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## The Curious Persistence of Blasphemy

Jeremy Patrick

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## THE CURIOUS PERSISTENCE OF BLASPHEMY

*Jeremy Patrick\**

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### I. AN INTRODUCTION

In his incisive 2006 book, *Blasphemy: Art That Offends*,<sup>1</sup> S. Brent Plate examined poet T.S. Eliot’s famous line “I am reproaching a world

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1. S. BRENT PLATE, *BLASPHEMY: ART THAT OFFENDS* (2006).

in which blasphemy is impossible.”<sup>2</sup> “Clearly, he was looking in the wrong direction[,]” Plate concluded.<sup>3</sup> “We have seen plenty of examples in which blasphemy has continued to be an issue among religious revivalists seeking to purge society from its evil images . . . [and] blasphemy has also moved from the realm of traditional religion into modern, secular society and the targets of blasphemy have been redirected.”<sup>4</sup> One could be forgiven for assuming that the concept of blasphemy would simply fade away over time, swallowed by a secularization of the world that may have seemed inevitable in Eliot’s time. If blasphemy faded away, what need would there be for blasphemy laws? Surely, in an age where constitutionalism and universal declarations of rights have swept the globe,<sup>5</sup> blasphemy laws would be quickly repealed or struck down in light of the clear threats they present to freedom of expression and religion?

Plate, however, is clearly correct. Blasphemy in its traditional religious conception still makes newspaper headlines: the anger over the Danish Muhammad cartoons<sup>6</sup> and Salman Rushdie’s *The Satanic Verses*<sup>7</sup> are among the most famous examples. More recently, a new controversy made front-page headlines and led to rioting around the world: the “International Burn a Qur’an Day” plan launched by a Florida pastor.<sup>8</sup>

However, it would be a mistake to assume that blasphemy still

2. T.S. ELIOT, *AFTER STRANGE GODS* (1934), quoted in PLATE, *supra* note 1, at 133.

3. PLATE, *supra* note 1, at 133.

4. *Id.*

5. See John Witte, Jr. & M. Christian Green, *Religious Freedom, Democracy, and International Human Rights*, 23 EMORY INT’L L. REV. 583, 584 (2009) (“Clearly, religion and freedom do not yet coincide in many countries, however rosy their new constitutional claims are as to religious rights and freedoms for all. Apostasy, Blasphemy, Conversion, Defamation, and Evangelization—these are the new alphabet of religious rights violations in a number of regions around the world.”).

6. See JYTTE KLAUSEN, *THE CARTOONS THAT SHOOK THE WORLD I* (2009).

7. See *R. v. Bow Street Magistrates Court Ex p. Choudhury*, [1990] 91 Cr. App. R. 393 (Queen’s Bench Div. Ct.) (UK) (dismissing blasphemy charges against the book on theory that scope of common law prohibition only extends to Christianity).

8. See, e.g., Mitch Potter, *Americans Rallying Against Qur’an Burning*, TORONTO STAR, SEPT. 7, 2010, available at <http://www.thestar.com/news/world/article/857888--americans-rallying-against-planned-qur-an-burning>. As September 11th, the planned date for the burning, approached, the organizer of the event changed his mind and cancelled it. See Jack Healy & Steven Erlanger, *Planned Koran Burning Drew International Scorn*, N.Y. TIMES, Sept. 9, 2010, available at <http://www.nytimes.com/2010/09/10/world/10react.html>. Six months later, Jones decided to “put the Koran on trial” and then proceeded to burn a copy on Mar. 20, 2011. The act incited protests and mob violence in Afghanistan, leaving at least 16 people dead and dozens injured. See Kevin Sieff, *Florida Pastor Terry Jones’s Koran Burning has Far-reaching Effect*, WASH. POST, Apr. 2, 2011, available at [http://www.washingtonpost.com/local/education/florida-pastor-terry-joness-koran-burning-has-far-reaching-effect/2011/04/02/AFpiFoQC\\_story.html](http://www.washingtonpost.com/local/education/florida-pastor-terry-joness-koran-burning-has-far-reaching-effect/2011/04/02/AFpiFoQC_story.html).

exists only in the Islamic world. Andrew Serrano's "Piss Christ,"<sup>9</sup> Chris Ofili's "Holy Virgin Mary,"<sup>10</sup> and Yuri Samodurov's and Andrei Yerofeyev's "Forbidden Art"<sup>11</sup> all managed to provoke cries of "blasphemy!" from Christian audiences. Nor have laws against blasphemy disappeared: all but a handful of countries in Western Europe maintain them,<sup>12</sup> Ireland adopted a new one just last year,<sup>13</sup> and even those countries which abolish or allow blasphemy laws to lapse are prone to adopt new "religious vilification" or "religious hate propaganda" laws that can work to the same end.<sup>14</sup> The repeated success of resolutions to ban the "defamation of religions" in the U.N. General Assembly<sup>15</sup> is additional evidence that blasphemy as a legal concept is far from dead.

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9. See *Archbishop of Melbourne v. Council of Trustees of National Gallery*, 1997 WL 1882161 (VSC 1997) (dismissing blasphemy charges against artwork on grounds that no evidence existed of imminent breach of the peace). In Spring 2011, vandals severely damaged "Piss Christ" by hacking at it with a hammer and a sharp blade while the piece was hanging at a French gallery. The gallery decided to increase security and continue showing the work in its damaged state. See Mary Elizabeth Williams, *The Endless, Idiotic Outrage About "Piss Christ,"* SALON, Apr. 19, 2011, available at [http://www.salon.com/news/religion/index.html?story=/mwt/feature/2011/04/19/andres\\_serrano\\_piss\\_christ\\_attacked](http://www.salon.com/news/religion/index.html?story=/mwt/feature/2011/04/19/andres_serrano_piss_christ_attacked).

10. See *Hillary Steps Into Dung Art Row*, BBC NEWS, Sept. 28, 1999, available at <http://news.bbc.co.uk/2/hi/459846.stm> (discussing Mayor Rudolph Giuliani's threat to cancel \$7,000,000 grant from city to Brooklyn Museum of Art over artwork he states "attack[s] and bash[es] the Catholic religion").

11. See David Nowak, *Russian Curators Sentenced but not Imprisoned*, THE GUARDIAN, July 12, 2010, available at <http://www.guardian.co.uk/world/feedarticle/9169345> (discussing conviction of museum curators for "inciting religious hatred" for exhibition that included images of Jesus Christ portrayed as Mickey Mouse).

12. See ALAIN CABANTOUS, *BLASPHEMY: IMPIOUS SPEECH IN THE WEST FROM THE SEVENTEENTH TO THE NINETEENTH CENTURY* 263 n.5 (trans. Eric Rauth 2002) ("In western Europe today only Belgium, Portugal, and France . . . have no antiblasphemy laws on the books"). Since Cabantous' work was published, England replaced its blasphemy law with a law prohibiting "threatening words or behaviour . . . to stir up religious hatred." See *Racial and Religious Hatred Act 2006*, 2006, c. 1, § 1, sch. 29B(1).

13. See *Defamation Act 2009* (Act No. 31/2009) (Ir.), s. 36, available at <http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf>.

14. See, e.g., Charles C. Haynes, *Living With our Deepest Differences: Freedom of Expression in a Religiously Diverse World*, in *FIDES ET LIBERTAS 2008-2009*, at 56, 57 (2008-2009) ("Instead of eliminating blasphemy laws, some European nations have revised them—or expanded their application—in order to account for religious pluralism. Thus, the old concern about blasphemy against the state religion has been replaced by a new concern about hate speech against religions"); Nicholas Aroney, *The Constitutional (In)Validity of Religious Vilification Laws: Implications for Their Interpretation*, 34 *FED. L. REV.* 287 (2006) (discussing religious vilification laws extant in three Australian states); *R. v. Keegstra*, [1990] 3 S.C.R. 697 (upholding constitutionality of Criminal Code prohibition on wilful promotion of hatred towards identifiable groups, including religious groups). The relationship between blasphemy and religious vilification or hate propaganda laws will be discussed in the next section.

15. See U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, *ANNUAL REPORT 2010*, at 336-37 (2010).

After discussing the role of blasphemy and blasphemy-like laws in the modern world, this Article discusses three related, but distinct, ways to think about blasphemy: as a religious concept, as a legal concept, and, in what at first may seem an oxymoron, “secular blasphemy.” The Article then proceeds to discuss two of the fundamental issues that underlay the curious persistence of blasphemy and blasphemy laws: (1) why do people blaspheme to begin with; and (2) what harms, real or imagined, does blasphemy cause? The theory presented in these pages is that the concept of blasphemy, in its diverse forms, speaks to a fundamental element of human psychology: as long as people believe certain things are sacred, they will believe certain remarks are blasphemous.

## II. BLASPHEMY LAWS: ALIVE AND STILL (INTERMITTENTLY) KICKING

A brief survey of recent global developments demonstrates that blasphemy laws and their derivatives maintain a surprisingly strong foothold in several jurisdictions. Each of the legal systems discussed below prohibit blasphemy either directly or through variations of religious hatred laws that can be (and sometimes are) used to suppress blasphemous speech. Here, the global drive to constitutionalism pushes against an ancient and perhaps almost intuitive desire to protect religious beliefs and believers from “upstarts” who would slander faith.

### A. *The United Nations and “Defamation of Religions”*

“A new value is emerging in the realm of the peoples’ rights[,] [because] the United Nations General Assembly has passed a resolution called[] Combating Defamation of Religions.”<sup>16</sup> Indeed, first introduced into the General Assembly in 2005, the resolution has passed each year since “by landslide votes.”<sup>17</sup> The resolution has its origins in a 1999 proposal by Pakistan before the U.N. Commission on Human Rights to prohibit the “Defamation of Islam.”<sup>18</sup> With the support of the Organization of the Islamic Conference (comprising 57 Muslim countries),<sup>19</sup> the resolution was broadened to include the protection of

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16. Liaquat Ali Khan, *Combating Defamation of Religions*, THE AMERICAN MUSLIM (TAM), Jan. 1, 2007, available at [http://www.theamericanmuslim.org/tam.php/features/articles/combating\\_defamation\\_of\\_religions/](http://www.theamericanmuslim.org/tam.php/features/articles/combating_defamation_of_religions/).

17. Vaughn E. James, *Defamation of Religions Versus Freedom of Expression: Finding the Balance*, in FIDES ET LIBERTAS 2008-2009 43, 44-45 (2008-2009).

18. See *id.* at 44.

19. See L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 EMORY INT’L L. REV. 69, 69 (2009).

all religions and received the support of the Commission (later Council<sup>20</sup>) for the last several years,<sup>21</sup> including 2010.<sup>22</sup> The resolutions change slightly each year and are several pages long, but include passages such as:

[D]efamation of religions is a serious threat to human dignity leading to restriction on the freedom of religion of their adherents and incitement to religious hatred and violence.<sup>23</sup>

Defamation of religions and incitement to religious hatred in general could lead to social disharmony and violations of human rights, and [the Council is] alarmed at the inaction of some States to combat this burgeoning trend and the resulting discriminatory practices against adherents of certain religions . . . in general and against Islam and Muslims in particular.<sup>24</sup>

[The Council notes] the various regional and national initiatives to combat religious and racial intolerance against specific groups and communities and emphasiz[es], in this context, the need to adopt a comprehensive and non-discriminatory approach to ensure respect for all races and religions.<sup>25</sup>

Thus, the resolutions are couched in rather broad terms and provide no definition for the term “defamation of religions.”<sup>26</sup> The inherent vagueness of the resolutions is alarming to the U.S. Commission on International Religious Freedom:

The “defamation of religions” resolutions purport to seek protection for religions in general, but the only religion and

20. The U.N. Commission on Human Rights was replaced by the U.N. Human Rights Council in 2006. See U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 15, at 227.

