesser" sanction: he was whipped to the pillory where he wore a paper to itemize his crimes, he had his tongue bored with a hot iron, and his forehead was branded with a large B. Nayler was also ridden facing backwards into Bristol, where he was whipped and pilloried again, and then removed to Bridewell Prison in London. He died in 1660, shortly after his release.

Although Hale did not sit in the so-called Nayler Parliament of 1657, he was an M.P. throughout most of the 1650s and could not have avoided the controversial details of the spectacular trial.[37] Nayler's case was, in fact, of a piece with other high-profile trials of the age, including Christopher Love's 1651 treason trial, in which Hale had served as attorney for the defense. In Love's trial, Hale had been the object of a heated fulmination mouthed by Richard Keble, Lord President:

> There is no law in England but is as really and truly the law of God as any Scripture phrase that is by consequence from the very texts of Scripture; so is the law of England the very consequence of the Decalogue itself; and whatever is not consonant with the Scripture in the law of England is not the law of England; . . . whatsoever is not consonant to the law of God in scripture . . . be it Acts of Parliament, customs, or any judicial acts of the Court, it is not the law of England, but the errour of the party which did pronounce it. . . . All the laws of this nation are Christian, and stand with evangelical truth, as we as with natural reason, and they are founded upon it; and therefore, Master Hale, we are here now to go on by these laws, which are the laws of God, and we must walk in them, as we would walk to heaven.[38]

Such a scripturalist view, which resurfaced in Nayler's trial as elsewhere, was anathema to a common lawyer like Hale, for it abrogated all the traditions, customs, and precedents of English law in favor of the unprofessional reading of scripture. Under such a regime, the common law might be swept away capriciously and replaced with a selectively cobbled-together and rigorous legal fundamentalism. Throughout his career, Hale had a generally tolerant attitude toward Protestant dissenters, and, as Alan Cromartie has argued, his inclination was to defend the rights of individual believers who maintained a sincere and decorous searching after divine grace. Indeed, Hale would plead the cause of thinkers as diverse as Edmund Ludlow and his good friend Richard Baxter.

With *Rex v. Taylor* in his eye, a young Thomas Jefferson would vilify Hale as a bigoted Puritan and an emblem of a repressive age. But a "bigoted Puritan" (of the New Haven style) would have likely collaborated with Keble and

Goffe in asserting a scriptural basis for all English law. Hale went out of his way to repudiate such an erroneous view of the common law. In his mid-60s tract "Considerations Touching the Amendments or Alteration of Laws," Hale defended the common law as the fruit of long experience, as a living tradition vetted by "the wisest thing in the world . . . time" and matched to the customs and habits of the English people.[39] The scripturalist position, as expressed by Goffe and Keble, that "whatever is not consonant with the Scripture in the law of England is not the law of England," is however, a dangerous innovation:

> Although the moral law, or the law of the two tables, were materially universal both in respect of extent and duration, and therefore . . . the divine wisdom fitted it according to the use and extent thereof, both in respect of all people and ages; yet the judicial laws . . . were never in the design of Almighty God intended farther than that people to whom they were given. . . . this indeed is a circumstance that ought to be an ingredient in the due constitution of all laws, that they should be accommodate to the condition, constitution, and exigences of the people to whom they are given. . . . The judicials given to the Hebrews . . . would not be apposite to the state of another people.[40]

Here the Decalogue is the universal moral law, of perpetual duration and extent, and while it may offer a moral foundation, it is not in Hale's view the source or basis of positive or judicial law. Those "judicials" from Leviticus, about which Goffe was so enthusiastic in Nayler's trial, are likewise no basis for English law—they are fitted only to the Jews in a particular historical moment. In Hale's view, the customs and habits of a people frame or fit their legal tradition, which has its roots in the moral law only in blandly abstract terms. Moreover, Hale saw the scripturalist enterprise of the interregnum as motivated in large part by explicitly political aims:

> it was evident that there would have been no one thing as obstructive to the king's return as [law reform], for upon a sudden, all mens properties, estates, and assurances would have much rested upon such new laws, and have engaged that community upon an account of their common interest to have supported that power which introduced those laws, wherein they were so much concerned. And the truth was, this was the great reason, the mystery, why reformation of the laws as so much desired by those then in power; and on the other side, as industriously and warily declined and shifted off by many good and knowing men that were respected in these times.[41]

Whether or not Hale was such an industrious and knowing man during the 1650s, as a judge and lawyer after the Restoration his first loyalty was to the English common law.

With Star Chamber and High Commission left out of the Restoration settlement as unwelcome relics of the last age and the once-robust local ecclesiastical courts increasingly toothless and inefficient, there was a significant

vacuum in jurisdiction over moral crimes.[42] In 1663, with the notorious case of Sir Charles Sedley, King's Bench claimed the lapsed jurisdiction of Star Chamber, newly intending to operate as *custos morum* or the nation's "guardian of morals."[43] Sedley's outrageously obscene behavior on the balcony of a Covent Garden tavern had led to an indictment for "several misdemeanors encounter le Peace del Roy et que fueront al Grand Scandal de Christianity." As Samuel Pepys reports it, Sedley had come

> in open day into the Balcone and showed his nakedness—acting all the postures of lust and buggery that could be imagined, and abusing of scripture and, as it were, from thence preaching a Mountebanke sermon from that pulpitt, saying that there he hath to sell such a pouder as should make all the cunts in town run after him—a thousand people standing underneath to see and hear him. And that being done, he took a glass of wine and washed his prick in it and then drank it off; and then took another and drank the King's health.[44]

Later Sedley was to complain that he was the "first man that ever paid for shitting," which he had in fact done in the direction of the assembled throng. This scurrilous spectacle apparently caused a small riot: "The people became very clamorous, and would have forced the door . . . [and] he and his companions were pelted into the room, and the windows belonging thereunto were broken."[45] Sedley's crime was much broader than blasphemy—the profaning of the Eucharist and the mountebank sermon was but one small part of his famously bad behavior, which was for many observers an emblem of the rampant wickedness of the age, of profanity and atheism run amok. Indeed, as John Spurr has argued, churchmen of the early Restoration routinely imagined themselves in a losing struggle against atheism, profanity, and hedonism.[46] In 1667, the perceived ringleader of atheism, Thomas Hobbes, had dodged a heresy prosecution under *de haeretico comburendo* (which would be repealed in 1677 largely, in my view, because it might be used by a Catholic ascendancy to punish Protestants). But particularly in the late sixties when the nation was in a fire-scarred and penitent mood, Hobbes was running scared, and he began to make a show of attending his local parish church.[47]

Equipped with the expanded view of King's Bench as *custos morum,* when in 1675 Taylor's case came before Hale, the Lord Chief Justice was ready. Tutored by experience and seeking to protect the common law from the potential reappearance of scripturalist hardliners, Hale's claim of jurisdiction over Taylor's case ratified the holding, in Sedley's case, that King's Bench might function as the guardian of morality and right social order. It is clear that Hale saw blasphemous acts as a criminal offence meriting punishment—Taylor was not in any reasonable sense a dissenter punished for heretical ideas. Taylor's case offered Hale a valuable constitutional opportunity; he could defend the

authority of the common law against ambitious and unprofessional reformers even as he offered Taylor a path to reclamation. Put another way, King's Bench, in its capacity as *custos morum,* had a potentially remedial function to accompany its punitive one. In extending the jurisdiction of common law over its rivals, Hale was not overreaching; he was instead inserting himself into a tradition of activist common lawyers that included the great Tudor jurist Christopher St. German and the irascible Sir Edward Coke, each of whom asserted the priority of the common law over the ecclesiastical and prerogative courts. Taylor's sentence, moreover, was explicitly designed to be exemplary—he was to wear a paper on his head in the pillory itemizing his crimes, and he was to be so humiliated in London and at the site of his blasphemies in Guildford. Blasphemy would thus be punished at law, and God's honor would be vindicated from Taylor's contumelious reproaches, but that law would be the law of England and not Leviticus. Taylor's case might be considered a replay of Nayler's blasphemy trial, with the crucial difference that the ameliorationist Hale was in charge, and he was interested in the path of remedy rather than retribution.

That famous utterance of Hale's—that "Christianity is parcel of the laws of England" is, in the context of seventeenth-century antiblasphemy actions, remarkably temperate, bland, or unassertive. Where Keble would hyperventilate that "the laws of England . . . are founded upon evangelical truth," Hale refused to make such a causal assertion, proposing instead a nebulous relation between Christianity and the common law. Since Hale rejected the foundational language so apparently available in such matters, as a principle of legal interpretation, the relation between Christianity and the common law had to be understood in the most general or elastic terms. It is unlikely that the careful Hale, recognizing the precedent and jurisdiction he was creating, would have been careless in his language. Hale proposed instead a general relation between Christianity and the common law, rather like the relation between the moral and positive law in his tract on the *Amendment of Laws.* Christianity might be understood as the moral standpoint of the English people, their collective ethical baseline, but it was not technically the source of any legal jurisdiction. And so, recognizing this crucial but necessary limitation, Hale went out of his way to ascribe a sociopolitical dimension to blasphemy—that it "tended to the subversion of all government," undermined the utility of oaths, and tore the social fabric. Without those added injuries, blasphemy was outside the jurisdiction of King's Bench. On Hale's spectrum of religious offenses, blasphemy lies in the middle. At one end is decorous Protestant dissent, which is to be tolerated as each individual searches for grace with respect and sincerity; at the other end is witchcraft, felonious acts inspired by the devil and directed at real victims. Blasphemy must be sanctioned to defend the honor of God