21. See James, *supra* note 17, at 44.

22. See UNHRC Votes by Narrower Margin to Condemn “Defamation of Religion”, RELIGION AND LAW CONSORTIUM, Mar. 2010, available at [http://religlaw.org/index.php?blurb\\_id=803&page\\_id=19](http://religlaw.org/index.php?blurb_id=803&page_id=19) (noting “[t]his marks the eleventh time in the past twelve years that such a resolution has been passed by the Council”).

23. H.R.C. Res. GE.09-12613, A/HRC/10/L.2/Rev/1, 10th Sess., (Mar. 26, 2009).

24. *Id.*

25. *Id.*

26. See Jaime Contreras & Rosa Maria Martinez De Codes, *Cultural and Legal Issues Concerning Defamation of Religions*, in FIDES ET LIBERTAS 2008-2009 31, 38 (2008-2009) (“there are a number of provisions that condemn defamation . . . stress the connection between defamation of religions and incitement to religious hatred . . . [and] mention that defamation of religions could lead to social disharmony and violations of human rights—but there is not one single definition of ‘defamation of religions’”).

religious adherents specifically mentioned are Islam and Muslims. Aside from Islam, the resolutions do not specify which religions are deserving of protection, or explain how or by whom this would be determined. The resolutions also do not define what would make a statement defamatory to religions or explain who decides this question. For its part, the [Organization of the Islamic Conference] appears to consider any speech that the organization, or even a single cleric or individual, deems critical of or offensive to Islam or Muslims to automatically constitute religious defamatory speech.<sup>27</sup>

The resolutions are non-binding, and thus impose no obligations on State actors to implement the principles contained within. However, at least one supporter argues that such resolutions may, over time, “pave the way for the formation of a multilateral treaty or customary international law,” and thus “cannot be dismissed as mere opinions.”<sup>28</sup> Western countries and NGOs have lobbied furiously against the resolutions in recent years, and the 2010 resolution before the Human Rights Council passed by its narrowest margin to date.<sup>29</sup>

The relationship between “defamation of religions” and blasphemy is clear. The originator and prime proponent of the resolutions is Pakistan, a country notorious for using its domestic blasphemy laws to suppress religious dissent or difference.<sup>30</sup> As Rebecca Dobras notes, “[h]uman rights organizations and several Western governments worry that the Defamation Resolutions bring blasphemy laws into the international arena.”<sup>31</sup> The U.S. Commission on International Religious

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27. See U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 15, at 336. Scholars note the difficulty in applying the traditional legal concept of “defamation” in the context of criticism of religious beliefs, as the truth or falsity of such statements are not capable of being resolved by a judge or jury. See Graham, *supra* note 19, at 76; Contreras & Martinez De Codes, *supra* note 26, at 35.

28. Khan, *supra* note 16. Khan argues that laws prohibiting the defamation of religions are “morally sound” but pose drafting challenges to ensure that they comply with freedom of speech. See *id.* See also James, *supra* note 17, at 46 (“combating ‘defamation of religions’ is a desirable goal, at least as long as the actions taken to achieve this goal are designed to cover all religions”).

29. See UNHRC Votes by Narrower Margin to Condemn “Defamation of Religion,” RELIGION AND LAW CONSORTIUM, Mar. 2010, available at [http://religlaw.org/index.php?blurb\\_id=803&page\\_id=19](http://religlaw.org/index.php?blurb_id=803&page_id=19).

30. See Rebecca J. Dobras, *Is the United Nations Endorsing Human Rights Violations?: An Analysis of the United Nations’ Combating Defamation of Religions Resolutions and Pakistan’s Blasphemy Laws*, 37 GA. J. INT’L & COMP. L. 339 (2009).

31. *Id.* at 378. See also *id.* at 369 (“Human Rights Watch argues that the Defamation Resolutions serve as an international endorsement of the blasphemy laws, which may give some justification to the violation of essential human rights, such as freedom of religion and freedom of speech”).

Freedom, for example, argues that

[I]n essence, the “defamation of religions” campaign is an attempt to export to the international level the repressive blasphemy laws found in some [Organization of the Islamic Conference] countries. . . . [T]hese laws allow repressive governments and religious extremists to suppress and punish whatever they deem to be offensive or unacceptable speech about a particular favored religion or sect.<sup>32</sup>

The fear of an international consensus that civil liberties concerns must give way to protecting religious sensibilities is exacerbated by three court decisions which held that the domestic blasphemy laws of signatory nations were consistent with the European Convention on Human Rights.<sup>33</sup>

### B. Ireland’s Surprising Resurrection of Blasphemy

Ireland has had a strange and surprising relationship with blasphemy laws. The earliest reported common law prosecution for blasphemy dates back to 1703,<sup>34</sup> and a couple of other prosecutions have been discovered dating back to the mid-1800s.<sup>35</sup> Despite there not having been a prosecution since 1855,<sup>36</sup> the framers of the Irish Constitution of 1937 decided to include, as an exception to the document’s free speech guarantee, a statement that “[t]he publication or utterance of blasphemous . . . matter is an offence which shall be punishable in accordance with the law.”<sup>37</sup> Still, the legal concept of blasphemy

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32. See U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 15, at 337.

33. See *Wingrove v. United Kingdom*, App. No. 17419/90, 24 Eur. H.R. Rep. 1 (1997); *Otto-Preminger Institute v. Austria*, App. No. A/295-A, 19 Eur. H.R. Rep. 34; *Gay News Ltd. v. United Kingdom*, App. No. 8710/79, 5 Eur. H.R. Rep. 123 (1983). See also Susannah C. Vance, *The Permissibility of Incitement to Religious Hatred Offenses Under European Convention Principles*, 14 *TRANSNAT’L L. & CONTEMP. PROBS.* 201 (2004); Natan Lerner, *Report on the Human Rights Council Subcommittee*, in *FIDES ET LIBERTAS 2008-2009* 25, 29 (2008-2009) (“The issue of blasphemy has not been satisfactorily taken care of by the international legal community.”).

34. See Paul O’Higgins, *Blasphemy in Irish Law*, 23 *MOD. L. REV.* 151, 159 (1960). See generally NEVILLE COX, *BLASPHEMY AND THE LAW IN IRELAND* (2000).

35. See O’Higgins, *supra* note 34, at 161, 163.

36. See Kathryn A. O’Brien, *Ireland’s Secular Revolution: The Waning Influence of the Catholic Church and the Future of Ireland’s Blasphemy Law*, 18 *CONN. J. INT’L L.* 395, 396 (2002).

37. IR. CONST., 1937, art. 40(6)(1)(i). See also Stephen Ranalow, *Bearing a Constitutional Cross: Examining Blasphemy and the Judicial Role in Corway v. Indep. Newspapers*, 3 *TRINITY COLL. L. REV.* 95, 95 (2000) (“The crime of blasphemy enshrined in [the Irish Constitution] is something of a constitutional oddity. The existence of a penal clause

seemed a dead letter for decades until, a full 141 years after its last invocation, a prosecution was brought in 1996.

The case, *Corway v. Independent Newspapers (Ireland) Limited*,<sup>38</sup> originated as a private prosecution against a newspaper for publishing a cartoon that allegedly made fun of priests and the Eucharist.<sup>39</sup> Because the trial judge refused to allow the prosecution to go forward, the case made its way up to the Supreme Court of Ireland, which dismissed the appeal on the unusual ground that there was no way of adequately determining the operative elements of blasphemy as a criminal offence.<sup>40</sup> According to the Court, Irish common law was unclear on the *actus reus* and *mens rea* of blasphemy,<sup>41</sup> and the Legislature had not “adverted to the problem of adapting the common law crime of blasphemy to the circumstances of a modern State which embraces citizens of many different religions and which guarantees freedom of conscience and a free profession and practice of religion.”<sup>42</sup> The Court therefore concluded that “[t]here is no doubt that the crime of blasphemy exists as an offence in Irish Law because the Constitution says so[,]”<sup>43</sup> but that no prosecution could be authorized in the absence of a statutory definition.<sup>44</sup> The professed inability of Ireland’s supreme judicial body to define the elements of a long-standing common law crime struck commentators (including myself) as disingenuous,<sup>45</sup> but in any event the issue seemed settled. As one not-so-prescient scholar wrote “given the unlikelihood of the Legislature suddenly deciding to define the elements of the crime, there is no longer a prohibition on

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within what is essentially a political declaration seems inappropriate . . . [but] [t]he absence of a blasphemy prosecution in Ireland since 1855 had meant that the unusual status of this offence was an issue of limited interest”).

38. *Corway v. Indep. Newspapers (Ir.) Ltd.*, [2000] 1 ILRM 426 (30 July 1999) (S.C.) (Ir.) available at <http://www.bailii.org/ie/cases/IESC/1999/5.html>. See also COX, *supra* note 34, at 53-64.

39. See *Corway*, 1 ILRM 426, ¶¶ 5-8.

40. See *id.* ¶¶ 10-41 .

41. See *id.* ¶ 38.

42. *Id.* ¶ 36.

43. *Id.*

44. See *id.* ¶ 38.

45. See Ranalow, *supra* note 37, at 100 (“Given the relevance of the judicial, statutory and historical authority just outlined, the Supreme Court’s refusal to clarify blasphemy on the grounds of uncertainty is unconvincing”); Jeremy Patrick, *Not Dead, Just Sleeping: Canada’s Prohibition on Blasphemous Libel as a Case Study in Obsolete Legislation*, 41 U.B.C. L. REV. 193, 210 (2008) (“This result—passing the buck back to the Legislature—was an institutionally canny move by the Court, but upon close examination the rationale seems dubious”). To be fair, O’Higgins’s 1960 article does state “[as to] the effect of the provisions of the Constitution on criminal responsibility for blasphemous offences, there is no case law here to guide us to the answer[.]” and “[t]he conclusion is then forced upon us that there is considerable doubt as to the meaning of the term ‘blasphemous’ as used in the Irish Constitution[.]” See O’Higgins, *supra* note 34, at 165, 166.

blasphemy in Ireland.”<sup>46</sup>

Then, almost fifteen years after *Corway*, and seemingly out of the blue, the Legislature suddenly decided to define the elements of blasphemy. According to the Defamation Act 2009:

[A] person publishes or utters blasphemous matter if (a) he or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and (b) he or she intends, by the publication or utterance of the matter concerned, to cause such outrage.<sup>47</sup>

The Minister of Justice responsible for the move, Dermot Ahern, stated that he could not “wilfully ignore the Constitution” and was “bemused” by criticism.<sup>48</sup> Although the statute goes on to provide an affirmative defence for publications of “genuine literary, artistic, political, scientific, or academic value,”<sup>49</sup> it provoked a counter-movement which advocated a repeal of the law and a referendum on removing the blasphemy provision from the Constitution entirely.<sup>50</sup> In March of 2010, Minister of Justice Ahern agreed to hold a referendum on the topic by the end of the year.<sup>51</sup>

### C. From Blasphemy to Vilification: The Australian Transition

Australia provides an intriguing example of the global trend towards transitioning away from blasphemy laws and toward religious vilification laws.<sup>52</sup> Blasphemy laws and religious vilification laws are not the same thing, nor is disparaging religious beliefs the same as disparaging religious believers. However, although conceptually quite distinct, blasphemy laws and religious vilification laws can seem identical to the defendant in trouble for angering a particular religious

46. Patrick, *supra* note 45, at 211.

47. Defamation Act 2009 (Act No. 31/2009) (Ir.), s. 36(2), available at <http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf>. The crime is punishable by a fine of up to 25,000 euros. See *id.* s. 36(1).