and the state, but those sanctions should allow the criminal a path toward rehabilitation.

The case was chiefly a victory for the common law and for moderation in the punishment of religious offences. Although it is not quite a piece of liberal jurisprudence, *Rex v. Taylor* is nonetheless a step toward the emergence of a civil religion in the later Stuart period. Hale was far from an antireligious thinker (or a "secularist" in a fully modern sense), but the common law was a secular phenomenon, an adaptive body of positive laws that relied upon flexible accommodations to the present. By fixing jurisdiction over reviling or reproaching God in King's Bench, Hale changed blasphemy from a crime against religion into a crime against public morality. As such, an ideological position or sectarian affiliation could no longer be legally construed as blasphemous; only those irreligious words, deeds, and writings that would dishonor God and offend the overwhelming majority of the people might be deemed blasphemy. This "civil religion," of which Hale was one of the creators, was a relatively comprehensive and nonsectarian Protestantism, assimilationist and secular in tone, nurtured and defended by the English common law.

Hale's opinion in *Rex v. Taylor* has been demonized by freethinkers as the theocratic prejudice of a repressive judge and celebrated by traditionalists as the assertion of the essentially Christian character of the English common law. As such, it has been widely misread. The case is the fountainhead of all subsequent blasphemy jurisprudence and remains good law at present. The dictum that "Christianity is parcel of the laws of England" was ratified in the next major blasphemy conviction, *Rex v. Woolston* (1729), wherein it was held that "whatever strikes at the root of Christianity, tends manifestly to the dissolution of civil government. But the court were careful to say, that they did not intend to include disputes between learned men upon particular controverted points."[48] As in Hale's opinion, blasphemy is to be sanctioned because it is an incitement to violence and a threat to civil order, not because it represents an intrinsic error of religious belief. But beginning in the mid–nineteenth century, *Rex v. Taylor* became a belated emblem of the Tudor-Stuart fusion of church and state; in the liberal imagination, Hale's decision was evidence of the Lord Chief Justice's primitive premodern sensibility, a standpoint at turns credulous, congenial to Stuart absolutism, and overly pious. In the new liberal jurisprudence, blasphemy had to be recast as a crime of style—the manner and the matter of an utterance were to be separated formally, and criminality would only attach to the most noxious of incitements to violence.[49] In *Reg. v. Hetherington* (1840), Lord Denman gives shape to the putative liberal transformation of religious-speech law:

> The question is not altogether a matter of opinion, but that it must be, in great degree, a question as to the tone, and style, and spirit, in which such inquiries are conducted. [If controversies over] the great doctrines of Christianity . . . 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 the younger part of the community, [then criminality is attached].[50]

Building on the protection afforded learned controversialists in *Rex v. Woolston,* Denman proposes that blasphemy is a crime of "tone and spirit," rather than one of improper belief. He sees blasphemy as a malicious appeal to the "wild and improper feelings of the human mind" that "leaves the judgment really not free to act." The scurrilous ridicule expressed by a blasphemer acts upon the untutored passions of the community; it incites violence, suspends individual judgment, and perhaps also solicits imitation. There is no absolute right," Denman continues, to publish "what tends to the general dissolution of society, or the destruction of property" (592).