48. Elaine Edwards, *Atheists Rally Over Blasphemy Law*, IRISH TIMES, JAN. 4, 2010, available at [http://www.irishtimes.com/newspaper/ireland/2010/0104/1224261600743\\_pf.html](http://www.irishtimes.com/newspaper/ireland/2010/0104/1224261600743_pf.html).

49. See Defamation Act 2009, *supra* note 47.

50. See *Irish Atheists Use Bjork, Mark Twain to Challenge Blasphemy Law*, CNN, Jan. 02, 2010, available at [http://articles.cnn.com/2010-01-02/world/ireland.blasphemy.law\\_1\\_blasphemy-law-religion-irish?\\_s=PM:WORLD](http://articles.cnn.com/2010-01-02/world/ireland.blasphemy.law_1_blasphemy-law-religion-irish?_s=PM:WORLD) (discussing Irish atheist group’s publication of famously “blasphemous” quotations to challenge law); Edwards, *supra* note 48.

51. See Carol Coulter, *Ahern to Propose Blasphemy Amendment*, IRISH TIMES, Mar. 17, 2010, available at [http://www.irishtimes.com/newspaper/ireland/2010/03137/1224266442534\\_pf.html](http://www.irishtimes.com/newspaper/ireland/2010/03137/1224266442534_pf.html).

52. England and Canada are other good examples.

group. Although this issue will be revisited in Section V.C, the following discussion provides important background information for the debate.

Blasphemy laws have a long history in Australia. With British settlers usually came British common law, and Australia was no exception. The English common law prohibition on blasphemy was received and implemented by some of the jurisdictions which would eventually become Australian States.<sup>53</sup> Even before Federation in 1901, prosecutions for blasphemy took place on Australian soil. Peter Coleman, for example, writes about the successful 1871 prosecution of a Unitarian street preacher named Lorando Jones for blasphemy.<sup>54</sup> Jones was giving a lecture in a Sydney park when he was arrested after having denied belief in the divinity of Jesus and the sacred nature of the Bible.<sup>55</sup> The jury did not even deliberate before finding Jones guilty, and the man spent several weeks in jail before being released on his own recognizance.<sup>56</sup> The occasional suppression of blasphemy continued after Federation, as evidenced by the Post Office denying a mailing permit because a freethinker newspaper published cartoons making fun of God in 1911,<sup>57</sup> and the 1919 prosecution for blasphemy of a Communist newspaper for publishing a satire of what would happen if Bolsheviks invaded Heaven.<sup>58</sup>

The most recent high-profile attempt to invoke the common law of blasphemy in Australia was a mid-1990s private prosecution brought by a Catholic archbishop against a museum for displaying Andres Serrano's "Piss Christ," a work of art which involved a photograph of a crucifix suspended in a bottle of the artist's urine.<sup>59</sup> The prosecution

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53. See Reid Mortensen, *Blasphemy in a Secular State: A Pardonable Sin?*, 17 U.N.S.W.L.J. 409, 417 (1994) ("[I]n practice, it has been assumed that the law was received in New South Wales and several British colonies. Prosecutions for blasphemous libel at common law have been brought in New South Wales and Victoria"). Mortensen also notes that a statutory ban on blasphemy was enacted as early as 1827 in New South Wales. See *id.*

54. PETER COLEMAN, *OBSCENITY, BLASPHEMY, SEDITION: 100 YEARS OF CENSORSHIP IN AUSTRALIA* 65-67 (rev. ed. 1974).

55. See *id.* at 65-66.

56. See *id.* at 66-67. Coleman states that "[t]he outrageous character of the case made the idea of prosecuting people for blasphemy so unpopular that it was largely responsible for finally killing the idea of blasphemy as a crime." See *id.* at 65.

57. See *id.* at 71-73.

58. See *id.* at 72-74. Coleman states that this case "is the last in which a Government instrumentality has taken action against a publication for its blasphemy." See *id.* at 74. I have not independently verified this statement, but no obvious counter-examples come to mind.

59. See Archbishop of Melb. v. Council of Trs. of Nat'l Gallery, 1997 WL 1882161, at \*2 (VSC 1997). See also Bede Harris, *Pell v. Council of Trustees of the National Gallery of Victoria: Should Blasphemy Be a Crime? The 'Piss Christ' Case and Freedom of Expression*, 22 MELB. U. L. REV. 217, 217 (1998). A reproduction of Serrano's piece can be found in PLATE, *supra* note 1, at 133.

was dismissed in an opinion that expressed doubts as to whether or not the offence of blasphemy had lapsed due to desuetude,<sup>60</sup> and held that, even if blasphemy were still an offence at common law, “there is no evidence . . . of any unrest of any kind following or likely to follow the showing of the photograph in question.”<sup>61</sup> Ironically, “[t]he court’s finding that no such disturbance was apprehended was, unfortunately, not borne out by subsequent events—vandals damaged the work and the gallery withdrew the exhibit for fear of injury to its staff should another attack be mounted.”<sup>62</sup>

Although rarely invoked, blasphemy to this day remains a common law offense in New South Wales and Victoria, and a statutory crime in Tasmania.<sup>63</sup> The status of blasphemy as an offence remains unclear in South Australia, Norfolk Island, and the Northern Territory,<sup>64</sup> and only in the States of Queensland and Western Australia has it been conclusively abolished.<sup>65</sup> There is no Federal prohibition on blasphemy, but Federal courts have, in dicta, assumed that blasphemy remains a part of the common law with a meaning similar to that given by English courts.<sup>66</sup>

As the legal enforcement of blasphemy laws have waned, new offences have taken their place: religious vilification laws. In the past two decades, three Australian States (Victoria, Queensland, and Tasmania) have enacted such laws,<sup>67</sup> which, for example, prohibit speech that “incites hatred against, serious contempt for, or revulsion or severe ridicule” of persons on the basis of their “religious belief or

60. See *Archbishop of Melbourne*, 1997 WL 1882161, at \*\*1-6.

61. *Id.* at \*6. Thus, the Court implicitly adopted the controversial view that the crime of blasphemy includes a requirement that the prosecution prove that the impugned material has a tendency to create a breach of the peace. See Harris, *supra* note 59, at 218-19, 226.

62. Harris, *supra* note 59, at 226.

63. See Mortensen, *supra* note 53, at 417-18. For Tasmania, see Criminal Code Act 1924 (Tas) s 119 (Austl.). For New South Wales, see Crimes Act 1900 (NSW) s 574 (Austl.) (limiting common law prosecutions for blasphemy to cases that include “scoffing or reviling,” “violating public decency,” or “tending to a breach of the peace”).

64. See Mortensen, *supra* note 53, at 417-18.

65. See *id.*

66. See *Archbishop of Melbourne v. Council of Trustees of National Gallery*, 1997 WL 1882161, at \*4 (VSC 1997) (“Not only may there be a place in a multicultural society for the offen[s]e of blasphemous libel of any recognized faith, but the ancient misdemeanour of that name may have survived transportation to the colonies. Certainly, there is a body of judicial opinion to the effect that it has”) (referencing *Ogle v. Strickland*, (1987) 13 FCR 306). See also Harris, *supra* note 59, at 218.

67. See Racial and Religious Tolerance Act 2001 (Vic) s 8 (Austl.); Anti-Discrimination Act 1998 (Tas) ss 17, 19 (Austl.); Anti-Discrimination Act 1991 (Qld) ss 124, 131 (Austl.). See also Aroney, *supra* note 14, at 287-88; Dermot Feenan, *Religious Vilification Laws: Quelling Fires of Hatred?*, 31 ALTERNATIVE L.J. 153, 153 (2006).

activity.”<sup>68</sup> Unless threats are involved, the laws do not carry the criminal sanction of imprisonment,<sup>69</sup> but the possibility of fines, injunctions, and simply the time and money involved in defending against an allegation of “religious vilification” could be enough to chill speech on religious topics.<sup>70</sup> The laws include an affirmative defense: for example, that the speech was made “reasonably and in good faith” for a “genuine academic, artistic, religious, or scientific purpose.”<sup>71</sup> This may shield some defendants, but “[o]nce it is shown that the speech in question promotes or incites hatred it is natural to reach the conclusion that the labels ‘good faith’ and ‘reasonable’ do not apply.”<sup>72</sup>

A recent case, *Catch the Fire Ministries v. Islamic Council of Victoria*,<sup>73</sup> has drawn the attention of several Australian legal commentators who view it as an important example of the potential dangers religious vilification laws pose to freedom of speech and religion.<sup>74</sup> *Catch the Fire* involved remarks made by a Christian minister, Pastor Scot, during a seminar at a Victorian church.<sup>75</sup> Pastor Scot, an immigrant to Australia, had fled Pakistan after being accused of blasphemy,<sup>76</sup> and his analysis of Islam and the Qur’an during the seminar led to him being brought up on religious vilification charges before the Victorian Civil and Administrative Tribunal.<sup>77</sup> The Tribunal

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68. Racial and Religious Tolerance Act 2001, *supra* note 67. Aroney notes that the religious vilification laws of the three states “are sufficiently similar that the considerations relevant to their constitutionality are substantially the same.” Aroney, *supra* note 14, at 289. To my mind, the most troubling phrase in the laws is the prohibition of “severe ridicule” of religious groups, which could easily be interpreted to outlaw works of comedy and satire. See Racial and Religious Tolerance Act 2001, *supra* note 67.

69. See Aroney, *supra* note 14, at 290 (distinguishing civil or “ordinary” vilification with criminal or “serious” vilification).

70. See Rex Tauati Ahdar, *Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law*, 26 U. QUEENSLAND L.J. 293, 297 (2007) (“The risk of expensive and protracted litigation is heightened by the vagueness of the law. Precisely at what point do we move from strong, even hostile, criticism of religion to attempts to stir up hatred of believers in that religion?”); Feenan, *supra* note 67, at 156 (“The danger in framing religious vilification as a wrong lies partly in the fact that it may capture views which represent legitimate disagreements about the appropriateness of different religious beliefs or practices”).

71. Racial and Religious Tolerance Act 2001, *supra* note 67.

72. Joel Harrison, *Truth, Civility, and Religious Battlegrounds: The Contest Between Religious Vilification Laws and Freedom of Expression*, 12 AUCKLAND U. L. REV. 71, 80 (2006); see also Aroney, *supra* note 14, at 315 (“it is not exactly clear how a ‘reasonableness’ requirement can or ought to apply to religious speech”).

73. *Catch the Fire Ministries Inc. v. Islamic Council of Victoria Inc.*, (2006) 235 ALR 750 (Vic.).

74. See, e.g., Harrison, *supra* note 72; Ahdar, *supra* note 70; Feenan, *supra* note 67.

75. *Catch the Fire Ministries Inc.*, 235 ALR 750, ¶¶ 1, 4(1). The case also involved a newsletter and website posting issued by the Christian group. See *id.* ¶ 4(2)-(3).

76. See Ahdar, *supra* note 70, at 303.

77. *Catch the Fire Ministries Inc.*, 235 ALR 750, ¶ 1.

found that Scot misrepresented the Qur'an by implying that it promotes violence and the subjugation of women, that he stated or implied that Muslims are demons and plan to take over Australia, that he stated Allah is not merciful, and more.<sup>78</sup> The Tribunal was not persuaded that Pastor Scot's other remarks that Christians should love and witness to Muslims cured the fault,<sup>79</sup> and therefore concluded that on the whole he "incited hatred and contempt of and revulsion towards the religious beliefs of Muslims[.]"<sup>80</sup> Further, his affirmative defense failed in part because of his inability "to put forward an honest and fair representation of Islam."<sup>81</sup> The Tribunal ordered Pastor Scot and the ministry to place on their newsletter, website, and in local newspaper advertisements, a statement written by the Tribunal that included the following sentence:

[The Tribunal] found the seminar was not a balanced discussion, that Pastor Scot presented the seminar in a way that was essentially hostile, demeaning and derogatory of all Muslim people, their God, their prophet Mohammed and in general Muslim beliefs and practices, that Pastor Scot was not a credible witness and that he did not act reasonably and in good faith. . . . [Pastor Scot] acknowledges the findings [that the statements breached the Act] and will in future refrain from making, publishing, or distributing . . . any statements, suggestions, or implications to the same or similar effect.<sup>82</sup>

If Pastor Scot said what the Tribunal said he said, then his having been guilty of committing religious vilification is not particularly surprising, regardless of whether or not such laws are a good idea. However, when the case went to the Victorian Court of Appeal, the Court conducted a long and exhaustive assessment of Scot's statements and concluded that the Tribunal had made an erroneous interpretation of his words on almost every count.<sup>83</sup> The Court found that the Tribunal's concern with "balanced" or "unbalanced" discussions of Islam was misplaced,<sup>84</sup> and that the Tribunal failed to distinguish between hatred of Muslims and hatred of Muslim beliefs.<sup>85</sup> The Tribunal's holding was vacated and the case was remanded to be heard before a different judge,<sup>86</sup> but the five-year battle ended before that happened, when

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78. *See id.* ¶ 25.

79. *Id.* ¶ 26.

80. *Id.* ¶ 5 (paraphrase by appellate court).

81. *Id.* ¶ 85.

82. *See id.* Annexure.

83. *See id.* ¶¶ 38-63.

84. *See id.* ¶ 64.

85. *See id.* ¶ 32.

86. *See Ahdar, supra* note 70, at 305.

mediation between the parties was successful in settling the matter.<sup>87</sup>

At first glance, the saga of the *Catch the Fire* case might be seen as an example of how “the system worked,” with appellate courts acting as guarantors of free speech and religion. The problem, however, is that the decision “valiantly endeavoured to clarify the law but actually generated new uncertainties,”<sup>88</sup> and is seen by one commentator as “the best argument against religious vilification [laws]” because it “bears out the concerns of many that [such laws] are conceptually unsound and produce results antithetical to the religious tolerance its promoters hope for.”<sup>89</sup> Courts and administrative tribunals are inevitably going to struggle in the morass generated by trying to decide when allowable criticism turns into forbidden contempt, revulsion, and ridicule, if criticism of beliefs can be distinguished between criticism of believers, whether the “truth” of statements about religion can or should be considered, and whether, if ever, strong and passionate criticism of religious beliefs can be made “reasonably” and in “good faith.” These are the sorts of issues that lead some to fear that “religious vilification laws are potentially a new form of blasphemy law.”<sup>90</sup>

#### D. Pakistan: Public Law and Private Violence

Many countries flirt with blasphemy laws, but Pakistan embraces them.<sup>91</sup> Enacted during dictator General Zia-ul-Haq’s decade-long control of the country from 1977 to 1988,<sup>92</sup> the laws were seen as corresponding to the general push toward the “Islamization” of Pakistan.<sup>93</sup> Some of the laws are crafted to capture and outlaw the

87. *Id.*

88. *Id.* at 314.

89. *Id.* at 293-94. Aroney notes that “religious vilification laws legitimate the use of State power to intervene in inter-religious disputes, often by enforcing the claims of one religious group against another.” Aroney, *supra* note 14, at 316. This seems to be a good description of what happened in *Catch the Fire*.

90. Harrison, *supra* note 72, at 77.

91. See Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT’L L. 303, 305 (2008) (“Though blasphemy laws are not peculiar to Pakistan, they arguably exist in a more problematic and controversial form in that country than in others”).

92. See *id.* at 310-11.

93. See Dobras, *supra* note 30, at 348 (“In the 1980s, the fundamentalists took Islamization to an even greater extreme by pressuring the government to specifically limit the freedom of religious minorities, culminating in the passage of the five ordinances that make up the blasphemy laws”). See generally David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT’L L. 27, 28 (1994) (“[L]aws directly criminalizing apostasy and blasphemy are reaching a crescendo of support among certain Muslim segments in many countries, to the dismay of many other Muslims, and to the detriment of minority religions”).

beliefs of a particular minority religious group (Ahmadis),<sup>94</sup> but others are more general in nature and punish insults of the Qur'an and Muhammad (including his wives and family members).<sup>95</sup> The laws are written in broad language and include severe punishments, such as this one titled "Use of derogatory remarks; in respect of the Holy Prophet," which reads:

Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Mohammed (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to a fine.<sup>96</sup>

A mixed picture emerges when considering the actual enforcement of blasphemy laws in Pakistan. They are easily manipulated for personal vendettas because "a mere accusation of blasphemy is sufficient for arrest . . . warrants are not required and investigations typically are not conducted."<sup>97</sup> Statistics based on reported cases show dozens of prosecutions have taken place,<sup>98</sup> but those convicted by trial courts are almost invariably acquitted and set free by appellate courts.<sup>99</sup> Although ultimate exoneration does not return the years spent in prison waiting for justice to slowly wind its way through the Pakistani legal system,<sup>100</sup> it is an indication that the system is capable of resisting, to at least some degree, the pressure exerted by Islamic fundamentalists to punish blasphemy in a swift and merciless fashion.

Perhaps the greatest danger posed to those accused of blasphemy in Pakistan is the "private justice" of vigilante violence.<sup>101</sup> Accused blasphemers have been gunned down outside the courthouse,<sup>102</sup> lynched by co-workers,<sup>103</sup> and stabbed to death.<sup>104</sup> Rebecca Dobras summarizes the problem:

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94. See Siddique & Hayat, *supra* note 91, at 310 n.8 (reproducing text of laws) & 312 n.10 (describing beliefs of the Ahmadis).

95. See Pak. Penal Code. Ch. XV ss. 295-B, 295-C, 298-A.

96. *Id.* s. 295-C.

97. Dobras, *supra* note 30, at 357. Dobras notes that "individuals can accuse others of blasphemy for a variety of reasons other than religion, such as economic or professional rivalry, personal grudges, intimidation, or political clashes." *Id.*

98. See Siddique & Hayat, *supra* note 91, at 325 tbl. D.

99. See Dobras, *supra* note 30, at 358.

100. See *id.* at 358-59.

101. See Forte, *supra* note 93, at 60 ("[N]ot only are charges of blasphemy often lodged for personal and political motives, but once brought, the accused is subjected to acts of private violence").

102. See Siddique & Hayat, *supra* note 91, at 329.

103. See Dobras, *supra* note 30, at 374.

104. See Forte, *supra* note 93, at 60-61.

[G]iven the general climate of religious intolerance and the lack of protection afforded by the government . . . [t]hose accused of or charged with blasphemy often face violence from private citizens. Even those individuals who are found innocent by the court system often have to go into hiding and seek asylum elsewhere as a result of the many death threats they and their families receive.<sup>105</sup>

Legislative attempts to add increased procedural protections for accused blasphemers have failed in recent years due to the public's overwhelming support of blasphemy laws.<sup>106</sup> In February 2010, Pakistan's Minister for Religious Affairs announced that the government was "holding consultative meetings with representatives of minorities and political parties, as well as with Muslim clerics" on how the blasphemy laws could be altered to limit their "misuse" by extremist groups.<sup>107</sup> The laws continue in force as of this writing, with their most recent high-profile invocation centering on whether the entirety of Facebook should be permanently banned in the country due to user-generated content like "Everybody Draw Muhammad Day" and "Everybody Burn Qur'an Day."<sup>108</sup> In March 2011, this official, Shabaz Bhatti, was assassinated by the Taliban. The terrorist organization attributed the murder to Bhatti's support of blasphemy law reform.<sup>109</sup>

#### E. Canada and England: Examples of Persistent Blasphemy Laws

Examples of the continuing persistence of blasphemy laws and their modern-day counterparts could easily be multiplied if time and space were of no concern. Canada retains a law against "blasphemous libel" on the statute books,<sup>110</sup> and the religious hate speech laws of one of its

105. Dobras, *supra* note 30, at 358-59. See also Siddique & Hayat, *supra* note 91, at 327.

106. See Dobras, *supra* note 30, at 375; Siddique & Hayat, *supra* note 91, at 379 n.332.

107. See Zeeshan Haider, *Pakistan Intends to Alter Blasphemy Law*, REUTERS, Feb. 25, 2010, available at <http://www.reuters.com/article/idUSTRE61O1M820100225>.

108. See Babar Dogar, *Facebook Banned in Pakistan*, TORONTO STAR, May 19, 2010, available at <http://www.thestar.com/news/world/article/811422--facebook-banned-in-pakistan> (reporting temporary ban); Howard Friedman, *Pakistan Court Hears Arguments on Permanently Banning Facebook Over Blasphemous Pages*, Religion Clause Blog, Aug. 5, 2010, available at <http://religionclause.blogspot.com/2010/08/pakistan-court-hears-arguments-on.html>.

109. See Samson Desta, *Taliban: Pakistani Minister Killed over Stance on Blasphemy Law*, CNN, Mar. 2, 2011, available at <http://edition.cnn.com/2011/WORLD/asiapcf/03/02/pakistan.minister.shot/?hpt=T2>. Three months before Bhatti's assassination, the governor of Pakistan's Punjab province was assassinated by his own bodyguard over his support for blasphemy law reform. See Unsigned, *Pakistani Leader Shot Dead by Own Bodyguard*, USA TODAY, Jan. 4, 2011, available at [http://www.uatoday.com/news/world/2011-01-04-pakistani-governor-killed\\_N.htm](http://www.uatoday.com/news/world/2011-01-04-pakistani-governor-killed_N.htm).

110. See Patrick, *supra* note 45, at 193.

provinces led to human rights commission hearings for a magazine that reprinted the Danish Muhammad cartoons.<sup>111</sup> England abolished blasphemy as a common law offense,<sup>112</sup> but invoked its new Religious and Racial Hatred Act against six men who burned the Koran and posted the video on YouTube.<sup>113</sup> Any predictions that blasphemy laws would simply fade away in the wake of increasing secularization or constitutionalization are simply mistaken.

### III. THREE CONCEPTIONS OF BLASPHEMY

What is blasphemy? No simple answer exists, because a crucial aspect of the question is “who is asking” and “for what purpose?”<sup>114</sup> Blasphemy as a concept (legal and otherwise) is “contested, fluid, and dynamic[,]”<sup>115</sup> “complex and protean[,]”<sup>116</sup> and “genuinely indefinable.”<sup>117</sup> In a very general sense, blasphemy can be thought of as an inevitable side effect whenever the barrier between the sacred and the profane is breached. As Plate notes, “blasphemy is fundamentally about transgression, about crossing the lines between the sacred and profane in seemingly improper ways.”<sup>118</sup>

Blasphemy can simultaneously be conceptualized as a unifying and a divisive force. On the one hand, blasphemy is a persistent concept that ties together the ancient and modern worlds, links East and West,

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111. See *Conservative Who Published Prophet Cartoons Faces Rights Commission* CANWEST NEWS SERV., Jan. 10, 2008, available at <http://www.canada.com/topics/news/story.html?id=6edbee05-bec3-46c0-aa22-f16cf3f0acb1&k=90175>.