Subsequently, in the famous trial *Reg. v. Ramsay and Foote* (1889), Lord Coleridge proposes that while Hale's opinion in *Rex v. Taylor* is symptomatic of its repressive age, it is never "so illiberal as it has been the fashion to represent." Hale "did not say that a grave argument against the Christian religion was punishable, but [only] such kind of wicked and blasphemous words were the offence." For Coleridge, Hale's decision anticipates the view he would lay down in his instructions to the jury in *Ramsay and Foote,* namely that blasphemy is a crime of style:

If the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy. . . . I am obliged to say that it is a difference not only in degree, but in kind and nature.[51]

Coleridge omits any mention of incitement or the threat to civil government posed by blasphemy, and indeed proposes that the case at hand is evidence of the progressive emergence of liberal toleration. *Reg. v. Ramsay and Foote* is essentially a free-speech case, and it makes explicit Hale's view that the regulation of religious speech should not be conducted on doctrinal grounds, but rather as a matter of secular civil interest. Coleridge's axiomatic construction was ratified in *Bowman and Ors v. Secular Society* (1919). In that case, Lord Parker of Waddington, for instance, rejects as unfounded the view that it is unlawful to "attack Christianity or deny its fundamental doctrines"; instead he endorses the liberal manner-matter distinction and restores Hale's view that blasphemy may be regulated in order to preserve social order:

To constitute blasphemy at common law there must be such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace. I cannot find that common law has

ever concerned itself with opinion as such . . . so far as such expression is compatible with public order.[52]

This liberal and assimilationist construction of blasphemy law, following Denman and Coleridge, has an openly secular purpose—individual liberty of conscience may not be infringed and religious speech may be sanctioned only when its tone and spirit is designed or very likely to incite violence and undermine the fundamental basis of civil order. Such was the intention behind Hale's decision in *Rex v. Taylor*, an opinion authored in a moment when the threat of widespread social unrest seemed likely to plunge the English people back into the brutalizing violence of civil war, from which they had only recently been released.

In the most recent blasphemy conviction, in *Whitehouse v. Lemon* (1979), also known as the *Gay News* case, Lord Scarman made a historical appeal to expanding the scope of the blasphemy laws to fit the religious pluralism of contemporary Britain. In that case, a Christian busybody called Mary Whitehouse brought an action against Denis Lemon, the publisher of *Gay News*, who in her view had blasphemed by publishing James Kirkup's explicit Christographic poem "The Love that Dares to Speak Its Name." The Law Lords upheld Lemon's conviction on the familiar grounds that the poem constituted an outrage against the deeply held religious feelings of the community, whatever the intended audience for the poem. Lord Scarman used the occasion to appeal for a more expansive and, in his view, more tolerant, version of blasphemy law:

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. The offence belongs to a group of criminal offences designed to safeguard the internal tranquility of the kingdom. 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.[53]

Scarman's objective here is to widen the scope of the blasphemy laws to "protect the religious beliefs and feelings of non-Christians" and in so doing to acknowledge the pluralistic character of contemporary Britain. In order to "safeguard the tranquility of the kingdom" and cultivate "a successful plural society," religion in the broadest sense must be protected from insult, reproach, and attack. Scarman's ambition is explicitly secular, and linked to the European Convention for the Protection of Human Rights and Fundamental Freedoms; he proposes a pluralist expansion of the older assimilationist view of blasphemy law as a remedy against sectarianism and the undue entanglement of church and state. But Scarman's position has failed to advance beyond these jurisprudential proposals.

On 31 January 2006, when it upheld narrowly the Lords' amendments to the Racial and Religious Hatred Bill, the House of Commons rejected the government's attempt to follow through on Scarman's pluralist agenda. The final version of this bill attached criminality only to threatening or inflammatory speech calculated deliberately to stir up religious hatred; it failed to execute the broadly sweeping regulation of any religious speech that might be insulting to the multiple faith traditions of contemporary Britain. The amended Racial and Religious Hatred Act of 2006 licenses *any* religious speech, however vile or insulting, provided it does not stir up hatred or incite violence:

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.[54]

In the struggle against a pluralist "blasphemy law writ large," the old test of tone and style has been swept away.

English common law antiblasphemy jurisprudence has been consistently secular in purpose and execution, from its origins in *Rex v. Taylor* to *Whitehouse v. Lemon*. Common law jurisdiction over blasphemy has been redescribed across generations; in each case, Hale's aim has been upheld. This body of law has illustrated consistently the view that blasphemy may not be construed as a crime of belief, but must be understood as an incitement to violence (sectarian, racial, or otherwise) that might threaten to destroy the foundations of social order. As the failed version of the Religious and Racial Hatred Act of 2006 makes plain, antiblasphemy legislation has now become a tool through which constitutional actors hope to protect the rights of religious minorities by criminalizing injurious disrespect for their varied faith traditions. The idea of a pluralist "blasphemy law writ large," which seems likely to have a chilling effect on religious expression, has met with stiff and eloquent resistance.[55] Not only was the act of 2006 amended in the House of Lords to prevent such protections but also, on 5 March 2008, the House of Lords voted to abolish the blasphemy laws altogether.[56]