112. See Martin Beckford, *Blasphemy Laws are Lifted*, TELEGRAPH, May 10, 2008, available at <http://www.telegraph.co.uk/news/1942668/Blasphemy-laws-are-lifted.html>.

113. See *Men Arrested in Gateshead Over Suspected Koran Burning*, BBC NEWS, Sept. 23, 2010, available at <http://www.bbc.co.uk/news/uk-england-tyne-11396980>.

114. See, e.g., Address to the Jury by Robert Ingersoll, Trial of C.B. Reynolds for Blasphemy at Morristown, N.J. (1887), available at [http://www.infidels.org/library/historical/robert\\_ingersoll/blasphemy\\_trial.html](http://www.infidels.org/library/historical/robert_ingersoll/blasphemy_trial.html) (“Now gentlemen, what is blasphemy? Of course nobody knows what it is, unless he takes into consideration where he is. What is blasphemy in one country would be a religious exhortation in another. It is owing to where you are and who is in authority”).

115. PLATE, *supra* note 1, at 27.

116. LEONARD W. LEVY, TREASON AGAINST GOD: A HISTORY OF THE OFFENSE OF BLASPHEMY 4 (1981) [hereinafter “Treason”].

117. JOSS MARSH, WORD CRIMES: BLASPHEMY, CULTURE, AND LITERATURE IN NINETEENTH-CENTURY ENGLAND 7 (1998).

118. PLATE, *supra* note 1, at 43. See also MARSH, *supra* note 117, at 7 (“blasphemy marks the moving boundary line between the permissible and the prohibited; it is always what you may not say; always whatever affronts what the people, or the people in power, put their faith in—God, religion, nature, art, even democracy, freedom, or childhood innocence.”). On the idea of the “sacred” and the “profane,” see the seminal work by MIRCEA ELIADE, THE SACRED AND THE PROFANE: THE NATURE OF RELIGION (trans. Willard R. Trask 1957).

Muslim and Christian. No specific idea or act is inherently blasphemous, as blasphemy is a historically contingent concept that will vary in form from age to age, place to place, and culture to culture.<sup>119</sup> However, any culture that has religion or taboos acquires, to some degree or another, the notion of blasphemy because the idealized conception of the “sacred” cannot exist without a reciprocal belief that the sacred should not be tainted with the profane.<sup>120</sup> In a less abstract sense, cries of “blasphemy” can give strength and unity to a society as it bands together to punish and cast out those who would mock or criticize the sacred. On the other hand, blasphemy caused by differing understandings of what is sacred can tear groups (religious, cultural, political, ethnic) apart, and lead to outrage, schism, or even violence. Indeed, the intense negative emotions—anger, grief, hatred—associated with blasphemy is one of the characteristics that distinguish it from mere disagreement on theological or political points.

The concept of blasphemy can be fruitfully understood from at least three different viewpoints: as a religious concept, as a legal concept, and as a secular and cultural concept. These three conceptions of blasphemy often intersect and reinforce one another, without necessarily leading to identical conclusions about what is or is not “blasphemy.”

Blasphemy is most commonly thought of as a religious concept, and notions of what is blasphemous will thus differ from religion to religion. To give a few examples, Judaism places strictures upon the use of God’s name,<sup>121</sup> Islam prohibits images of Allah and the Prophet Muhammad,<sup>122</sup> and Christianity makes blaspheming against the Holy Spirit an unforgivable offense.<sup>123</sup> As a religious concept, blasphemy can be intra-faith (originating within a religious group, and thus akin to heresy), inter-faith (when adherents of one religion or denomination blaspheme against another), or extra-faith (when non-believers blaspheme). Of course, “one person’s blasphemy can be someone else’s deep-seated pious belief,”<sup>124</sup> and the invocation of the concept in a religious context can be viewed in everything from the Biblical trial of Jesus to the Protestant Reformation to the continuing persecution of Ahmadis in Pakistan. The ability of religious groups to police their ranks and purge them of blasphemy depends on how much influence the

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119. See PLATE, *supra* note 1, at 125.

120. See *id.* at 37 (“[T]he sacred and the profane need each other for their very definitions. The sacred provides meaning and orientation for the profane; the profane sustains the sacred”).

121. See *id.* at 968.

122. See M.K. Hassanvand, *A Survey of Prohibition of Painting in Islam*, 11 J. HUMANITIES 31, 33, 38, 42 (2004).

123. See *Matthew* 12:31-32.

124. Daniel J. Lasker, *Blasphemy: Jewish Concept*, in 2 ENCYCLOPEDIA OF RELIGION 968, 970 (Lindsay Jones ed., 2d ed. 2005).

religion has with civil authorities. On their own, religious groups must resort to denouncement, demotion, and excommunication. With the assistance of the State, however, far more severe punishments become available.

As a legal concept, blasphemy in the Western common law tradition was originally defined as “contumelious reproaches of God or the religion established.”<sup>125</sup> An American case from 1838 stated that:

In general blasphemy may be described, as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God, calculated and designed to impair and destroy the reverence, respect, and confidence due to him, as the intelligent creator, governor and judge of the world . . . It is a wilful and malicious attempt to lessen men’s reverence of God.<sup>126</sup>

Over time, the substance of an impugned statement was viewed as less problematic than was the manner in which it was uttered, leading to the famous dictum that “[i]f the decencies of controversy are observed, even the fundamentals of religion may be attacked[.]”<sup>127</sup> A tendency for the statement to breach the peace became seen by some judges as an essential element of the offense,<sup>128</sup> and statutory versions usually included affirmative defences for speech made “in good faith” for various purposes.<sup>129</sup> Of course, generalizations about the “Western

125. See COX, *supra* note 34, at 6-7 (quoting Hale); see *State v. Mockus*, 113 A. 39, 41 (Me. 1921) (quoting Blackstone). See also LEVY, *supra* note 116, at 313-14. A fuller discussion of the evolution of the legal definition of blasphemy can be found in various sources, including Patrick, *supra* note 45, at 196-207.

126. *Commonwealth v. Kneeland*, 37 Mass. 206, 213 (1838).

127. *Reg. v. Ramsay*, (1883) 15 Cox C.C. 231 (Q.B.D.) at 238.

128. See Harris, *supra* note 59, at 218 (“Whether the common law definition also requires the publication of the scurrilous material must be likely to produce a breach of the peace is disputed”). Before the common law crime of blasphemy was abolished in England, a court in 2007 stated that

[T]he elements of the offence are common ground. First, there must be contemptuous, reviling, scurrilous and/or ludicrous material relating to God, Christ, the bible or the formularies of the Church of England. Second, the publication must be such as tends to endanger society as a whole, by endangering the peace, depraving public morality, shaking the fabric of society or tending to cause civil strife.

*Re. Green v. City of Westminster Magistrates’ Court*, [2007] EWHC (Admin) 2785 [11].

129. See, e.g., Criminal Code, R.S.C. 1985, c. C-46, s. 296 (Can.) (“No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an

common law tradition” obscure the many variations within that tradition, and do not even begin to address the legal meaning of blasphemy in countries outside of that tradition. Even though commonalities exist, the simple truth is that just as “blasphemy” means something different to every religion, it also means something different in every legal system.

If religion were to fade as an influential force in a society and its legal system, would blasphemy as an operative concept fade away as well? In other words, is the concept of blasphemy so tied to the concept of religion that the two cannot exist without each other? The thesis advanced in this Article is that, while blasphemy requires a notion of the sacred, the sacred need not be conceived of in a religious fashion.<sup>130</sup> That is, the concept of blasphemy is useful in understanding how social and legal pressure can be brought to bear on nonconformists or provocateurs who challenge the secular ideals that a society holds as sacred.

“Cultural blasphemy” exists because, although in theory modernism and rationalism go hand-in-hand, and social values or concepts should be defended on their own merits in the marketplace of ideas, in reality every society, culture, or nation-state has certain notions that are more or less “off-limits” to normal criticism and debate. Blasphemy against the secular sacred may be punished by the legal system in the same fashion that blasphemy against the religiously sacred is punished, though of course the laws will be given different names and perhaps different justifications.

The concept of “cultural blasphemy” can be illustrated through examples. Patriotism is a common expectation in nation-states, and perceived disrespect, even though it may have no tangible consequences, will be seen in an unfavourable light.<sup>131</sup> The following examples are illustrative: desecrating a flag in the United States was commonly prohibited before such laws were narrowly struck down by the Supreme Court;<sup>132</sup> the requirement to swear an oath to “be faithful and bear true allegiance” to the Queen is still a bar to principled anti-monarchist immigrants who wish to become citizens in Canada;<sup>133</sup> and a

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opinion on a religious subject”); Defamation Act 2009, *supra* note 47 (“It shall be a defence . . . for the defendant to prove that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates”); Criminal Code Act 1924 (Tas.), *supra* note 63 (“It is not an offence under this section to express in good faith and in decent language . . . any opinion whatever upon any religious subject”).

130. See PLATE, *supra* note 1, at 28 (“[i]n the contemporary world, targets of blasphemy are often shifted from the traditionally sacred—gods, prophets, and holy books—to the ‘gods of modernity’ such as the nation-state, education, friendship, and freedom of expression”).

131. See *id.* at 163-69.

132. See *Texas v. Johnson*, 491 U.S. 397, 418-20 (1989).

133. See *Roach v. Canada* (Att’y Gen.) (2009), 185 C.R.R. (2d) 215 (Can. Ont. Sup. Ct.

passing remark that the United States was “cowardly” in its use of cruise missiles was enough for comedian Bill Maher to lose his nightly network talk show.<sup>134</sup> A professed belief in the perfect equality of the sexes and racial groups is arguably *de rigueur* in certain circles, as demonstrated by the controversy over former Harvard President Lawrence Summers’ comments on possible “innate differences” between men and women when it comes to math and science,<sup>135</sup> or the uproar over the *Bell Curve*’s suggestion that there may be racial differences in intelligence.<sup>136</sup> Challenges to the social idealization of parenthood may be met with overwhelming vehemence, as demonstrated by the “firestorm of controversy” that resulted when a mother wrote in an English newspaper that her children were “boring.”<sup>137</sup> Holocaust denial is a good example of “cultural blasphemy,”<sup>138</sup> and remains punishable as a criminal offence in several countries.<sup>139</sup>

The common factor that sets “cultural blasphemy” apart from normal social or political controversy is the swift, almost intuitive, anger that blasphemous remarks cause in listeners, an anger that can become so intense that the result is a cry for suppression or condemnation rather than thoughtful response or informed debate. “Cultural blasphemy” as a concept is a useful one because it may shed light on the difference between what a democratic society professes to cherish (the search for truth, an open and fair exchange of ideas), and

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J.).

134. Cathal Kelly, *Bill Maher Uses the Word You Can Never Use*, TORONTO STAR, Sept. 15, 2010, available at <http://www.thestar.com/news/world/article/861302--bill-maher-uses-the-word-you-can-never-use>.

135. James Bone, *Harvard President Faces Faculty Revolt Over Sexism Claims*, TIMES (U.K.), Feb. 17, 2005, available at [http://www.timesonline.co.uk/tol/life\\_and\\_style/education/student/news/article515309.ece](http://www.timesonline.co.uk/tol/life_and_style/education/student/news/article515309.ece).

136. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 269-315 (1994).

137. César G. Soriano, “Bored” by Her Kids, She’s Getting It Full-Bore, USA TODAY, July 31, 2006, available at [http://www.usatoday.com/news/health/2006-07-30-bored-mom\\_x.htm](http://www.usatoday.com/news/health/2006-07-30-bored-mom_x.htm). This is a good example of how the “problem” of blasphemy can be addressed through strong social pressure geared towards forcing the blasphemer to conform to mainstream values. Laws are unnecessary where the power of public opinion suffices. See also RICHARD WEBSTER, *A BRIEF HISTORY OF BLASPHEMY: LIBERALISM, CENSORSHIP AND “THE SATANIC VERSES”* 25-26 (1990) (discussing how, in the context of blasphemy against Christianity in the West, “the restraints of good taste have gradually made the restraints of the law all but redundant” and that “[b]ecause of this process individuals or organi[z]ations can, to a large extent, be relied upon to impose the kind of censorship which was once enforced by the state”).

138. See PLATE, *supra* note 1, at 100 (“Denial, belittling, or making fun of the Holocaust evokes judgments that are parallel to the responses against blasphemers”).

139. See Peter R. Teachout, *Making “Holocaust Denial” a Crime: Reflections on European Anti-Negationist Laws From the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 656 n.9 (2006) (listing nine countries with Holocaust denial laws).

what its people actually care about the most.

These three conceptions of blasphemy—religious, legal, and cultural—provide a starting point for asking deeper questions: “why do people blaspheme,” and “what are the perceived harms of blasphemy?”

#### IV. WHY DO PEOPLE BLASPHEME?

The issue of blasphemy is often looked at through the lenses of legality and legitimacy, with the focal point being the traditional tension between individual rights and social needs. Thus, blasphemy is seen as leading to a contest between “freedom of speech” on the one hand and “religious sensibilities” on the other, and the balancing process of divergent interests, familiar to law students around the world, takes center stage. However, abstract general concepts like “freedom of speech,” although necessary at an analytical level, tend to obscure differences between the various components that make up those concepts. Thus, to understand if, how, or why blasphemous speech should be afforded protection under the general rubric of free expression, an inquiry needs to be made into the very different reasons people blaspheme. Some of these reasons are obvious, others less so, but together they demonstrate that “blasphemy” may be a more complex concept than generally thought.

##### A. *Sincere Faith*

Today, blasphemy is often thought of as something the irreligious do to the religious,<sup>140</sup> but historically, sincere differences in religious belief were the common cause of blasphemy prosecutions. Several scholars have noted that the concept of blasphemy existed primarily as a tool to enforce religious orthodoxy against dissidents whose consciences led them to beliefs that the established churches found heretical. For example, Alain Cabantous notes that “[i]n light of the tragic divisions that then so shattered the peace in post-Reformation Europe—hardening adversaries and the lines separating professions of the true faith—the guilty’ were . . . religionists of the other confession.”<sup>141</sup> In the same context, Levy notes that “[f]or most of history, blasphemers have been devout Christians, although obnoxious

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140. See, e.g., Talal Asad, *FREE SPEECH, BLASPHEMY, AND SECULAR CRITICISM in IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH* 20, 56 (2009) (discussing “the obsessive need to repeat again and again the words and images that secularists know will be regarded by the pious with horror”).

141. CABANTOUS, *supra* note 12, at 16.

to the majority of Christians among whom they lived.”<sup>142</sup> The same idea holds true for the persecution of devout Ahmadis in Pakistan, who are seen as “false” Muslims by the government.<sup>143</sup> Of course, sincere expressions of faith are not necessarily temperate expressions of faith, and historically there are plenty of examples of believers articulating the distinction between the “true faith” and all others using coarse and strident language.<sup>144</sup>

### B. Oppression

The ability to suppress speech as “blasphemous” has traditionally been held by those in power: judges, legislators, leaders of established churches. Limiting the speech of minorities is a form of oppression, but so too can be blasphemy against the minority’s beliefs. The ability to blaspheme with impunity against a religion is a show of power (by the blasphemer) and a show of powerlessness (by those blasphemed against). The destruction by the Taliban of 1700 year-old Buddhist statues in Afghanistan is a good example of this type of blasphemy,<sup>145</sup> as is, to some critics, the publication of the cartoons mocking Muhammad in Denmark, a country where Muslims are heavily outnumbered.<sup>146</sup>

### C. Resistance

One response to oppression is resistance, and blasphemy against the dominant beliefs in a society can be a powerful tool for those in the minority. In this context, blasphemy serves as an act of defiance, a show of unity, or even a rallying cry and call to arms for the faithful. When an

142. LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* ix (1993) [hereinafter *BLASPHEMY*]. See also COX, *supra* note 34, at 8 (“A remarkable feature of the blasphemy prosecutions in the 17th-19th centuries, was the fact that they frequently involved genuinely religious defendants . . .”).

143. See *infra* Part II.D.

144. See LEVY, *supra* note 116, at 332 (“Inoffensive speech was not the hallmark of Elijah, Isaiah, or of Jesus himself; Paul, Athanasius, Augustine, Luther, Calvin, Fox, and other champions of true faith pursued a tradition of vehement denunciation”); F. LAGARD SMITH, *BLASPHEMY AND THE BATTLE FOR FAITH* 73 (1990) (“Looking back to Biblical illustrations, Jesus and John the Baptist probably would not fare very well in today’s society if they insisted on using modern linguistic equivalents of ‘you brood of vipers,’ ‘you hypocrites,’ and ‘son of hell’”).

145. See Ahmed Rashid, *After 1,700 Years, Buddhas Fall to Taliban Dynamite*, TELEGRAPH (U.K.), Mar. 12, 2001, available at <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1326063/After-1700-years-Buddhas-fall-to-Taliban-dynamite.html>.

146. See, e.g., Cindy Holder, *Debating the Danish Cartoons: Civil Rights or Civil Power?*, 55 U.N.B.L.J. 179, 183 (2006) (arguing that the cartoons, and the lack of an apology, “[are] not about rights, [they are] about power”).

Anglican priest put up a vehemently anti-Catholic poster in the overwhelmingly Catholic Quebec of 1936,<sup>147</sup> the display clearly had more to do with notions of resistance than mere theological differences. Blasphemy of this type can serve to bind a religious minority together, setting them apart from mainstream society. The polemical and inflammatory language used by Jehovah's Witnesses in the early twentieth century was driven by both religious zeal and a constant apprehension of persecution.<sup>148</sup>

#### D. Accident

If the essence of blasphemy is that the sacred has been tarnished by the profane, then logically it does not necessarily matter why the blasphemous act took place. In other words, the good intentions or non-malevolent mental state of the blasphemer cannot erase the fact that blasphemy occurred, nor is it enough to absolve the blasphemer of guilt. In English common law, blasphemy was a strict liability offense—if it could be proven that the defendant intended to utter or publish material that turned out to be blasphemous, it was doctrinally of no consequence whether or not he intended to blaspheme.<sup>149</sup> The idea that blasphemy could take place unintentionally is borne out in some cases, ancient and modern. In Ireland in 1855, a Reverend Petcherine had given a series of sermons on the danger of “evil” literature (popular novels and the like) and then invited his listeners to bring bundles of the books for a public burning.<sup>150</sup> Unbeknownst to Petcherine, a copy of the Bible somehow ended up in the flames, and Petcherine was promptly charged with

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147. See *R. v. Rahard*, (1935) 65 C.C.C. 344, 345-46 (Can. Que. C.S.P.).

148. See WILLIAM KAPLAN, *STATE AND SALVATION: THE JEHOVAH'S WITNESSES AND THEIR FIGHT FOR CIVIL RIGHTS* 11 (1989) (“[A]s more and more Jehovah's Witnesses were arrested in the 1930s, the literature of the group became increasingly intemperate. The Jehovah's Witnesses blamed the Roman Catholic hierarchy for the ‘persecution’ they were forced to endure, and the church was portrayed in insulting terms in their literature”); Allen Rostron, *Demythologizing the Legal History of the Jehovah's Witnesses and the First Amendment*, 22 QUINNIPIAC L. REV. 493, 498 (2004) (reviewing SHAWN FRANCIS PETERS, *JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* (2000)) (arguing that “the legal struggles served even more fundamental needs for the Witnesses, setting them apart from others, indulging their need for opposition and adversity, and reassuring them that they were indeed a special people to God”).

149. See *Whitehouse v. Gay News Ltd.*, (1979) 68 Crim. App. R. 381, 394 (HL) (Viscount Dilhorne) (“If it be accepted, as I think it must, that that which is sought to prevent is the publication of blasphemous libels, the harm is done by their intentional publication, whether or not the publisher intended to blaspheme.”); Law Commission, ‘Offences Against Religion and Public Worship’ (Law Com No 79, 1981)[6.7] (“[t]he practical consequence of the exclusion of any requirement as to the intent of the defendant to blaspheme is that he cannot give admissible evidence as to what he claims to be his beliefs and purpose”).

150. See O’Higgins, *supra* note 34, at 163.

blasphemy—fortunately, the jury acquitted him.<sup>151</sup> A well-known recent example of accidental blasphemy is that of the British national, teaching at a children’s school in the Sudan, who allowed her students to name the class teddy bear “Muhammad.”<sup>152</sup> Arguably, some common types of profanity in North America fall into this category—blasphemous expressions uttered in anger, like “God Damn” or “Jesus Christ” rarely include any intent to make a religious statement; they are simply markers of cultural inheritance.

### E. *Provocation: Art, Satire, Literature*

The taboo, shocking nature of blasphemy is exactly what makes it useful in creative endeavours. Although an artist may want to be provocative simply for the sake of being provocative, or funny for the sake of being funny, blasphemy holds other possibilities. In a world saturated with images, ideas, and viewpoints, the strategic deployment of blasphemy can get people to stop and pay attention—whether out of surprise, anger, or mirth. The hope, presumably, behind Salman Rushdie’s blasphemous portrayal of Muhammad in the *Satanic Verses* was for readers to come away with questions about the nature of revelation, historical truth, and faith.<sup>153</sup> Similarly, the most famous of the Danish Muhammad cartoons, that of Muhammad wearing a turban shaped like a bomb,<sup>154</sup> has a larger point to make—whether true or not—about the role of violence and extremism in Islam.

The blasphemous writer or artist is by nature a gambler: he or she is betting that once the initial shock of seeing the blasphemous work wears off, the viewer retains the presence of mind to grasp the larger idea behind it. In other words, blasphemy is a risky tool for provoking thought—a passerby who sees an image of Jesus Christ wearing Mickey Mouse ears<sup>155</sup> might reflect on the influence of capitalism and commercialism in mainstream society, but that person could just as well be insulted and walk away, resisting any further attempts to establish the truth of the proposition that the artist is making. Thus, if the question is “does blasphemy work,” the only sensible answer seems to be “sometimes.” It is clearly extremely effective at gaining attention, and attempts to suppress blasphemous speech often have the ironic

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151. *See id.*

152. *See British Teacher Held in Sudan for Calling Teddy Bear “Mohammed” Could Be Jailed for Sedition*, DAILY MAIL (U.K.), Nov. 27, 2007, available at <http://www.dailymail.co.uk/news/article-496460/British-teacher-held-Sudan-calling-teddy-bear-Mohammed-jailed-sedition.html>.