Despite the impassioned protestations of Thomas Jefferson and Lord Coleridge, Hale was not a credulous Puritan or a tool of Stuart absolutism. Just as Lord Scarman has done recently, Hale saw a case of blasphemy as a constitutional opportunity to develop a theory of civil religion fitted to the political, religious, and social character of his age.[57] Hale had encountered firsthand the excesses of scriptural fundamentalism, the bloodshed of civil war and the retaliation of the early Restoration, and the enduring threat of socially divisive sectarianism. Scholars have not examined the context of, or

the “original intention” behind, Hale’s famous opinion. In the process, Hale’s chiefly secular purpose has been ignored. Like the liberal nineteenth-century blasphemy jurisprudence descending from it, *Rex v. Taylor* was motivated by the desire to prevent penalties upon opinion and preserve the individual liberty of conscience; it was, moreover, Hale’s chance to combat fundamentalism, preserve the common law, and assert the basic parameters of an emerging later Stuart form of civil religion.

Notes

I would like to thank Robert Post, Steve Justice, Debora Shuger, Jill Campbell, David Manning, and the editorial board of *Representations* for their generous and illuminating responses to this essay. I was fortunate to present this material first at the Bangor Conference on the Restoration, and subsequently to audiences at Yale and Columbia; I am grateful to colleagues in each place for their suggestions and encouragement. Finally, I am happy to thank Alice Wolfram, who provided outstanding research assistance, and the Macmillan Center for International and Area Studies, which kindly provided funds for this and other projects.

1. *The King Against Taylor* (aka *Rex v. Taylor*) in *Pleas of the Crown*, comp. Sir John Tremaine, ed. John Rice, trans. Thomas Vickers (Buffalo, 2003), 1:226–28.
2. *A Full and True Account of the Notorious Wicked Life of that Grand Impostor John Taylor; one of the sweet-singers of Israel, who was committed to King’s Bench for speaking blasphemy; and on Monday last, was confined close prisoner to the common-side for uttering treason against his majesty* (London, 1677), 3.
3. There were fourteen pieces of failed legislation, divided equally between the House of Commons and the House of Lords, between 1660 and 1688 aimed against some combination of “atheism, blasphemy, and profaneness”; see Julian Hoppit, ed., *Failed Legislation, 1660–1800* (London, 1997).
4. *Journal of the House of Lords,* vol. 12: May 11, 1675.
5. I owe the suggestion of John Morley’s involvement to John Spurr.
6. *Journal of the House of Lords,* vol. 12: May 14, 1675.
7. *Journal of the House of Lords,* vol. 12: May 20, 1675. Taylor’s case was mentioned again in the House of Lords twice in the fall, on November 11 and 20. Throughout this article, I am indebted generally to Alan Cromartie, *Sir Matthew Hale, 1609–1676: Law, Religion, and Philosophy* (Cambridge, 1989).
8. Tremaine, *Pleas of the Crown,* 1:226–28.
9. 1 Ventris 293, in *English Reports,* vol. 86: King’s Bench 15, ed. M. A. Robertson and Geoffrey Ellis (London, 1908), 189.
10. 3 Keble 608, 621, in *English Reports,* vol. 84: King’s Bench 13, ed. M. A. Robertson and Geoffrey Ellis (London, 1908), 906, 921.
11. Thomas Jefferson to Joseph Cooper, 1817, in Merrill D. Peterson, ed., *Thomas Jefferson: Writings* (New York, 1994), 1321–29.
12. The witch trials in Suffolk over which Hale presided, and in which he issued a capital sentence, are reported in *A Tryal of Witches at the Assizes Held at Bury*

St. Edmunds for the County of Suffolk: on the tenth day of March, 1664, before Sir Matthew Hale, kt, then Lord Chief Baron of his Majesties' Court of Exchequer (London, 1682).