153. *See generally* SALMAN RUSHDIE, *THE SATANIC VERSES* (Viking, 1988).

154. The cartoons are available on various Internet websites, and a reproduction of the cartoon discussed is reprinted in PLATE, *supra* note 1, at 18.

155. *See* Nowak, *supra* note 11.

effect of making blasphemers into martyrs whose condemnation vaults them (and their work) into the headlines.

The reasons why people may blaspheme listed here—sincere faith, oppression, resistance, accident, and provocation—do not exhaust the field, and additional examples can surely be found at varying levels of generality and specificity. A discussion of the motivations behind blasphemous speech allows for the creation of a continuum of the legal treatment of blasphemous speech. At one end is the strict liability approach exemplified by early English common law, which prohibited blasphemy, regardless of why the defendant uttered it.<sup>156</sup> At the other end would be an approach that constitutionally guarantees the right to blaspheme for almost any reason—the law in the United States.<sup>157</sup> At various points in between would be those countries that still prohibit blasphemy, but make convictions dependent upon whether or not the defendant could establish that the speech was made for a “religious,” “artistic,” “scientific,” or some other “legitimate” purpose.<sup>158</sup>

## V. THE HARMS OF BLASPHEMY, REAL OR PERCEIVED

The curious persistence of blasphemy laws and their modern counterparts requires explanation. What is it about blasphemous speech that necessitates its prohibition in a vast array of cultures stretching back through time and across the globe? Is it prohibited simply from an intuitive sense that “blasphemy is wrong,” or are there real harms arising from blasphemous speech that legitimate its suppression? The perceived harms of blasphemous speech have, in some countries, changed dramatically over the centuries, and the decisions of judges and legislators over which harms are real and which are imaginary help to determine the scope and enforcement of blasphemy laws.

### A. *Divine Wrath*

The precise way in which a religion conceives of the divine affects how blasphemy will be viewed in that religion, and the culture and society to which it belongs. The distant, “watchmaker” God of the Deists takes no notice of blasphemy. However, if the god or gods of a

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156. See generally *Whitehouse v. Gay News Ltd.*, (1979) 68 Cr. App. R. 381 (HL); SELECT COMMITTEE ON RELIGIOUS OFFENCES IN ENGLAND AND WALES, VOLUME I—REPORT (House of Lords), 2002-03, HL Paper 95—I, ¶ 19 (indicating that the offense of blasphemy is “one of strict liability. That is to say, intent to commit an act of blasphemy is irrelevant; all that matters is whether the accused did in fact publish material that is the subject of prosecution”).

157. See *Burstyn v. Wilson*, 343 U.S. 495, 505-06 (1952) (excluding true threats, fighting words, and the like).

158. See, e.g., Defamation Act 2009, *supra* note 47.

religion are attributed certain characteristics—omniscience, omnipotence, and anthropomorphic emotions such as anger, jealousy, and vengefulness—then it logically follows that blasphemy can incur swift and painful retribution from on high. The wrathful and violent God depicted in what Christians call the Old Testament exemplifies a divine being willing and able to respond to blasphemy by punishing not just the blasphemer, but also his entire family or community.<sup>159</sup> In this context, a society prohibits blasphemy almost as a form of self-defense, as a way to protect itself from divine wrath by demonstrating that the blasphemer is not representing the community as a whole. A perfect example of this fear comes from a speech by Georges Vanier, a Brigadier General for the Canadian armed forces during World War II.<sup>160</sup> As part of a public campaign against blasphemy, Vanier tells about an incident that took place while he was leading troops on the battlefield and accompanies it with evocative imagery.<sup>161</sup> The reader pictures a brave group of men advancing quietly across a darkened battlefield, moving quietly in single file toward the barbed wire and trenches that mark the enemy's front line. Suddenly shells burst overhead, and one of Vanier's men utters undisclosed blasphemies.<sup>162</sup> "These blasphemies," Vanier says, "[when] we were so close to death, filled me with fear because blasphemy brings divine curses. I managed to reach the blasphemer and ask him[,] 'What is it that Christ did to you, my friend, that you offend him so?' He trembled like a child and burst into tears."<sup>163</sup>

### B. Moral Degradation

If one of the justifications for prohibiting blasphemous speech was fear of the direct and very tangible punishments an angry god could mete out, the fear often operated alongside a far more diffuse anxiety that blasphemy undermined society itself. Although speculative and unproven, the concern was that blasphemy operated to diminish public morality and respect for the established religion, which in turn weakened social bonds, the sanctity of oaths, and even allegiance to the state.<sup>164</sup> In early English common law, for example, the state and

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159. See, e.g., 2 Kings 19:6-7.

160. See DON'T BLASPHEME (Pamphlet) (Current Events in Tracts No. 20) in Campagne contre le blaspheme, Ottawa, National Archives of Canada (MG 32-A2, Vol. 14, File 16) (Vanier fonds) (all translations mine). Vanier, his campaign against blasphemy, and this anecdote are discussed at more length in Jeremy Patrick, *Canadian Blasphemy Law in Context: Press, Legislative, and Public Reactions*, 16 ANN. SURV. INT'L & COMP. L. 129, 158-62 (2010).

161. See Patrick, *supra* note 160, at 158-59.

162. *Id.*

163. *Id.*

164. See, e.g., *The People v. Ruggles*, 8 Johns. 290 (N.Y. Sup. Ct. 1811) (stating that

Christianity were so closely identified that blasphemy was viewed as a form of sedition:<sup>165</sup> as Hale noted in *Taylor's Case*, “[f]or to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and [because] Christianity is parcel of the laws of England . . . to reproach the Christian religion is to speak in subversion of the law.”<sup>166</sup> Blasphemy has also been viewed as a form of profanity or obscenity,<sup>167</sup> with its prohibition paternalistically justified as necessary to protect the impressionable morals of women, children, and the naive.<sup>168</sup> In modern times, proponents of blasphemy prohibitions have largely abandoned arguments based on the diffuse fear of moral degradation in favor of justifications relating to discrimination and breaches of the peace. However, there are still those who believe that blasphemy statutes (even if rarely enforced) serve an important symbolic function in setting forth the moral standards that a

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blasphemous statements “are punishable because they strike at the root of moral obligation, and weaken the security of the social ties.”) See also Robert A. Brazener, *Annotation, Validity of Blasphemy Statutes or Ordinances*, 41 A.L.R.3d 519, § 3[a] (WL 2006) (referencing *State v. Mokus*, in which the court reasoned that “any word or deed which would expose the God of the Christian religion, or the Holy Scriptures, ‘to contempt and ridicule,’ . . . would rob official oaths of any of their sanctity, thus undermining the foundations of their binding force . . .”); Clive Unsworth, *Blasphemy, Cultural Divergence and Legal Relativism*, 58 MOD. L. REV. 658, 666 (1995) (discussing blasphemy as a crime concerned with the “social value of maintaining respect for a sense of reverence for the sacred” and noting that “[i]t is the tenuous and intangible nature of the harm against which the offence protects that causes especial outrage to liberal exponents of the pre-eminent value of freedom of expression”).

165. See *Whitehouse v. Gay News Ltd.*, (1979) 68 Cr. App. R. 381, 384 (HL) (Lord Diplock), where the court stated that

In the post-Restoration politics of seventeenth and eighteenth century England, Church and State were thought to stand or fall together. To cast doubt on the doctrines of the established church or to deny the truth of the Christian faith upon which it was founded was to attack the fabric of society itself; so blasphemous and seditious libel were criminal offences that went hand in hand.

*Id.*

166. *Taylor's Case*, (1675) 86 E.R. 189, 189. See also Note, *Blasphemy*, 70 COLUMBIA L. REV. 694, 698 (1970) (stating that, although the rationale in *Taylor's Case* is “not entirely clear,” it is probably “that the fabric of society itself is weakened by mockery or questioning of the foundations of law, one of which is the Christian religion”).

167. See WEBSTER, *supra* note 137, at 23 (“there has always been a close relationship between obscenity laws and blasphemy laws, with obscene or scurrilous language tending to be construed as one of the characteristics of blasphemy”); LEVY, *supra* note 142, at 506 (discussing how in American cases “[s]ometimes profanity and blasphemy were treated as almost interchangeable”).

168. See, e.g., *Ruggles*, 8 Johns. 290, at 290 (“Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful”).

nation expects from its citizens.<sup>169</sup>

### C. *Offense and Discrimination*

Blasphemy upsets people. This is a simplistic way of putting it, but it cuts to the core of why blasphemy laws persist, in one fashion or another, in modern times. Abstract discussion of blasphemy as transgressing the barrier between the sacred and the profane should not obscure the fact that blasphemy provokes emotional responses. When that emotion is anger, the resulting violence can lead to social unrest and breaches of the peace—a topic discussed in the next section. When that emotion is shock, dismay, and sadness, it can (arguably) become psychologically harmful to the individual.<sup>170</sup> In the context of the Danish Muhammad cartoons, for example, Saba Mahmood writes: “[a]t the time of their initial publication, I was struck by the sense of personal loss expressed by many devout Muslims on hearing about or seeing the cartoons. While many of those I interviewed condemned the violent demonstrations, they nonetheless expressed a sense of grief and sorrow.”<sup>171</sup>

The need to protect the religious sensibilities of minorities can be seen as even more vital in countries that strive to be multicultural, diverse, and tolerant.<sup>172</sup> Some advocates would go a step further and

169. See, e.g., SELECT COMMITTEE ON RELIGIOUS OFFENCES IN ENGLAND AND WALES, VOLUME I—REPORT (House of Lords), 2002-03, HL Paper 95—I, ¶ 34 (“Many think that the law on blasphemy offers much more than legal protection; they believe it to be an expression of the fabric of our society, of the values on which our relationships with one another depend, of our constitutional heritage, and of the nature of our national identity”); SMITH, *supra* note 144, at 14-15 (“Some people think it is desirable to keep blasphemy laws on the books, just as they are, but without actively enforcing them. Their idea is that even unenforced blasphemy laws could ‘make a public statement’ about the seriousness of religious libel”).

170. The argument is most clearly seen in laws that may function as modern-day counterparts to blasphemy laws, such as those prohibiting “religious vilification” and “religious hate propaganda.” See Harris, *supra* note 59, at 223 (“The argument therefore is that blasphemy is really a species of vilification law, analogous to laws penalising racial vilification”); Ahdar, *supra* note 70, at 295-97 (discussing discrimination and psychological harm in the context of religious vilification); R. v. Keegstra, [1990] 3 S.C.R. 697, ¶ 64 (“It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence”) & ¶ 119 (discussing “the severe psychological trauma suffered by members of those identifiable groups targeted by hate propaganda”); Canada v. Taylor, [1990] 3. S.C.R. 892, ¶ 40 (“The Cohen Committee noted that individuals subjected to racial or religious hatred may suffer substantial psychological distress, the damaging consequences including a loss of self-esteem, feeling of anger and outrage and strong pressure to renounce cultural differences that mark them as distinct”).

171. Saba Mahmood, “Religious Reason and Secular Affect: An Incommensurable Divide?,” in *IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH* 74 (2009).

172. See, e.g., *Whitehouse v. Gay News Ltd.*, 68 Cr. App. R. 381, 404 (HL) (Lord Scarman) (“In an increasingly plural society such as that of modern Britain it is necessary not

argue that speech contemptuous or dismissive of the religious beliefs of minorities exposes them to an increased risk of actual discrimination and even violence.<sup>173</sup> History is sometimes drawn into the debate, with the rise of anti-Semitism in early Nazi Germany and public advocacy of ethnic cleansing in Rwanda cited as examples of the harms of hateful speech towards minorities.