13. Tremaine, *Pleas of the Crown*, 1:228.
14. *A Full and True Account . . .* (London, 1678). All further references to this tract are noted parenthetically.
15. The bulk of these references are drawn from *A Full and True Account*; the description of a "company of debaucht vitiated atheists" comes from a corresponding pamphlet called *The Sweet Singers of Israel, or The Family of Love* (London, 1678).
16. The most substantial and focused history of English blasphemy law is G. D. Nokes, *A History of the Crime of Blasphemy* (London, 1928). Courtney Stanhope Kenny's excellent article, "The Evolution of the Law of Blasphemy," *Cambridge Law Journal* 1, no. 2 (1922), makes a valuable contribution to the subject, as do more recent studies: Leonard Levy, *Blasphemy: Verbal Offense Against the Sacred from Moses to Salman Rushdie* (New York, 1993); and David Nash, *Blasphemy in Modern Britain: 1789 to the Present* (Aldershot, 1999).
17. Robert Post, "Cultural Heterogeneity and Law: Blasphemy, Pornography, and the First Amendment," *California Law Review* (1988). And for a history of the afterlife of Hale's dictum, see Stuart Banner, "When Christianity Was Part of the Common Law," *Law and History Review* 16 (1998): 27–62.
18. The rider of the display poster is included in *Stone v. Graham* 449 U.S. 39 (1980), the holding upon which has been underscored recently in *McCreary County, Ky. v. ACLU of Kentucky* 545 U.S. 844 (2005). In *Stone v. Graham*, the Supreme Court struck down a Kentucky statute (1978 *Ky. Acts*, ch. 436, § 1 [effective June 17, 1978], *Ky.Rev.Stat.* § 158.178 [1980]), that required the following:

    (1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.
    (2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."
    (3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act.

19. *People v. Ruggles*, 8 Johns. R. 290 N.Y. (1811): "Though the constitution has discarded religious establishments, it does not forbid judicial cognizance of those offences against religion and morality which have no reference to any such establishment, or to any particular form of government, but are punishable because they strike at the root of moral obligation, and weaken the security of the social ties."
20. Gordon Wood, *The Radicalism of the American Revolution* (New York, 1991), 331.
21. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Chief Justice Burger's opinion establishes the three-part "Lemon test" to be applied in Establishment Clause cases:

"In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity'"; *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); [403 U.S. 602, 613]: and finally, the statute must not foster "an excessive government entanglement with religion"; *Walz v. Tax Commission*, 397 U.S. 674 (1970).

22. Nokes, *History of the Crime of Blasphemy*, 56, offers the most forceful and disinterested assertion that Hale's opinion was an expression of the basic norms of the age: "In the seventeenth century, Hale's dictum was literally true: when he said that Christianity was part of the law he enunciated a proposition which was in harmony with both current political and current legal theories." See also Sir William Holdsworth, *History of English Law* (London, 1925), 8:452–55. Jefferson's blistering critique of Hale reappears frequently in the nineteenth century, including in the writings of freethinkers such as George Jacob Holyoake and Hypatia Bradlaugh-Bonner. See George Jacob Holyoake, *The History of the Last Trial by Jury for Atheism in England* (London, 1850), 54–55; and Hypatia Bradlaugh-Bonner, *Penalties Upon Opinion* (London, 1912), 22–26.
23. Here is Jean-Jacques Rousseau: a civil religion is "a purely civil profession of faith of which the Sovereign should fix the articles, not exactly as religious dogmas, but as social sentiments without which a man cannot be a good citizen or a faithful subject. . . . The dogmas of civil religion ought to be few, simple, and exactly worded, without explanation or commentary. The existence of a mighty, intelligent and beneficent Divinity, possessed of foresight and providence, the life to come, the happiness of the just, the punishment of the wicked, the sanctity of the social contract and the laws"; Jean-Jacques Rousseau, *The Social Contract*, ed. and trans. Victor Gourevitch (New York, 1997). The most influential contemporary application of Rousseau's theory is Robert Bellah, "Civil Religion in America," *Daedalus* 96 (1967).
24. In 1697, Parliament passed "An Act for the More Effectual Suppressing of Blasphemy and Profaneness" in order to squash the apparent success of Unitarianism. This legislation creates a religious test for office—any subject having been educated in, or professing, Christianity who denies the Trinity is disabled in law and may be imprisoned upon a second offense. Recanting leads to a full restoration of rights and privileges. The Blasphemy Act is surely evidence of an illiberal and intolerant attitude toward Socinianism in the Parliament of 1697, although it is perhaps most telling that there has never been a criminal prosecution under this act—not in the 1690s and not since. The Blasphemy Act has long been considered a dead letter, as it was perhaps even in its day, and one implication of this fact is that the fitful emergence of a language of civil religion in the later Stuart period is a chiefly extralegislative phenomenon.
25. *Acts and Ordinances of the Interregnum, 1642–1660*, ed. C. H. Firth and R. S. Rait (London, 1911), 2 May 1648, 1133–36.
26. "The Capitall Lawes of Connecticut," in *The Colonial Origins of American Constitutionalism: A Documentary History*, ed. Donald Lutz, (Indianapolis, 1998), 229–31.