This Article has tended to treat blasphemy and religious vilification/hatred as if they were the same thing. Conceptually, this is a mistake; the two offenses have different historical antecedents, address different perceived threats, and, most importantly, are distinguishable (theoretically) on the ground that blasphemy attacks beliefs, while religious vilification/hatred attacks believers.<sup>174</sup> The belief/believers distinction lies at the heart of why mainstream Western liberals who would be aghast at the introduction of blasphemy legislation designed to protect orthodoxy may be quite supportive of religious vilification/hatred laws designed to protect minorities.<sup>175</sup>

A crucial question arises: even if the belief and believers distinction is conceptually sound, is drawing the distinction meaningful and

only to respect the differing religious beliefs, feelings, and practices of all but also to protect them from scurrility, vilification, ridicule, and contempt"); Ahdar, *supra* note 70, at 294 ("Religious vilification laws endeavour to strike a balance between several policy aims and objectives. There is a broad desire to promote religious tolerance. This in turn . . . derives from a broader policy endorsing multiculturalism"). In a decision upholding the validity of domestic blasphemy laws, the European Commission on Human Rights stated that "the offence of blasphemous libel as it is construed under the applicable common law in fact has the main purpose to protect the right of citizens not to be offended in their religious feelings by publications." *Gay News Ltd. and Lemon v. U.K.*, No. 8710/79, 5 Eur. H.R. Rep. 123, 130 (1983) (Eur. Comm'n on H.R.).

173. See the discussion in Ahdar, *supra* note 70, at 297, stating that

The argument that vilification can indirectly contribute to discrimination, abuse or even violence is a more difficult charge to dismiss. If insulting and contemptuous words or written material feed the animosity of those who might later express that hatred in criminal conduct, then logic does suggest it might be prudent to nip this pernicious process in the bud. But the linkage here is indirect, conjectural and rather diffuse. Some sorts of disparaging or inflammatory speech may provoke improper conduct in some hearers in some circumstances.

*Id.* (emphasis in original quotation omitted).

174. See Harris, *supra* note 59, at 224 ("[B]laspemy consists in vilification of Christian beliefs (rather than believers). . . . Racial vilification consists of hostile expression directed towards a person on the basis of some characteristic"); Aroney, *supra* note 14, at 313 n.155 ("[T]he line between inciting hatred of beliefs and inciting hatred of persons may be a difficult one to draw[,] [b]ut by proscribing only the incitement of hatred against persons or groups, the [religious vilification] legislation calls for the distinction to be made").

175. A brief analysis of the scope of traditional blasphemous libel laws compared to religious hate propaganda laws in Canada is in Patrick, *supra* note 45, at 237-38.

feasible? Supporters of the distinction suggest that “[t]he distinction is nevertheless a real one, however hard it may be to draw,”<sup>176</sup> and that, for example, there is “a crucial difference between saying ‘you Catholic bastard’ on the one hand and ‘Christ was a charlatan on the other.’”<sup>177</sup> Opponents argue that, subjectively the religiously faithful will feel the same amount of hatred or contempt whether they hear attacks on their beliefs or attacks on themselves as believers.<sup>178</sup> In this vein, Joel Harrison argues:

There can be no bright line between criticising doctrine and criticising a person who adheres to it. For many, religion forms the centrepiece of life, dearly cherished beliefs, criticism of which evinces a personal attack. In this way there is no real difference between saying “Christianity is evil” as opposed to “all Christians are evil”—both both have the potential to incite religious hatred.<sup>179</sup>

Even if a meaningful distinction exists, the ability of human rights commissions, judges, and individuals to reliably draw the distinction when faced with the vast spectrum of debate and criticism of religion appears dubious.<sup>180</sup> The conclusion here is that even if religious vilification and hatred laws have the best of intentions, they likely have the practical effect of transporting blasphemy prohibitions into the twenty-first century.

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176. Ahdar, *supra* note 70, at 310.

177. Harris, *supra* note 59, at 224.

178. See Feenan, *supra* note 67, at 156 (“The distinction appears difficult, if not impossible, to justify in relation to expression. It resonates with that equally fallacious dichotomy that is used to justify homophobia; love the sinner, but not the sin. The religious beliefs or activities of individuals are intimately tied to religion, and vice versa”); Harrison, *supra* note 72, at 95 (“Religious vilification laws attempt to draw a distinction between criticising an ideology and inciting hatred against a person, but this neglects the fundamental nature of religious belief—any attack against beliefs and doctrine is felt personally by its adherents”).

179. Harrison, *supra* note 72, at 78.

180. Consider the following statements, some of which are clearly targeted at beliefs, others clearly targeted at believers: “The doctrine of transubstantiation is stupid;” “The Catholic doctrine of transubstantiation is stupid;” “People who believe in the doctrine of transubstantiation are stupid;” “Catholics are stupid for believing in the doctrine of transubstantiation;” “Catholics are stupid.” Can we reliably place ourselves in the shoes of the “average” orthodox Catholic hearing these statements, and predict which are more or less likely to cause hurt feelings or potentially lead to an atmosphere conducive to discrimination and violence? Moreover, can we reliably predict how courts and human rights tribunals will respond to this array of statements? All laws have grey areas and can bring forth hard cases, but the “belief/believer” distinction so crucial to religious vilification/hatred laws seems to create few if any “easy” cases.

### D. Breaches of the Peace and Social Unrest

“Blasphemy laws recogni[z]e what blasphemy produces: gut-level outrage! It is that welling up of the emotions that makes a peaceful person want to throttle somebody.”<sup>181</sup> The need to prevent breaches of the peace is a staple in arguments for the existence of blasphemy laws.<sup>182</sup> In English common law, an actual breach of the peace did not need to be established, nor even a likelihood of a breach of the peace—all that was necessary was to show a possibility that a breach of the peace could take place.<sup>183</sup>

For most of the twentieth century, the argument that blasphemy laws were necessary to preserve social order probably seemed far-fetched.<sup>184</sup> The reported cases never involved actual breaches of the peace, and even if a hypothetical street corner blasphemer received a bloody nose from an irate listener from time to time, government censorship of a whole swath of material hardly seemed warranted. However, new life was breathed into this old justification after the violent protests over the *Satanic Verses* (which led to at least two murders and twelve riot-related deaths),<sup>185</sup> and the Danish Muhammad cartoons (which led to over 100 riot-related deaths worldwide),<sup>186</sup> not to mention the more recent “International Burn a Koran Day.”<sup>187</sup> Blasphemy laws and their modern-day counterparts receive a new urgency when incidents have ramifications beyond the local and into the global. Indeed, if judges begin looking at blasphemy prohibitions as a matter of national security

181. SMITH, *supra* note 144, at 48.

182. See I.D. Leigh, *Not to Judge But to Save: The Development of the Law of Blasphemy*, 8 CAMBRIAN L. REV. 56, 68 (1977) (“The justification for the offence must, therefore, be seen as a secular one: to prevent breaches of the peace and to protect individuals from insult to their religious feelings”); Note, *Blasphemy*, *supra* note 166, at 701 (“As a corollary to the offense to religious sensibilities, there was always the assumption that a religious insult might lead to a breach of the peace by the hearer”).

183. See *In re John William Gott*, (1922) 16 Cr. App. R. 87, 88-89 (Justice Avory); Law Commission, *supra* note 149, at [3.3] (discussing “vestigial” nature of the breach of the peace element in blasphemy prosecutions); LEVY, *supra* note 142, at 543 (discussing 1970s British blasphemy case and noting that the trial judge “held that the publication need not intend to breach the peace but must just create a tendency toward such a breach; the mere possibility that it might exist, not the probability, sufficed”).

184. See SMITH, *supra* note 144, at 45 (“Perhaps there was a time when religious dissent or contemptuous ridicule amounted to ‘fighting words,’ but the rarity of cases alone (five between 1883 and 1922, and only one since) would suggest that breach of the peace over religious issues is hardly likely”).

185. See COX, *supra* note 34, at 37 & 37 n.62.

186. See Joshua Foster, *Prophets, Cartoons, and Legal Norms: Rethinking the United Nations Defamation of Religion Provisions*, 48 J. CATH. LEG. STUD. 19, 22-23 (2009).

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

and foreign policy,<sup>188</sup> it is difficult to foresee what the future holds in this area of law.

Weighing the harms of blasphemy in the abstract is a difficult (and arguably impossible) task because of the nature of its effect—blasphemy attacks beliefs. Because beliefs have no legal standing and no fixed value, an assessment of damages is impossible. Proxies for the harm to beliefs—divine anger, social morality, social unrest, and individual grief—are similarly of an incalculable nature. Thus, while justifications for prohibiting blasphemy can involve reasons—some less persuasive in modern liberal societies (fear of divine wrath for example), others more so (fear of prejudice and discrimination)—they can rarely include evidence.

How can it be proven that one or several acts of blasphemy have depraved public morality or led to an atmosphere conducive to discrimination? In the one area where a causal tie can be established between a particular act of blasphemy and a particular harm (breaches of the peace) there is another difficulty. Out of all the blasphemous utterances ever made, why did these particular blasphemous utterances lead to violent altercations and protests? In other words, what is the risk or likelihood of more violence taking place if a future, unrelated blasphemous utterance were allowed? Anecdotes, religious faith, and intuitive notions of right and wrong are far more likely to be deployed in support of the suppression of blasphemy than are careful research studies. Of course, if the harms of blasphemy are often abstract and incalculable, so too are the benefits of allowing it—the value of freedom of speech cannot be placed on a scale and weighed. This dilemma helps to explain the curious persistence of blasphemy and the recurring battle between blasphemy and free speech.

## VI. CONCLUSION

Blasphemy laws in some form or another remain a part of most legal systems around the world. They may be changed, renamed, deemphasized, or revitalized, but they will not disappear anytime soon.<sup>189</sup> As the threshold between the sacred and the profane, the

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188. Cf. George Stephanopoulos, *Justice Stephen Breyer: Is Burning Koran "Shouting Fire in a Crowded Theater"?*, ABC NEWS Sept. 14, 2010, available at <http://blogs.abcnews.com/george/2010/09/justice-stephen-breyer-is-burning-koran-shouting-fire-in-a-crowded-theater.html> (discussing statement of U.S. Supreme Court Justice Stephen Breyer that relationship of First Amendment to Koran burning an issue for future courts and questioning whether or not it is akin to shouting "fire" in a crowded theatre).

189. The mere existence of blasphemy and religious vilification/hatred laws should be kept in context, however. Actual enforcement of the laws may be rather rare in many countries. This is not to say this whole discussion about blasphemy has been "much ado about nothing," but as

concept of blasphemy—religious, legal, or cultural—expresses something fundamental about human nature. The drive to push against boundaries, to provoke thoughts which at first seem abhorrent and then become accepted, to express truth in the face of pain, imprisonment, and death, always remains present in some members of a society, whether that society be democratic or totalitarian. Similarly, the fear of blasphemy—incarnated as the risk of angering God, disrupting society, hurting minorities, or something else—points to the drive for conformity and unity by societies and institutions, be they State, Church, Community, or Family. The need to blaspheme and the need to suppress blasphemy continue to persist, and perhaps the only truly curious aspect is why we ever thought they would fade away to begin with.

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Levy noted, “[l]iberals too often behave like Chicken Little, giving the impression that one case of suppression means the sky is falling and Shakespeare will be next.” LEVY, *supra* note 142, at 576.