27. *Acts and Ordinances of the Interregnum*, 9 Aug 1650, 409.
28. Studies of radical religion in the interregnum and the early Restoration include Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (London, 1972); Jerome Friedman, *Blasphemy, Immorality, and Anarchy: The Ranters and the English Revolution* (Athens, OH, 1987); Richard Greaves, *Deliver Us From Evil: The Radical Underground in Britain, 1660–1663* (New York, 1993); Nigel Smith, *Perfection Proclaimed: Language and Literature in English Radical Religion* (Oxford, 1989); Kristen Poole, *Radical Religion from Shakespeare to Milton* (New York, 2000); and Nicholas McDowell, *The English Radical Imagination: Culture, Religion, and Revolution, 1630–1660* (Oxford, 2003).
29. On the rise of Quakerism and Nayler's status within that movement, see Leo Damrosch, *The Sorrows of the Quaker Jesus: James Nayler and the Puritan Crackdown on the Free Spirit* (Cambridge, 1996).
30. "The Trial of James Nayler," in *A Complete Collection of State Trials*, comp. T. B. Howell, 33 vols. (London, 1809–26), 5:801.
31. Major-General Edmund Goffe, speech in Parliament, as reported in *The Diary of Thomas Burton*, 11 Dec. 1656 (London, 1828), 108–11.
32. *Diary of Burton*, 11 Dec. 1656, 113–14.
33. *Diary of Burton*, 12 Dec. 1656, 120.
34. Ibid.
35. Speech of Bulstrode Whitelock, in *State Trials*, 5:823.
36. Ibid., 5:827.
37. Hale sat in Parliament consistently from 1650 to 1656 and again from 1658 to 1659.
38. "The Trial of Christopher Love," in *State Trials* (London, 1810), 5:238.
39. Sir Matthew Hale, "Considerations Touching the Amendment or Alteration of Laws," in Francis Hargrave, *A Collection of Tracts Relative to the Law of England* (Dublin, 1787), 254–55.
40. Hale, "Considerations," 259.
41. Ibid., 274.
42. On the robustness and the broad social impact of the local ecclesiastical courts in the later sixteenth and early seventeenth century, see Martin Ingram, *Church Courts, Sex and Marriage in England, 1570–1640* (Cambridge, 1987). I concur with Christopher Hill's assessment of the general inefficacy of these local courts after the Restoration; see *Society and Puritanism in Pre-Revolutionary England* (Basingstoke, 1997), 304–61.
43. 1 Sid. 168 Mich 15 Car. II. Here is the formal report in law-French: "Les Justices que coment la ne fuit a cel temps ascun *Star-Chamber* uncore ils voil fair luy de scaver que cest Court Est *Custos Morum* de toute les Subjects del *Roy*."
44. *The Diary of Samuel Pepys*, ed. Robert Latham and William Matthews (Berkeley, 1971), 4:209.
45. "The Life of Mr. Anthony à Wood Written by Himself," in *The Lives of those Eminent Antiquaries John Leland, Thomas Hearne, and Anthony A Wood*, vol. II (Oxford, 1777), 2:187–88. Here is the full account of the escapade:

    > Being all inflamed with strong Liquors, [Sedley and his pals] went into the Balcony, joining to their Chamber-window, and putting down their Breeches, they excrementized in the Street. Which being done, Sedley stripped himself naked, and with Eloquence preached Blasphemy to the People. Whereupon a Riot being raised, the people became very clamorous,

and would have forced his Dore, next to the Street open, but being hindered, the Preacher and his Company were pelted into their Rome or Chamber, and the Windows belonging thereunto broken.

This frolick soon being spread abroad, especially by the fanatical party, who aggravated it to the utmost, by making it the most scandalous thing in nature, and nothing more reproachful to Religion than that, the said Company were . . . indicted of a Riot . . . and fined, and Sr Charles Sedley being fined 500, he made answer, that he thought he was the first man that paid for shitting.

46. John Spurr, *The Restoration Church of England* (New Haven, 1991), 234–78.
47. The potential heresy prosecution of Thomas Hobbes is well served by scholarship, as are his intellectual reception and his anxious personal circumstances after the Restoration; see, for instance, S. L. Mintz, *The Hunting of Leviathan* (New York, 1962); and especially Philip Milton's outstanding study of the subject in "Hobbes, Heresy, and Lord Arlington," *History of Political Thought* 14, no. 4 (1993).
48. *Rex v. Woolston* (1729) Str. 834. Fitzg. 64.
49. Joss Marsh, *Word Crimes: Blasphemy, Culture, and Literature in Nineteenth-Century England* (Chicago, 1998), 200.
50. *The Queen Against Hetherington*, 1840, in *State Trials*, New Series, ed. John Wallis (London, 1892), 4:590.
51. *Reg. v. Ramsay and Foote* (1883), in *Cox's Reports of Cases in Criminal Law*, ed. John Thompson and R. Cunningham Glen (London, 1886), 15:236–37.
52. *Bowman and Ors v. Secular Society* [1917] A. C. 406.
53. *Whitehouse v. Lemon* [1979] 2 WLR 281. See discussion in Post, "Cultural Heterogeneity."
54. The Racial and Religious Hatred Act of 2006 is available at http://www.opsi.gov.uk/acts/acts2006/20060001.htm.
55. Lord Lester of Herne Hill's speech to the House of Lords (House of Lords Hansard, 11 October 2005, http://www.publications.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds05/text/51011-07.htm) is emblematic of the argument in defense of free speech:

The new speech crimes proposed, like the racial incitement offences, are sweepingly broad. They apply to threatening, abusive or insulting words, behaviour, written material, recordings or programmes intended or likely to stir up religious hatred. Unlike most other serious offences they require no specific criminal intent. They apply not only to words spoken in public but also in private. They cover the electronic and print media, plays, films, works of fiction, political argument, preaching by priests and clerics, comedians and politicians. They are subject to very serious criminal sanctions of up to seven years' imprisonment.

In seeking to criminalise the stirring up of religious hatred the Bill links vulnerable groups to religion or belief. In other words, it covers not only Jews as Jews, or Hindus as Hindus or Sikhs as Sikhs, or Muslims as Muslims, but members of these groups defined by reference to their religion or belief. It is that link, between protecting groups of people and protecting their belief and practices which gives the impression to those seeking to protect their religion against insult that the offences are akin to a blasphemy law writ large. It is that link which creates such difficult problems for free

speech, because it covers religious beliefs and practices that should be open even to intemperate criticism.

Religion and belief are concepts that defy precise legal definition. They concern matters of faith and philosophy and are strongly influenced by history and politics and by tradition and culture. The line separating religious beliefs from political beliefs is also blurred, not least because religion is often used and misused for political purposes. The distinction between stirring up hatred of someone because of his religious beliefs and expressing hatred of those beliefs in the abstract is a subtle one—far too subtle for many who support the Bill, including some Ministers and Members of the Other Place.

It should cause concern to the Government, for example, that Sir Iqbal Sacranie OBE, the leader of the Muslim Council of Britain, still believes, according to his public utterances, that the new offences will enable Salman Rushdie to be prosecuted for publishing his novel *The Satanic Verses*.

Freedom of speech, like equality and freedom of religion, is a fundamental civil and political right. Its protection is at the heart of our liberal democratic society. The right to freedom of speech means the right of everyone to communicate information and opinions without unnecessary state control or interference. That includes evil ideas expressed intemperately or in ways that shock, disturb or offend some sections of society. It includes insulting and offensive criticism of religious beliefs and practices—whether traditional religions or new religions or cults—provided it poses no imminent threat to public order.

56. The remarks of Evan Harris, M.P., on 9 January 2008 in the House of Commons are emblematic of the movement to abolish the blasphemy laws (House of Commons Hansard, 9 January 2008, http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080109/debtext/80109-0026.htm):

> the offence [of blasphemy] is also divisive in terms of social cohesion, partly because it is discriminatory. The corollary of that is that it raises a sense of unfairness among other religions, particularly those whose adherents are more sensitive than adherents to the Christian faith—a sense that they are being singled out because they are not protected. It raises the expectation, which previous Governments may have sought to keep going, that they will be entitled to their own—Islamic, say—version of a blasphemy law. The best way in which to make clear to the communities and people of this nation that we do not expect there to be protection of beliefs, or indeed of people's sensibilities about their beliefs, is to abolish the existing blasphemy offences, and that is one of the strongest arguments for so doing.

The record of the contentious and historic debate is in the House of Lords Hansard for 5 March 2008: http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80305-0005.htm#08030578000146.

57. It is hard to predict how Hale would react to the contemporary debates over the expansion or abolition of the blasphemy laws. In my view, his principal goal was to stabilize social order and prevent backsliding into the kind of rigorous and violent sectarianism of the midcentury. The notion of an expanded blasphemy law that includes all sects and faith traditions turns away from the assimilationist model and enlarges the power and potentially divisive parochialism of sects; these are precisely the conditions that Hale hoped to avoid by secularizing blasphemy.